The Supreme Court and Strip Searches

By Charles J. Russo, J.D., Ed.D.

Maintaining a safe, orderly learning environment is a significant challenge for education leaders, especially when students insist on bringing alcohol, weapons, and drugs into schools. To compound that challenge, educators who wish to uncover contraband must do so within the confines of the Fourth Amendment's prohibition against unreasonable searches and seizures.

The Supreme Court has interpreted the Fourth Amendment as permitting searches of students and their property (*New Jersey v. T.L.O.* 1985) and drug testing of student athletes (*Vernonia School District 47J v. Acton* 1995; *Board of Education of Independent School District No. 92 of Pottawatomie v. Earls* 2002). Further, state and lower federal courts have dealt with an array of Fourth Amendment issues, such as using sniff dogs in schools (*B.C. v. Plumas Unified School District* 1999) and basing searches on anonymous tips (*In re Doe* 2004).

With regard to a more controversial type of search, lower courts have reached varied decisions regarding the constitutionality of strip searches. Although most courts have rejected their use (*Thomas ex rel. Thomas v. Roberts* 2001; *Phaneuf v. Fraikin* 2006, 2007), some have ruled that they do not violate the Fourth Amendment (*Williams ex rel. Williams v. Ellington* 1991; *Cornfield by Lewis v. Consolidated High School District No. 230* 1993; *Cesta v. School Board of Miami–Dade County* 2002). Still others have rejected claims for imposing personal liability on officials who performed such searches (*Jenkins v. Tallaedga City Board of Education* 1997; *Beard v. Whitmore* 2005; *Lamb v. Holmes* 2005).

However, in a dispute from Arizona, *Redding v. Safford Unified School District No. 1* (2008c), the Ninth Circuit rejected an assistant principal's motion for qualified immunity shielding him from liability after he ordered the strip search of a student who violated board policy by possessing ibuprofen in school. On further review, the Supreme Court affirmed that the search was unconstitutional but also ruled that the assistant principal was entitled to immunity since the student's rights were not clearly established at that time the search occurred.

Redding v. Safford Unified School District No. 1

Redding unfolded in October 2003 in a middle school in Arizona that had a history of problems with students using and distributing illegal substances on campus. In response to the problem, officials adopted a policy strictly prohibiting "the nonmedical use, possession, or sale of any drug on school grounds," including "[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy (*Redding* 2009a at * 6).

In October 2003, a Safford Middle School student, Jordan Romero, and his mother met with the principal and assistant principal Kerry Wilson, telling them that other students were bringing drugs and weapons on campus and that he became ill after taking pills he received from a classmate. A few days later, Romero gave Wilson a white pill that he said he received from fellow student Marissa Glines. When Wilson learned

from Peggy Schwallier, the school nurse, that the pill was 400-milligram ibuprofen, available only by prescription, he called Marissa out of class.

One of the items that Marissa brought to Wilson's office was a day planner, which Wilson opened in the presence of Helen Romero, the school's administrative assistant. The day planner contained a small knife, a cigarette, and a lighter, in addition to several pills. When asked where she got the pills, Marissa named another student, Savana Redding. This was, in fact Savana's folder, Marissa said, which she had borrowed earlier. But she denied knowing anything about the contraband items.

When Wilson called Savana into his office and showed her the day planner, Savana said the planner was hers, but that she knew nothing about the contraband. Wilson showed her the pills and said he received a report that she was giving them to fellow students. She denied the allegation and agreed to let him search her belongings. Helen Romero entered the office and, together with Wilson, searched Savana's backpack, finding nothing considered contraband.

Next, Wilson directed Romero to take Savana to the school nurse's office to search her clothes for pills. Romero and Nurse Schwallier asked Savana to remove her jacket, socks, and shoes, leaving her in stretch pants and a T-shirt, which she was also asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.

Savana's mother sued the Safford School District, Wilson, Romero, and Schwallier for allegedly violating her daughter's Fourth Amendment rights. The federal trial court in Arizona granted the defendants' motion for summary judgment based on qualified immunity on the grounds that they had not violated the Fourth Amendment.

After the Ninth Circuit affirmed in favor of the defendants (2007), an en banc panel reversed the motion for summary judgment that had been entered in favor of Wilson but affirmed it for Schwallier and Romero, since they had not acted as independent decision makers (*Redding* 2008a). After agreeing to hear an appeal (*Redding* 2009a), the Supreme Court affirmed in part, reversed in part, and remanded for further consideration (*Redding* 2009b).

Supreme Court Rulings

The Court affirmed by an 8–1 margin, with Justice Thomas dissenting, that the search was unconstitutional. Also, by a vote of 7–2, with Justices Stevens and Ginsburg dissenting, the Court reversed the holding that Assistant Principal Wilson was personally liable for the unconstitutional search.

As an initial matter after reviewing the facts, the Court conceded that Wilson had the requisite level of suspicion to search Savana's backpack and outer clothing. Turning to the strip search, the Supreme Court acknowledged that it implicated the student's subjective and reasonable societal expectations of personal privacy that were violated by her "embarrassing, frightening, and humiliating" experience (*Redding* 2009a, p. 7).

Lower courts have reached varied decisions regarding the constitutionality of strip searches.

The Court was not convinced that its indignity notwithstanding, this was what rendered the search unreasonable. Instead, the Court invalidated the search because it failed the reasonableness standards that it enunciated in *New Jersey v. T.L.O.* (1985). The Court pointed out that under *T.L.O.*, "the search as actually conducted reasonably related in scope to the circumstances which justified the interference in the first place" (*Redding* 2009a, p. * 7 citing *T.L.O.*, p. 341). The scope will be permissible, that is, when it is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction" (*Redding* 2009a, p. * 7 citing *T.L.O.*, p. 342).

Pursuant to *T.L.O.*, the Supreme Court decided that the search was unconstitutional because the level of Wilson's suspicion did not match the degree of intrusion insofar as he was searching for what he knew were over-the-counter medications. The Court held that while although possession of these pills in school violated board policy, Wilson had no reason to suspect that the student was distributing large amounts of drugs in school or that she was hiding painkillers in her underwear. The Court explained that such an intrusive search for "nondangerous school contraband" (*Redding* 2009a, p. * 8) could not have been based on general possibilities and that there was no evidence that students in the school had pills in their underwear.

The Court added that since Wilson lacked an indication that Savanna posed a threat to other students or that she was hiding pills in her underwear, the search was unreasonable.

The Supreme Court rounded out its analysis on this point by declaring that Wilson's acts were unconstitutional because he lacked the requisite level of reasonable suspicion before ordering a search that made "the quantum leap from outer clothes and backpacks to exposure of intimate parts" (*Redding* 2009a, p. *8).

In the final part of its opinion, the Supreme Court reasoned that since the law with regard to the constitu-

tional status of strip searches was not clearly established at the time that *Redding* arose, Wilson was entitled to qualified immunity, freeing him from financial liability.

Recommendations

It is worth noting what *Redding* does *not* do. *Redding* does not outlaw all strip searches. Rather, the Supreme Court ruled that the search as conducted was too intrusive because it was not reasonable under the *T.L.O.* standard. Also, the Court did not forbid the use of strip searches in all circumstances, such as when officials might be seeking weapons.

Educators should proceed with extreme caution in balancing legitimate student expectations of privacy and school safety.

Redding raises questions about the limits of strip searches and the need for student privacy if local officials develop policies for such searches. When dealing with strip searches, educators should proceed with extreme caution in balancing legitimate student expectations of privacy and school safety. Even though the majority of strip searches based on individualized suspicion have not resulted in financial liability, the expense of litigation and resulting turmoil in districts are costs that cannot be measured adequately. In fact, the human cost in bad feelings and distrust over strip searches may fester for years.

When developing policies on strip searches, education leaders, including school business officials, acting in conjunction with their attorneys, should consider the following key guidelines:

1. Involve a wide spectrum of the school community, including faculty, staff, parents, and students, in developing search policies.
2. Ensure that written policies are consistent with federal and state case law, as well as state statutes and regulations.
3. Include the following strategies limiting the discretion of school personnel:
   - Document the need for strip searches based on a greater quantum of suspicion than if seeking to examine outer clothing or backpacks and lockers;
   - If used at all, limit such searches to trying to locate drugs and weapons;
   - Identify which designated officials have the authority to conduct searches; and
   - Ensure that the school personnel who conduct searches are the same gender as the students.
4. Make sure students and parents know that students can be searched at the discretion of school officials. Publish the policy in student handbooks and, as an added safeguard, have students and parents sign an acknowledgment form indicating they understand and will abide by all school rules.
5. Since the law of the Fourth Amendment continues to evolve, revisit your policies annually to ensure that they are up-to-date.

By keeping policies current, school business officials and other education leaders can enhance the likelihood of helping their districts save money by devising policies that are designed to protect student safety while avoiding costly legal battles.

References

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