

SORRY KIDS: SAFETY TRUMPS PRIVACY

Introduction

Undoubtedly, America's education system plays a pivotal role in the development of children into good citizens. Many children spend much of their formative years in America's public education system, entering as toddlers and exiting as adults. The goal of that journey is a good, high quality education. However, for many students, that goal is not realized. Although a high quality education is vital to creating opportunities in life and oftentimes essential to both one's personal and economic success, drugs and violence derail some students.

For those that aren't derailed by drugs and/or violence, what makes a good education? While there may be no concrete or agreed upon answer to that question, there are some essential elements that comprise a good education which many agree on.¹ There is data to support that the following elements are essential to fostering good schools: (1) a small class environment; (2) highly qualified teachers; (3) a diverse learning environment; and (4) an intensely involved parent community. *Id.* Each one of these ingredients is dependent upon resources—it can be affected by access to or lack of resources.

It is beyond dispute that these ingredients cannot be effectively delivered without a safe school environment. While the 4th Amendment to the U.S. Constitution ensures that people will be free from unreasonable searches and seizures, a student's privacy expectation is limited in America's public school system. A student's privacy interest is limited within the confines of school property. While some critics may argue against this

¹ Michael J. Kaufman & Shereyn R. Kaufman, EDUCATION LAW, POLICY, AND PRACTICE CASES AND MATERIALS, 3-4(2013).

privacy limitation, schools must be able to ensure the safety of their students to deliver a high quality education. To that end, a student's privacy interest should be limited in public schools. Over approximately the past twenty years, there have been no shortage of tragedies in America's public schools. Some of the most violent and heinous crimes have played out in American classrooms. Additionally, America's struggle with drugs has not evaporated. A school's interest in protecting students, teachers, administrators, staff, and the surrounding community outweighs any limited privacy intrusion. Furthermore, in the context of this ever growing digital world we live in, many of our 4th Amendment rights have all but evaporated. Limiting a student's expectation of privacy in a public school is constitutionally proper and consistent with a societal trend towards less privacy.

The United States Constitution: The 4th Amendment

On the heels of the Revolutionary War, the drafters of the U.S. Constitution were keenly aware of the danger posed by warrantless government intrusion. To that end, the 4th Amendment to the Constitution was drafted to protect people from unreasonable searches and seizures. The 4th Amendment provides that:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”²

The 4th Amendment does not make any distinction between adults and minors. It contains no caveat or limitation on the rights of school children. On its face, the 4th Amendment should offer the same protection to children attending school as it does to adults outside of school. However, over the past several decades, the case law that has developed in the United States limits the privacy rights of students in a school setting.

² https://www.law.cornell.edu/constitution/fourth_amendment

The development of the case law in this arena shows that this limitation is with good reason.

New Jersey v. T.L.O.

In *New Jersey v. T.L.O.*, the Supreme Court addressed the proper standard for determining the legality of a search conducted by a school official in a public school.³ In *T.L.O.*, a teacher found two girls smoking in a school bathroom. *Id.* Smoking in the school bathroom was a violation of school policy, and the teacher took the girls to the Principal's office. *Id.* One of the students denied that she had been smoking when she was confronted by a school administrator. *Id.* The administrator asked the student to come to his office and demanded her purse. *Id.* The administrator searched the purse finding a pack of cigarettes and rolling papers. *Id.* A more thorough search of the purse revealed marijuana, money, other drug paraphernalia, a ledger, and two letters which revealed the student was selling marijuana. *Id.* The evidence was ultimately turned over to the police and the student was criminally charged. *Id.* The student attempted to suppress the evidence against her arguing that its seizure was a violation of her 4th Amendment right against unreasonable search and seizure. *Id.* The New Jersey court denied the student's motion. *Id.*

The Supreme Court had to decide whether the school administrator's search was subject to the 4th Amendment's prohibition against unreasonable searches and seizures. *Id.* The Court held that the 4th Amendment does apply to school administrators. *Id.* The Court quoted from *West Virginia State Bd. of Ed. V. Barnette*, reiterating:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures---*Boards of Education not excepted* [emphasis added]. These have, of course, important, delicate, and highly

³ *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)

discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. *Id.*

Furthermore, because school administrators act as stewards of the State, in carrying out searches pursuant to school policies, they cannot claim parents' immunity. *Id.*

The Court's inquiry did not stop there, however; the Court said it must consider the reasonableness of a search which depends on its context. *Id.* To determine reasonableness, the Court said requires "balancing the need to search against the invasion which the search entails. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order." *Id.* The Court determined that in a school setting, school officials do not need to obtain a warrant. *Id.* To require one, "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* Furthermore, the Court found that a school official's search need not be based on probable cause. *Id.* The Court came up with a two-part test to determine the reasonableness of a school official's search. *Id.* The test says a search will be justified and permissible if: (1) there is reasonable belief to suspect that the search will yield evidence a student has or is violating the law or school rules; and (2) the methods utilized must be reasonably related to the goal of the search and not overly intrusive taking into account the age, sex, and infraction of the student to be searched. *Id.*

The ruling in *T.L.O.*, had a large impact on the rights of students attending public schools. No longer did teachers and administrators have to adhere to the standard of "probable cause" to justify a search. The societal issues underlying the Supreme Court's

decision in this case have not abated over the last three decades. Drug use and violent crime in schools continue to be major social problems. The permissibility of the privacy intrusion by public school officials under the test established in *T.L.O.* is as relevant today as it was back then. The scale did and continues to tip in favor of school administrators.

Vernonia School District 47J v. Acton

In *Vernonia School District 47J v. Acton*, the Supreme Court once again had the opportunity to address the issue of unreasonable search and seizures in a school setting.⁴ In *Vernonia*, the School District adopted the Student Athlete Drug Policy which authorized random urinalysis drug testing of athletes. *Id.* A student signed up to play football at one of the District's schools but was denied participation because his parents refused to assent to random urinalysis screenings. *Id.* The student's parents sought declaratory and injunctive relief on the basis that the school policy violated both the 4th and 14th Amendments of the U.S. Constitution. *Id.*

The Supreme Court applied the two-part analysis that it had established in *T.L.O.* *Id.* The Court highlighted that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Id.* Beyond this though, the Court stated that a student's legitimate privacy expectations are diminished even more when it comes to student athletics. *Id.* When a student voluntarily decides to try out for a sports team, they have voluntarily subjected themselves to a higher level of scrutiny than that imposed on the

⁴ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)

general student population. *Id.* The Court analogized this choice to that of an adult who chooses to participate in a “closely regulated industry.” *Id.* Students who participate in school sports should expect intrusions on their privacy. *Id.* The Court also considered the immediacy of the governmental concern and the means by which it was tackling that concern. *Id.* Once again, the Court recognized the scourge drugs was having not just on society but on children. *Id.* As the Court poignantly highlighted:

Deterring drug use by our Nation’s schoolchildren is at least as important as enhancing efficient enforcement of the Nation’s laws against the importation of drugs...School years are the time when the physical, psychological, and addictive effects of drugs are most severe...In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction. *Id.*

The Court upheld the District’s policy as constitutional. *Id.*

In *Vernonia*, we see, once again, the Supreme Court showing extreme deference towards school administrators and school policies. Furthermore, the Court again highlights the difficult social issues facing school administrators. The Court is correct to punctuate the threat of drug use, because during the transformative years when children are transforming into adults is typically when they elect to begin experimenting with drugs. In this case, the Court rightfully sided with the School District. The liberty interest of the student was not outweighed by the school’s interest in fostering a drug free environment.

**Board of Education of Independent School District No. 92 of Pottawatomie
County v. Earls**

Similar to the facts of *Vernonia*, in *Earls*, the Supreme Court was faced with a School District that had implemented a policy which required all students who

participated in any competitive extracurricular activities to acquiesce to drug testing.⁵ Unlike *Vernonia*, in *Earls*, the School District required all middle and high school students to agree to drug testing in order to participate in not only sports but any extracurricular activity. *Id.* Pursuant to the school policy, students were required to submit to a drug test before participation in extracurricular activities as well as random screenings while engaged in that activity. *Id.* Additionally, a student could be tested any time there was reasonable suspicion that the student was using drugs. *Id.* In applying the principles set forth in *Vernonia*, the Court held that the School District's drug testing policy was constitutional. *Id.* In finding the policy to be Constitutional, the Court said: "A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety...Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults." *Id.*

In *Earls*, we still see the Supreme Court giving great deference to school administrators and school policies. There is a strong public policy argument that the Court gravitates to in all of the aforementioned cases. Maintaining discipline, health, and safety are strong arguments in favor of limiting the 4th Amendment privacy rights of students attending public schools.

Drug Use by Students

The issue of student drug use was a concern not only for school administrators in the preceding cases but a decisive factor influencing the Supreme Court's rulings. That

⁵ *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822 (2002)

concern has not abated since these cases were decided. Drug use by school aged children and those attending public schools is a ubiquitous concern in America. According to a 2012 study by the National Center on Addiction and Substance Abuse, 17% of American high school students are using drugs, drinking, or smoking during the school day.⁶ The study utilized telephone interviews with 1,003 students aged 12-17. *Id.* About half of the respondents acknowledged that there was a place near school where students could go to drink, smoke, or use drugs. *Id.* Furthermore, almost half of the respondents knew of a classmate who sells drugs. *Id.* The most readily available drugs to students were marijuana, prescription drugs, cocaine, and ecstasy. *Id.* According to Joseph A. Califano Jr., the former US Secretary of Health, Education, and Welfare, “For millions of American teens, drugs and alcohol, not more advanced education, are what put the ‘high’ in the high schools they attend...For millions of parents trying to raise drug-free kids, the ‘high’ school years are the most dangerous times their children face, and the ‘high’ schools are a dangerous place to send their kids.” *Id.* These sentiments capture the real threat drugs have on America’s school children and supports the public policy argument behind limiting a student’s 4th Amendment rights in schools.

Of growing concern since the Supreme Court decided the aforementioned cases is the prevalence and influence of social media in schools. Due to the digital age we live in, the school day is no longer 9 a.m.-3p.m. Social media, cell phones, and the internet have allowed students to stay connected twenty-four hours a day. The goings on of students can continuously play out via these platforms in a way that they never have in the past. In fact, the survey found that digital peer pressure was influential in getting students to

⁶ http://www.huffingtonpost.com/2012/08/23/annual-survey-finds-17-pe_n_1824966.html

begin using drugs or alcohol. *Id.* Seeing pictures of friends and classmates on social media who are partying with drugs and alcohol influences the viewers who then want to join in. *Id.* These findings, while likely unsurprising, strengthen support for the Supreme Court's restrictions of student's 4th Amendment rights. In fact, one may argue that they present a case for further restrictions on a student's 4th Amendment right to privacy in the school setting.

Violence in Schools

Since the mass shooting of high school students at Columbine high school in 1999, there has been no shortage of other school shootings which have been sensationalized in the news. In spite of the media's tendency to sensationalize such stories, there is data that violent crime in America is trending downward.⁷ However, violence and the threat of violence in schools remain a prevalent concern for school administrators, teachers, students, the community, and parents. This is particularly true in communities which are already plagued by violence. This tends to be the case in big cities such as Detroit, New York, Los Angeles, and Chicago. In its "Indicators of School Crime and Safety: 2014" report, the National Center for Education Statistics states:

Our nation's schools should be safe havens for teaching and learning free of crime and violence. Any instance of crime or violence at school not only affects the individuals involved but also may disrupt the educational process and affect bystanders, the school itself, and the surrounding community. For both students and teachers, victimization at school can have lasting effects. In addition to experiencing loneliness, depression, and adjustment difficulties, victimized children are more prone to truancy, poor academic performance, dropping out of school, and other violent behaviors. For teachers, incidents of victimization may lead to professional disenchantment and even departure from the profession altogether.⁸

⁷ https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/violent-crime-topic-page/violentcrimemain_final

⁸ <http://nces.ed.gov/pubs2015/2015072.pdf>

According to the report, from 2011-2012, there were 45 school associated violent deaths. *Id.* The definition of a school associated violent death is: “a homicide, suicide, or legal intervention (involving a law enforcement officer), in which the fatal injury occurred on the campus of a functioning elementary or secondary school in the United States, while the victim was on the way to or from regular sessions at school or while the victim was attending or traveling to or from an official school-sponsored event.” *Id.* In relation to the way the media sensationalizes mass shooting events at schools, this number is not very high. That being said, the report did find that there were 1,420,900 nonfatal victimizations at school between students aged 12-18. *Id.* Of those victimizations, 966,000 were violent to include: simple assault, robbery, aggravated assault, rape, and sexual assault. *Id.* While violent crime may be trending down nationwide, violence in schools is still prevalent. Although some students may safely go to and from school each day, for some, violence is a constant threat. The threat of violence to students, teachers, school administrators, and the surrounding community further supports the notion that a student’s 4th Amendment privacy expectations should be limited in a school setting. To keep schools safe, officials must be able to search for and keep weapons off of school grounds. For teachers to effectively teach their students, the school environment must be one free from violence.

Conclusion

The Supreme Court decisions which limited a student’s 4th Amendment liberty interest (to be free from unreasonable searches and seizures) in a school setting were well justified. The Court properly balanced the harm facing school administrators against the liberty interest of the student. Drugs and violence remain an imminent threat in

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America's schools. There are times and settings when we can expect to have a lower expectation of privacy – our public schools should remain one of those places.