Minnesota MNJOA Workshop Summary

I. Safe Schools and the Law: Collaboration Issues

Lessons Learned from the Student Search Cases

Lately federal and state courts have shied away from rigid rules about the rights of students, favoring a more flexible approach toward the authority of educators. The area of law most affected by this shift is student searches. The courts are following the lead of the U.S. Supreme Court that set the tone for this trend in the landmark Fourth Amendment decision of New Jersey v. TLO, (469 U.S. 325 (1985)). In TLO, the Court ruled in favor of a school administrator who turned over to the police drugs and drug materials that the educator confiscated from the purse of student. The Justices relaxed the application of the Fourth Amendment for on-campus searches under the following rationale.

"[W]e have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship". 469 U.S. 339-340.

However, to what extent can a school official rely upon the SRO as a member of the safe schools team when a search needs to be conducted? Does the TLO "reasonable suspicion" standard change when the school resource officer (SRO) is involved in the search? Does the presence of the SRO on campus shift the legal analysis back to its original "probable cause" standard? Who is a "school official" for purposes of utilizing the lower Fourth Amendment standard? The SRO search cases provide an excellent context for fine-tuning this level of educator/SRO collaboration. Test your "Search and Seizure IQ" on the following scenarios.

1. A school staff member at a high school notifies the principal that he observed a student smoking in a car in the school parking lot. The principal went to the parking lot, encountered the student and took him to come to the administrative office. The principal directed the student to empty his pockets. The student refused. The principal asked a police officer assigned to the high school to search the student. Marijuana was found on the student. Can the educator use the SRO in this manner and stay under the TLO standard?

Y___ N___

2. A high school principal receives reports from three students of the theft of clothing, wallets, a purse and money from their lockers. The principal asked the SRO to help her investigate the thefts. During the investigation, suspicion fell on four students who were seen around the lockers at a time when they should have been in class. Together, the principal and the SRO searched one of the students, who was found possessing contraband from the theft. Does the more forgiving standard of TLO apply to this search?

Y___ N___

3. An SRO walking the campus observes a student standing alone in the hallway displaying a red bandanna from the back pocket of his pants. Possession of a bandanna on campus is a violation of school rules because colored bandannas commonly indicate gang affiliation. The SRO approached the student and asked him to remove the bandanna. The SRO decided to take the student to the principal's office for the violation. Before doing so, the officer conducted a patsearch for weapons. The SRO discovered a knife that the student said he used for self-protection. Again, assuming that the SRO did not have probable cause to conduct the search, then is this search valid? Y___ N___

4. An SRO encounters a student walking the halls of the school. The juvenile did not have the required identification card or a hall pass to be out of class. The SRO conducted a pat-down search of the student in the hall during which the student put something down his pants. The SRO handcuffed the juvenile and brought him to the police office on campus, where another officer searched him and found marijuana. Does the TLO standard apply to these searches?

Y___ N___

The starting point for answering questions about student searches remains the U.S. Supreme Court ruling in TLO. There the justices decided that, "[t]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause… [r]ather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." 469 U.S. 325, at 341. The reasonableness test of TLO has two elements: (1) whether the search was justified at its inception; and (2) whether the search was reasonably related in scope to the circumstances that triggered the concern in the first place.

The Court in TLO provides a pragmatic guide for educators who wish to stay on the constitutional side of the privacy line. The first element is satisfied when "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." 469 U.S. 325, at 341. The second requirement is fulfilled when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U.S. 325, at 342. In addition to the federal

courts, all states have also adopted the TLO standard for purposes of applying state constitutional privacy provisions to these disputes.

TLO answers only the most basic question about the reasonable suspicion standard when educators collaborate with police. Its fact pattern approves of the type of cooperation that is still the most common in school safety incidents: a school official who, while enforcing the code of conduct, finds evidence of the violation of the juvenile code. Items seized during this activity may be turned over to police for use in adjudications despite the fact that police would not have been able to acquire the evidence on their own under the more rigorous probable cause standard. To avoid any confusion over this many state education codes expressly require that crimes discovered while enforcing school policies be reported to police. See for example Alabama Education Code, 16-1-24.1.

However, the lower federal courts and the state courts have fashioned additional rules that address more active involvement by law enforcement officials. It should come as no surprise that these rules remain faithful to the desire expressed in TLO that educators be allowed some leeway in maintaining safe schools. The courts have divided the student search rules into three scenarios:

(1) where school officials initiate the search or police involvement is minimal, the reasonableness standard is applied;

(2) where the search is conducted by the school resource officer on his or her own initiative to further educationally related goals, the reasonableness standard is applied; and

(3) where "outside" police officers initiate the search of a student for investigative purposes, the probable cause and warrant requirements are applied.

These courts also provide a matter-of-fact guide for educators who work closely with SROs. Law enforcement officials who act in their capacity as SROs are considered "school officials" and their activities fall under TLO. In this sense, educators may bring SROs into the school community, effectively delegating to the SRO a more efficient set of tools for keeping schools safe. As the facts and outcome of TLO indicate, both the educational code of conduct and the state juvenile justice code may be enforced through this close teamwork. On the other hand, "outside" law enforcement officers who come onto campus without a collaborative relationship and act without the immediate involvement and supervision of school officials are subject to the stricter requirements of the Fourth Amendment. Moreover, the TLO standard does not apply to law enforcement officers who come onto campus and effectively commandeer school officials into assisting with a search of a student or student property solely for police investigative purposes.

Any ambiguity in this aspect of the educator/SRO relationship can be effectively eliminated by implementing a written interagency agreement. The memorandum of understanding (MOU) provides structure for the collaboration by spelling out the role of the SRO in maintaining a safe school. The MOU should address the range of misconduct that past campus incidents suggest are likely to occur and provide routines for resolving

them. Although courts already assume that when properly supervised and trained SROs may act on their own to enforce the code of conduct or the law, the MOU should provide protection against challenges by spelling it out. The language should provide that, "school resource officers may act on their own initiative to further educationally related goals".

So far, only one case has refused to apply the reasonable suspicion standard where police were involved in a campus search at the request of educators and it is a pre-TLO decision that is not followed anymore (See Picha v. Wielgos, 410 F.Supp. 1214, 1219-1221 (N.D. Ill. 1976). Compare with Martens v. District No. 220, Board of Education, 620 F. Supp. 29 (N.D. Ill. 1985)). The U.S. Supreme Court has kept a careful watch over these cases and has, to-date, refused to grant appeals that challenge current rules allowing this close working relationship between law enforcement and school officials. Perhaps the best explanation is supplied by one of the first court decisions to allow SRO searches under the TLO standard:

"Were we to conclude otherwise, our decision might serve to encourage teachers and school officials, who generally are untrained in proper pat down procedures or in neutralizing dangerous weapons, to conduct a search of a student suspected of carrying a dangerous weapon on school grounds without the assistance of a school liaison officer or other law enforcement official. While the T.L.O. Court adopted the less stringent reasonable grounds standard in part because of the need of teachers to maintain swift and informal disciplinary procedures, it could be hazardous to discourage school officials from requesting the assistance of available trained police resources." See *In re Angelia D.B.*, 564 N.W.2d 682, 687 (Wis. 1997).

In the I.Q. test, the answer is “Yes” to each of the fact patterns. The TLO standard applies to each of the searches conducted by the SROs. In Question One the court held that the SRO had reasonable suspicion arising from what the principal had observed and the officer's own observations. See Russell v. State, 74 S.W.3d 887 (Tex. App. Waco 2002). In Question Two, the court ruled that the police assistance given was marginal and in support of the educator. See *Cason v. Cook*, 810 F.2d 188 (8th Cir. Iowa 1987), cert. den., 482 U.S. 930 (1987). In Question Three, the court decided that an SRO assigned to a school was a school official for the purpose of assessing the legality of a search on school grounds. See *In re William V.,* 4 Cal. Rptr. 3d 695 (2003), cert. den., 541 U.S. 1051 (2004). Similarly in Question Four, the court applied TLO to the search since the identification rule the SROs were seeking to enforce had as its purpose the safety of the campus. See *D.L. v. State*, 877 N.E.2d 500 (Ind. Ct. App. 2007).

SROs and Search and Seizure:

The legality of the presence of the school resource officer (SRO) on campus is, by now, firmly established. Court decisions and state statutes make the SRO an essential element in maintaining a safe, effective campus. Clearly, the SRO exists to protect and serve the educational community by enforcing state, federal and local laws. In this role, the SRO protects both the education mission as well as the interest of the juvenile justice system in identifying and responding to the needs of delinquent children and at-risk youth.

In what other capacities can the SRO serve as a resource for school officials? Does the law require that the SRO act only for purposes of law enforcement? Or, may the SRO go beyond law enforcement and assist school officials with other administrative rules that govern student conduct?

This topic is now a timely one. Many SROs now enforce educational codes of conduct as a natural result of becoming more comfortable with administrators, students and campus life. Other SROs refuse to handle disciplinary problems on campus because of uncertainty over the law and because their commanders will not allow it.

Test your " Code of Conduct IQ" on the following scenarios.

1. A high school principal receives reports from three students of the theft of clothing, wallets, a purse and money from their lockers. Theft is an expellable offense under the code of conduct. The principal asked the SRO to help her investigate the thefts. Suspicion fell on four students who were seen around the lockers. Together, the principal and the SRO search one of the students, who was found possessing contraband from the theft. Does the TLO standard apply to this search? Y___ N___

2. A school staff member at a high school notifies the principal that he observed a student smoking in a car in the school parking lot. Smoking on campus is a violation of the code of conduct. The principal went to the parking lot, encountered the student and took him to come to the administrative office. The principal asked a police officer assigned to the high school to search the student. Marijuana was found on the student. Can the educator use the SRO in this way?
Y___ N___

3. An SRO walking the campus observes a student standing alone in the hallway displaying a red bandanna from the back pocket of his pants. Possession of a bandanna on campus is a violation of school rules because colored bandannas commonly indicate gang affiliation. The SRO approaches the student and asks him to remove the bandanna. The SRO decides to take the student to the principal's office for the violation. Before doing so, the officer conducted a patsearch for weapons. The SRO discovered a knife. Is this search valid? Y___ N___

4. An SRO encounters a student walking the halls of the school during a class

period. The juvenile did not have the required identification card or a hall pass to be out of class. The SRO intercepted the student and took him to the office for this violation of the campus code of conduct. The SRO has been asked to search students found wandering the halls and bring them to the Principal's office. Does the law allow the SRO to do this?

Y___ N___

5. An SRO brought a student to the dean's office because he couldn't produce his school ID card upon entering the building. He was also wearing clothing that indicated a gang affiliation. Both are violations of the school code of conduct. School policy requires the SRO to conduct a search and take the student to the Principal's office. The SRO conducted a pat down, and felt a hard bulge in the student's jacket pocket. The officer then reached into the pocket and pulled out a gun. . Does the law allow the educator to use the SRO in this manner?

Y___ N___

The Role of the SRO – The Basics

The 'easy' cases involving use of the SRO in enforcing the code of conduct have always been fact patterns in which the misconduct is both a violation of the law as well as school rules. As to these cases, the actions of the SRO make the school discipline possible although law enforcement officials usually ignore the reality that the school also disciplines the student for violating school rules. The 'hard' cases involve enforcement of the code of conduct independent of any violation of the law.

The staring point for understanding the legality on the use of SROs in enforcing codes of conduct is the broad authority of school officials to keep campuses safe. The public school campus is a unique place, "in which serious and dangerous wrongdoing is intolerable. The state, having compelled students to attend school and thus associate with the criminal few-or perhaps merely the immature and unwise few-closely and daily, thereby owes those students a safe and secure environment.'" 4 W. LaFave, Search & Seizure § 10.11(a), at 802-06 (3d ed. 1996). This mandate is of a constitutional dimension. In New Jersey v. TLO, (469 U.S. 325 (1985)) the Supreme Court ruled that because of this responsibility

[A] search of a student by a teacher ***or other school official*** will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law ***or the rules of the school***. TLO. 469 U.S. at 341-42 (emphasis added).

More recently, in Board of Educ. v. Earls, (536 U.S. 822 (2002)), the Court ruled that

[The interest to keep children safe] ***is sufficiently compelling*** to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. Earls, 536 U.S. at 829 (emphasis added).

The main reason the United States Supreme Court in TLO and Earls lowered the fourth amendment standard applicable to searches of students at school was to protect and

maintain a proper educational environment for all students. This goal is equally important when criminal laws are enforced (TLO) as well as administrative regulations (Earls).

Following the lead of the Supreme Court, lower courts ignore the distinction between criminal law and codes of conduct and instead focus on whether "school officials" are furthering legitimate educational interests when regulating student activity. The SRO has been brought into the safe school environment, not as an outsider, but as a core part of the educational family. A police officer on assignment to the school as a resource officer is a ***school official*** when furthering legitimate educational interests. Therefore, if a search of a student on school grounds by an SRO at the request of school officials is deemed a search by a school official, then both "the law and the rules of the school" are in play for the SRO (see TLO quote above).

This is not just good law; it is common sense as well. The facts of the TLO decision are useful on this point. As in TLO, school officials often uncover evidence of a serious threat to student safety (the crime of possession of drugs with intent to sell) while looking only to investigate and enforce the code of conduct (smoking cigarettes on campus). The laws of several jurisdictions now specifically authorize and provide statutory structure for this unique collaboration. Texas law states that, "[a] 'school resource officer' means a peace officer who is assigned by the officer's employing political subdivision to provide… a police presence at a public school[,] safety or drug education to students of a public school; or…other similar services". Tex. Occ. Code § 1701.601 (2007). A District of Columbia law provides that, "[t]he [SRO] curriculum shall include training in… District of Columbia laws and regulations, including Board of Education regulations; and… [c]onstitutional standards for searches and seizures conducted by school security personnel on school grounds". D.C. Code § 5-132.04 (2008).

The message from the courts to policymakers on this matter is both encouraging and challenging. The Courts have decided not to micromanage this aspect of the SRO-Educator relationship. Instead, the courts have left it up to educators and law enforcement officials to work out the details of the collaboration in a way that maximizes school safety. Both sides should take care to respect and protect this unique relationship by giving constant attention to the following:

• The Interagency agreement: This is an essential working agreement and partnership guide. It provides structure to, and contact persons for, the activities of the SRO and gives both agencies an opportunity to find comfort in the partnership in the language of the document. Its contents should identify the key players, define tasks and fix responsibilities for the safe school plan.

• The Incident History of the Campus: The message from the courts is quite clear on the importance of this factor. When school officials and SROs use the incident history of a campus to prioritize the work of the SRO with respect to the code of conduct, the SRO is seen as a part of a team focused on assisting the educators in maintaining a safe and effective learning environment.

•The Training Factor: School officials need to understand that SROs remain peace officers to whom ordinary legal standards apply when enforcing criminal laws on campus. SROs need to understand that different rules apply when assisting educators, particularly with non-criminal code of conduct violations.
When properly trained, the SRO and educator will quickly adjust to the challenge that the SRO is, in fact, wearing two hats (at a minimum) on campus and in doing so must recognize WHEN TO LEAD (performing the essential "routine" function) and WHEN TO FOLLOW (performing a supportive role).

The answers to the questions in the I.Q. test are all "yes". Questions One and Two involve the comparatively easy teamwork involved when the student misconduct is both a violation of the law and the code of conduct. See *Cason v. Cook*, 810 F.2d 188 (8th Cir. Iowa 1987), cert. den., 482 U.S. 930 (1987) and *Russell v. State*, 74 S.W.3d 887 (Tex. App. Waco 2002). Questions Three, Four and Five each involve enforcement of the code of conduct that, like TLO, evolve into discovery of a crime. In such cases, the violation of the school rule justifies the actions of the SRO. "When SROs are acting to further school-related safety ends, the reasonable suspicion they acquire can be used to determine whether a search or other action is necessary to 'turn up evidence that [a student] had violated or was violating either the law or the rules of the school.'" Russell v. State, 74 S.W.3d 887, 892-893 (Tex. App. Waco 2002). See *In re William V.*, 4 Cal. Rptr. 3d 695 (2003), cert. den., 541 U.S. 1051 (2004) and *D.L. v. State*, 877 N.E.2d 500 (Ind. Ct. App. 2007) and *People v. Butler*, 188 Misc. 2d 48, 725 N.Y.S.2d 534, 2001 N.Y. Misc. LEXIS 129 (N.Y. Sup. Ct. 2001).

Lessons Learned from the Interrogation Cases

Most court decisions on school safety and student rights now clearly favor educators. School officials currently enjoy an extraordinary degree of goodwill from courts and judges on the issue of safe schools. Indeed, safe schools policies are presumed to represent a good-faith attempt by educators to maintain safety and discipline. Supreme Court decisions going as far back as New Jersey v. TLO, (469 U.S. 325 (1985)), explain the reasoning behind this presumption as well as the judicial deference to educators that it produces.

Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship. 469 U.S. 339-340.

What is not yet clear is how the trend toward greater collaboration with law enforcement will affect future case decisions. Does the presence of the SRO on campus change the legal analysis? The first wave of educator/SRO cases suggest that courts will continue to resolve doubts in favor of educators when it is clear that the SRO is primarily assisting school officials in maintaining a safe and proper educational environment in response to school-related incidents. This deference will be lost when the focus of the team shifts toward law enforcement activities unrelated to school safety. Student rights will become more important and the collaboration itself called into question as to who is leading and who is following.

The interrogation cases provide an excellent context for fine-tuning these aspects the educator/SRO relationship. Test your "Interrogation IQ" on the following scenarios.

1. A middle school principal discovers drugs on Student A. When questioning the student the principal does not advise Student A of his Miranda rights. Student A confesses and names Student B as the seller. The principal brings Student B into the office and questions her. The principal does not advise Student B of her Miranda rights. Student B admits selling the drugs. The police are called to arrest both students. Should the incriminating statements of either student be suppressed?

Y___ N___

2. A plainclothes police officer comes onto campus to question a 13 year-old student about a rape that occurred in the community. The student brought to the principal's office. The officer shows the student his badge and asked if he could talk with him. The officer told the child he was not under arrest, could leave if he wanted to, and did not have to answer questions. Miranda warnings are not given. The child agrees to talk. Should the court suppress any incriminating statements made to the police officer?

Y___ N___

3. A student is asked to come to the principal's office. She is told by the principal that she has been implicated in a home burglary in the community. An armed, uniformed police officer questions her in the presence of the school principal. No Miranda warnings are given and the student is not told that she has the right to leave. The next day at school the officer questions her again. Should any incriminating statements made by the student be suppressed?

Y___ N___

4. A student's backpack is found on campus with a gun inside. The student who owns the backpack is brought to the principal's office where the principal and a SRO question him. Neither the SRO nor the principal give Miranda warnings. The principal tells the student that he will ask a few questions that then allow the SRO to conduct a taped interview, adding, "you have no choice but to answer our questions." Should Miranda warnings have been given to the student?

Y___ N___

5. Local police receive an anonymous tip about a student with a gun on campus. An officer goes to the school to tell the principal. The principal says that he will investigate the tip. The officer then leaves the campus. The principal removes the student from class and questions him. Miranda warnings are not given. The principal asks the student if he has a gun in school. The student admits that he does and says that it is in the pocket of his jacket, which is located in the locker of another student. After retrieving the gun, the police are called to arrest both students. Should Miranda warnings have been given before the questioning?

Y___ N___

Student Interrogation Basics

The rules of interrogation are called "*Miranda* warnings" in reference to the seminal case of *Miranda v. Arizona* where the "right to remain silent…" warnings were first required. See Miranda v. Arizona, 384 U.S. 436 (1966). The *Miranda* warnings are a part of the jurisprudence of the Fifth Amendment; "No person… shall be compelled in any criminal case to be a witness against himself." The rules apply to both juveniles and adults alike; a *Miranda* warning is required whenever a police officer conducts a custodial interrogation of a person, including a student on campus. When there is uncertainty over whether or not a person is "in custody", courts typically use a reasonableness test measured from the point of view of the person being interrogated. Thus, *Miranda* warnings must be given when a person reasonably believes his freedom to leave has been curtailed. It is irrelevant whether the police have probable cause to arrest the person, or whether the police officer subjectively believes that the person is not in custody.

In 2011, the Court handed down the first school safety decision involving students and the Fifth Amendment. In *J.D.B. v. North Carolina*, 564 U.S. __; 2011 U.S. LEXIS 4557 (2011), the Court announced rules governing the impact a child's age will have on interrogations by police officers on campus. The Court held that the age of a child must be considered as a factor when determining custody for *Miranda* purposes.

J.D.B. settles an longstanding debate in constitutional law about juveniles: the *Miranda* rules apply to both juveniles and adults alike. When there is uncertainty over whether a person is "in custody," courts typically use a reasonableness test measured from the point of view of the person being interrogated. Thus, *Miranda* warnings must be given when a person reasonably believes his freedom to leave has been curtailed. It is irrelevant whether the police have probable cause to arrest the person, or whether the police officer subjectively believes that the person is not in custody. All police know that this rule is harder to apply than it is to explain. After *J.D.B.*, it becomes a little more difficult.

However, one can make too much of the case of *J.D.B. v. North Carolina*. *J.D.B.* is not a case that involves school safety of any kind. It is a case about so-called "outside police officers." In J.D.B., a 13-year-old middle school student, was suspected of two home break-ins in which various items were stolen. On the day of the incidents, J.D.B. was found

in the neighborhood of the homes and was questioned by police. Police additionally spoke with J.D.B.'s grandmother, also his legal guardian, and aunt. A digital camera was stolen from one of the homes, and a camera that matched the description was later found at J.D.B.'s school and had been seen in his possession.

Five days after the break-in, a police investigator visited the school in order to question J.D.B. The investigator informed the school resource officer, assistant principal and administrative intern of his purpose, but J.D.B.'s grandmother was not contacted. The school resource officer removed J.D.B. from one of his classes during the school day and escorted him to a conference room within the school. The investigator, assistant principal, and administrative intern were also present. J.D.B. was questioned in the room for 30-45 minutes with the door closed. He was not presented with *Miranda* warnings, told that he was free to leave the room, nor given an opportunity to speak with his grandmother.

The questioning began with leisurely topics, such as sports and family life. The investigator then received J.D.B.'s permission to talk about the break-ins. J.D.B. denied that he was involved and stated that he was in the neighborhood to find work mowing lawns. The investigator continued to pursue the topic, showing the stolen camera and asking about an incident in which a homeowner returned to find J.D.B. behind her home. The investigator informed J.D.B. that he would seek to place J.D.B. in juvenile detention if he believed that J.D.B. would continue to invade homes. J.D.B. subsequently confessed to breaking into the homes with a friend. After the confession, the investigator informed J.D.B. that he did not have to answer the questions and was free to leave.

J.D.B. was tried for breaking and entering and for larceny. The trial court denied his motion to suppress his statements obtained during the questioning. The decision was affirmed by the court of appeals, and the North Carolina Supreme Court which both held that J.D.B. was not in custody during the questioning and *Miranda* warnings were not required. The North Carolina courts refused to include the age of a juvenile as an element in the custody analysis.

"Custody" and Age in the Public School Setting

The U.S. Supreme Court reversed and expanded the scope of *Miranda* to include a new rule for youthful offenders. The justices ruled that given the coercive nature of police interrogation, the requirement that officers give *Miranda* warnings helps to ensure that statements made by all suspects are completely voluntary. Then the justices got to the crux of the matter: whether J.D.B. was in custody at the time of the questioning. The Court ruled that the custody issue is to be determined by an objective standard. This standard is established by examining the circumstances surrounding the interrogation and whether a reasonable person would have felt free to leave in those circumstances. Any circumstance that affects a person's belief that they are not free to leave should be a part of the inquiry.

In determining whether J.D.B. was in custody when he confessed, the Court drew a line between the objective mind of an adult and that of a child. "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult

would feel free to go." The Court noted that the risk of a suspect admitting to a crime that he did not commit is even greater when the suspect in questioning is a minor, and that the vulnerability and susceptibility of children to submit to pressure is a commonsense conclusion. The Court pointed to instances in which the immaturity of children is applied to other applications of the law: limits on entering binding contracts and marriage without parental consent. Further, in negligence lawsuits determining liability, all courts include a person's childhood as a relevant circumstance in the reasonable person analysis.

The Court emphasized the uniqueness of a student interrogation being carried out in a middle school setting, which by its nature limits the freedom of children. An adult would not be subject to removal from the class or unavoidable questioning from a school administrator. However, a juvenile in school expects to do what he/she is told and, while hoping it will never happen, knows that being summoned to the school office to answer for an indiscretion is a reasonable possibility. Therefore, the Court found that it only made sense, to factor age into the custody analysis. The Court distinguished a child's age from personal characteristics, which do not have an "objectively discernible relationship to a reasonable person's understanding of his freedom of action." The Court assured that factoring in a child's age would not jeopardize the objective custody analysis. Rather, the fact that an individual is a child leads to the objective conclusion that the child is "more susceptible to influence."

The Court defended its position several times in the opinion. In response to the argument that age is a personal characteristic and not an "external" circumstance affecting the interrogation, the Court noted that other personal characteristics, such as blindness, have been considered as relevant objective circumstances. Moreover, age may be considered because although it may internally or psychologically influence a suspect's perception, "the *Miranda* custody inquiry turns on the mindset of a reasonable person in the suspect's position." All objective circumstances carry such an impact to some degree.

Another argument criticized by the majority was that including age as a factor would muddle police officers' analysis of whether custody exists. The Court responded by saying that, ignoring a child's age would be confusing in that the results would be unrealistic and unfair. Further, when a child's age is readily apparent, its role in the analysis is would not be difficult. This inquiry would require no more competency than officers already employ, as only common sense is necessary to scrutinize the age of a child as it relates to custody. Even if clarity were compromised, the Court noted that it has not declined to include as a factor any relevant objective circumstance that may blur the line between custodial and noncustodial.

The Court ultimately held that a child's age is a proper factor to be considered in the objective custody analysis. This rule was qualified by limiting its application to situations where the child's age was known by the officer during questioning or would have been objectively evident to a reasonable officer. The Court did not address whether J.D.B. was in custody under the new rule, but remanded the case to the state court for a factual analysis.

J.D.B. **and the Role of the SRO**

J.D.B. formalizes the factor of age when juveniles are being questioned on campus by police. Significantly, *J.D.B.* does not represent a radical departure from the rules that previously applied in the public school setting. Essentially, the U.S. Supreme Court in *J.D.B.* endorses, without citations, the course previously plotted by the many state court decisions that ruled that special caution is required when young, impressionable children encounter police while on campus. These state court cases, now codified by *J.D.B.*, create a list of sorts to regulate the interrogation setting on campus.

(1). *Miranda* does not apply to school officials. See, *In re D.E.M.*, 727 A.2d 570 (Pa. 1999), *State v. C.G.*, 2000 Wash. App. LEXIS 1304 (Wash. Ct. App. 2000). If an SRO is present, but is otherwise silent, there is no need for Miranda warnings to be given.

(2). *Miranda* does apply to police of all kinds when they conduct the questioning. See, *In re K.D.L.*, 700 S.E.2d 766 (N.C. Ct. App. 2010), *In re C.E.*, 2011 WL 2581921 (Cal. Ct. App. 2011), *Kalmakoff v. State*, 2011 WL 3241860 (Alaska 2011), *In re Welfare of G.S.P.*, 610 N.W.2d 651 (Minn. Ct. App. 2000). In re I.J., 906 A.2d 249, 263-64 (D.C. App. 2006), In re D.A.R., 73 S.W.3d 505, 512 (Tex. App. 2002).

(3). If police question a student, then police must insure that the student understands that he is not under arrest, can leave if he wants to, and does not have to answer questions from the police. See, *In re Loredo*, 865 P.2d 1312 (Or. Ct. App. 1993), *In re Killitz*, 651 P.2d 1382 (Or. Ct. App. 1982), *In re Welfare of G.S.P.*, 610 N.W.2d 651 (Minn. Ct. App. 2000), *Kalmakoff v. State*, 2011 WL 3241860 (Alaska 2011).

(4). Particular care should be given to police questioning of students of tender years and fragile sensibilities. See, *In re John Doe*, 130 Idaho 811; 948 P.2d 166 (1997), *In re Welfare of G.S.P.*, 610 N.W.2d 651 (Minn. App. 2000), *State v. D.R.*, 84 Wn. App. 832, 930 P.2d 350, 353 (Wash. App. 1997).

This rule is compatible with the legal reform in school safety regarding police. Fourth Amendment law recognizes the SRO when acting as a resource to the educator's desire to maintain a safe campus, but treats police as an outsider for all other collaboration. The courts have divided the student search rules into three scenarios:

(1) Where school officials initiate the search or police involvement is minimal, the reasonableness standard is applied;
(2) Where the search is conducted by the school resource officer on his or her own initiative to further educationally related goals, the reasonableness standard is applied; and
(3) Where "outside" police officers initiate the search of a student for investigative purposes, the probable cause and warrant requirements are applied.

J.D.B. effectively treats all police as outsiders when (1) the event that causes the questioning does not involve school safety, and (2) when the event involves school safety but a competent educator is available to perform the necessary *tasks in-loco parentis*.

J.D.B. and the Role of Educators

After *J.D.B.,* it is clear that school officials must be considered protective guardians when it comes to on-campus interrogations by police officers. This duty, while contrary to the usual collaborative relationship with police, is required to discourage abuse by the coercive appearance of both public officials in the eyes of the student in question. Courts are wary that students who are younger and who also have no prior experience with questioning by police or school officials may reasonably believe that they are either in police custody or believe that they are in trouble with the school and thus be more likely to make incriminating statements. The Idaho Court of Appeals underscores this in *In re John Doe*, 130 Idaho 811; 948 P.2d 166 (1997), where a ten-year-old boy was told by educators to leave his fifth-grade classroom and go to the faculty lounge to be interrogated by an SRO without receiving *Miranda* warning of any kind.

"We think it unlikely that the environment of a principal's office or a faculty room is considered by most children to be a familiar or comfortable setting, for students normally report to these locations for disciplinary reasons, as Doe had in the past. It is also unlikely that any ten-year-old would feel free to simply leave the administrative area of the school after having been summoned there by school authorities for a police interview. We are persuaded that under these circumstances a child ten years of age would have reasonably believed that his appearance at the designated room and his submission to the questioning was compulsory and that he was subject to restraint which, from such a child's perspective, was the effective equivalent of arrest." 948 P.2d at 172-74.

Otherwise, the role of educators does not change after *J.D.B.*. Before, *J.D.B..*, the attention of the Court focused solely on student rights arising out of the First and the Fourth Amendments. The rules from these cases are more favorable toward school officials than students. Recently, in *Morse v. Frederick*, 551 U.S. 393 (2007), the Court set forth the controlling principle.

"[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings…Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' . . . the nature of those rights is what is appropriate for children in school." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56, (1995). In particular, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere . . ."); *Bd. of Educ. v. Earls*, 536 U.S. 822, 829-30 (2002) ("'special needs' inhere in the public school context"; "while schoolchildren do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."
Morse v. Frederick, 551 U.S. 393, 396 - 406 (2007).

After J.D.B., as a matter of constitutional law, educators should make sure that students fully understand what it is they are being asked to do. When incidents are school-related, the best practice is for educators to conduct the questioning; no warnings of any kind are required. Any confusion over the role of age in a police interrogation will be resolved in favor of the student, especially as the age of the juvenile decreases. However, the Supreme Court does not change the nature of the authority of the educator to question students as a means of keeping the campus safe for learning. In this context, *J.D.B.* is not a school safety case at all, but instead is specifically about limitations on outside government officials who come onto campus.

In the I.Q. test, the answer is "No" to fact patterns One, Two, Five and Six - *Miranda* warnings are not required. The answer is "Yes" to scenarios Three and Four - *Miranda* warnings are required. Question One involves an educator conducting the questioning and *Miranda* does not apply. See *State v. C.G.*, 2000 Wash. App. LEXIS 1304 (Wash. Ct. App. July 21, 2000). Question Two describes questioning by a law enforcement official, but *Miranda* does not apply because precautions were taken to eliminate any impression that the student was in custody. See *In re Loredo,* 125 Ore. App. 390, 865 P.2d 1312 (1993). See also *State v.* Oligney, 841 N.W.2d 581 (Ct. App.Wis. 2013). Questions Three and Four both involve questioning by police combined with a failure to inform the juvenile that he was free to leave and that he was not under arrest. See *In re Killitz*, 59 Ore. App. 720, 651 P.2d 1382 (1982) and *In re Welfare of G.S.P.*, 610 N.W.2d 651 (2000) and *N.C. v. Commonwealth of* Kentucky, 396 S.W.3d 852 (Sup Ct Ky. 2013). Question Five is an illustration of the collaborative best practice between educators and law enforcement. The principal is not an agent of law enforcement subject to Miranda. The need to question students to determine whether rules have been violated or crimes committed do not turn an educator's questioning into a custodial interrogation. See In re D.E.M., 1999 PA Super 59, 727 A.2d 570 (Pa. Super. Ct. 1999). Question Six is also a "best practice" example in which the school official conducts the questioning of the student. The presence of the SRO does not create a custodial environment. See *S.G. v. State of Indiana,* 956 N.E.2d 668 (Ct App Ind. 2011).

Safe Schools, Information Sharing and FERPA

Collaboration between schools and other agencies is quickly becoming the norm rather than the exception. Interagency teams are increasingly motivated to maintain an effective network for making better assessments about the needs of children and the safety of school campuses. As this trend continues, the rules regarding information sharing will remain a hot topic, deserving constant and careful scrutiny.

In particular, the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C.S. §1232g, is being studied by many agencies to determine the scope and the limits on efforts

by educators to share information. Persistent misperceptions exist about the role of FERPA in the safe schools movement. This need not be. Each member of an interagency team needs to understand FERPA and its impact on interagency collaboration.

Test your "FERPA IQ" on the following scenarios.

1. Local police are investigating an assault that occurred on a public school campus during the school day. School officials have received a request from the police to provide a class list containing the name and address of all students in the classroom for the particular period when the assault occurred and all attendance lists for the class. Does FERPA allow this disclosure?

2. Mary, age 15, is arrested for shoplifting. This is her first offense, and the police department contacts the school for information about Mary's school attendance, discipline and academic performance. Can school officials share the information without violating FERPA?

3. A state child protection agency, after receiving complaints from parents about alleged incidents of child abuse at a public school, ask school officials for permission to visit the school during school hours, speak to students and have access to student records. Does FERPA permit access to the records?

4. The federal government wants to make an assessment regarding the compliance by a local school district with federal antidiscrimination law. The federal agency asks school officials to provide for each student in the school district the following: name, student identification number, address, grade, school, homeroom number, birth date, race, sex, telephone number, any special education designations, and whether the student transferred to the school. Does FERPA allow this disclosure?

5. A student's father wrote his son's teacher a letter, in which he stated his opinion about certain politically sensitive issues discussed in class and frank criticism about the teacher's educational goals. One year later, when the same parent ran for the City Council, school officials released the letter for publication to a local newspaper. The parent filed a lawsuit for money damages for invasion of privacy based on FERPA. Will the lawsuit be successful?

6. Two students get into a fight on campus. A school resource officer (SRO), who is assigned to the campus, breaks up the fight and files an incident report with the assistant principal. The SRO gives the original report to the assistant principal and keeps a copy for herself. Later, when the same students are taken into custody for fighting in a local shopping mall, the city police ask the school for a copy of the incident report. Does FERPA permit this?

FERPA Basics

These questions are not as difficult to discuss as they once were because FERPA is no longer as inscrutable. First, it is still true that FERPA remains focused on what Congress

in 1974 saw as growing evidence of abuse of access to student records. Attracting specific concern were incidents of access to student records without parental notice or consent, lack of a consistent system for governing access to records by other agencies and failure to disclose disciplinary information to parents. Second, it is equally clear that FERPA provides a strict framework to deter abusive practices by conditioning the availability of federal funds to schools that comply with its regulations:

"No funds shall be made available…to any educational agency or institution which has a policy or practice of permitting the release of education records… of students without the written consent of their parents to any individual, agency, or organization." 20 U.S.C.A. §§ 1232g(a) and (b)(1).

However, both Congress and the courts have clarified what constitutes a violation of FERPA's privacy provisions. With this clarity comes a degree of confidence in describing the role of educators as information providers. The essential starting point for FERPA disclosure is always notice to, and consent from, the parent or guardian prior to the sharing of the contents of the education record. After this, Congress has refined a list of the circumstances when disclosure is permitted without prior written consent. It includes disclosures that are made:

• To comply with a judicial order or lawfully issued subpoena. 34 CFR 99.31(a)(9)

• In connection with a health or safety emergency. 34 CFR 99.31(a)(10);

• To provide "directory information" (student name, address, date of birth, dates of attendance, etc.). 34 CFR 99.37;

• To State and local officials in compliance with a State statute that requires or authorizes information sharing. 34 CFR 99.31(a)(5) and 34 CFR 99.38;

• To provide information from the school's law enforcement unit records file that is usually maintained by the SRO. 34 CFR 99.3 and 99.8.

• To other school officials, including teachers, within the school or school district. 34 CFR 99.31(a)(1);

• To officials of another school, school system, or postsecondary institution where the student seeks or intends to enroll. 34 CFR 99.34;

• To teachers and school officials in other schools when the information concerns disciplinary action taken against the student for conduct. 34 CFR 99.36;

For its part, the courts have clarified how FERPA is to be enforced. FERPA does not create a private right of action that allows a person to bring a lawsuit for damages in court. See Gonzaga University v. Doe, 536 U.S. 273 (2002). The U.S. Supreme Court based the ruling on its view that spending legislation is generally not intended to create a right to file a

lawsuit as a means of enforcement, "[u]nless Congress speaks with a clear voice and manifests an unambiguous intent to confer [such a right]…" Gonzaga, 536 U.S. at 273-74. As a result, enforcement for violations of FERPA rests solely with the U.S. Department of Education through its Family Policy Compliance Office. Taken together a different picture of FERPA is emerging that is compatible with the safe schools collaborative movement.

In the I.Q. test, the answer is "Yes" to all fact patterns except number five. In Question One, the information sought is "directory information" concerning the names and addresses of students who were present in class when the assault occurred. Disclosure of such information is not privileged under FERPA. Therefore, providing the police with the names and addresses does not require parental consent and is not a violation of federal law. See Patterson v. School Dist., 2000 U.S. Dist. LEXIS 10245 (E.D. Pa. July 19, 2000). See also Staub v. East Greenbush School Dist., 128 Misc. 2d 935, 491 N.Y.S.2d 87 (N.Y. Sup. Ct. 1985). In Question Two, the school can release school attendance, academic performance, or other information from Mary's education record with the consent of one of her parents. If State law authorizes the disclosure to juvenile justice system agencies, the school can share information from Mary's education record without parental consent. Absent such a State law, the school should ask the police department to obtain a subpoena for the records. See Sharing Information: A Guide to the Family
Educational Rights and Privacy Act and Participation in Juvenile Justice Programs. A Guide to FERPA. Series: NIJ (www.ncjrs.org/txtfiles/163705.txt). In Question three, the information sought is part of the essential work of an agency created under state and federal law for child protection. Therefore, any interest in maintaining the privacy of student education records is outweighed by the broad mandate to investigate and remedy suspected abuse or neglect. See Disability Rights Wis., Inc. v. State Dep't of Pub. Instruction, 463 F.3d 719 (7th Cir. Wis. 2006).

In Question Four, the government's discovery request falls within the law enforcement exception of FERPA because law enforcement is not limited to the enforcement of criminal laws. The government's request to obtain the records in order to determine whether the school district is in compliance with the law constitutes law enforcement purposes under 20 U.S.C.S. § 1232g(b)(1)(C)(ii) of FERPA. See United States v. Bertie County Bd. of Educ., 319 F. Supp. 2d 669 (E.D.N.C. 2004). Also Patterson v. School Dist., 2000 U.S. Dist. LEXIS 10245, 2000 WL 1020332, (E.D. Pa. July 19, 2000). In Question Five, although the parent has a valid argument that the disclosure violates FERPA, he is not permitted to enforce FERPA through a private civil lawsuit. See Gonzaga University v. Doe (above). Finally, in Question Six, while it is true that the record of the school incident is an education record that is ordinarily subject to FERPA constraints, the incident reports created and maintained by the SRO may be disclosed under the law enforcement unit record exception. See 34 C.F.R. 99.3 definition and 99.8.

Body Worn Cameras:
Student Privacy Rights and Video Surveillance

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One important dimension of campus safety which affects student rights is the movement among educators toward greater reliance on video surveillance. Events are moving swiftly and a great deal is being attempted. For instance:

> - The U.S. Department of Education reports that during the school year 2013-2014, more schools reported using security cameras.[1]
>
> - Washington, D.C.-area public school districts utilize more than 30,000 surveillance cameras inside school buildings to monitor school safety.[2]
>
> - In Illinois, the Springfield School District is spending $489,200 in health life safety funds to install 30 to 40 security cameras at each school.[3]
>
> - In California, the Santa Maria Joint Union High School District is installing cameras and tracking devices to its buses. The monitoring system, "vMax Trac," will allow the school district to know the location of its buses, see what's happening on the buses, and know the names of all the students on board.[4]

At the same time, a new form of video surveillance that is very controversial among educators and law enforcement is emerging. School districts and police departments are introducing body-worn camera programs ("BWC") onto public school campuses.

> - In Iowa, the Burlington Community School District is equipping school administrators with body cameras to record their interactions with students and parents.[5]

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[1] *Public School Safety and Discipline: 2013-2014*. U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics. Online at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2015051.

[2] *30,000 Surveillance Cameras Monitor D.C.-Area Public Schools*. 4-NBC Washington, January 1, 2015. Online at http://www.nbcwashington.com/news/local/30000-Surveillance-Cameras-Monitor-DC-Area-Public-Schools-287297041.html.

[3] *Springfield School Board OKs $489,200 in New Security Cameras*. The State Journal Register, July 7, 2015. Online at http://www.sj-r.com/article/20150707/NEWS/150709626.

[4] *Student Tracking, Cameras being added to School Buses*. Santa Maria Times, July 7, 2015. Online at http://santamariatimes.com/news/local/student-tracking-cameras-being-added-to-school-buses/article_28157696-f95a-5b57-b1d7-776e1fd7548a.html.

[5] *Body Cameras for School Administrators*. The Washington Post, July 6, 2015. Online at http://www.washingtonpost.com/news/morning-mix/wp/2015/07/07/iowa-school-district-to-outfit-principals-and-assistant-principals-with-body-cameras/

? That's the plan in one Iowa school district.

- In Pennsylvania, York City officials are equipping school resource officers with body cameras. The new policy will require School Resource Officers (SROs) to record incidents when officers are called to respond.[6]

- In Georgia, SROs in Clayton County will again begin the school year equipped with body cameras.[7]

In policy discussions it is possible make too much of the differences between BWC and the traditional, fixed, video surveillance cameras, thereby losing one's way in selecting the best program. Admittedly, the BWC is an imposing leap forward by simultaneously recording both video and audio footage. It also gives the wearer mobility to target the subject(s) of the surveillance with the ability to film close-up images of events. However, these differences should be taken at face value. In all cases they merely serve to place an even greater emphasis on existing privacy laws that limit government surveillance of citizens.

Two traditional constraints from the law carry over to school-based BWC programs. The first restricts the places where the device is allowed to record. This privacy demand is a variation on the well-known theme of the legitimate expectation of privacy students possess while in school. The second constraint is the duty to avoid unwarranted disclosures of personal student information by implementing administrative security procedures. Therefore, the policy challenge is straightforward: How should BWC programs be implemented to avoid violation of student privacy rights?

Development of BWC Programs

There is no way of knowing when the first BWC programs were commissioned. Law enforcement agencies in the United Kingdom were experimenting with BWC as far back as 2005.[8] In the United States, police officers in Rialto, California, Mesa, Arizona, and Fort Worth, Texas, began using body-worn cameras in 2012. In August 2013, the Police Executive Research Forum ("PERF"), made a survey of 500 law enforcement agencies in the U.S. in which 25% made use of BWCs.[9]

Early BWC programs were primarily internal tools to improve police operations. The video record was used as a training tool for incoming officers, as documentation in performance evaluations for veteran personnel, and as a resource for improving tactics

[6] *York City Police Captain Explains Plan for Body Cameras*. The York Dispatch, November 8, 2014. Online at http://www.yorkdispatch.com/News/ci_26897907/York-City-police-captain-explains-plan-for-body-cameras.
[7] *Clayton Co. Schools Resource Officers Wearing Body Cameras*. Fox 5 Atlanta, August 10, 2015. Online at http://www.fox5atlanta.com/news/6449529-story.
[8] See, Ellis, Jenkins, and Smith, *Body-Worn Video: Evaluation of the Introduction of Personal Issue Body Worn Video Cameras on the Isle of Wight*. University of Portsmouth Press (2015). ISBN: 978-1-86137-654-1.
[9] Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, COPS – (2014). Online at http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf.

and communication. At the same time BWC programs were being required to resolve misconduct investigations against police departments by outside organizations. Jurisdictions began relying on BWC programs to document compliance with the terms of consent decrees with courts and in agreements with the Civil Rights Division at the U.S. Department of Justice. In this way, expansion of BWC programs evolved to its current form.

The undeniable benefits of BWC programs were established in 2012 in pilot programs in Rialto, California and Mesa, Arizona. The results of the studies show both a decline in public dissatisfaction with police conduct and a decrease in tension between residents and officers. In Rialto, a small city of approximately 100,000 residents, officials saw the number of complaints filed against police officers decline 88 percent. In Mesa, a city of 400,000, complaints against officers declined 40 percent.

Two most important implications for BWC programs quickly emerged – police accountability and public trust. Phoenix, Arizona officials made use of BWC footage to discharge a police officer from employment for directing profane language at citizens during calls and traffic stops.[10] And in Kentucky, a Louisville school resource officer was arrested after school surveillance cameras caught him punching a student and placing another in a chokehold.[11]

With the exception of the Burlington Community School District in Iowa, school security officers and school resource officers wear the devices in BWC programs. The objectives in these programs reflect the hope of improving officer performance and accountability, providing an important new category of evidence in solving crimes, resolving civil rights complaints, and enhancing the transparency of law enforcement programs. The BWC program in the Burlington, Iowa suggests more educators will soon wear the devices with two additional goals: improving how school officials relate to students and enhancing the community's perception of the safety of the school.

State Laws on BWC Programs

To date, state laws broadly authorize and regulate BWC programs focusing on law enforcement use only. Twelve (12) states have enacted the following legislation.

Arizona	SB 1300
Colorado	HB 15-1285
Florida	SB 248
Georgia	SB 94
Illinois	SB 1304
Nevada	SB 111 and AB 162
North Dakota	HB 1264

[10] *Video Reveals Fired Phoenix Cop's Extreme Conduct*. USA Today, July 10, 2013. Online at http://www.usatoday.com/videos/news/nation/2013/07/10/2505385/

[11] *JCPS responds to resource officer's assault arrest*. WLKY Louisville, February 4, 2015. Online at http://www.wlky.com/news/police-say-video-shows-school-resource-officer-punching-student/31090656.

Oklahoma	HB 1037
Oregon	HB 2571
Pennsylvania	SB 57
South Carolina	SB 47
Texas	SB 158

Florida's BWC law (SB 248) became effective on July 1, 2015. The law creates a broad exemption for BWC footage preventing disclosure to the public. It makes BWC recordings confidential if the recording is taken within a private residence, a health care facility or a place where a person would expect privacy. Pennsylvania's BWC law (SB 57) became effective February 2014. It amends state wiretapping laws to allow police to implement BWC programs. The law places restrictions on BWC use in private residences, and requires officers to announce the use of the BWC of the camera to citizens as soon as reasonably possible. The law does not contain an exemption for BWC footage and a court has recently ruled that BWC records are subject to public disclosure.[12]

In South Carolina, the BWC law (S 47) was signed into law on June 10, 2015. It creates an unfunded mandate for all law enforcement agencies in the state to implement a BWC program. The law exempts BWC footage from disclosure under the Freedom of Information Act, but police agencies have discretion under the law to release body camera footage. In Texas, legislation (SB 158) authorizing BWC programs took effect on September 1, 2015. Under the law, a grant fund is created to help Texas law enforcement agencies purchase and implement their programs. An officer equipped with a BWC is required to activate the camera "when responding to calls for assistance and when performing other law enforcement activities, including traffic stops, pursuits, arrests, searches, or interrogations, unless activation of the camera would be unsafe, unrealistic, or impracticable." The Illinois BWC law (SB 1304) takes effect on January 1, 2016. Its provisions regulate footage retention, recording protocol, and video dissemination. The BWC must be able to record for 10 hours, must be turned on 30 seconds before an encounter with a citizen, and be on at all times when an officer is responding to a call. An officer must inform the citizen they are being recorded. Video footage can be held for 90 days before being destroyed unless it has been flagged because of a complaint or as part of an investigation.

None of the state laws govern BWC programs by educators. Future legislation on school-based BWC programs will need to acknowledge and account for four unique elements in education law: the wide expanse of common areas on public school campuses, the reduced expectation of privacy of students, the broad authority of educators to maintain a safe learning environment, and the unique relationship between SROs and school officials.

BWC Programs and Common Areas on Public School Campuses

[12] See Pennsylvania State Police v. Grove, ___ A.3d ___; 2015 WL 4078727 (Commonwealth Court of Pennsylvania, July 7, 2015).

The bright line that separates lawful surveillance from illegal recording is the reasonable expectation of privacy. The law of the Fourth Amendment to the U.S. Constitution controls all student assertions of privacy.

> 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.[13]

Generally, most school video surveillance programs used for campus safety do not intrude upon legitimate expectations of privacy. When video cameras cover only public spaces the expectation of privacy is difficult to assert. For example, student activities occurring in parking lots, hallways, classrooms, buses, auditoriums, and other common areas do not create reasonable expectations of privacy.[14] In addition, schools have an effective and lawful way to eliminate expectations of privacy for the physical plant and school-owned equipment used by students from day-to-day by declaring their intentions in school policy documents. This effectively disqualifies lockers, desks, books, computers, tablets, and other school property from providing the basis for a reasonable expectation of privacy.[15]

Therefore, in common areas the validity of school-based BWC programs is a given. Moreover, there is no first Amendment claim to be asserted in the BWC context; video surveillance "does not violate First Amendment rights, even though it may be directed at communicative or associational activities, and even though it may inhibit those activities." Reporters Committee for Freedom of Press v. AT.T., 593 F.2d 1030, 1058 (D.C. Cir. 1978). The First Amendment affords no additional protection against BWC beyond what is provided by the Fourth Amendment.

BWC Programs, Reasonable Suspicion, and the Expectation of Privacy of Students

Nevertheless, the Fourth Amendment does make demands on BWC programs when the surveillance captures students in areas and at times when the expectation of privacy is reasonable beyond quibble. This includes school bathrooms, locker rooms, and the contents of student-owned personal property in the possession of the student during the

[13] U.S. Constitution, Fourth Amendment.

[14] For classrooms, see Plock v. Bd. of Educ., 545 F. Supp. 2d 755 (N.D. IL 2007). For buses, see State v. Duchow, 749 N.W.2d 913 (WI Sup Ct. 2008). See also, Goodwin v. Moyer, 549 F. Supp. 2d 621 (M.D. Pa. Mar. 29, 2006).

[15] Only two states provide students with a legitimate expectation of privacy in the use of school lockers. Florida Statutes Annotated § 1006.09(9) allows the search of a school locker only "if she or he has reasonable suspicion that a prohibited or illegally possessed substance or object is contained within a student's locker." Iowa Courts have mumbled through an extraordinary ruling in State v. Jones, 666 N.W.2d 142, 2003 Iowa Sup. LEXIS 134 (Iowa 2003) that gives students an expectation of privacy in lockers only to extract its teeth by declaring that it "may be impinged upon for reasonable activities by the school in furtherance of its duty to maintain a proper educational environment."

school day – book bags, purses, and smart devices.[16] The court decisions in this area of education law attempt to balance the right of the student to be left alone against the duty of educators to maintain a safe campus. However, the courts are failing to achieve any sort of balance. School officials prevail in most cases.

The courts have held that while students do not give up their rights to attend school, the "school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search." New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). The courts have agreed that "the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children". Vernonia Sch. Dist. 47j v. Acton, 515 U.S. 646, 656 (1995). As a result, "a student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety." Board of Education. v. Earls, 536 U.S. 822, 831 (2002).

T.LO. controls the formula for a valid student search using a BWC: (1) whether the BWC search is "justified at its inception"; and (2) whether the BWC search is reasonably "related in scope" to the circumstances which justified the video surveillance in the first place. See T.L.O., 469 U.S. at 341. Therefore, when the use of video surveillance constitutes a search, courts tend to bring the traditional deference to school officials when "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." T.L.O., 469 U.S. at 341. A BWC search is valid when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." T.L.O., 469 U.S. at 342. Therefore, challenges to the implementation of school-based BWC programs should mimic the results of the reasonable suspicion cases generally.

The Unique Relationship between SROs and School Officials.

An issue that is both misunderstood and controversial among policymakers is the question of the status of the school resource officer when conducting searches. Education law on searches after T.LO. is based on the presumption that a "school official" is conducting the search. As the Court in T.LO. puts it,

> "[A] search of a student by a teacher ***or other school official*** will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law ***or the rules of the school***. TLO. 469 U.S. at 341-42 (emphasis added).

[16] For student locker rooms, see Brannum v. Overton County Sch. Bd., 516 F.3d 489 (6th Cir. Tenn. 2008). For an analysis of student cell phones, see Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622, 627 (E.D. Penn. 2006). Mendoza v. Klein Indep. Sch. Dist., No. H-09-3895, slip op. at 2 (S.D. Tex. Mar. 15, 2011). J.W. v. DeSoto County School District, 2:09-CV-00155-MPM, 2010 WL 4394059, at *2 (N.D. Miss. Nov. 1, 2010. See also, Bernard James, Safe Schools, Cell Phones, and the Fourth Amendment, NASRO Journal of School Safety, Winter 2009, available at http://law.pepperdine.edu/academics/faculty/publications/James-NASROCellPhoneLaw.pdf.

In all but two states the law generously considers the school resource officer to be a school official.[17] One federal court summarizes the law this way:

> "[T]he weight of authority holds… that a search of a student on school grounds by a school resource officer at the request of school officials should be deemed a search by a school employee for Fourth Amendment purposes and thus is subject to the reasonableness standard, not the probable cause standard." Wilson v. Cahokia Sch. Dist. # 187, 470 F. Supp. 2d 897, 2007 U.S. Dist. LEXIS 3974 (S.D. Ill. 2007)

The Indiana Supreme Court adds significant clarity to the majority rule with the apparent agreement of the U.S. Supreme Court:

> "(1) where school officials initiate the search or police involvement is minimal, the reasonableness standard is applied; (2) where the search is conducted by the school resource officer on his or her own initiative to further educationally related goals, the reasonableness standard is applied; and (3) where "outside" police officers initiate the search of a student for investigative purposes, the probable cause and warrant requirements are applied." Myers v. State, 839 N.E.2d 1154, 1160 (Ind.2005), cert. denied, 547 U.S. 1148 (2006).

Therefore, in the instance when a student has a reasonable expectation of privacy the reasonableness standard should apply to BWC programs without regard for whether the educator or the school resource officer is wearing the device. However, when an outside officer brings a BWC onto campus for purposes unrelated to a school incident, the probable cause standard will apply to its use in settings where students have a legitimate expectation of privacy.

BWC Programs and Model Disclosure Policy: the "Law Enforcement Unit"

After an incident is recorded the most important issue in BWC programs focuses on the duty to avoid unwarranted disclosures of personal student information. This is not simply a question of a school district enforcing privacy rules as part of its administrative custom; numerous and complicated laws govern the ways in which educators share information from student records. The education code of every state sets limits and conditions on sharing information from student records. In addition, the U.S. Department of Education makes the most stringent demands in this regard through the provisions of the Family

[17] Georgia and Washington State have rejected the majority rule in favor of unique approaches to the status of the school resource officer on campus. In Georgia, the rule is that ""[A]ction by school officials will pass constitutional muster only if those officials are acting in their proper capacity and the search is free of involvement by law enforcement personnel." State v. Young, 234 Ga. at 498(2), 216 S.E.2d 586. T.L.O. has never been adopted in Georgia. Therefore, the state courts have flatly refused to entertain the possibility of a school resource officer as a school official. See State v. K.L.M., 278 Ga.App. 219, 628 S.E.2d 651 (2006) (""[T]he [reasonable suspicion] analysis of Young will not apply even if a law enforcement officer searches at the direction of a school official."). In Washington State, the standard appears to fix the status of the SRO to category three (law enforcement only), although it is not clear if local interagency agreements have the capacity to make the SRO a school officials. (See State v. Meneese, 174 Wn.2d 937; 282 P.3d 83 (Sup. Ct. Wash 2012). In Florida, one appellate court ruled in 1993 that an SRO could never be a school official, see A.J.M. v. State, 617 So. 2d 1137 (Fla. 1st DCA 1993). But the same court repudiated its decision as one that "does not correctly state the law." State v. D.S., 685 So. 2d 41 (Fla. 3d DCA 1997).

Educational Rights and Privacy Act [FERPA] (20 U.S.C.S. §1232g). FERPA imposes on educators an array of regulations (34 CFR Part 99) that cover the entire landscape of student record disclosure.[18] School cannot be too careful to keep current on the limits of disclosure of BWC footage of students.[19]

The U.S. Department of Education has recently issued a model policy on the subject of video recordings and FERPA.

> Schools are increasingly using security cameras as a tool to monitor and improve student safety. **Images of students captured on security videotapes that are maintained by the school's law enforcement unit are not considered education records under FERPA**. Accordingly, these videotapes may be shared with parents of students whose images are on the video and with outside law enforcement authorities, as appropriate. Schools that do not have a designated law enforcement unit might consider designating an employee to serve as the "law enforcement unit" in order to maintain the security camera and determine the appropriate circumstances in which the school would disclose recorded images.[20]

Taken together with state mandated reporting laws and interagency agreements with local agencies, a school-based policy would resemble the following model:

> BODY-WORN CAMERA POLICY
>
> 100 PUPOSE AND SCOPE
> The School Board authorizes the use of body-worn cameras (BWC) on district property to ensure the health, welfare, and safety of all staff, students and visitors to district property, and to safeguard district facilities and equipment. Video cameras shall be used with no conditions or limitations in all common areas. In areas otherwise private BWC will be used when reasonable grounds exist for suspecting that the recording will turn up evidence that the student has violated or is violating either the law or the rules of the school.
>
> The use of BWC provides objective documentary evidence, transparency of safe school procedures, as well as protecting the SRO and school staff wearer from civil litigation and allegations of misconduct.

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[18] See "Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs" [https://www.ncjrs.gov/pdffiles/163705.pdf]

[19] Disclosures of education records permitted by FERPA include:
• To comply with a judicial order or lawfully issued subpoena. 34 CFR 99.31(a)(9)
• In connection with a health or safety emergency. 34 CFR 99.36 and 99.31(a)(10);
• To provide "directory information" (student name, address, date of birth, dates of attendance, etc.). 34 CFR 99.37;
• To State and local officials in compliance with a State statute that requires or authorizes information sharing. 34 CFR 99.31(a)(5) and 34 CFR 99.38;
• To provide information from the school's law enforcement unit records file that is usually maintained by the SRO. 34 CFR 99.3 and 99.8.
• To other school officials, including teachers, within the school or school district. 34 CFR 99.31(a)(1);
• To officials of another school, school system, or postsecondary institution where the student seeks or intends to enroll. 34 CFR 99.34;
• To teachers and school officials in other schools when the information concerns disciplinary action taken against the student for conduct. 34 CFR 99.36;

[20] See, *Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools*. Online at https://www2.ed.gov/policy/gen/guid/fpco/brochures/elsec.pdf.

Every SRO and school staff wearer equipped with a BWC must be trained in the operation of the equipment prior to its use. When utilizing these devices the SRO or school staff wearer shall adhere to the objectives and procedures outlined in the school safety plan so as to maximize the effectiveness of the BWC and the integrity of the video documentation.

The SRO or school staff wearer should make every effort to document all incidents anytime he or she is interacting with students and visitors. If it is safe and practical to do so, the SRO or school staff wearer should activate the BWC while approaching an incident or as soon as practical. The SRO or school staff wearer may supplement the BWC recording with an audio description of the event and describe any external factors that may not have been recorded (e.g., prior observations, surrounding conditions).

101 NOTICE AND DUE PROCESS

Each school shall notify staff and students through student/parent and staff handbooks that BWC surveillance may occur on campus and at school sponsored events.

The notification shall include that students engaged in conduct in violation of Board policies, administrative regulations, codes of conduct, building rules, or law shall be subject to appropriate disciplinary action. Others may be referred to law enforcement agencies.

The notification shall include that BWC recordings may become a part of a student's educational record. The district shall comply with all applicable state and federal laws related to record maintenance, retention, and disclosure.

102 RETENTION

All raw, unedited recorded imagery will be stored and retained by _____ for no more than 90 days, OR until all administrative uses to which the recordings are relevant have been completed. _____ shall have the authority to move data to disk or mark data to be saved permanently for purposes consistent with Board policy and school rules.

103 UNAUTHORIZED MANIPULATION OF RECORDINGS PROHIBITED

Under no circumstances will an SRO or school staff wearer edit or attempt to edit, alter, erase, delete, duplicate, copy, record, or distribute by any other means any recordings made with the BWC without the prior authorization from _____ OR HIS/HER designee. All recordings are considered the property of the _____ and no personal use of the BWC will be permitted. Violations of this policy shall be formally documented and may be grounds for disciplinary action.

104 RECORD REQUESTS

It is the goal of the Board to support and promote openness and transparency in an effort to improve relationships with students and parents as well as enhancing the community's perception of the safety of the school. All requests for recordings will be received and processed in accordance with federal, state and local statutes and in accordance with Departmental policy. The release of recordings must also ensure the rights to privacy of students, staff, and visitors whenever possible and ensure that the integrity of an investigation is not compromised. Legitimate redactions and/or denials of requests shall be made to ensure that this is accomplished. Classification of BWC recordings as private, protected or controlled will be made on a case-by-case basis and as allowed by state law. This policy will not conflict or interfere with the release of recordings pursuant to a court order or valid subpoena.

Adopted by the _____ on [DATE]

Cell Phones, and the Fourth Amendment

Reform in education law continues to give school officials broad authority to implement policies that are designed to keep campuses safe. The primary reason for this trend is that each State, "having compelled students to attend school and thus associate with the criminal few-or perhaps merely the immature and unwise few-closely and daily, thereby owes those students a safe and secure environment.'" 4 W. LaFave, Search & Seizure § 10.11(a), at 802-03 (3d ed. 1996). The U.S. Supreme Court has held that, "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship". New Jersey v. TLO, (469 U.S. 325, 340-341 (1985)). Educators who take up this challenge find themselves under constant pressure to keep their campus policies up-to-date in response to the evolving ways in which student conduct may conflict with a safe and effective learning environment.

New technology, including cell phones, pagers, and other personal digital assistants (PDAs) raise important questions about the authority of educators to seize, search and inspect the contents of these devices when their possession or use violate school rules. Do students have an expectation of privacy in these devices that outweighs the authority of educators to ban their possession and use on campus? If school codes may prohibit these devices, then may educators search the contents of seized devices? Does the law require educators to obtain a search warrant before the contents of the devices can be inspected? Or, may school officials rely on mere reasonable suspicion to inspect student devices that violate the code of conduct?

This topic is now a timely one. Many educators have prohibited possession and use of the devices on campus to eliminate disruptions, crimes, and harassment as well as to discourage cheating on exams. These educators routinely examine the confiscated phones. Other educators wish to do so, but are unclear as to what the law permits. Lawyers for both schools and students frequently discuss the issue and disagree over what the law requires in this regard.

Test your " cell phone IQ" on the following scenarios.

1. A student is stopped in the hallway for being out of class between periods without the hall pass required by the code of conduct. The assistant principal searches the student and feels an object under the student's coat. The principal reaches into the coat and pulls out a cell phone in a case. The principal felt there was something in the case in addition to the phone, opened the case and found what was later determined to be heroin. The student was suspended and the police were called. Was the search of the cell phone case lawful?
Y___ N___

2. A student was caught smoking in the bathroom in violation of school policy. The student's purse was searched by the principal who suspected her of having more

cigarettes therein. The principal discovered cigarettes in her possession, and discovered the drug marijuana, a cell phone, and a written list of alleged users from the school. The principal believed that the cell phone contained information about drugs on campus and read several text messages. The messages led the principal to other students who had drugs and a non-student who was the supplier of the drugs. The students were suspended and the police called to arrest the students. Is the search of the cell phone a valid under the Fourth Amendment?

Y___ N___

3. A student is taken to the principal's office after his pager starts ringing in class. Possession of pagers and cell phones are prohibited by the school code of conduct. The principal seized and made a list of the telephone numbers stored in the student's pager. Is this search valid without a search warrant?

Y___ N___

4. While patrolling campus during the school day, an SRO observes a student talking on a cell phone in the campus parking lot. Possession and use of a cell phone during the school day is a violation of the school code of conduct. The student was brought to the office of the principal, who examined the cell phone. He observed numerous calls logged on the caller ID screen. While reviewing the contents of the phone, it began ringing. When the phone rang, the principal flipped it open, activating the backlight. He observed a "wallpaper" photo of another student who was the caller. It was later determined that the caller was truant from school. Is this handling of the phone valid?
Y___ N___

The Standards for Searching Student Property
Under the Fourth Amendment, searches and seizures must be "reasonable". There are at least two branches of reasonableness jurisprudence. Under the criminal law branch a reasonable search must be based on probable cause to believe that a violation of the law has occurred and a search warrant. However, under the education law branch neither probable cause nor a warrant is required. The U.S. Supreme Court has decided that, "[t]he accommodation of…the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause." TLO, 469 U.S. at 341. Instead, the following rules govern.

> "Determining the reasonableness of [a student] search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception"; [and] second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the

> student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. New Jersey v. TLO, (469 U.S. 325, at 341 (1985)).

Under these guidelines, those arguing against the validity of content searches of confiscated phones assume a heavy burden of persuasion because current judicial attitudes uphold school policies that are designed to uncover and prevent misconduct by students that, "materially disrup[t] classwork or involv[e] substantial disorder or invasion of the rights of others". Tinker v Des Moines Independent Community School Dist. (393 US 503, at 509 (1969). The TLO standard has been applied to uphold a broad range of content searches that are difficult to distinguish from the search of a phone. The contents of **lockers** (State v. Jones, 666 N.W.2d 142 (Iowa 2003)), **purses** (New Jersey v. TLO, (469 U.S. 325 (1985)), **backpacks** (DesRoches v. Caprio, 156 F.3d 571 (4th Cir. 1998)), **cars** (Enterprise City Bd. of Educ. v. C.P. by & Through J.P., 698 So. 2d 131 (Ala. Civ. App. 1996)), and **clothing** (Thompson v. Carthage Sch. Dist., 87 F.3d 979 (8th Cir. 1996) and In re William V.; 111 Cal. App. 4th 1464 (2003)), have all been upheld when the educator has a reasonable suspicion for suspecting that the student has violated or is violating either the law or the rules of the school.

When applied to cell phone searches, it is clear that the initial seizure and search that occurs when a student is found in possession (and or use), of a phone in violation of school policy is justified at its inception. Students have no immunity from the seizure or the search of a phone or PDA which school officials have prohibited from campus. Possession of the phone in violation of school rules supports, at a minimum, an inquiry (as to both the student and the phone) to determine the circumstances of its possession and the uses, if any, to which it has been put that affect the campus. Indeed, when TLO is faithfully applied to school polices of cell phones and other devices, then the focus will be not on whether such a search is justified at its inception, but on the scope of the search. How far can an educator go in harvesting the contents of a phone before it is no longer (to use the words of TLO), "reasonably related in scope to the circumstances which justified the interference in the first place?"

At one end of the "how far can the educator go" issue, some content searches of a phone will not be controversial at all. For example, an educator who examines the contents of a phone in order to determine its true owner would be acting under the best of our traditions in public education. So too, a teacher who handles and examines a phone that is receiving a call, delivering a message, or signaling an alarm, would not be second-guessed. The searches in these examples are directly related in scope to the interest of the educator to make an accurate assessment of the nature of the disruption and its risk to the school. Beyond these "safe" scenarios lies considerable discomfort and disagreement over both the legality and the wisdom of content searches of phones that harvest the contents of a confiscated phone.

Court Cases involving School Searches of Cell Phones

Only five cases have been decided that involve cell phones in public education. Three cases uphold school enforcement of policies that prohibit phones and other devices on campus. Price v. New York City Bd. of Educ., 51 A.D.3d 277 (N.Y. App. Div. 1st Dep't 2008); Laney v. Farley, 501 F.3d 577 (6th Cir. 2007); Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272 (W.D. Wash. 2007). Two cases address the decision by school officials to search the contents of the phones. In Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009), officials confiscated several students' cell phones, examined them, and discovered that the students were engaged in "sexting". In additional to school discipline, the phones were turned over to the over to the District Attorney who began a criminal investigation. The parents did not challenge the searches, but the parents sued to stop the district attorney from initiating criminal charges for the nude photographs. In Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622 (E.D. Pa. 2006), the trial court agreed that the seizure of a student's cell phone and search of the phone number directory and call log was valid. But the court ruled that school officials crossed the line when they pretended to be the student while sending an instant message to the student's brother and when they called nine other students listed in phone number directory.

These cases support school policies that prohibit possession and use of cell phones and other devices on campus. They are influenced greatly by the 2014 ruling of the U.S. Supreme Court in *Riley v. California*, 573 U.S. ___; 134 S. Ct. 2473 (2014). In *Riley*, the Supreme Court affirmed the longstanding authority of law-enforcement officials to seize and secure a suspect's personal property, including a cell phone, after an arrest. The Justices then altered Fourth Amendment doctrine in part: they unanimously took away the power to search the digital contents of a cell phone under the search-incident-to-arrest exception to the Fourth Amendment. The court reasoned that cell phones were different from other physical possessions that are searched incident to arrest without a warrant. Incident to arrest, police are not free to search the digital data of a cell phone without additional justification.

Riley cannot be ignored in the school context. Students now possess a unique and higher-order expectation of personal privacy in cell phones and other "smart" devices. However, students do not pick up an additional measure of protection against seizures and searches of their smart devices in most confrontations with educators. Only in the schools that have no policy on cell phones, or whose policies freely permit cell phone possession and use, will *Riley's* impact greatly limit educator's discretion. And even this restraint has drawbacks; when the use of the cell phone is related to a violation of other provisions in the school code of conduct, TLO opens the door for searches when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school

After *Riley*, the rules for searching a student's cell phone are straight-forward:

1. When a school allows cell-phone possession and seeks to search the phone of a student whose misconduct does not involve cell-phone use, the search is invalid unless it is necessary to prevent imminent and serious harm, or the

educator has actual knowledge or corroborated suspicion that evidence of wrongdoing is in the device. ‘’

2. When a school allows cell-phone possession and seeks to search the phone of a student whose misconduct involves cell-phone use, the search is valid because all knowledge and suspicion focuses on the uses to which the device itself has been put. Therefore, no additional justification is needed and the search may expand as suspicions evolve.

3. School officials possess the authority to prohibit cell-phone possession and use on campus. Therefore, when a school prohibits cell-phone possession and seeks to search the phone of a student whose misconduct involves cell-phone use, the search is valid because all knowledge and suspicion focuses on the uses to which the device itself has been put. Therefore, no additional justification is needed and the search may expand as suspicions evolve. However, when a school prohibits cell-phone possession and seeks to search the phone of a student whose misconduct involves mere possession of the cell phone, the search must proceed cautiously, if at all, to ensure that student privacy will be invaded no more than necessary to achieve the legitimate end of preserving order in the schools. Confiscation is the go-to remedy here unless the search is necessary to prevent imminent and serious harm, or the educator has actual knowledge or corroborated suspicion that evidence of wrongdoing is in the device.

4. The answers to the questions in the I.Q. test are all "yes." In Question One the educator has reasonable suspicion to search the student because the student was out of class between periods without the hall pass required by the code of conduct. The school officials are allowed to complete the search of the student without any additional justification. See In re William V., 111 Cal. App. 4th 1464 (Cal. Ct. App. 2003); D.L. v. State, 877 N.E.2d 500 (2007); New York v. Butler,725 N.Y.S.2d 534 (2001). Question Two is the fact pattern of New Jersey v. TLO, (469 U.S. 325 (1985), with a cell phone added to the other items in the purse. The search of the cell phone is reasonably related to the need of the educator to turn up evidence of the extent to which the student is violating the law. Even after *Riley v. California*, the search is valid because the list of student names corroborates the suspicion of the educator and the use of drugs is an unacceptably dangerous condition on campus. Question Three involves a search that is directly related in scope to the device itself and the interest of the educator to make an accurate assessment of the nature of the disruption and its risk to the school. See United States v. Hunter, 1998 U.S. App. LEXIS 27765 (1998)(a criminal law case using the probable cause standard). For a school version of the confiscation of a ringing phone, see Laney v. Farley, 501 F.3d 577 (6th Cir. 2007). The answer to Question Four is borrowed from the companion case decided with *Riley v. California*. (*United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009)). When the rules of *TLO* are applied to this fact setting, the search is valid because all

knowledge and suspicion focuses on the uses to which the device itself has been put. Therefore, no additional justification is needed and the search may expand as suspicions evolve.

Legal Update

Message from the Courts: 2014-2015 Top Cases

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Perhaps the most powerful incentive to maintain safe schools is the desire to avoid legal liability. It is no surprise that educators and school resource officers have been attentive to legal reform in judicial cases, especially in recent times as public attention to school policies grows more intense.

While public laws (legislation) represent the most straightforward type of reform to put into practice, court decisions are a mysteriously difficult tool of reform. This is due to the variety of courts and the mixture of state and federal rules that may be relevant to a case. Therefore, despite the good intentions of school officials, court decisions appear to vary in a way not easily explained, making the question of when school policies cross the line difficult to understand.

Fortunately, there are two big stories from the student rights decisions of 2014-2015. First, on the subjects of excessive force, bullying, student searches, and the duty of school officials to protect students, the courts are no longer divided on the relevant law. The courts appear to be speaking the same language with rules that can easily be put into practice by school officials. The second big story reflects the truth of the first: eight of the eleven court decisions come out in favor of the school policies.

When one combines the results of both the federal decisions and the state court rulings, it is clear that the audience to whom theses decisions are written is beginning to understand what the law permits and what it requires. Only on the subject of bullying are all of the courts uncertain about where the law draws the line for purposes of the liability of school officials. And for the present time, the courts are resolving doubts in favor of school attempts to regulate bullying in the absence of evidence of improper training, complacency, or abuse of authority.

As is often the case, the Fourth Amendment produces the most consistent rulings with two noteworthy conclusions. First, in the area of student searches, educators win every case. School officials appear to have mastered the ins and outs of their authority to search students based upon reasonable suspicion that "the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." New Jersey v. TLO, (469 U.S. 325, at 341 (1985)). The decision in State v. Lindsey, holding

that a student athlete has a lowered expectation of privacy using a school-issued equipment bag, is sure to affect day-to-day school searches involving extracurricular activities. Indeed, the current focus on campuses on weapons and drugs makes Lindsey and People v. T.S. (holding that a search of a student backpack for weapons is valid even with the assistance of two school resource officers) especially important decisions for schools that inherit these risk factors. Perhaps the most impressive decision in this area is the Jackson v. Ladner case where the court rules in favor of proactive school officials aggressively enforcing a cyber-bullying policy by searching a student's social-networking account upon receiving information that the student sent threatening online messages concerning school activities.

The second important outcome in the area of the Fourth Amendment has to do with two very interesting excessive force cases. J.W. v. Carrier suggests that all courts are moving quickly to flatly adopting a three-part rule to resolve excessive force lawsuits (1) as the age of the student decreases the amount of force used should be reduced accordingly; (2) when the offense involves non-violent minor incidents the amount of force should be reduced accordingly; and (3) increased use of force is justified when the conduct of the student escalates a tense situation – the responses of school officials (and school resource officers) are then seen as a reasonable attempt to deescalate the situation, protecting the safety of others as well as the safety of the official. This is the best explanation of the outcome in the case of J.W. v. Birmingham Board of Education. The lesson of the Birmingham case is that school officials would do well to exercise wise discretion in the use of pepper spray.

Meanwhile, the duty of school officials to protect students benefits from the clarity of the reasoning provided by the courts in Beward v. Wittaker and Estate of Massey v. City of Philadelphia. Both the federal and the state court agree that educators have an affirmative duty to take all reasonable steps to prevent foreseeable harm to its students, such that educators are not entitled to qualified official immunity for negligent performance of this duty. This language is used rarely because it often creates confusion between liability in statutory and common-law cases and liability involving constitutional law, where the Due Process Clause does not make such a demand. Nevertheless, the rule that emerges is that school liability follows the negligence.

Only the bullying cases take us down the rabbit hole into the judicial reluctance to control this area of school safety law reform, apparently in the hope that lawmakers will devise a workable standard that assists educators in distinguishing kids-play from chronic predatory acts. In Hankey v. Town of Concord-Carlisle, the court holds that a school district is not liable for student injuries sustained by bullying even though educators should have done more to protect the victim and take the incidents seriously. In Maldari v. Mount Pleasant Central School District and Emmanuel B. v. City of New York, the court ruled that school officials are not liable for injuries to a student sustained by bullying unless they had actual or constructive notice of prior conduct to place them on notice. And in Gauthier v. Manchester School District, the court held that failure by school officials to comply with school bullying policy does not create a private right of action to sue the school district for injuries to a student. Judicial restraint of this

magnitude is rare except in constitutional cases and is best explained as a form of deference to law makers, who only now are beginning to address the gap between legislation that prohibits bullying and the rules for holding educators accountable for eliminating its harmful effects from the school climate.

In the pages that follow, detailed summaries of all eleven cases are provided, grouped by subject matter. Within subject categories, the cases are presented in chronological order, which can sometimes help demonstrate how the rules and the thinking of the courts are developing over time. The goal of these summaries is to provide a context for school officials and school resource officers for understanding what the law permits and what it requires in maintaining a safe and effective campus. The reader should remember that these are merely summaries; policymakers and scholars should review the actual case decisions to fully understand the implications of a case for their school environment.

I. The Duty of School Officials to Protect Students

• Beward v. Whitaker
--- S.W.3d ----; 2015 WL 293461 (Court of Appeals of Kentucky 2015)

Headline: Educators have a "special relationship" with their students by virtue of state law and an affirmative duty to take all reasonable steps to prevent foreseeable harm to their students.

Facts: A fellow student injured Whitaker in the school hallway just prior to the beginning of his first class. The attacker put Whitaker into a chokehold until he passed out. He let go of Whitaker, and he fell to the ground, hitting his head on the floor and causing severe head trauma. No teachers or administrators were in the hallway at that time to supervise the students. State and school policy required school officials to provide a "safe environment for students," and to not tolerate "[b]ehavior that materially or substantially disrupts the educational process." Whitaker filed a complaint alleging that school officials failed to meet their duty to keep the students safe, monitor the hallways, and maintain control of the students at the time he was attacked and therefore breached their duty of care to him. The school official argued that they were entitled to immunity from suit in student injury cases.

Holding: Educators are not entitled to qualified official immunity for negligent performance of the duty to keep students safe. "Official immunity" is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed. Immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment, (2) in good faith; and (3) within the scope of the employee's authority. There is no immunity from tort liability for the negligent performance of a ministerial act, i.e., one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts. The "special relationship" formed between a school district and its

students imposes a ministerial and an affirmative duty on the district, its faculty, and its administrators to take all reasonable steps to prevent foreseeable harm to its students. **NOTE**: On September 16, 2015, the Kentucky Supreme Court agreed to review the case and issue a new ruling on whether the duty to protect students is a ministerial or a discretionary function.

• Estate of Massey v. Philadelphia
-- F.Supp.3d --; 2015 WL 4533104 (United States District Court, E.D. Pennsylvania 2015)

Headline: Educators can be held liable for preventing a student from seeking medical attention or by forbidding the taking medication that is necessary to function, thereby creating a danger to the student.

Facts: Massey was a sixth grade student in the Philadelphia Public Schools. She suffered from chronic asthma and used medication to treat her asthma. School officials knew of Massey's medical condition, particularly that an asthma attack would require immediate intervention such that any delay could lead to death. Nevertheless, school official followed a policy that students could not possess or use prescribed medication at the school without the supervision of a nurse. On day in school, Massey had an asthma attack. Her teacher informed her that no nurse was on duty, but did nothing else to provide medical treatment to Massey. Although Massey's condition worsened, school officials did not contact emergency medical aid or take her to the hospital, despite her having told the educators that she could not breathe. Later in the day, school officials drove Massey home where her family took her to the hospital. She died soon thereafter of acute exacerbation of asthma. Massey's family argued that educators and the school district were liable for here death by preventing here from obtaining medical treatment.

Holding: The court ruled that under federal law school districts can be liable under the "state-created danger rule," when they take action that creates a danger to a student or that renders a student more vulnerable to danger than had educators not acted at all. The policy of not having a nurse on duty while also not permitting Massey to use prescription medication without a nurse on duty is a basis for liability under the state-created danger rule. This is particularly true because school officials were said to know of the risk to Massey if an asthma attack was not immediately treated. The court ruled that under Pennsylvania law school officials have no immunity from liability when their conduct is shown to be unreasonable, reckless, willful, and deliberately indifferent to the health, safety, and well-being of a student. This sort of misconduct is synonymous with an intentional tort and is not protected by state tort immunity laws.

II. Excessive Force

• J.W. v. Corporal Carrier
2015 WL 2085438 (United States District Court, D. Maryland 2015)

Headline: A school resource officer does not use excessive force when handcuffing and lifting the arm of an unruly student.

Facts:

J.W. was a special education student at a public middle school. He was on medications for his disabilities. J.W. was having an outburst at school during which he told school officials her was going to harm himself, resisted all attempts to calm him down, and lifted up a desk and tipped it over. The assistant principal and the school resource officer informed J.W. that they were going to place handcuffs on J.W and take him to the hospital for an emergency psychiatric evaluation. J.W. physically resisted the school resource officer, kicking him and pulling away. Eventually, the SRO handcuffed J.W., took him out of the classroom to a police car and transported him to the hospital. At the hospital, J.W. complained of pain in his left wrist. His left wrist was put in a splint. J.W. sued for "excessive force."

Holding:
The court ruled that an "excessive force" claim should be judged under Fourth Amendment rules and focuses on the objective reasonableness of the officer's conduct. The court ruled that the SRO acted reasonably when he lifted J.W.'s arm in an attempt to gain control of J.W. to transport him to the hospital. Assuming that Corporal Carrier could have gained control of J.W. by grabbing his shoulders and escorting him from behind," the Court ruled that "reasonableness is evaluated from the perspective of the officer on the scene, not through the more leisurely lens of hindsight." Moreover, the court ruled that the fact that an arguably less "forceful" alternative to gaining control of J.W. might have existed does not render the force that Corporal Carrier used unreasonable.

• J.W. v. Birmingham Board of Education

U.S. District Court, N.D. Alabama, Southern Division (2015)
Findings of Fact and Conclusions Of Law
https://www.splcenter.org/sites/default/files/documents/findings_of_fact_and_conclusions_of_law.pdf

Headline: The guiding principle in excessive force cases is that unwarranted use of force when a student is not resisting constitutes excessive force.

Facts: Several former students of the Birmingham City School District sued for excessive force, representing a class action of all current and future Birmingham City Schools high school students. The parties all agree that Birmingham Police Department School Resource Officers sprayed students with a chemical spray. The SROs were required to carry duty belts that contain canisters of chemical spray. All parties agree that deploying the chemical spray was the standard response for school disruptions – even for the non-threatening, non-violent incidents – including backtalking and challenging authority. Between 2006 and 2014, SROs sprayed 19,930 Birmingham City School students with chemical spray in 110 incidents. With one exception, none of these incidents involved any students who had weapons in their possession. The SROs also failed to decontaminate the students, and instead left them to suffer the effects of the chemical spray until they dissipated over time. The class action seeks injunctive relief to cease the unconstitutional use of the chemical spray.

Holding: This case boils down to four issues. The first is whether the SROs inflicted excessive force on the students when they sprayed them. The second is whether the SROs adequately decontaminated the students after spraying them, and if not, whether their

failure to do so constituted excessive force. The third is whether, if the SROs' behavior was pursuant to a Birmingham Police Department policy or custom. The fourth is whether the students have demonstrated that they are entitled to injunctive relief.

The guiding principle in excessive force cases is that unwarranted use of force when a person is not resisting constitutes excessive force. The SROs assigned to Birmingham City Schools can lawfully spray students who are actively engaged in a physical fight or other violent behavior with chemical spray. But, two of the plaintiffs succeed on the merits of their individual excessive force claims against the SROs who sprayed them. Although these two students were creating noisy disturbances when SROs sprayed them, neither posed a danger to anyone. The claims of the other students fail; these persons resisted, fled, or tried to assault someone, all grounds for the lawful use of chemical spray.

Six students who the SROs directly sprayed succeed on the merits of their excessive force claim against the SROs for failing to adequately decontaminate them. By and large, the SROs did nothing to decontaminate students. Absent exigent circumstances, failing to decontaminate an individual after exposing him to chemical spray shocks the conscience and is a violation of the Fourteenth Amendment.

These two constitutional violations occurred pursuant to Birmingham Police Department policy or custom. Birmingham police officers were instructed that they could respond to resistance with a degree of force one to two levels greater than the resistance itself. These plaintiffs have met their burden and are entitled to injunctive relief – the termination of the unconstitutional use of the chemical spray. The court temporarily enjoined the use of chemical spray in Birmingham City high schools until the Birmingham Police Department, the plaintiffs, and the court can craft policy changes aimed at addressing the constitutional violations.

III. Student Searches

• People in Interest of T.S.
2015 WL 4505955 (Superior Court of the Virgin Islands, Division of St. Thomas and St. John 2015)

Headline: A school official's search of student backpacks for weapons is valid on mere reasonable suspicion. The assistance of two school resource officers did not raise the standard to probable cause. In light of reasonableness standard, the minor's consent was not necessary to conduct the warrantless search.

Facts: T.S. sought to suppress all evidence seized from his backpack during a search outside a fence at his high school, asserting that the search was unlawful and in violation of the Fourth Amendment. On the day of the search a school staff member and an SRO went behind the school campus where several students were reported to be hanging out. T.S. and two other students were found. The staff member asked why they were not in school. She then asked for their backpacks to search for weapons. T.S. gave the staff member his backpack where several small plastic bags filled with marijuana were found. T.S. was arrested and charged with possession of a controlled substance.

T.S. argued that (1) the search required probable cause because it occurred off campus and was conducted with police involvement; (2) even if a "reasonable suspicion" standard was applicable, it is not met by the facts; (3) an off campus search by a school monitor is an act exceeding her authority; and (4) T.S. did not voluntarily consent to the search.

Holding: In 1985, the Supreme Court addressed the issue of warrantless searches by school officials, on school grounds, in N.J. v. T.L.O., 469 U.S. 325 (1985). The Court held "that school officials need not obtain a warrant before searching a student who is under their authority." N.J. v. T.L O., at 340. The Supreme Court determined that the school settings require a modified level of suspicion, a "standard of reasonableness – reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."

The location where T.S. was found is within the boundary line of the school's property. The staff member had reasonable suspicion to conduct the searches. She has worked as a school monitor for five years. She knows the students and utilizes the same practices for all students found in unauthorized areas and limited her search to the students' backpacks. When school officials initiate the search or police involvement is minimal, the reasonableness standard applies. In this instance, the school staff member questioned the students, initiated the investigation, and searched T.S. The SRO's involvement in the search of T.S. was minimal – he was merely present. Therefore, the reasonableness standard applies. In light of reasonableness standard, the minor's consent was not necessary to conduct the warrantless search.

• **State v. Lindsey**
868 N.W.2d 881; 2015 WL 3884175 (Court of Appeals of Iowa 2015)

Headline: A school administrator's search of school property (a school-issued athletic equipment bag) is reasonable and does not violate the Fourth Amendment.

Facts:
Lindsey sought to suppress all evidence seized from his bag during a search by a school official, asserting that the search was unlawful and in violation of the Fourth Amendment. On the day of the search Lindsey sustained a serious injury during a football game. On learning he would have to be hospitalized, Lindsey expressed concern about his school-issued equipment bag several times leading school officials to wonder what was in it. The school Superintendent searched the bag and found a loaded firearm and drug paraphernalia. Lindsey was arrested, charged, and sentenced for possession of a firearm as a felon, carrying weapons on school grounds, going armed with a dangerous weapon, and possession of a controlled substance. Lindsey appealed his judgment and sentence arguing that the school officials seized and searched his backpack without a warrant and without consent in violation of federal and state law.

Holding:

Students who participate in competitive extracurricular activities voluntarily subject themselves to many intrusions on their privacy. Students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. The T.L.O. "reasonable grounds" standard was met on these facts. As a student athlete using a school-issued equipment bag, Lindsey had a lowered expectation of privacy. Lindsey's preoccupation with his bag in the face of his hospitalization for a serious injury would have led a reasonable person to suspect the bag contained something illicit.

• **Jackson v. Ladner**
2015 WL 5332664 (United States Court of Appeals, Fifth Circuit 2015)

Headline: School officials have qualified immunity when accessing a student's social-networking account upon receiving information that the student sent threatening online messages to another student, where those remarks concerned school activities and where the quarrel began at a school-related function.

Facts: A high school student sought to reverse school disciplinary action (suspension from sponsored extracurricular events – cheerleading – and community service to the school) taken in response to her sending threatening and offensive remarks on the social networking platform Facebook that related to school activities. The incident occurred after a bus ride returning from a cheer squad event, when the teacher who supervised the squad was told that the student had cursed at and threatened the captain of the cheer squad. The reports stated that the student had continued to send threatening and swearing Facebook messages. The teacher coercively requested the student's Facebook login information and accessed the Facebook messages. This confirmed that the Facebook correspondence contained threatening and offensive language and concerned cheer squad activities. The student was not invited to join the cheer squad for the following school year. The student sued for violations of her constitutional rights to privacy and freedom of speech.

Holding: School officials have qualified immunity from federal constitutional lawsuits on the novel facts of this case. The court took "as given" that the student did not consent to the search of her Facebook profile. While it appeared that school officials had authority to seize and search the Facebook page of the student under the "reasonable grounds" standard of New Jersey v. T.L.O., 469 U.S. 325 (1985). and the "disruption" standard of Tinker v. Des Moines School District, 393 U.S. 503 (1969), the court expressed no opinion regarding whether the school officials' conduct violated the Fourth Amendment or the First Amendment. The rule in constitutional cases is that if no prior ruling of the U.S. Supreme Court clearly applies the First and Fourth Amendments to the facts of a current case, then school officials did not have fair warning. The "fair warning" doctrine means that the unlawfulness of the actions of school officials must be apparent in light of pre-existing law. Therefore, these school officials did not have fair warning that they could not, consistent with the First and Fourth Amendments, access a student's social-networking account upon receiving information that the student had sent threatening online messages to another student, where those remarks concerned school activities and where the quarrel began at a school-related function.

IV. Bullying

• Hankey v. Town of Concord-Carlisle
--- F.Supp.3d ----2015 WL 5737136 (United States District Court, D. Massachusetts 2015)

Headline: A school district is not liable for student trauma and property damage caused by bullying even though educators should have done more to protect the victim and take the incidents seriously**.**

Facts:
Hankey, a student of the Concord-Carlisle School District sued under Title IX and Due Process Clause alleging that educators were liable for failing to adequately respond to a pattern of bullying and threats she suffered at the hands of other students at the High School. The facts were not in dispute that the high school had an antibullying policy that required school officials to (1) fully investigate allegations of bullying or retaliation, (2) take steps to assess the need to restore a sense of safety to victims, (3) protect the victims from further incidents, and (4) document any incident of bullying that is reported. It was also not disputed that school officials were promptly advised of nearly all of the incidents of bullying focused on Hankey, but the policy was not followed. The court concluded that, "the record shows meager efforts to root out the cause and stop the bullying of [Hankey] prior to actual threats being made."

Holding:
A school receiving federal funds may be liable for sex-based discrimination under Title IX if the school is deliberately indifferent to student-on-student harassment that is sufficiently severe and pervasive to deprive the student of educational opportunities or benefits. The standard is a high one to satisfy and does not easily lend itself to an application to bullying incidents. To prevail on a Title IX claim, a student must establish that: (1) the school had actual knowledge of the harassment, (2) the harasser was under the school's control, (3) the harassment was based upon the victim's sex, (4) the harassment was "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit," and (5) the school was deliberately indifferent to the harassment. The court ruled that there was insufficient evidence to establish that Hankey was harassed by others students because she was female. As to the Due Process claim, the court ruled that school officials did undertake some measures to address Hankey's harassment. Therefore, although school officials' response to the bullying and threats may have been unreasonable and ineffective in some respects, it did not create or enhance the bullying and cannot be characterized as "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."

• Gauthier v. Manchester School District
--- A.3d ----2015 WL 5174775 (Supreme Court of New Hampshire 2015)

Headline: A failure by school officials to comply with state law on school bullying prevention does not create a private right of action that allows a parent to sue the school district.

Facts: Student's mother filed suit against the Manchester School District to recover for injuries sustained in incidents at school, based in part on the fact that the school principal breached a statutory duty to inform the mother of the bullying within 48 hours. State law requires that, "[t]he Principal or administrative designee shall report to the parents of a student who has been reported as a victim of bullying and to the parents of a student who has been reported as a perpetrator of bullying within 48 hours of receiving the report." The school principal did finally notify the parent after one week, during which time the student received threatening Facebook messages and was victimized in two fights. The student's parent argued that the school principal had a common law duty to protect and supervise her child and that he breached this duty by failing to notify her in a timely manner. The trial court dismissed the case, ruling that the educator was protected by statutory immunity.

Holding: On appeal, the appellate judges affirmed the dismissal of the lawsuit. The 48-hour reporting statute explicitly states that it does not create a private right of action. The creation by the courts of a common law right of action would undermine the policy of immunity expressed by the legislature.

• **Maldari v. Mount Pleasant Central School District**
131 A.D.3d 1019; 17 N.Y.S.3d 48 (Supreme Court, Appellate Division, New York 2015)
• **Emmanuel B. v. City of New York**
131 A.D.3d 831; 15 N.Y.S.3d 790 (Supreme Court, Appellate Division, New York 2015)

Headline: School officials are not liable for injuries to a student sustained by bullying unless they had actual or constructive notice of prior conduct to place them on notice.

Facts:
The students in both cases sued the school districts based on a theory of negligent supervision. Maldari claimed that school officials negligently failed to prevent him from being bullied by fellow students at his high school. The bullying included verbal taunts, pushing and bumping, being grabbed by another student who simulated a lewd act. Emmanuel B claimed that he had informed his teacher that a specific student was picking on him and calling him names only to suffer serious physical injuries later the same day as a result of a fight in which the same bully caused him to strike his head against a bookcase. The trial courts dismissed the cases, ruling that the students' lawsuits could not be based on injuries resulting from the sudden and unforeseeable act of another student.

Holding: On appeal, the appellate judges affirmed the dismissals of the lawsuits. A school district is not required to provide constant supervision of its students. Nevertheless, schools are under a duty to adequately supervise the students under their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. To prevail, a victim must show that, school officials had actual or constructive notice of prior similar conduct, which caused injury, such that the third-party acts could reasonably be anticipated. Injuries caused by the impulsive, unanticipated conduct of a fellow student will not give rise to a finding of negligent

supervision. Under New York law, even a physical attack by a student having a record of disciplinary problems, but no history of violence, is unforeseeable.

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