SCHOOL SEARCH AND SEIZURE: AN OVERVIEW OF THE LAW

Juvenile Defense Network
Youth Advocacy Project - Committee for Public Counsel Services[1]

There are very few cases in Massachusetts that address the issue of search and seizure in schools. We have included all the Massachusetts cases that are on point and have included some cases from other jurisdictions where there is no Massachusetts decision.

I. Public School Students Have a Constitutional Right to Privacy.

A. The Fourth Amendment Protections Apply in Public Schools.

a. Students do not "shed their constitutional rights . . . at the school house gate." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).

b. "[T]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures … Boards of Education not excepted." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

c. Public school administrators are state actors for purposes of the Fourth Amendment and are subject to the constitutional prohibition on unreasonable searches and seizures. New Jersey v. T.L.O., 469 U.S. 325, 333-334, 341 (1985). See also Commonwealth v. Damian D., 434 Mass. 725 (2001); Commonwealth v. Carey, 407 Mass. 528, 530-531 (1990).

d. Students have an expectation of privacy in their persons and the articles they bring to school. Commonwealth v. Damian D., 434 Mass. 725, 727 (2001).

B. The Fourth Amendment and Article 14 Do Not Apply in Private Schools.

1. Private or parochial school students, however, are not afforded the same constitutional protections. See, e.g., In re Devon T., 85 Md. App. 674 (1991) (citing the Supreme Court's suggestion in New Jersey v. T. L. O., 469 U.S. 325 (1985) that the Fourth Amendment would not apply to employees of parochial or other private schools because such employees are not agents of the government).

2. Private school students, at school or school sponsored events, do not have Fourth Amendment protections. Commonwealth v. Considine, 448 Mass. 295 (2007). In Considine, students from a private school were on a school ski trip. Upon learning

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that some students were in their room unsupervised (which was against the school policy) the room was searched by chaperones and the school principal whereupon contraband was found. The hotel security (also a part-time police officer) was then notified and the defendant's handed over personal belongings and one defendant admitted to possessing cocaine. The SJC ruled that the search was not unlawful under the Fourth Amendment and Article 14 of the Declaration of Rights. The school officials were not agents of the state since this was a private school. Additionally, the statements were admissible since there was no state action. The security guard was not serving as a police officer at the time of the search.

C. The Fourth Amendment and Article 14[2] are Implicated Whenever There is an Intrusion by a State Actor into a Space in Which the Student has a Reasonable Expectation of Privacy.

1. **What is a "Reasonable Expectation of Privacy?"** A person has a reasonable expectation of privacy when they have an actual subjective expectation of privacy in the area searched or in the item seized and when society is prepared to accept this expectation as reasonable. See Rakas v. Illinois, 439 U.S. 128, 143 (1979); Commonwealth v. Carey, 407 Mass. 528, 531 (1990); Commonwealth v. Berry, 420 Mass. 95, 106 (1995). If the reasonableness of the student's expectation of privacy is in dispute, the burden will be on the student to prove that their expectation of privacy was reasonable.

2. **Students Have a Lower Expectation of Privacy than the General Public.** Because students are subject to numerous regulations on their behavior when they are in school, and because school officials need to maintain order in school, a student's reasonable expectation of privacy is lower than that enjoyed by the populous generally. T.L.O., 469 U.S. at 348 (Powell, J., concurring); Vernonia School District No. 47J v. Acton, 515 U.S. 646, 657 (1998).

   a. **Areas or Items in Which Students Have a Reasonable Expectation of Privacy**

   Student's Person. T.L.O., 469 U.S. at 339 (stating in dicta that even a limited search of a student's person is a substantial invasion of privacy); DesRoches by DesRoches v. Caprio, 156 F.3d 571 (4th Cir. 1998) (like members of the public, students have a legitimate expectation of privacy in their persons).

   Items the Student Brings to School. In T.L.O., the Court recognized that students have a legitimate privacy interest with regard to items they bring to school, stating:

2 No Massachusetts case has addressed whether Article 14 applies in school search and seizures. Commonwealth v. Snyder, 413 Mass. 521 (1992).

> *Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. 469 U.S. at 339.*

Lockers (when school policies dictate that lockers are private). In Commonwealth v. Snyder, 413 Mass. 521, 526 (1992), the SJC held that, because the school code provided that a student has the right "[n]ot to have his/her locker subjected to an unreasonable search," the student in question had "a reasonable expectation of privacy in his locker that was entitled to constitutional protection." It is not clear, however, that the SJC would have upheld this expectation of privacy as reasonable if the school code had been equivocal, or had provided that students have no expectation of privacy in their lockers. See also In re Dumas, 515 A.2d 984, 985-86 (Pa. Super. Ct. 1986) (citing the Supreme Court's definition of privacy in T.L.O. as supporting the proposition that high school students have a reasonable expectation of privacy in their lockers).

Inside of Purses or Backpacks. T.L.O., 469 U.S. at 339 (student has a reasonable expectation of privacy in closed purse carried on her person); DesRoches by DesRoches v. Caprio, 156 F.3d 571 (4th Cir. 1998) (student enjoyed legitimate expectation of privacy in backpack that school official sought to search).

School Papers. In Commonwealth v. Buccella, 434 Mass. 473 (2001), the defendant's history of making racial slurs to teachers and his proximity to the scenes of the incidents in question, led school officials to suspect that the defendant had written racially charged and obscene graffiti on a blackboard and wall within his school. In an effort to determine whether the offensive handwriting matched the defendant's handwriting, school officials provided samples of the defendant's school work to local police for analysis. The SJC held that, while school papers do not come within the definition of "student records" for confidentiality purposes, he defendant "had a reasonable expectation of privacy with respect to his school papers, notwithstanding the fact that he had turned them over to his teachers." Id, at 485.

b. **Areas or Items in Which Students Do Not Have a Reasonable Expectation of Privacy.**

Lockers (when school policies or statutes dictate that lockers are not private). Courts in other jurisdictions have held that students do not have a reasonable expectation of privacy in their lockers when school polices or, in one

case, a state statute, dictate otherwise. See In Re Patrick Y., 358 Md. 50 (2000) (students had no reasonable expectation of privacy in locker due to state statute; contrary provision of student handbook held not to apply in light of the statute); In Interest of Isiah B, 176 Wis.2d 639 (1993) (no expectation of privacy in school lockers based on written policy communicated to students that school lockers were the property of the school, that the school retained control over the lockers, and that periodic general inspections of lockers may be conducted by school authorities at any time for any reason, with or without notice and without a warrant); Shoemaker v. State, 971 S.W.2d 178 (Tex. App. 1998) (no expectation of privacy in locker in light of school policy that lockers remained under the jurisdiction of the school and were subject to search at any time upon reasonable cause; school officials had pass keys to the lockers); Commonwealth v. Cass, 551 Pa. 25 (1998) (because school policy provided that lockers were subject to search without warning only on reasonable suspicion and school officials had pass keys to all lockers, the court held that students have a "minimal" privacy expectation in the lockers. In Cass, dogs were used to sniff the lockers, while this was not a search under the Fourth Amendment, it was considered a search under the state constitution). **But See** State v. Jones, 666 N.W.2d 142 (Iowa 2003) (public school student has legitimate expectation of privacy in contents of his or her school locker, notwithstanding existence of school rules or state laws contemplating and regulating searches of lockers) **and** In re Adam, 120 Ohio App. 3d 364, 697 N.E.2d 1100, 127 Ed. Law Rep. 1029 (11th Dist. Lake County 1997) (student does not lose his Fourth Amendment expectation of privacy in coat or book bag merely because he places those objects in his locker).

Outside of Purse or Bag. In re Gregory M., 82 N.Y.2d 588 (1993) (student had only a minimal expectation of privacy regarding the outer touching of his school bag where school personnel heard a loud thump when the student placed his bag on a metal table).

II. Searches of Students by School Officials Must be Reasonable Under All the Circumstances.

A. Under the Fourth Amendment, School Officials Do Not Need Probable Cause to Initiate a Search. In T.L.O, the Supreme Court held that school officials represent a hybrid for Fourth Amendment purposes; they are constrained by the Fourth Amendment's reasonableness requirement, **but not** by its probable cause or warrant requirements. 469 U.S. at 341-342; Carey, 407 Mass. at 533-34. "The relaxation of the warrant and probable cause requirements of the Fourth Amendment are only applicable to school officials who are not acting 'in conjunction with or at the behest of law enforcement agencies'" Commonwealth v. Lawrence L., 439 Mass. 817, 819 (2003), citing T.L.O. at 341, n. 7.

B. The Standard Under Article 14 is Unclear. In Snyder, the SJC did not determine

whether Article 14 requires a stricter standard than the Fourth Amendment "reasonableness" standard. Snyder, 413 Mass. at 529. The Court noted that there was probable cause to conduct the search and Article 14 does not impose a standard higher than probable cause. Id at 529. When a school official is explicitly acting on behalf of law enforcement officials, Article 14 does not require a warrant for a school search. Id., at 528. To date, the SJC has expressly declined to determine the standard for school searches under Article 14.

Despite the significant lack of guidance on how the SJC may view school searches under Article 14, the SJC has interpreted Article 14 to provide more protection to individuals than the Fourth Amendment in other contexts. See, e.g., Commonwealth v. Upton, 394 Mass. 363, 373 (1985) (rejecting the Fourth Amendment totality of the circumstances test of Illinois v. Gates, 462 U.S. 213 (1983) for determining if a warrant application shows probable cause in favor of the more stringent two-pronged test of Aguillar and Spinelli); Commonwealth v. Blood, 400 Mass. 61, 67-74 (1987) (one party consent to recording telephone conversation violates Article 14 even though United States v. Caceres, 440 U.S. 741, 750-751 (1979) upheld such recordings under the Fourth Amendment); Commonwealth v. Stoute, 422 Mass. 782 (1996) (holding that under Article 14 a person is seized whenever police engage in pursuit that is intended to stop and detain a person or upon a show of police authority, rejecting the Supreme Court's rule that under the Fourth Amendment a stop only occurs when there is physical restraint of the person, California v. Hodari D., 499 U.S. 621 (1991).

C. A Search by a School Official is Reasonable if it is "Justified at its Inception" and "Reasonable in Scope." To determine whether a search of a student by a school official was reasonable, courts ask whether it was justified at its inception *and* whether it was limited in its execution to the circumstances which justified the intrusion in the first place. T.L.O., 469 U.S. at 341; Snyder, 413 Mass. at 523; Carey, 407 Mass. at 528.

1. **When is a Search "Justified at its Inception?"** A search is justified at 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 rules of the school." T.L.O., 469 U.S. at 342. In Carey, the SJC wrote that, "[r]easonable suspicion of wrongdoing is a 'common-sense conclusio[n] about human behavior' upon which 'practical people'--including government officials--are entitled to rely." 407 Mass. at 528, quoting, T.L.O., 469 U.S. at 346. Courts in other jurisdictions have held that a search is justified at inception only where there is individualized suspicion that the search will yield evidence of the suspected violation. See, e.g., Willis v. Anderson Community School Corp., 158 F.3d 415, 420 (7th Cir. 1998) ("to be reasonable under the Fourth Amendment, a [school] search must ordinarily be based on individualized suspicion of wrongdoing"); In the Interest of Doe, 77 Hawaii 435, 445 (1994), ("individualized suspicion is a necessary element in determining reasonableness" of school searches); People v. Dilworth, 169 Ill.2d 195, 215-216 (IL Supreme Court 1996), cert. den., 517 U.S. 119 (1996) (individualized suspicion required for school search).

a. **Courts Have Held that the Following <u>Will</u> Justify a Search at its Inception:**

i. **Tips (when source is considered reliable).** Carey, 407 Mass. at 528 (searches of the defendant and his locker were reasonable at inception when they were based on direct statements from two students to a teacher that the defendant had shown them a gun he brought to school as a result of a fight a few days earlier, the school official had prior knowledge of the fight, and the teacher-informant, a long-time employee of the school, considered the student-informants to be reliable); Snyder, 413 Mass. at 523 (even though students have a "reasonable and protected expectation of privacy in their school lockers," search of defendant's locker was reasonable after a long-time teacher, who had provided reliable information in the past, reported that a student told him that defendant was selling marijuana in school and was carrying three bags of marijuana in a video cassette case that was in his book bag).

ii. **Direct Observations of Suspicious Activity.** Buccella, 34 Mass. at 485 (assembling examples of the student's written work and turning them over to the police as part of an investigation into racially-charged graffiti was reasonable at inception when the student was believed to be the only student in the area of the hallway where the graffiti was written and had spoken some of same words that were written on the wall to an assistant principal earlier in the day that this graffiti was found); Bridgman v. New Trier High Sch. Dist. No. 203, 128 F.3d 1146, 1149-1150 (7th Cir. 1997) (bloodshot eyes, dilated pupils, and unruly behavior supported reasonable suspicion to justify search**)**; Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993) (school officials had reasonable suspicion to subject a public high school student to a nude search, based on an unusual bulge in his crotch area, and there were various allegations that the student had, on previous occasions, allegedly smoked marijuana on a school bus, hid marijuana in his crotch area, dealt drugs, tested positive for marijuana, and failed to successfully complete a drug rehabilitation program); In Re: Gregory M, 82 N.Y.2d 588 (NY Ct. of Appeals 1993) (school security officer was justified in touching the outer surface of student's book bag after he heard an unusual metallic thump when the student put the bag on a metal shelf; upon feeling the outline of a gun the ensuing search of the bag was reasonable).

iii. **Prior History of Proscribed Activity.** State v. Moore, 254 N.J. Super 295 (1992) (search of a public high school student's book bag based on, among other things, a previous incident of drug possession by the student, was justified at its inception and therefore constitutional).

b. **Courts Have Held that the Following Will Not Justify a Search at its Inception:**

i. **Student's Status as a "Rule Breaker."** Damian D., 432 Mass. 725 (2001) (search of a juvenile who had violated school rules by skipping classes and being tardy was unlawful at inception when there was no evidence tying truancy to a reasonable belief that the student possessed contraband); In re William G., 40 Cal. 3d 550, 566 (1985) (belief that student was tardy or truant from class alone did not provide a reasonable basis for conducting search of any kind); Cales v. Howell Public Schools, 635 F. Supp. 454, 455 (E.D. MI 1985) (no reasonable suspicion to search a student who was seen in parking lot of high school, "attempting to avoid detection by ducking behind a parked car," and who gave a false name when stopped by the school security guard because there was no reasonable suspicion that the student had violated a particular rule or law). But see In Re Bobby B., 218 Cal. Rptr. 253, 256, 172 Cal. App. 3d 377, 382 (CA. App.Ct. 1985) (search upheld where there was evidence that two students were in a school restroom without a pass, student "falter[ed]" and "searched" for an answer when asked for a pass, and the bathroom was known to be the site of "repeated acts of narcotic involvement").

ii. **Hunches or Rumors.** In re Appeal in Pima County Juvenile Action, 152 Ariz. 431 (App. 1987) (search of a high school student's pockets based on, among other things, the student's name being mentioned in staff meetings during discussions of drug use, was not supported by reasonable suspicion).

iii. **Association with Wrongdoers.** People v D., 34 N.Y.2d 483 (1974) (search of a public high school student's person by school officials based on, in part, the student's association with a classmate who was under suspicion for dealing with drugs, was not reasonable and was therefore unconstitutional); A.S. v. State, 693 So.2d 1095, 1095-1096, (Fla. 2nd Dist.App.Ct. 1997) (search of a student who was seen "fiddling" in his pocket and standing next to a student who was holding money was not reasonable at its inception).

2. When is a Search "Reasonable in Scope?" A search is reasonable 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." Carey, 407 Mass. at 528, quoting T.L.O., 469 U.S. at 346.

a. **Searches of Individuals are Normally Limited to Pat Frisks.** A search based on reasonable suspicion is ordinarily limited to a pat frisk of the student's outer clothing, Commonwealth v. Almeida, 373 Mass. 266, 270 (1977), and must be "strictly tied to and justified by the circumstances which

rendered its initiation permissible." Commonwealth v. Mercado, 422 Mass. 367, 371-372 (1996), quoting Commonwealth v. Silva, 366 Mass. 402, 407 (1974). The scope of the search is strictly limited by the "degree of suspicion that prompted the intrusion." Id. An analysis of cases suggests that only those areas that are likely to contain the object(s) of the search may be inspected.

b. **Searches of the Following Have Been Deemed "Reasonable in Scope:"**

i. **Lockers.** Carey, 407 Mass. at 528 (after receiving a reliable tip that the student had a gun, and after failing to find the gun in searches of the student and the room he was in before he was searched, a search of student's locker was reasonable in scope, because it "was clearly based on common sense, and was reasonable . . . in its scope"); Snyder, 413 Mass. at 523 (decision to search student's locker, the less intrusive search, before searching the defendant, the more intrusive search, "was a reasonable judgment").

ii. **Student's Pockets.** In re S. K., 647 A.2d 952 (Pa. Super 1994) (search of public middle school student's pockets for cigarettes by a school official was reasonable in its scope because the student admitted to school official that he had been smoking).

iii. **Student's Purse.** T.L.O., 469 U.S. at 342, 346-7 (search of pocketbook belonging to a female high school student suspected of smoking was justified where the school official found cigarettes and cigarette rolling papers, and upon a further inspection uncovered some marijuana, a pipe, plastic bags, money, and an index card and letters that implicated the defendant in dealing marijuana in the purse).

c. **The Following Searches Have Been Deemed "Unreasonable in Scope:"**

i. **Locker (when contraband was observed on student's person).** See In Interest of Dumas , 357 Pa. Super 294 (1986) (a teacher's seeing cigarettes in a high school student's hand did not provide reasonable suspicion for a search of the student's locker for drugs).

ii. **Student's Pockets.** In re Appeal in Pima County Juvenile Action, 152 Ariz. 431 (App. 1987) (search of a high school student's pockets based, among other things, on the student's being in the area of school bleachers where students sometimes used drugs, was not reasonable in scope).

iii. **Purse.** T.J. v. State, 538 So.2d 1320, 1321-1322 (FL. 2d Dist. App. Ct. 1989) (scope of search of 15 year-old student was unreasonable when, based on information that either she or another student had a knife at

school, assistant principal searched student's purse and, finding no knife, unzipped a small side pocket inside the purse where marijuana was found).

3. Group Searches.

a. **Under the Fourth Amendment**: Most of the decisions in this area discuss when or if individualized suspicion is required to search any one of the students in the targeted group. For the most part, cases suggest that courts will uphold group searches when drugs or weapons are the object of the search, but not when stolen property or an object that poses a less immediate threat to the school environment is sought. See, e.g., DesRoches v. Caprio 156 F.3d 571 (4th Cir. 1998) (search of backpacks belonging to classroom of students based on information that a pair of sneakers had been stolen was not reasonable "given the Supreme Court's admonitions [in T.L.O.] that individualized suspicion should be required in all but the most compelling cases"); Kennedy v. Dexter Consolidated Schools, 124 N.M. 764 (1998) (strip searches of students to uncover a missing ring were unconstitutional based on the extreme nature of the search and the lack of individualized suspicion); Thompson v. Carthage School District, 87 F.3d 979 (8th Cir. 1996) (metal detector, pat down and pseudo-strip searches of all 6th to12th grade boys, which was originally prompted by a bus driver's observations of cuts on the seats of her bus, was reasonable in light of information gathered during such searches that a gun had been brought to the school that morning).

b. **Under Article 14:** When a group search leads to the discovery of contraband and the bringing of delinquency charges, a separate argument should be made under Article 14. As discussed in section III, B, an argument should be made that the SJC has interpreted Article 14 more broadly than the Fourth Amendment in other contexts.

III. School Searches Involving Local or School Police:

A. School Searches Conducted Exclusively by Police Require Probable Cause. See, e.g., Patman v. State, 244 Ga. App. 833 (2000) (unlike school officials, a police officer must have probable cause to search a suspect); F.P. v. State, 528 So.2d 1253 (Fla.App.1988) (applying probable cause standard where an outside police officer investigating an auto theft initiated the search of a student at school); State v. Tywayne H., 123 N.M. 42, 45 (N.M. App. Ct.), cert. den., 123 N.M. 83 (N.M. Supreme Court 1997) (search conducted by police officers on their own initiative while providing security at a MADD post-prom dance that was held on school premises was a police search required probable cause because the search was conducted "completely at the discretion of the police officers").

B. The Standard for Searches Conducted by School Officials in Conjunction with Police Depends on the Level of Police Involvement.

1. Searches Conducted by School Officials at the Behest of Police Require Probable Cause if Police Dominate or Direct the Actions of the School Officials. See Snyder, 413 Mass. at 528 (noting that a warrant would be required if school officials conducted a search "explicitly acting on behalf of law enforcement officials"). In Picha v. Wieglos, 410 F. Supp 1214 (N.D. Il. 1976), a case cited by the Supreme Court in T.L.O. as establishing the rule that probable cause applies to school searches that directly involve police, the Northern District of Illinois affirmed that students have a constitutional right not to be searched by school officials who are in contact with police unless the intrusion is justified by the state's interest in maintaining the order, discipline, safety and education of students. Because the search of the 13 year-old student in question by a school nurse and school psychologist occurred after police had arrived at the school and was caused by police for evidence of crime, the Court held that it must be supported by probable cause. 410 F. Supp. at 1214.

2. Where Police Involvement is Minimal, Most Courts Have Held that Reasonable Suspicion Applies. Commonwealth v. Ira I., 439 Mass. 805 (2003) (assistant principal's investigation of student was not subject to probable cause standard where there was no evidence that police, who had merely taken statements from the complainant and the assistant principal on the day of the incident, "directed, controlled or otherwise initiated or influenced" his investigation); Cason v. Cook, 810 F.2d 188 (8th Cir.1987) (applying reasonable suspicion test where school principal was accompanied by a law enforcement official during search but search was not conducted at the behest of the law enforcement official); Tarter v. Raybuck, 742 F.2d 977 (6th Cir 1984) (applying reasonable suspicion test where school officials summoned police officers to scene in order to remove students but not to aid in the search); State v. D.S., 685 So.2d 41,43 (Fla. Dist. Ct. App. 1997 (noting that the mere presence of a police officer in the school office where a school official searches a student does not require that the search be supported by probable cause).

3. Memos of Understanding Between School and Police Departments. In Commonwealth v. Lawrence L., 439 Mass. 817 (2003), the SJC held that a Memorandum of Understanding between the Lynn School and Police Departments, which required school officials to notify police if student is found to possess a controlled substance, but did not require school officials to search students for controlled substances, did not transform school officials into agents of the police (and therefore did not subject them to a probable cause standard). The Court reasoned that, because the Memorandum specifically stated that school officials were "not agents of the police," did "nothing more than provide guidelines for school officials to contact law enforcement in the event that students are found to

illegally possess controlled substances," and did indicate that penalties would be assessed for the non-reporting of infractions, it did "not elevate school officials to agents of law enforcement." Id. at 821-22. It is important to recognize that the decision in Lawrence L. is very fact-specific; its holding does not foreclose defenders from arguing that differently worded Memoranda do in fact transform school officials into agents of law enforcement. Also, the search in Lawrence L. was initiated and conducted by the vice principal without police involvement.

C. The Standard for Searches Conducted by School Liaison or Resources Officers Depends on the Nature of the Officer's Employment.

1. Massachusetts courts have not yet decided this issue.

2. Courts in Other Jurisdictions Have Concluded that Reasonable Suspicion Applies to Searches Conducted by School Police or Liaison Officers Who Are Employed by the School District or Serve as Full-Time School Staff. People v. Dilworth, 169 Ill.2d at 197 (search conducted by a school liaison officer, who was employed by the local police force, assigned to work at the school full-time as a member of the school staff, and whose primary purpose at the school was to "prevent criminal activity," was subject to reasonableness standard); In re S.F., 607 A.2d 793, 794 (Pa.Super 1992) (applying reasonable suspicion to a search by a "plainclothes police officer for the School District of Philadelphia"); Wilcher v. State, 876 S.W.2d 466, 467 (Tex.Ct.App.1994) (applying reasonable suspicion where the searcher was "a police officer for the Houston Independent School District").

3. Courts In Other Jurisdictions Have Concluded That Probable Cause Applies To Searches Conducted By School Police Or Liaison Officers Who Are Employed By Or Take Direct Orders From Outside Police Departments. People v. Bowers, 356 N.Y.S.2d 432 (1974) (search of public high school student by school security officer, who was appointed by the police commissioner at the request of the Board of Ed, paid by the Board of Ed, but remained subject to the orders of the commissioner and the rules of the police department, was subject to probable cause).

IV. Seizures of Students Do Not Require Reasonable Suspicion

A. Massachusetts Courts Have Not Decided This Issue.

B. Courts in Other Jurisdictions Have Held that School Officials Do Not Need Reasonable Suspicion to Seize or Detain a Student. In In re D.E.M., 727 A.2d 570 (PA Superior Court 1999), a student was asked to step out of class and accompany a school official to the principal's office as the result of an anonymous tip that the student had a gun in school. To determine whether the seizure was permissible under the

Fourth Amendment, the Court balanced the school's "substantial interest in maintaining a safe and educational environment on school grounds" against the student's right to "control his person, free from interference of others, while in the school environment." Id. at 577. Noting that students have only a "limited right" to control their person while in school, the Court wrote that, "[t]o require teachers and school officials to have reasonable suspicion before merely questioning a student would destroy the informality of the student teacher relationship which the United States Supreme Court has respected and preserved." Id. The Court expressly held that the reasonable suspicion standard of Terry is inapplicable to the detention and questioning of a student by school officials. Id. at 578; See also W.J.S. v. State, 409 So.2d 1209, 1210 (FL Dist. Court of Appeals, 1982) (school officials do not need reasonable suspicion in order to detain a student and take him, to be questioned or "checked out" on the school premises).

C. However, at Least One Court Has Held that Students May Not be Seized in an Arbitrary, Capricious or Harassing Manner. See In re Randy G., 26 Cal.4th 556, 559 (CA Supreme Court 2001) (noting that "the broad authority of school administrators over student behavior, school safety, and the learning environment requires that school officials have the power to stop a minor student in order to ask questions or conduct an investigation even in the absence of reasonable suspicion, so long as such authority is not exercised in an arbitrary, capricious or harassing manner").

V. The *Miranda* Rule Does Not Apply to School Officials Unless They are Acting as an Instrument of the Police. See Snyder, 413 Mass. at 532 ("[t]he *Miranda* rule does not apply to a private citizen or school administrator who is acting as neither an instrument of the police nor as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile"); Ira I., 439 Mass. at 805 (*Miranda* rule did not apply to questioning of student by assistant principal because there was no evidence that police "directed, controlled or otherwise initiated or influenced" his investigation).

VI. Reasonable Suspicion/Probable Cause is Not Required if One of the Following Exceptions Applies:

A. Administrative Urine Screens.

1. **Under the Fourth Amendment, Urine Screens Do Not Require Individualized Suspicion.**

a. No reported Massachusetts decision addresses the legality of so-called administrative or suspicionless searches conducted in a school setting.

b. The U.S. Supreme Court has upheld policies requiring school athletes to submit to random urine screens. See Board of Education of Independent School District No. 92 Pottawatomie v. Earls, 536 U.S. 822 (2002) (upholding school district policy requiring all high school students who

participate in competitive extracurricular activities to submit to random urine screens despite a lack of evidence of a "particularized or pervasive drug problem"); Vernonia School District No. 47J v. Acton, 515 U.S. 646, 657 (1998) (upholding a school district policy requiring all students who participated in interscholastic athletics to undergo random urinalysis).

2. **Under Article 14, Urine Screens May Require Individualized Suspicion.**

a. No Massachusetts decision has addressed the legality of a policy that requires students generally, or identifiable groups of students, to undergo suspicionless urinalysis as a condition of attending public school or participating in school activities.

b. However, established Article 14 jurisprudence suggests that such search policies are not likely to survive scrutiny. See Horsemen's Benevolent & Protective Association v. State Racing Commission, 403 Mass. 692, 702-703 (1989) (holding that a state regulatory scheme that required jockeys to submit to suspicionless urinalysis violated Article 14); Guiney v Police Comm'r of Boston, 411 Mass. 328, 332 (1991) (holding that a Boston Police policy requiring all officers to submit to random urinalysis violated Article 14).

B. The Student Consented to the Search. One of the specifically established exceptions to the prohibition against warrantless searches is consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Commonwealth v. Walker, 370 Mass. 548, 555, cert. denied, 429 U.S. 943 (1976).

1. **Consent Must be Voluntary.** For a consent search to be valid, the Commonwealth must prove that the consent is "unfettered by coercion, express or implied." Walker, 370 Mass. at 555. The question of whether consent was voluntary is determined from the totality of the circumstances. Commonwealth v. Krisco Corp., 421 Mass. 37, 46 (1995).

Courts consider several factors, though no one factor is dispositive, in deciding whether consent was given voluntarily:

a. whether police advised the defendant of his right to refuse to consent, Commonwealth v. Harmond, 376 Mass. 557, 561 (1978);

b. whether a show of force was made by the police, Com. v. Greenberg, 34 Mass. App. Ct. 197, 201-202 (1993);

c. the defendant's condition at the time consent was given, Commonwealth v. Heath, 12 Mass.App.Ct. 677, 684-85 (1981);

d. whether the defendant was in custody at the time, Commonwealth v. Franco, 419 Mass. 635, 642 (1995) (that defendant under arrest at time of giving consent to search not preclude a finding of voluntariness);

e. whether the police made any threats or promises, Commonwealth v. Deeran, 364 Mass. 193, 196 (1973); and

f. whether the defendant believed that the police would inevitably discover that for which they were looking, Com. v. Brown, 32 Mass. App. Ct. 649, 652 (1992).

2. **Consent Must be Clear**. A student's consent to search must be clear and unequivocal. See, e.g., R.J.M. v. State, 456 So.2d 584 (Fla. App. 1984) (student's statement "I guess this is what you want," as he handed a concealed knife to assistant principal during course of search, did not constitute consent sufficient to render an otherwise unlawful search consensual).

C. The Search Was Incident to a Lawful Arrest. See, e.g., Farmer v. State, 156 Ga. App. 837 (1980) (strip search of a high school student by a police officer apparently acting on behalf of school authorities was constitutional because the search was incident to a lawful arrest).

D. There Were Exigent Circumstances. See, e.g., State ex rel. Juvenile Dep't of Washington County v. DuBois, 110 Or. App. 314 (1991) (public high school student supervisor's warrantless search of a student's pockets and fanny pack was valid because the possible presence of a gun created exigent circumstances making the warrant requirement inapplicable); S.C. v. State, 583 So.2d 188 (Miss. 1991) (warrantless search of high school student's locker based on a classmate's report that student possessed firearms was constitutional because of the exigent circumstances presented); People v. Lanthier, 5 Cal.3d 751 (1971) (noxious odor in area of university study hall constituted emergency sufficient to justify search of student's carrel and briefcase).

E. The Object of the Search Was in Plain View (if the person searching was lawfully in a place to see it). See, e.g., In re William V., 4 Cal. Rptr. 3d 695 (Cal. App. 1st Dist. 2003) (initial detention and subsequent search of high school student by police resource officer was reasonable, where officer saw colored bandanna in student's pocket, which violated school rule prohibiting bandannas as indicative of gang affiliation, manner in which bandanna was folded indicated pending confrontation, and lifting jacket to search waistband was justified by baggy clothes worn by student); But see State v. Lamb, 137 Ga. App. 437 (1973) (school official violated the Fourth Amendment when he entered a dormitory room in contravention of school rules and saw illegal drugs in plain view).

F. **The Object of the Search was within Plain Feel (if the person searching was lawfully in a place to feel it).** See, e.g., Com. v. Wilson, 441 Mass. 390, 397 (2004) (when the contour of an object makes its identity as contraband immediately apparent during a lawful pat frisk, a warrantless seizure of the object does not violate the Fourth Amendment).

VII. The Individuals with Disabilities Education Act (IDEA) Does Not Prohibit School Officials or Police from Searching Students with Disabilities

A. IDEA does not prohibit a school from reporting a crime committed by a child with a disability to appropriate authorities or to prevent law enforcement or judicial authorities from exercising their responsibilities with regard to crimes committed by a child with a disability. Commonwealth v. Nathaniel N., 54 Mass.App.Ct. 200 (2002).

B. In Nathaniel N., a teacher observed the juvenile conduct an apparent drug transaction and reported the observation to the principal. The principal questioned the defendant in the presence of the police and, after asking the juvenile to empty his pockets, found two bags of marijuana in his wallet. Subsequently, the police filed three delinquency complaints. 54 Mass.App.Ct.at202.

C. The juvenile moved to dismiss the complaints on the grounds that he did not receive the procedural requirements of 20 U.S.C. §§ 1400 et seq. (IDEA), claiming that the school failed to provide the "free and appropriate education to which he was entitled" under the act. 54 Mass.App.Ct. at 202, citing Morgan v. Chris L., 927 F.Supp. 267 (E.D.Tenn. 1994), aff'd, 106 F.3d (6th Cir.), cert. denied, 520 U.S. 1271 (1997). Specifically, the juvenile claimed that the initiation of the delinquency proceedings triggered due process protections connected with the initiation of a "change in placement," and that failure to provide these protections required dismissal. 54 Mass.App.Ct. at 203.

D. The Court denied the motion, noting that the statute explicitly provides that, "Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability." 20 U.S.C. § 1415(k)(9)(A).

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