



## THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

**CEPI Education Law Newsletter**

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APRIL 2011 : Vol. 9-8

**SEARCH AND SEIZURE 2011: INVOLVEMENT OF RESOURCE OFFICERS****Overview**

It is well established that the Fourth Amendment protects a person's right to be secure against *unreasonable searches and seizures*. Ironically, while the 1970's produced several important court lower decisions involving student search and seizure issues [*see, e.g., Potts v. Wright* (E.D. Pa. 1973) and *Bellnier v. Lund* (N.D.N.Y. 1977)], the United States Supreme Court did not hand down a decision specifically involving the applicability of the Fourth Amendment's prohibition to students in public schools until the mid-1980's. Up to that point in history judicial reasoning associated with public school searches was controlled by application of the age-worn *in loco parentis* doctrine—placing almost unlimited authority to search students in the hands of school principals. In 1985, however, the legal landscape changed and a new standard emerged.

**The Supreme Court Speaks**

In *New Jersey v. T.L.O.* (1985) the United States Supreme Court made it clear that: (1) students in public schools fall within the purview of the Fourth Amendment's unreasonable searches and seizure prohibition, (2) public school administrators are acting as governmental agents when conducting student searches, and (3) school searches are different from police searches. To balance these often competing interests the Court fashioned the following two-pronged judicial standard of analysis to judge the constitutionality of student searches: (1) to launch a student search school administrators must have *reasonable suspicion* to believe that a violation of law and/or school system policy exists, and (2) the search as conducted remained *reasonable in scope* (*i.e., reasonably related* in scope to the circumstances and the nature of the search).

It is important to note that in crafting the Court's rationale in *New Jersey v. T.L.O.* (1985), Justice White added the following observation: "Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. 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." He then added the following reminder: "Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures...." (*T.L.O.* 1985) In my professional opinion it

was this one, often overlooked, statement that served to: (1) strike a balance between the legitimate privacy expectations of students and, (2) give public school administrators and teachers authority (albeit authority limited by the totality of the circumstances in each situation) to do what had to be done to maintain a safe and secure learning environment. (Vacca, 2004)

*Special Needs Analysis.* A decade later, in Vernonia School District v. Acton (1995), the Supreme Court further extended the search authority of public school officials. In the Vernonia opinion the Court made it clear that: (1) police searches are different from school searches regarding the applicability of the Fourth Amendment's *warrant* requirement, and (2) the *intrusiveness* of the search conducted on a student must be factored into the determination of reasonableness. In clarifying the Court's rationale Justice Scalia opined that *special needs* exist in the public school context. As such, the warrant requirement required in police searches would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed to maintain order in schools." (Vernonia 1995) The Court's *special needs* rationale was further extended in Board of Education v. Earls (2002), where the Court added that "individualized suspicion was not required" in situations where school officials exercise their legitimate prerogatives. Like Vernonia (1995) the Supreme Court in Earls (2002) sanctioned the notion of "suspicionless searches."

### **Recent Case Law**

In 2011, the general rule is that whenever a public school administrator has *reasonable suspicion* to believe that a student may be harboring something illegal or harmful (especially weapons, bombs, contraband, and "street drugs"), he/she has the authority to immediately conduct a search. It is well established that a warrant is not required. However, as school law experts remind us, "the search must be conducted in order to further a legitimate school purpose, such as the maintenance of discipline in the school." (Alexander and Alexander, 2012) Public school administrators are not in the business of searching students to successfully gather evidence of illegal behavior—that is the job of law enforcement agencies.

In this era of full-time presence and involvement of police officers in public schools (where the officer functions as a school resource officer during the school day) a question remains and continues to produce litigation. When is a search of a student a police search or a school search—especially in situations where a resource officer is present during the search on school property during school hours? *See, e.g., Patman v. State* (Ga. App. 2001), and M.W. v. Madison County (E.D. Ky. 2003)

### **Ortiz v. The State (Ga. App. 2010)**

Recently I came across an interesting public school student search case decided by the Court of Appeals of Georgia. The case, Ortiz v. The State (Ga. App. 2010), involved a high school student (Ortiz) who had been convicted by the Superior Court, Gwinnett County, of carrying a weapon on school property. An appeal was filed challenging the trial court's denial of the student's motion to suppress evidence. In his appeal Ortiz claimed that because the school administration's search violated the Fourth Amendment the evidence obtained during the search should be excluded. What follows is a brief summary of the facts and the appellate court's rationale and decision.

*Facts:* Evidence presented showed that Ortiz was observed smoking a cigarette on South Gwinnett High School property—a violation of school policy. Subsequently he was questioned by an assistant principal. He told the assistant principal that he was not attending school that day and that he was passing through school grounds on his way home. The assistant principal escorted him to a nearby administrative office where she called for

another administrator and the school's resource officer to join her during the questioning. She later testified that she made the request because she believed that Ortiz was "not quite right." She thought he might have been "high" because "his eyes were going king of wildly."

Asking a resource officer to be present was a customary request at the school when an administrator felt "there might be a threat." Evidence showed that the resource officer told Ortiz that he only was there to protect everybody's safety. More specifically, he told Ortiz that "...this is an administrative action. I'm just here for everybody's safety, the safety of students, for your safety, et cetera."

During her questioning the assistant principal asked Ortiz to "dog ear" his pockets so that she could search them. At that point Ortiz told her that because he did not want her to cut herself he removed a "razor blade" from his breast pocket. Subsequently he was arrested and accused of carrying a weapon on school property. At trial Ortiz's motion to suppress the evidence seized during the school search was denied. Ortiz waived his right to a jury trial and, after a bench trial, he was found guilty and sentenced to three years probation with the first six months under house arrest. An appeal was taken in which Ortiz contended that the trial court erred in denying his motion to suppress because he had been illegally searched.

*Court of Appeals of Georgia Rationale.* The appellate court began by citing the Georgia Supreme Court's decision in State v. Young (Ga. 1975) where it was made clear that when dealing with the *exclusionary rule* in a public school setting the following three categories of actor must be separated out for individual examination : (1) *private individuals* (where there is no Fourth Amendment prohibition and no occasion to apply the exclusionary rule); (2) *government officials* (whose conduct constitutes state action and is covered by the Fourth Amendment); and (3) *law enforcement personnel* (whose conduct is governed by the Fourth Amendment and subject to the exclusionary rule.). The appellate court placed public school officials in the second group where they are engaged in state action and as such are subject to the Fourth Amendment. But, because school officials are neither law enforcement officials nor agents of law enforcement, evidence produced during school administrative searches is not subject to application of the exclusionary rule. The Court added that a determination of whether or not a public school administrator acts as an agent of law enforcement "must be made on a case-by-case basis."

The appellate court was convinced that in Ortiz v. The State (Ga. App. 2010) the resource officer (a police officer) was merely present in the room during the administrative search, for the sole purpose of protecting the safety of those present in the room. In the words of the Court, "...an officer's mere presence in the room, without more evidence of his involvement, does not indicate participation..." In this case no evidence was presented at trial to demonstrate that he was actually involved in either initiating or conducting the search. In other words he did not actively *participate* in the search of the student. The search as conducted was a school administrative search and did not amount to a police search implicating the exclusionary rule.

*Decision:* Decided on October 10, 2010, The Court of Appeals of Georgia concluded that the trial court did not err in denying Ortiz motion to suppress the evidence. The trial courts judgment was affirmed.

### **Policy Implications**

Even though Ortiz v. The State (Ga. App. 2010) is but one lower court decision from one jurisdiction, it still serves as a brief primer and as such is very informative. While one cannot accurately generalize legal and policy implications based on this one case, and recognizing that future decisions will hinge upon the totality of the circumstances in each case, the Ortiz decision is nonetheless important.

The Court of Appeals of Georgia's rationale succinctly restates what the majority of courts have already said and as such offers the reader a glimpse of what a future court might do when dealing with issues that spring up in situations where school administrators and school resource officers are present during a student search. Listed below are ten recommendations for policy analysis gleaned from the Ortiz opinion.

When auditing existing policies or drafting new ones, local school boards must make it clear that:

- A primary goal and compelling interest of the Board is to provide in every school, on school property, and at all school sponsored and/or sanctioned activities, a safe, secure, and non-disrupted environment.
- It is the Board's intent to provide students and staff with a crime-free, weapon-free, and thug-free learning environment.
- The Board's intent is to consistently and vigorously implement and enforce all policies, rules, and procedures regarding student discipline and control.
- School administrators are empowered to act quickly and decisively when faced with situations where *reasonable suspicion* of imminent harm to persons and/or property is evident.
- While the Board respects the Fourth Amendment rights of all students (including their reasonable expectation of privacy), no student is immune to school system policies, rules, and procedures designed to protect the safety, security, and welfare of all students and staff.
- Student searches are a viable and necessary disciplinary tool available to school administrators where *reasonable suspicion* exists that present is something in violation of school policies and/or the law.
- Parents and legal guardians will be regularly informed and involved as soon as possible in all disciplinary matters involving their child—especially in situations where their child might be subject to a search.
- The Board fully welcomes and values the cooperation of law enforcement agencies in helping to provide a safe and secure environment for students and staff.
- When present on school property and at school sponsored and/or sanctioned activities and events, school resource officers are employees of their respective law enforcement agency and are not employees of the school system.
- The role of school resource officers is to help the school administration provide and maintain safe and secure environments for all students, administrators, staff members, and visitors.

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**Note:** The views expressed in this commentary are those of the author.