REPORT OF THE
BOARD OF EDUCATION

GUIDELINES FOR STUDENT SEARCHES IN PUBLIC SCHOOLS

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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COMMONWEALTH of VIRGINIA

DEPARTMENT OF EDUCATION

P.O. BOX 2120

RICHMOND 23218-2120

December 21, 1999

The Honorable James S. Gilmore, III
Governor of Virginia
State Capitol Building
Richmond, Virginia 23219

Dear Governor Gilmore and Members of the General Assembly:

The report transmitted herewith was prepared pursuant to House Bill No. 1489 of the 1999 General Assembly of Virginia. This bill requested the Department of Education, in consultation with the Office of the Attorney General, to develop guidelines for student searches, including random locker searches and strip searches, and to report on the implementation of these guidelines to the 2000 session of the General Assembly.

Respectfully submitted,

Jo Lynne DeMary

Jo Lynne DeMary
Acting Superintendent of Public Instruction

JD/gjm

Enclosure

PREFACE

Authority for Study

The 1998 General Assembly amended the Code of Virginia by adding Section §22.1-277.01:2:

> *The Board of Education shall develop, in consultation with the Office of the Attorney General, guidelines for the conduct of student searches, including random locker searches, consistent with relevant state and federal laws and constitutional principles.*

The 1999 General Assembly further amended this section by adding a requirement for strip searches:

> *The Board of Education shall develop, in consultation with the Office of the Attorney General, guidelines for the conduct of student searches, including random locker searches* ***and strip searches,*** *consistent with relevant state and federal laws and constitutional principles.*

Finally, the Board of Education shall report on the implementation of the guidelines to the General Assembly by December 1, 1999.

Implementation

To implement the General Assembly's mandate, the Virginia Department of Education invited representatives from local school divisions, state agencies and professional organizations to participate in the development of the guidelines. This advisory group met on February 23, 1999 to discuss and plan for the specifics to be included in the guidelines. In August and September, the advisory group reviewed and provided suggestions for the final draft of the guidelines.

It was the intent of the advisory group to develop the guidelines for use as technical assistance by local school divisions in developing local policy and practice. As envisioned, the guidelines will set forth the law regarding student searches within the public schools as the laws are generally understood and applicable in most situations.

The guidelines are not intended to be regulations that displace local discretion and authority. Instead, they are to be considered as technical assistance that outlines relevant constitutional and statutory principles that may be considered by local school authorities.

Members of the Advisory Group

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Cynthia Cave	Virginia Department of Education
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Executive Summary

School administrators must continue to work toward keeping Virginia schools safe; that is, to continue to provide an environment of safety -- a place where teachers can teach and students can learn without disruption.

To ensure school safety, the courts have sought a balance between the constitutional rights of students and the need for safety and freedom from school violence. At this time, the balance leans toward safety and against any extension of constitutional rights currently enjoyed by students.

It is vitally important to remember that education is almost exclusively a matter of state laws. It seldom involves Federal powers, except for the Federal courts' interpretations of constitutional protections within the school setting. While Federal decisions apply nationwide and serve as boundaries of permissible state and local actions, they do not take the place of an understanding of the many legal issues that are mainly a function of state and locality laws.

These guidelines are intended for use as technical assistance by local school officials to develop local policies and practices. These guidelines are not regulatory and do not replace local discretion. The guidelines cannot and do not address all possible issues that could develop as a result of student searches. It is important that school divisions continue to assure that related local policy and practice is in compliance with state and federal laws and constitutional principles.

BOARD OF EDUCATION'S GUIDELINES CONCERNING STUDENT SEARCHES IN THE PUBLIC SCHOOLS

Introduction

In 1999, the General Assembly amended and reenacted §22.1-277.01:2 of the *Code of Virginia.* This section, *Guidelines for student searches,* states that *"The Board of Education shall develop, in consultation with the Office of the Attorney General, guidelines for school boards for the conduct of student searches, including random locker searches and strip searches, consistent with relevant state and federal laws and constitutional principles."*

The Board of Education, in cooperation with the Office of the Attorney General, convened an advisory committee made up of representatives of legal, educational, and other professional organizations with interest in student rights. The purpose of the advisory committee was to develop guidelines for local school board use in developing or revising local policy and procedure as related to student searches.

The guidelines are intended for use as technical assistance by local school officials to develop local policies and practices. These guidelines are not regulatory and do not replace local discretion. The guidelines cannot address all possible issues that could develop as a result of student searches. Therefore, it is incumbent upon school divisions and their legal counsel to assure that related local policy and practice is in compliance with state and federal laws and constitutional principles. The resulting document, *Guidelines Concerning Student Searches in Public Schools,* was approved by the Board of Education on November 18, 1999.

GUIDELINES CONCERNING STUDENT SEARCH IN THE PUBLIC SCHOOLS

Section 1

STUDENT SEARCHES AND FOURTH AMENDMENT PROTECTION

§1.1 Emerging Educational Roles

Since the 1980's increasing community concern regarding student drug use and campus violence has resulted in a heightened awareness of the public school's responsibility to maintain the sanctity of the school and school yard. At no time in history has the need for a safe learning environment been a higher community priority. Reflecting this priority, recent court decisions have expanded the powers of public school authorities to limit student expectations of privacy thus demonstrating a decided trend towards supporting the decisions of public school officials whenever possible.[1] Efforts to ensure that public schools are safe have led to an intensified level of administrative concern for student safety.

Public school administrators, while not in the business of law enforcement, are nonetheless agents of the larger community and are, therefore, charged with maintaining order within the school community. *New Jersey v. T.L.O.* reiterated the principle that today's public school officials act to achieve publicly mandated educational and disciplinary policies.[2] Courts have emphasized that the power of public schools permits a higher degree of control and supervision over students than generally could be exercised over adults. Thus, while children do not shed their constitutional rights at the school house gate the nature of those rights is balanced against what is appropriate for children in the school setting.[3]

With the emergence of significant national and state support for school reform and improved student achievement, it is more important than ever before for schools to assume responsibility for the daily learning environment. School authorities must achieve a balance between the privacy rights of the individual and the right of the school community to a safe learning environment. This balance can be maintained by school division policy and practice.

Carefully written and appropriately executed school policy that advances a safe learning environment is an intrinsic component of today's school management practice. Such policy and

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[1]Law Advisory Group, Inc., Safety, Order, and Discipline in American Schools (Cleveland, Ohio: Law Advisory Group, Inc., 1998-99) 112.

[2]*New Jersey v. T.L.O.*, 469 U.S. at 325 (1985).

[3]*Vernonia School* Dist. 47J v. Acton, 515 U.S. at 646 (1995).

practice respects each student's rights within the public school setting as required by the Fourth Amendment to the United States Constitution. Local school boards of education have a responsibility to develop school policy that meets the Fourth Amendment standard. It is the best practice for the policy to be written, authorized, specific, published, and disseminated.[4]

§1.2 The Fourth Amendment

In the 1985 case, *New Jersey v. T.L.O.,* the Supreme Court determined that the Fourth Amendment, as related to the public school setting, generally governs searches of students and student property in areas that are provided to students by the school for their use. In T. L. 0. the Court held that public school administrators serve as agents of the government and must comply with the restraints imposed by the Fourth Amendment that states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...

All school policy that concerns searches of students must conform to the limits described in the Fourth Amendment as interpreted in *T.L.O.* and subsequent court decisions. Student searches must meet the standard of reasonableness as set forth in *T.L.O.*

§1.3 New Jersey v. T.L.O.

New Jersey v. T.L.O. is a landmark case regarding student searches. *T.L.O.* articulated the following:

1. Children in school are protected by the Fourth Amendment.

2. Public school administrators act as representatives of the government rather than exclusively as surrogates for the parents of students.

3. Searches of students by school officials or teachers may be based on reasonable suspicion rather than on probable cause.

4. Search warrants are generally not necessary for school-related searches by school administrators.

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[4] Safety Order, and Discipline 103-104.

The Court further held that the search must be justified at the outset and that the reasonable suspicion requirement applies to student searches. Furthermore, the search must be conducted consistent with the original objective and may not be excessively intrusive based on the student's age and sex.[5]

The standards of *T.L.O.* apply only to searches of public school students conducted by school officials or their designees. Sworn law enforcement officers (See Section 3 regarding sworn law enforcement officers.) must have probable cause before conducting a search, they generally cannot conduct an individualized search on reasonable suspicion alone.

§1.4 The Doctrine of Reasonable Suspicion

Any decision by a school administrator to search a student implicates the Fourth Amendment. Student searches must comply with constitutional law. Constitutional searches may be implemented when a school official has a "reasonable suspicion" that the law or a school rule has been broken. Reasonable suspicion must be present in order to implement a search, and the reason for searching must relate directly to the law or school rule identified at the onset of the search. In *New Jersey v. T.L.O.*, the Supreme Court held that the standard of "reasonable suspicion" applied to searches of students as conducted by school officials.[6] Since the *1985 T.L.O.* case, Courts have consistently held that school officials operate under the less rigid concept of "reasonable suspicion" as opposed to the concept of "probable cause" that guides searches by sworn law enforcement officers. Courts have increasingly extended to schools the right to control the school environment for the benefit of the school community at large.

The concept of "reasonable suspicion" as outlined in *T.L.O.* allows student searches by school officials if the officials have information that leads them to believe that a student has broken the law or school rule and that the search will yield evidence of a violation. This standard is considerably more flexible than the probable cause requirement. Reasonable suspicion can be created if the school administration has received reliable information from one or more sources.

In conducting a student search, the school official must act in a reasonable way. The school official must first determine that a student search is within the school's legitimate objectives. The official should next consider whether or not the violation is severe enough to warrant a search that invades the student's privacy rights. The official must then consider the age of the student, the area involved, the reasonable proximity of the time and place of the offense, and the invasiveness of the search. The school official must then limit the scope of the search to the evidence sought.

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[5]Jon M. Van Dyke and Melvin M. Sakurai. Checklists for Searches and Seizures in Public schools. (St. Paul, West Group, 1999), 1-8, 9.

[6]*T.L.O.*, 469 U.S. at 337.

§1.5 The Doctrine of Probable Cause

Historically, the decision to conduct a search of a public school student was based on the premise that "probable cause" existed to warrant the search. Probable cause suggests that there should be a high level of facts specific to the crime to guide the decision to search. Probable cause does not require absolute certainty, only that the facts support the probability of success when considered in their entirety. A sworn law enforcement officer must have probable cause to conduct a search. In addition to probable cause, a sworn law enforcement officer must have a warrant unless there are exigent circumstances that threaten the immediate safety of the student or others. Moreover, a sworn law enforcement officer cannot evade the need for a warrant or probable cause by simply directing or requesting a school official to perform a search.

§1.6 Parental Notification

Schools are not required to notify parents prior to conducting a student search. "While functioning in routine fashion something the law refers to as the 'ordinary course of business,' the school does not need to notify or obtain permission from the parent of a student prior to a search..."[7]

A parent's right to be notified, either before or afterwards, of any happening in school is usually limited and discretionary. However, parents should be notified in situations in which failure to do so would create or enhance danger to the student. Parents should be notified whenever a student's opportunity to obtain an appropriate education would be limited and whenever the parent has been promised such notification, whether expressly or implicitly. Such promises can be implied by school rules.[8]

Current standards of practice encourage the involvement of parents in the child's school experience to the extent practical, reasonable, and possible. Whenever a child has been searched, parents or guardians should be notified as soon as practical. As guardians of the child, parents are important to his or her well-being. Community practice and values encourage parental involvement and timely notification.

§1.7 Student Expectations of Privacy

Public school students are considered a group distinct within the general public. Their privacy rights, as protected by the Fourth Amendment, differ from the rights of adults by being more limited in scope. Even though limited, the student's privacy rights are important and must be protected. Every action carried out by school officials in the search process must be thoughtful and respectful insofar as individual circumstances warrant. Every effort must be made to administer

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[7] Safety, Order, and Discipline 111.

[8] Safety, Order, and Discipline 110.

policy in order to protect the constitutional rights of students and protect the school division. The guiding concept is always reasonableness.

The privacy rights of public school students are diminished when safety, discipline, and learning are at stake. However, it is important to remember that a student's expectation of privacy may be heightened or lowered, to the extent constitutionally permitted, by the school division's administration of its written student search policy.

Section 2

WRITING SCHOOL POLICY

§2.1 School Division Mission Statement

Local school boards should develop a mission statement that reflects the division's commitment to provide a safe, nondisruptive environment for effective teaching and learning. The mission statement, along with school board policy, should be promulgated to the community at large. Direct links should be established between the mission statement, the Code of Conduct, the search policy, and the implementation of the search policy by the school division.

§2.2 Importance of School Policy

The Code *of Virginia, §22.1-278,* requires school boards to develop local policy governing student conduct and to review the policy biennially in order to "...preserve a safe, nondisruptive environment for effective teaching and learning." The purpose of such written policy is to define expectations and rules and to reduce the possibility of non-compliance with laws and school rules. The Student Code of Conduct also can define and limit students' expectations of privacy while at school and school-sponsored activities, In addition to the statutory requirement for a Student Code of Conduct, best practice requires written school policy on student searches. The mission statement, the Student Code of Conduct, and the search policy should be consistent and complementary.

§2.3 Implementation of Policy

A Student Code of Conduct consistent with school division policy must be distributed to students and their parents. The *Code of Virginia, §22.1-279.3,* requires each parent of a student to sign and return to the school a statement that acknowledges the receipt of the school board's standards of student conduct and the notice of the requirements of the Code of Conduct. Furthermore, each school is required to maintain records of the signed parental statement. The Code of Conduct must be reviewed biennially, and should be enforced regularly and consistently, in order to remain viable, establish the limits of privacy expectations, and protect the school's effort to provide a safe learning environment. While not required by law, the best practice is to distribute, or otherwise make available, the written school policy on student searches to parents and students.

Section 3

ROLES OF SCHOOL AUTHORITIES

§3.1 The School Principal or Designee

Generally, the principal or designee is the school official authorized by school board policy to conduct student searches. The school official should be knowledgeable of the law, school board policy, and trained in proper search techniques. He or she must adhere to stated policy and procedure for random and individualized searches. AD steps that lead up to a search should support the least intrusive, most reasonable, and individualized search possible. The school official should respect the individual privacy rights of the individual student.

§3.2 The School Resource Officer (Sworn Law Enforcement Officer)

In recent years, school officials have increasingly turned to local law enforcement for assistance with maintaining order in schools. The result has been the emergence of a new type of sworn law enforcement officer: the School Resource Officer. This position, with duties different from those of the usual police officer, requires additional training. School Resource Officers work directly with school personnel and students to reduce the incidence of school problems and law breaking. Assigned to the school site, the visible presence of the sworn law enforcement officer sends a message to the community that educators are committed to and serious about maintaining a safe and stable learning environment.

School Resource Officers may be present at student searches but do not typically conduct searches at the school site. As sworn law enforcement officers, School Resource Officers must have probable cause to search an individual student; whereas, local school officials are required to meet only the doctrine of reasonable suspicion. A written and published memorandum of understanding between the school division and local law enforcement agencies should define and clarify the responsibilities assigned to the School Resource Officer.

§3.3 Other School Security Personnel

Schools may use personnel to perform school security functions who are not sworn law enforcement officers. These employees typically serve under the guidance of the principal. The security employee is not usually the person designated by the principal to conduct student searches. However, the security employee is often the individual who first identifies the need to search Because school security employees assist school officials in conducting student searches, they should be trained in appropriate search procedures and knowledgeable of laws and policy that govern student searches.

Section 4

GUIDELINES FOR STUDENT SEARCHES

§4.1 Definition of a Student Search

Student searches are an important strategy to detect school rule and law violations. A student search can occur when a school official attempts to discover any thing hidden from view and/or located in a secluded place. Whenever a search of a student is undertaken by a school official, the Fourth Amendment privacy rights of the student must be taken into consideration. An individual search of students by school officials cannot take place unless it has been determined, based on reasonable suspicion, that the search may produce evidence that the law or a school rule has been violated. School officials should remember that as searches become more intrusive, an increasingly higher degree of individualized suspicion must exist.

§4.2 Search of Student Property

When reasonable suspicion exists, school officials may search property belonging to students. Reasonable suspicion requires circumstances that would lead a reasonable person to conclude that the person or persons to be searched are the most likely individuals to be in violation of a law or school rule. Property belonging to students includes item that can be connected to a student, carried by a student, or stored by a student in areas made available to the student by the school. These areas may include lockers, desks, storage bins, parking lots, and other locations. The school may retain access to these areas through policy statements and thereby diminish students' expectations of privacy in them Prior to initiating a student search, school officials should inform the student of the reason for the search and may request consent to search. If consent is not granted, the search may be conducted anyway if the standard of reasonable suspicion is met.

Searches based upon reasonable suspicion may include:

- Examining a student's person, clothing, and possessions such as handbags, backpacks/bookbags, notebooks, books, and other items that can be connected to the student.
- Looking through, handling, or feeling the student's personal possessions.
- Opening any closed containers owned by the student.
- Opening any secured property to which the school has retained possession and access such as lockers, desks, or storage cabinets.
- Opening automobiles.
- Reviewing educational technology/computer use records of students.
- Requiring students to be scanned with metal detectors or to submit to drug screens.

The more secured the area in which the student's property is kept, the higher may be the student's expectation of privacy. Therefore, a search of a locked area could require more specific reasons than would a search of an open desk with its lessened expectation of privacy. Courts are more likely to uphold searches of student property when the schools have lessened students' expectations of privacy through policy and practice. Even where the school has in place policy that requires periodic searches of areas of the schools such as the locker areas, the searches must be conducted in accordance with that policy.

§4.3 Locker Searches

Locker searches generally are permissible when supported by policy that is authorized and publicized to the students and their parents. Through policy and practice, the school retains ownership to certain areas of the school including student lockers. While students can expect a level of privacy when using school lockers, the expectation of privacy can be severely diminished by policy. The student's expectation of privacy is further diminished by the right of the school to control and distribute locks, retain locker combinations as well as to open and repair lockers at any time. Policy should establish that school lockers are for storage of permitted student belongings and may not be used to hide objects or materials that are prohibited by law or school rule.

Suspicionless random locker searches must be actually and consistently random. If a random search produces evidence of school rule or legal violations, it is generally permissible to search the locker further. At times, students may state that the property in question does not belong to them In order to alert students that they should be attentive to the contents of the lockers, policy should clearly state that students are responsible for the contents of their assigned lockers.

Individualized locker searches are permissible when supported by reasonable suspicion. Reasonable suspicion focuses on individual students and is supported by evidence that justifies the search. The totality of information must consistently point in the direction of a particular student or students and must be corroborated by reliable sources.

§4.4 Computer Searches

School computers, software, and other similar educational technology, including school Internet access records, may be searched by school officials at any time if there exists reasonable suspicion that such search will yield evidence of law or school rule being broken. School policy and the Student Code of Conduct should define school computer, technology, and internet use and its limits. Because schools retain possession of their computers and because student use is to be consistent with the educational mission of the school, students should have a highly diminished expectation of privacy in their use of school-site computers. School computer use policies should alert students to the lack of privacy in their use of school computers and software and their obligation to confine such use to the means and methods educationally permitted.

§4.5 Automobile Searches

In order to conduct searches of student automobiles, school officials should have established a diminished expectation of privacy for automobiles through policy statements, the Student Code of Conduct, and the use of parking permits that require both parent and student signatures. Where schools have experienced extraordinary drug or weapons problems, additional control over automobiles may be warranted. For example, where need is documented, school officials might require students to turn in car keys upon arrival at school and pick them up at the end of the day. Officials might also require that students grant school officials the right to search automobiles, consistent with constitutional limits, in return for the privilege of parking. Generally, however, searches may be implemented by school officials when they have reasonable suspicion that the automobile search will yield evidence that the student broke the law. Searches must be carried out in such a way as to discover the forbidden item or other evidence using reasonable strategies. Random searches of automobiles may be conducted only if done under a previously established and published, neutral, random search procedure.

§4.6 Search Locations

The locations at which searches of students and student property may be conducted are not confined to the school building or property, but may be wherever the student is involved in a school-sponsored function whether located on the school campus or not. The search, however, must meet the reasonableness standard and be conducted in accordance with school policy.

§4.7 Search of Person

Strip searches of persons are generally considered highly intrusive and should be used only when an extremely serious situation exists requiring immediate action.[9] Strip searches are constitutionally suspect under any circumstances and should only be used in the context of imminent threat of death or great bodily injury to a person or persons.

Strip searches, if conducted, are best conducted by a sworn law enforcement officer of the same sex accompanied by same-sex witnesses. If conducted by a school official, strip searches should only be used to avoid the imminent threat of death or great bodily injury to an individual or individuals. A strip search constitutes the most extreme type of student search undertaken by school officials and poses the greatest threat of legal challenge for school officials.[10] Body cavity searches should not be undertaken by school officials.

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[9]Kern Alexander and M. David Alexander, American Public School Law, 4th ed. (Belmont, CA: West/Wadsworth, 1998) 387.

[10]Joseph C. Beckham, "Student Searches in Public Schools." Focus on Legal issues for School Administrators, n.d.:5.

A less intrusive, but still controversial, type of search is the physical "pat-down" in which the student is searched by touching the student while he or she is fully clothed. The "pat-down" search requires that the administrator have established a high level of reasonable suspicion that evidence will be found to corroborate suspicion that a law or school rule has been broken. A "pat-down" search should be conducted and witnessed by same-sex school officials.

§4.8 Suspicionless Searches

Suspicionless searches, including group searches, may be conducted if the school officials act in accordance with published local school board policy. The right of school divisions to conduct suspicionless searches has been *upheld in* the Oregon case of *Vernonia v. Acton.* Suspicionless searches can be a reasonable means of ensuring a safe, nondisruptive school environment through deterrence.[11] Such searches, which may be of the student classroom, desk, locker, or automobile, must be random, systematic, non-selective searches implemented according to a pre-determined formula. Group or suspicionless searches, when not random, can embarrass or stigmatize students who may appear to others to be under suspicion.

§4.9 Consent Search

A consent search of a student exists when a student grants the school official permission to search. Under these circumstances, the school official need not demonstrate grounds for reasonable suspicion. A student's consent is valid only if given willingly and with knowledge of the meaning of "consent." Students should be told that they have a right to refuse to be searched, and they should demonstrate an awareness of the risk to themselves involved in granting school officials permission to search. Consent searches may be invalid if the student perceives himself to be at some risk of suspension or other punishment if he does not grant permission for the search. For this reason, school officials may prefer to base their search on reasonable suspicion rather than on student consent.

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[11]Van Dyke 12-6,7.

Section 5

ALTERNATIVE SEARCH STRATEGIES

Alternative search strategies generally include the use of trained drug sniffing dogs, metal detectors, or other types of surveillance devices.

§5.1 Searches Utilizing Metal Detectors

Random, suspicionless searches of students may be conducted using metal detectors. Such searches as conducted by school officials must ensure randomness in administering the search. All students may be searched or certain, randomly selected students may be searched. Searches with metal detectors also may be conducted whenever individualized suspicion exists. Searches with metal detectors should be covered by school policy, communicated to students, parents, and the community through the Code of Conduct, and conducted within announced time frames. Failure to do so could negate the policy.

§5.2 Searches Utilizing Trained Drug Dogs

The use of trained drug sniffing dogs has generally been upheld by the courts to assist school officials in their efforts to maintain a safe and stable learning environment. Searches that utilize trained drug sniffing dogs are not usually considered "searches" unless a dog is used to sniff individuals instead of property. Searches that are designed to aid school officials in their search for drugs usually represent minimal intrusion and do not usually invoke Fourth Amendment protections. There is usually not a need for individualized suspicion. A canine sniff of students' persons can constitute an individual search. Such canine searches of students have been found to be intrusive, thus triggering full Fourth Amendment protections.

Canine sniffs of student lockers in a sweeping fashion do not initially constitute a "search." If however, the dog alerts to a specific locker, then individualized suspicion to search the specific locker exists. Students may, under school policy, maintain only minimal expectations of privacy in lockers or other school-owned storage areas. School policy should define the ownership of such spaces as belonging to the school thus establishing a diminished expectation of privacy for the student using the space. Likewise, using dogs to sniff around student automobiles in a sweep of the school parking lot ordinarily does not constitute a search.

Educational policy considerations regarding the health and psychological well-being of students also come into play when police trained dogs are brought near students in schools. Sound educational judgement should be used in deciding whether, when, and under what circumstances drug sniffing dogs will be used in schools.

CONCLUSION

School policies regarding searches, particularly those setting forth use of school facilities and random administrative search and deterrence practices should be linked to the Code of Conduct and school mission. Such policies should be published and available to both students and parents. Parental involvement in the development of such policies is good practice and encourages proper implementation. A *safe school environment is a community task.*

MEMORANDUM

TO: ALL CONCERNED

FROM: THE OFFICE OF THE ATTORNEY GENERAL

DATE: August 20, 1999

RE: ***Memorandum of Legal Principles Animating Guidelines***

These Guidelines and the accompanying Memorandum are not regulatory, nor are they intended as rigid templates for local school policies. They are intended to inform school administrators, teachers, parents and students about the considerations that come into play in drafting local policies. They are also intended to provide quick reference points to legal principles and decisions bearing upon searches conducted in the public schools.[12]

These Guidelines and accompanying Memorandum reserve for local school authorities, and their legal counsel, the task of analyzing the specific facts and circumstances which will determine whether searches in their own school settings are legally permissible, defensible, appropriate and prudent. Instead of providing formulas and definitive answers for all fact situations, these materials seek to alert and sensitize the reader to the competing legal considerations characterizing this area of the law.

Public school officials, administrators and teachers must have a working knowledge of these laws and principles, not only to enforce discipline, but also to be responsible role models. As Justice Stevens noted in his separate opinion in *New Jersey v. T.L.O.*, "schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry." 469 U.S. 325, 373, 105 S. Ct. 733, 759 (1985) (Stevens, J., concurring in part and dissenting in part). Thus, properly conducted searches, and well written policies, can be instructive to students, and can advance their respect for authority, and the value of mutual respect.

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[12]Note: Citations to court decisions in other jurisdictions are for information only and do not imply that such decisions would be adopted by, or viewed as persuasive authority by, the courts of this jurisdiction. Further, court decisions after the date of this Memorandum may change some legal principles set forth herein.

Finally, these Guidelines and the accompanying Memorandum seek to minimize the risk of contests and litigation, and the costs thereof, which ill-conceived searches can engender. A keen awareness of the applicable legal principles and an advance consideration of their application in each specific school setting can help educators, parents, and students focus on promoting and achieving a stimulating and safe school setting within the constitutional framework.[13]

I. Controlling Constitutional and Statutory Provisions

A. United States Constitution

The Fourth Amendment to the Constitution of the United States provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated. . . ." (Emphasis added.)

This Amendment embodies fundamental restraints on the power of government. It protects citizens from arbitrarily conducted and overly broad searches by government officials. Under the Fourteenth Amendment to the Constitution of the United States, these restraints apply not only to the "laws of Congress," but also to the policies, practices and decisions of state and local government, including public school officials, administrators and teachers entrusted with our public school system. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

B. Constitution of Virginia (1971)

Article I, § 10 of the Constitution of Virginia (1971) provides that "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not be granted."

The requirements under this constitutional section, and the state statutes implementing it, are substantially the same as those contained in the Fourth Amendment to the United States Constitution. *Iglesias v. Commonwealth*, 7 Va. App. 93 (1988).

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[13]These Guidelines also seek to avoid the expenditure of valuable energy and resources in litigation and contention. Violations of protected constitutional rights may result in substantial damage awards, and even absent such awards, prevailing plaintiffs are entitled, under federal law, to reimbursement of their attorney's reasonable fees. *See* 42 U.S.C. § 1988.

C. Virginia Statutory Provisions

Virginia's General Assembly has enacted Va. Code § 19.2-59 which generally prohibits searches without warrants, and provides protection co-existent with the Fourth Amendment to the United States Constitution. The General Assembly also has enacted Va. Code § 19.2-59.1 pertaining to strip searches during custodial arrests, and generally prohibiting them except under specific conditions which are set forth by that statute. A "strip search" for the purpose of Va. Code § 19.2-59.1 is defined in Va. Code § 19.1-59.1(F) as having the arrested person "remove or arrange some or all of his [or her] clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts, or undergarments of such person."

Virginia laws generally prohibit students from bringing firearms or destructive devices onto school property or to school sponsored events. *See* Va. Code §§ 18.2-308(exemptions), -308.1 and 22.1-277.01, which also defines the terms "firearm" and "destructive device." Further, students are prohibited by law from bringing a controlled substance, imitation controlled substance, or marijuana onto school property or to a school sponsored event. *See* Va. Code § 22.1-277.01:1.

II. The Conceptual Framework in the Law

A. Balancing Test Determines Reasonableness

A search entails an invasion of privacy. Whether that invasion is legally permissible or not will depend upon the weight of the factors involved in balancing the individual student's privacy right against the school division's governmental interests.[14] All searches, therefore, entail a balancing of competing interests. The Fourth Amendment does not protect all subjective expectations of privacy, but only those privacy expectations that society recognizes as legitimate. "Like members of the public generally, school children enjoy a legitimate expectation of privacy in their persons and effects." *DesRoches by DesRoches v. Caprio*, 156 F.3d 571, 576 (4th Cir. 1998). This expectation remains, as the United States Supreme Court observed, along with the need to maintain order and discipline in school. "Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy." *T.L.O.*, 469 U.S. at 338. "A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy" which society recognizes as "legitimate." *Id.* at 337-39.

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[14] *See generally* Alexander C. Black, Annotation, *Search Conducted By School Official Or Teacher As Violation Of Fourth Amendment Or Equivalent State Constitutional Provision*, 31 A.L.R.5th 229 (1995).

A student's Fourth Amendment right to privacy and security must be weighed against the interest of school officials in maintaining order, discipline, and the security and safety interests of other students. Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere. A proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995). Although students do not "shed their constitutional rights . . . at the schoolhouse gate," the nature of students' rights is determined by what is appropriate for children in school. Students within the school environment have a lesser expectation of privacy than members of the general population. But in the public school context, when "carrying out searches and other disciplinary functions . . ., school officials act as representatives of the State, . . . and they cannot claim the parents' immunity from the strictures of the Fourth Amendment." *New Jersey v. T.L.O.*, 469 U.S. 325 at 336-37 (1985). Therefore, school officials' ability to search students and to seize students' belongings is circumscribed by legal principles.

Generally, law enforcement officers must have a search warrant and probable cause,[15] based upon individualized suspicion, before they legally can conduct a search. Even for law enforcement officers, however, these requirements are not absolute. The United States Supreme Court has noted that the Fourth Amendment is flexible and that "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Nat'l Treasury Employees Union v. VonRaab*, 489 U.S. 656, 665 (1989). School officials are not required to obtain search warrants or to demonstrate probable cause before they search students in school. One important reason for the difference in legal requirements is that the role of the school official is significantly different from the role of the law enforcement officer. In scrutinizing whether any search -- including one conducted in a public school -- is permissible, many factors must be weighed. Chief among those factors are (a) the method of searching, (b) the object of the search, and (c) the role of the individual conducting the search. The interplay and weight of each of these factors generally will determine the propriety of the search.

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[15]Courts recognize degrees of belief -- ranging from the lack of suspicion, through "reasonable suspicion" to "probable cause" to "beyond reasonable doubt." Each degree should be supported by a collection of facts which can be documented. If the method of search is to be more intrusive (for example, drug testing rather than searching lockers), the degree of suspicion required generally increases. If the object of the search poses immediate danger (for example, searching for lethal weapons rather than cigarettes), the degree of suspicion required generally increases. If the individual conducting the search is in a role approaching that of a law enforcement officer (for example, the role of school security officer), the degree of suspicion required generally increases. The suspicion standard required for police to conduct a search is "probable cause."

In the school environment, a search is constitutionally permissible at its inception where the school official has reasonable grounds, based on the totality of the known circumstances, for suspecting that the search will reveal evidence that the student has violated or is violating either the law or the rules of the school.

B. Reasonable Suspicion Motivating a Search or Seizure

"Reasonableness" is the watchword in this area of the law. Identifying the impetus or reason for the search, its focus, scope and manner can be crucial. "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler v. Miller*, 117 S. Ct. 1295, 1301 (1997). Fundamental requirements for suspicion-based school searches were set forth by the United States Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In determining whether an "individualized suspicion of wrong-doing" is present, the following two-pronged test is used:

(1) Whether the search was justified at its inception (that is, whether there were "reasonable grounds for suspecting that the search would turn up evidence that the student [had] violated or [was] violating either the law or the rules of the school"); and

(2) "[W]hether the search as actually conducted 'was reasonably related in scope to the circumstances,'" which initially justified it. *T.L.O.*, 469 U.S. at 341, quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968).[16]

In order to survive constitutional scrutiny, a search must be reasonable not only at its inception, but also in its scope. But the fact that a less intrusive option was available to school officials does not automatically mean that the search method chosen will be found unreasonable. The legal test is whether the search at issue was reasonable. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

C. Acting on Hearsay

"Hearsay" is a permissible way for school officials to receive information to support their reasonable suspicion for a search, especially when reliable or credible informants provide it. *See State v. Moore*, 254 N.J. Super. 295, 603 A.2d 513 (1992) (assistant principal acted on guidance counselor's report from a specific student about drug possession by the searched student); *State v. Biancamano*, 284 N.J. Super. 654, 666 A.2d 199 (App. Div. 1995), *cert. denied*, 143 N.J. 516, 673 A.2d 275 (1996) (vice-principal properly acted on information from "confidential informant").

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[16] "*T.L.O.* did not hold that individualized suspicion is an essential element of reasonableness for all school searches. . . . [T]he Court cautioned that, as in other contexts, a search conducted in the absence of individualized suspicion would be reasonable only in a narrow class of cases, "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.'" *DesRoches by DesRoches v. Caprio*, 156 F.3d 571, 575 (4th Cir. 1998) (quoting *T.L.O.* at 342 n.8).

D. Obtaining Consent

The Fourth Amendment is not violated if a student knowingly and voluntarily consents to a search. All of the circumstances surrounding the consent determine whether it was knowingly and voluntarily given. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Proving the voluntariness of a student's consent obtained by a school official is often difficult to do with certainty, and school officials have the burden of providing such proof. If a student is a minor (under age 18), that burden will be increased. Even once given, consent may be terminated at any time requiring that the search immediately stop. If the reasonable suspicion standard is met, however, and consent is not obtained, the search may be conducted. *See Desilets on behalf of Desilets v. Clearview Regional Bd. of Educ.*, 265 N.J. Super. 370, 627 A.2d 667 (App. Div. 1993) (consent found given in parental permission slip allowing search of hand luggage student takes on field trip); *In re Corey L.*, 203 Cal. App. 3d 1020, 250 Cal. Rptr. 359 (1st Dist. 1988) (student, in denying allegation, said to school principal "You can search me if you want to"); *RJM v. State*, 456 So. 2d 584 (Fla. App. 1984) (ruling that knife was not voluntarily surrendered where student relinquished it in the course of a search which, from its inception, was not based on reasonable suspicion); *State ex rel. Juvenile Dep't v. Doty*, 138 Or. App. 13, 906 P.2d 299 (1995) (search of backpack was permissible where student consented to that search by vice-principal, but student refused to allow search of his person).

III. Special Considerations for Various Types of Searches

A. Group Searches Prompted by Reasonable Suspicion

The requirement for individualized reasonable suspicion does not mean that the suspicion must be confined to only one person at a time. In some situations a group of students may be so small that the entire group may be searched without violating the individualized suspicion requirement. *DesRoches by DesRoches v. Caprio*, 156 F.3d 571 (4th Cir. 1998). "[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *T.L.O.*, 469 U.S. at 346. *See Smith v. McGlothlin*, 119 F.3d 786 (9th Cir. 1997) (vice-principal of high school acted legally on reasonable suspicion when he ordered a group of 20 students to remain in a room for up to two hours to be searched in an attempt to discover which of them had been smoking); *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979 (8th Cir. 1996) (upholding search of all male students by requiring them to empty their pockets and scanning them with metal detector to find knives after finding school bus seats cut).

B. Mass "Administrative" Searches Conducted Without "Individualized Suspicion"

The United States Supreme Court uses a balancing test, evaluating and weighing the following considerations when it determines whether a suspicionless mass "administrative" search is proper:

1. the government's interest in achieving its objectives;
2. the limited intrusion of privacy interests of the person searched; and

3. effectiveness of this type of search in achieving the government's objective.

The legitimate governmental interest in mass "administrative" searches is usually deterrence. "Suspicionless" searches should be conducted only pursuant to neutral, formally promulgated board of education directives, administered on blanket, non-discretionary bases that utilize mechanical screening where student expectations of privacy have been reduced through notice, or other similar circumstance. example, metal detectors at school entrances are a permissible means to deter those entering from bringing weapons into school facilities. *See People v. Pruitt*, 278 Ill. App. 3d 194, 662 N.E.2d 540 (1st Dist. 1996), *appeal denied*, 667 N.E.2d 1061 (1996); *People v. Dukes*, 151 Misc. 2d 295, 580 N.Y.S.2d 850 (City Crim. Ct. 1992).[17]

C. Locker Searches

In *T.L.O.*, the United States Supreme Court did not specifically address locker searches, but it did note the disagreement in lower courts regarding the circumstances that must be present for school officials to search an individual locker without the student's consent. In a footnote it cited three cases: *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981) (school and student had joint control of locker which gave school official the right to inspect it); *People v. Overton*, 24 N.Y.2d 522, 249 N.E.2d 366 (1969) (school administrators could consent to the search of a student's locker); *State in Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983) (student has legitimate expectation of privacy in his school locker). All of these cases cited by the Supreme Court involved individualized suspicion. Many schools, as part of a neutral search policy conduct "administrative" suspicionless random locker searches, about which students (and their parents and guardians) are notified at least annually that school lockers or other storage facilities provided for use by students will be regularly searched on a random selection or lottery basis. This eliminates the stigma attached to selecting individuals on the basis of a particularized suspicion. *See Desilets on behalf of Desilets v. Clearview Regional Bd. of Educ.*, 265 N.J. Super. 370, 627 A.2d 667 (App. Div. 1993); *In the Interest of Isiah B.*, 500 N.W.2d 637, 644 (Wis. 1993) (Abrahamson, J., concurring and dissenting).

Schools can heighten or lower students' expectations of privacy by how the locker search policy is managed. If the school treats the lockers as student property, that increases students' expectations of locker privacy. If, however, written school policies make clear (both to students and their parents and guardians) that the student's possession of the locker is not exclusive and that the school retains ownership and control of the locker, a student's expectations of privacy in use of the locker will be lessened.

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[17] *See* R. J. Davis, Annotation, *Validity, Under Federal Constitution, of Search Conducted As Condition of Entering Public Building*, 53 A.L.R. Fed. 888.

See Commonwealth v. Carey, 407 Mass. 528, 554 N.E.2d 1199 (1990) (assistant principal called police after he was told by a teacher who heard that a student brought a gun to school, and then school officials searched the student's locker for the gun, and found it, while police questioned student); *Commonwealth v. Snyder*, 413 Mass. 521, 597 N.E.2d 1363 (1992) (upholding warrantless locker search where school principal acted on information from a student that the subject tried to sell him drugs and had placed the drugs in a bookbag); *Coronado v. State*, 806 S.W.2d 302 (Tex. App. Texarkana 1991), *rev'd*, 835 S.W.2d 636 (Tex. Crim. App. 1992); *In Interest of Isiah B.*, 500 N.W.2d 637 (Wis. 1993), *cert. denied, Isiah B. v. Wis.*, 510 U.S. 884 (1993) (school policy and notices to students retain lockers as school property in which students cannot have expectation of privacy and random search revealing a gun and cocaine was reasonable); *In re Joseph G.*, 32 Cal. App. 4th 1735 (1995) (search of student locker for handgun was prompted by information from the mother of another student and school official saw student placing bookbag in his locker); *In the Interest of Dumas*, 357 Pa. Super. 294, 515 A.2d 984 (1986) (invalidating search of student locker for cigarettes, as unjustified at the onset); *R.D.L. v. State*, 499 So. 2d 31 (Fla. Dist. Ct. App. 2d Dist. 1986) (upholding search of locker by assistant principal for stolen meal tickets where student was seen in possession of articles from area where the meal tickets were kept); *S.C. v. State*, 583 So. 2d 188 (Miss. 1991) (student has expectation of privacy in locker, but when assistant principal, acting on informant's tip, asked student to come from class and open his locker, and two guns were found, search was ruled proper); *Singleton v. Bd. of Educ. USD 500*, 894 F. Supp. 386 (D. Kan. 1995) (factors supporting the search included informant's statement that student had stolen large amount of money, and school policy statement that the student's possession of locker was not exclusive); *State v. Brooks*, 43 Wash. App. 560, 718 P.2d 837 (1986) (upholding search of student locker, and specifically a metal box in it, where school officials had tips that student was dealing in drugs); *State v. Joseph T.*, 336 S.E.2d 728 (W. Va. 1985) (upholding search by assistant principal who smelled alcohol on student's breath, and after questioning student, searched student's locker for alcohol but found cigarette making paraphernalia instead); *State v. Slattery*, 56 Wash. App. 820, 787 P.2d 932 (1990) (upholding school officials' search first of student locker, which did not reveal drugs, then student's car trunk and a locked briefcase, which did reveal drugs, after informant told them that student was dealing in drugs from school parking lot). *See also State v. Michael G.*, 106 N.M. 644, 748 P.2d 17 (Ct. App. 1987).

D. Strip Searches[18]

A "strip search" is highly intrusive of privacy rights. *See generally, Taylor v. Commonwealth*, 28 Va. App. 638, 507 S.E.2d 661 (1998) (strip search prohibited); *Gilmore v. Commonwealth*, 27 Va. App. 320, 498 S.E.2d 464 (1998) (body cavity search prohibited). In at least one case cited by the United States Supreme Court in a footnote in *New Jersey v. T.L.O.*, a court expressly held that a higher standard of justification (approaching full probable cause) applies where a search is "highly intrusive." *See M. v. Anker*, 607 F.2d 588, 589 (2d Cir. 1979). The *Anker* case

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[18]*See* Va. Code § 19.2-59.1. *See also* J. H. Derrick, Annotation, *Fourth Amendment As Prohibiting Strip Searches of Arrestees or Pretrial Detainees*, 78 A.L.R. Fed. 201.

involved a "strip search" of a female student for some unidentified stolen object. Further, in *T.L.O.*, the United States Supreme Court expressly warned that the scope of a search conducted in school must not be "excessively intrusive in light of . . . the nature of the infraction." 105 S. Ct. at 733. Some states, through legislation, have banned strip searches in the school context. Courts are mixed in approving the legality of strip searches.[19] *See Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991) (upholding strip search of student suspected of drug possession, where student informants claimed subject possessed drugs, locker search found nothing, and the female student was searched by a female official in the presence of another female school employee); *State ex rel. Galford v. Mark Anthony B.*, 189 W. Va. 538, 433 S.E.2d 41 (1993) (invalidating as too intrusive under the circumstances the search of a 14 year old suspected of stealing $100 from a teacher's purse); *Cornfield v. Consolidated High School Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993) (upholding the action of school officials who suspected a 16 year old student of "crotching" drugs and ordered him to change into a gym uniform while they searched his street clothes in a search which occurred in a locked locker room, after the student was reported to be dealing in and using drugs, and had admitted to "crotching" drugs previously when his mother's house was searched); *Cales v. Howell Public Schools*, 635 F. Supp. 454 (E.D. Mich. 1985) (invalidating search of female tenth grader by female assistant principal in the presence of a female security guard where student was told to strip to her underwear); *Oliver by Hines v. McClung*, 919 F. Supp. 1206 (N.D. Ind. 1995) (denying teachers immunity from liability after they strip searched seventh grade girls to recover $4.50).

E. Bookbag Searches

Students can have a legitimate expectation of privacy in their bookbags and backpacks. *DesRoches by DesRoches v. Caprio*, 156 F.3d 571 (4th Cir. 1998). As the United States Supreme Court noted in *T.L.O.*, "schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds." *Id.* at 339. Searches of such items as bookbags and backpacks should either be supported at their inception by "individualized suspicion" or be conducted pursuant to a neutral, blanket screening policy wherein "the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.'" *Id.* at 342 n.8 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)). *See Berry v. State*, 561 N.E.2d 832 (Ind. Ct. App. 1990); *F.P. v. State*, 528 So. 2d 1253 (Fla. Dist.

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[19]For example, the New Jersey Supreme Court has strongly criticized the use of strip searches in schools, saying: "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under 'settled indisputable principles of law.'" *State in Interest of T.L.O.*, 94 N.J. 331, 344 n.6 (1983), quoting from *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

Ct. App. 1988); *In re Devon T.*, 85 Md. App. 674, 584 A.2d 1287 (1991); *Irby v. State*, 751 S.W.2d 670 (Tex. App. Eastland 1988); *In re Appeal in Pima County Juvenile Action*, 152 Ariz. 431, 733 P.2d. 316 (Ct. App. 1987); *In re Ronnie H.*, 198 A.D.2d 415, 603 N.Y.S.2d 579 (1993); *People in Interest of P.E.A.*, 754 P.2d 382 (Colo. 1988).

F. Searches of Automobiles

Vehicles, unlike lockers, are not school property. They are often, however, parked on school property where parking may be made a privilege, rather than a right, and where consent to vehicle search may be made a condition for obtaining a parking permit.

G. Random Drug Testing[20]

In *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), the United States Supreme Court upheld a school division's random drug testing program of student athletes. The school, in response to an increasing drug problem, had developed special classes and speakers' programs regarding the problems of drug abuse. Despite these efforts, students continued to glamorize drug use and classroom disruptions increased three-fold. Parent-teacher meetings provided unanimous approval for the random drug-testing of student athletes. The program was upheld (6-3) by the United States Supreme Court because it was narrowly tailored to protect students who choose to play sports and the "role model" effect of student athletes' drug use is important in deterring drug use among children. *See also Miller v. Wilkes*, 172 F.3d 547 (8th Cir. 1999) (upholding under Fourth and Fourteenth Amendments a policy of random urine testing of students for the presence of controlled substances and alcohol, with disqualification from extra activities as a sanction for refusal to submit to a test or for testing positive); *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998), *reh'g, en banc, denied*, 139 F.3d 571 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 68 (1998) (upholding school district policy requiring random drug tests for all students participating in extracurricular activities); *Willis by Willis v. Anderson Community Sch. Corp.*, 158 F.3d 415 (7th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1254 (1999) (overturning as violative of the Fourth Amendment a school division's policy that required drug testing of all suspended students, regardless of their offense).

H. Use of Trained Dogs to Detect Narcotics[21]

In *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637 (1983), the United States Supreme Court held that the use by law enforcement officers of a drug-detector dog to sniff the *exterior surface of a container* was not a search. *See also U.S. v. Jeffus*, 22 F.3d 554 (4th Cir. 1994). Nevertheless, use of drug sniffing dogs in schools requires planning and sensitivity because dog

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[20] *See* Kathleen M. Door, J.D., Annotation, *Validity, Under Federal Constitution of Regulations. Rules, or Statues Allowing Drug Testing of Students*, 87 A.L.R.Fed. 148.

[21] *See generally* B. L. Porto, Annotation, *Use of Trained Dog to Detect Narcotics or Drugs as Unreasonable Search in Violation of Fourth Amendment*, 150 A.L.R. Fed. 399.

sniffs can constitute searches where dogs are used to sniff persons. A dog handler should not allow a scent dog to come into direct contact with students, except as part of an assembly or classroom demonstration where the handler is certain that the dog's adverse to students, and the students' interaction with the dog can be controlled. *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980) (teams of drug sniffing dogs sniffing closely to students, without administrators having individualized suspicion, violated students' privacy because of threatening presence of animals). One court has found that allowing the trained dog to sniff the air around students' persons and desks does not violate the students' right to privacy. *See Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part and remanded in part*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981) (non-intrusive "search" by drug-trained dogs was not a "search" under the Fourth Amendment, but was preliminary to an individualized search). This decision (*Renfrow*) has, however, been severely criticized. *See Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) (use of drug-trained dogs to closely sniff students violated Fourth Amendment, but use of dogs to sniff automobiles and lockers did not). *See also Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981) (upholding use of dogs in the exploratory sniffing of lockers, the school having given notice at the beginning of the year that the lockers were joint student/school property and would be opened periodically by school officials); *Commonwealth v. Cass*, 709 A.2d 350, 352-3, 362 (Pa. 1998) (upholding use of drug-detection dogs to conduct a schoolwide locker inspection where the dogs were a screening device to determine which of the 2,000 school lockers would be opened based upon the individualized reasonable suspicion created by the trained dog's reaction).