

APPENDIX 1

**Original “Attorney General Guidelines Regarding School Searches”
(1985)**



IRWIN I. KIMMELMAN
ATTORNEY GENERAL

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
RICHARD J. HUGHES JUSTICE COMPLEX
CN 080
TRENTON, N. J. 08625
609 292-4919

TO: ALL NEW JERSEY
PUBLIC SCHOOL TEACHERS
AND ADMINISTRATORS

Re: Attorney General's Guidelines
Regarding School Searches

Recently, the United States Supreme Court decided a landmark case dealing with the sensitive issue of searches conducted by teachers or school officials. This particular case, New Jersey v. T.L.O., dealt with a search of a student which took place in the Piscataway High School in Middlesex County. The high Court's opinion thus focused national attention on our State's school search policy. While the underlying issue is truly one that is national in scope, it is only fitting that New Jersey continue to lead the way in developing and implementing a consistent and coherent policy governing the use of school searches. This letter is intended to more fully explain and explore the test of "reasonableness" recently adopted by the United States Supreme Court.

A. Teachers and School Administrators Must Learn and Respect the Requirements of the Constitution.

In T.L.O., the Court concluded that the prohibition against unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution does indeed apply to students while on school grounds. This conclusion can lead to certain collateral consequences which public school teachers and school administrators should carefully consider before undertaking any search.

Evidence of a crime revealed during an improper search, for example, may be subject to the "exclusionary rule," which is a court-created doctrine which often requires the suppression of otherwise probative evidence from a criminal trial. In other words, probative and reliable evidence of guilt or delinquency may be lost as a result of the manner in which the evidence was discovered. A school official's unreasonable

error in judgment, therefore, may unwittingly interfere with the orderly administration of the criminal and juvenile justice systems; systems in which we all have a stake and a responsibility to support.

Furthermore, an illegal search may in certain circumstances subject school officials to a civil suit for compensatory and punitive damages. In other words, a student who has been aggrieved by an unreasonable search, one that is not conducted in good faith, may be tempted to sue school officials in an effort to vindicate his or her constitutional rights. Because such litigation is invariably time-consuming and expensive, school officials will obviously want to know how to recognize and avoid situations where such civil liability is likely to be imposed.

Finally, and most importantly, school officials must learn and respect the bounds of constitutional behavior if they are to remain faithful to their duties as teachers and role models. Our state and federal constitutions, and the Bill of Rights in particular, are not merely empty words to be memorized by rote from the pages of a social studies textbook. Rather, they set forth the basic tenets which limit the power of government in its dealings with private citizens. Our public schools often provide a young citizen with his or her first exposure to the practical workings of our government and the administration of justice. Schools thus emerge as a particularly appropriate forum in which to demonstrate how our system of government was intended to work. Obviously, any teacher or school official who chooses to ignore the requirements of the Constitution is providing an unacceptable example and lesson to the students in his or her charge.

B. School Searches Entail a Balancing of Competing Interests.

The United States Supreme Court employed a balancing test to weigh the constitutional rights of students against the need for school officials to maintain order and discipline. In order to apply the Court's balancing approach in practice, it is first necessary to understand the principles and interests which are arrayed on opposite sides of the imaginary scales. First, we will briefly examine the scope and nature of students' Fourth Amendment rights, that is, those factors which would ordinarily militate against undertaking a search.

As noted above, the Fourth Amendment is an essential part of the Bill of Rights, which imposes definite limits on the permissible conduct of all government officials. Public school teachers and administrators, while obviously not law enforcement officers in the traditional sense, are nonetheless deemed

to be "state actors" whose conduct is subject to the requirements of the federal Constitution. The Fourth Amendment thus provides all citizens, including school children, with certain protections as against the actions of government employees, including their teachers and school administrators.

The great number of search and seizure cases which have been decided in recent years discuss a number of inter-related rights and protections, all of which have traditionally fallen under the broad umbrella of the Fourth Amendment. Some of these Fourth Amendment rights, however, were designed specifically to protect the interests of those who are accused by law enforcement with the commission of a crime, and therefore would not ordinarily apply in a schoolhouse setting. It is necessary to briefly examine those parts of the law of search and seizure which do not apply to school officials; otherwise, teachers and administrators might mistakenly be discouraged from engaging in conduct which has always been and continues to be proper, and which is unaffected by the Court's decision in T.L.O.

The Fourth Amendment, for example, has traditionally provided citizens with a right of liberty and freedom of movement. Some have described this as a right to be left alone. The "arrest" of an accused is the most common example of government action, undertaken by police, which interferes with a citizen's liberty and freedom of movement.

Under ordinary circumstances, this particular right has little applicability to schoolchildren. For one thing, our State's compulsory school attendance laws make clear that school-age children, unlike adults, are not free to come and go as they please. By the same token, a school official may require a student to stay after class, go to the principal's office or forego attending an event or extracurricular activity. Such routine acts of discipline simply do not amount to restraints of liberty which rise to the level of constitutional significance. For many of the same reasons, it is equally obvious that school officials may question students as to possible rule infractions without the necessity of first administering the so-called Miranda warnings, which must ordinarily precede all custodial interrogations conducted by law enforcement.

The Fourth Amendment has also been viewed as providing citizens with a right to enjoy the use and possession of their personal belongings, free from government interference. The "seizure" of an item by police is a common example of law enforcement conduct which interferes with a citizen's right to enjoy and make use of personal property. Again, this particular right has limited applicability in the schoolhouse. School

officials, for example, may promulgate rules which legitimately restrict the use or possession of items which, under our adult criminal laws, are simply not prohibited as contraband. A school can, for example, prohibit students from possessing or smoking cigarettes or from playing radios. Furthermore, school officials may properly confiscate disruptive artifacts, even if they are not per se prohibited under a school's rules. It goes without saying, for example, that a teacher may "seize" a sheet of paper which has been fashioned into the shape of an airplane or a slingshot fashioned from an ordinary rubber band and paper clip, without in any way running afoul of the Constitution. (provided this seizure does not entail a search of private areas, which is discussed below).

The most important Fourth Amendment right, and the one which lies at the heart of the T.L.O. decision, is the right of privacy. Indeed, it is well-recognized that the basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals, including schoolchildren, against arbitrary invasions by government officials. In this way, the Constitution imposes definite limits on the ability of teachers and school administrators to peek, poke and pry into a student's private effects, such as purses, handbags, clothing, briefcases, and knapsacks. School officials must therefore respect a student's legitimate and reasonable expectations of privacy.

It is against this constitutionally-guaranteed right of privacy that the right of school officials to conduct searches must be measured, since the term "search" necessarily implies an act of peeking, poking or prying into a closed area or opaque container. On the other side of the scales, of course, rests the undeniable and compelling right of all students, teachers and administrators to work in a safe environment--one that is free from drugs and violence and which is conducive to education. In order to preserve such an environment, school officials have a substantial interest in maintaining discipline in the classroom and on school grounds.

The United States Supreme Court recognized that maintaining order and discipline in the classroom has never been an easy task, especially in view of the recent proliferation of drugs and violence which has troubled so many schools across the country. Even in schools which have been spared the most serious disciplinary problems, the preservation of order and a proper educational environment often requires close supervision of schoolchildren. The New Jersey Legislature, in this vein, has already given school officials broad authority to maintain order, safety and discipline.

Events calling for discipline, moreover, often require prompt, effective action. We have all learned from personal experience that breaches of decorum and discipline can be contagious; thus, even minor infractions or breaches of technical rules can quickly work to disrupt a school environment. For this reason, the Supreme Court has recognized that a school may enforce all of its rules and code of conduct, and not just those rules which are designed to deter the most severe forms of misconduct, such as violence and drug-abuse.

Finally, the Court recognized that enforcing rules and preserving decorum require a high degree of flexibility. Obviously, school officials will want to maintain the informality which characterizes student-teacher relationships. Teachers in this State are, first and foremost, educators; they are not, nor should they be viewed as, law enforcement officers; nor should they be deemed to be students' "adversaries."

C. The Standard of Reasonableness:How to Apply it in Practice.

After balancing these competing interests, the United States Supreme Court concluded that, while the Fourth Amendment applies to their conduct, teachers and school administrators need not follow the strict procedures which govern police-initiated searches. School officials need not, for example, obtain a search warrant from a judge, which is usually required before police can conduct a search. Nor is it necessary that a search conducted by a school official be based on probable cause to believe that a crime has been or is being committed. The New Jersey Supreme Court had earlier observed that probable cause is an "elusive concept," incapable of being precisely defined. Because teachers and school administrators are deemed to be educators, and not experienced police officers, they need not worry about the technical niceties as to what constitutes probable cause, since the Court has adopted a different and more flexible standard of justification.

The legality of a search conducted by school officials depends simply on the reasonableness of the search under all of the attending circumstances known to the school official undertaking the search. The cornerstone of reasonableness, moreover, is rudimentary common sense. Having just described the competing policy considerations involved, it should not be difficult in practice for conscientious school officials to regulate their conduct within the bounds of reasonableness and common sense.

Although the notion of "common sense" defies our best efforts to define it within the confines of a strict set of rules, or to reduce it to the head of a pin, it is nonetheless possible to provide some meaningful guidelines. In order for

a search to be reasonable, for example, the school official must satisfy two separate inquiries: first, the intended search must be justified at its inception. In other words, the circumstances must be such as to justify some privacy intrusion at all. Second, and equally important, the actual search must be reasonable in its scope, duration and intensity, that is, the search should be no more intrusive than is reasonably necessary to accomplish its legitimate objective. In analyzing the problem, we will first discuss how to determine whether an intended search is reasonable at its inception.

Under ordinary circumstances, a search will be justified at its inception when the school official contemplating the search has reasonable grounds for suspecting that the intended search will reveal evidence that the student has violated or is violating either the law or the rules of the school. Again, the concept of "reasonable grounds" is founded on common sense. A school official will have reasonable grounds if he or she is aware of objective facts and information which, taken as a whole, would lead a reasonable person to suspect that a rule violation has occurred and that evidence of that infraction can be found in a certain place. A reasonably grounded suspicion is more than a mere hunch; rather, the school official should be able to articulate the factual basis for his or her suspicion.

In deciding whether reasonable grounds exist, the teacher or school administrator may consider all of the attending circumstances, including, but not limited to, the student's age, any history of previous violations, and his or her reputation, as well as the prevalence of the particular disciplinary problem in question. The attending facts and circumstances, moreover, should not be considered in artificial isolation, but rather should be viewed together, and taken as a whole. It is conceivable, for example, that a piece of information, viewed individually, might appear to be perfectly innocent, but when viewed in relation to other bits of information, might thereafter lead to a reasonable suspicion of wrongdoing.

Under this common sense approach, a school official does not require "direct evidence" that a purse or handbag, for example, contains evidence of an infraction. (An example of "direct evidence" would be a reliable statement made by another student and claiming that he or she had actually observed the suspected evidence inside of the purse or handbag). Rather, school officials are entitled to draw reasonable and logical inferences from all of the known facts and circumstances. Thus, if a student was observed to have been smoking in a restroom while in possession of a purse or handbag, a school official could reasonably infer that cigarettes

might be concealed in that purse or handbag, even though no one had actually witnessed the student place the cigarettes in that container.

By the same token, school officials are not bound by the technical rules of evidence, and need not be concerned, for example, with the "hearsay" rule. Instead, school officials may rely on information provided by others, even if done in confidence, provided that a reasonable person would credit the information as reliable. As a matter of practical common sense, the school official should consider the totality of the circumstances, including such factors as the credibility of the source of the information, based on past experience and reputation. A school official contemplating a search should be careful to scrutinize unattributed statements or information to make certain that they are not merely unsubstantiated rumors. The school official should also consider, as part of the totality of the circumstances, any other facts, statements and details which might corroborate (or contradict) the information at issue and which would thereby tend to make the source of that information seem more (or less) trustworthy and reliable.

It is critically important to recognize that the standard of reasonable grounds is not one which requires either absolute certainty or proof beyond a reasonable doubt. Nor does it require the level of proof necessary before which a school official could actually impose a disciplinary sanction. Consequently, a teacher or school administrator can entertain and act upon a perfectly reasonable suspicion which ultimately turns out to have been mistaken. With respect to the above illustration involving the student observed smoking in a restroom, for example, it may turn out that the observed cigarette was provided by another student. A school official's suspicion that additional cigarettes would be found in the student's handbag or purse might turn out to be mistaken, and a search might therefore fail to reveal such cigarettes. Even so, the initial suspicion giving rise to the search would have been entirely reasonable, and thus would survive constitutional scrutiny, based on an objective view of the facts known at the time the search was initiated. It is a fundamental principle of our law that an unreasonable search is not made good by what it fortuitously turns up. It is equally true that a search based on reasonable grounds at its inception is not made bad merely because it failed to uncover the suspected evidence. Were it otherwise, the legal standard would not be one of reasonable grounds, but rather would be one which approaches absolute certainty.

Ordinarily, a search should be based on an "individualized" suspicion, that is, a suspicion based on reasonable grounds to believe that the particular individual who is to be searched has violated the law or a school rule, and that evidence of the infraction will be found in his or her

possession. There are many conceivable instances, however, where a given search may be reasonable even in the absence of an individualized suspicion. In other words, a school official may develop and act upon a reasonably grounded suspicion of wrongdoing which, by its nature, is simply not limited to a single, specific individual or place. Consider, for example, the situation where a school official learns by means of reliable information that a knife-fight involving two unidentified individuals is taking place in a certain room. Upon his arrival, the school official acquires corroborative information which confirms that such a fight has indeed taken place, but the school official is nonetheless uncertain as to which two individuals among the several who are present were the actual armed combatants. If we assume further that none of the other witnesses will disclose the identity of the fighters or the location of the weapons, it may well be reasonable for the school official to require all of the students present to submit to a search. By the same token, if the school official is only provided with a reliable but generalized description of the actual combatants, the official may be justified in searching all of the individuals present who reasonably fit the generalized description.

Obviously, these examples are merely illustrations, and do not comprehensively set forth every conceivable situation where a search will be proper. Once again, these conclusions are based on a common sense balancing of the competing interests: the students' right of privacy as against the school officials' interest in maintaining order and safety.

Generally, however, a search which is not based on an individualized suspicion will be tolerated only if there are other safeguards to ensure that the school officials' conduct is reasonable and not arbitrary. Under no circumstances may a search be based on a school official's personal animosity towards an individual or group of students; nor may searches be based on such criteria as a student's race or ethnic origin. Invasions of privacy predicated on such impermissible and discriminatory criteria are blatantly contrary to the Constitution's fundamental guarantees, and cannot and will not be tolerated in this State.

Having established the grounds upon which a search may be initiated, it is next necessary to discuss the scope of the actual search, that is, the degree to which the teacher or school administrator may peer into a student's private belongings. A search will be permissible in its scope when it is 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 suspected infraction. Once again, the permissible scope of any search is bounded by the dictates of common sense.

Under this test, obviously, there must be some logical and reasonable connection between the thing or place to be searched and the item which is suspected to be found there. A school official's reasonable suspicion that a particular student had stolen a textbook, for example, would not justify a search of that student's purse if that container is simply too small or otherwise ill-suited to conceal the missing textbook.

Furthermore, a search should be no broader in scope, nor longer in duration, than is reasonably necessary to fulfill its legitimate objective. The physical intrusiveness of the search should thus be minimized so far as is practicable. One need not be a constitutional scholar to recognize that students should never be subjected to any conduct even approaching the intensity of a strip search, except in the most urgent, extraordinary and life-threatening situations, such as to seize an observed dangerous weapon or to secure the implements of an imminent suicide attempt. But even in the far less intrusive searches contemplated by T.L.O., conscientious teachers and school administrators should always carefully consider the emotional well-being of the student, and the risk that the discovery of implements of personal hygiene or other highly personal items might embarrass a sensitive adolescent.

Because every search should be geared to its legitimate objective, a search should ordinarily cease when the particular item or items being sought have been found and removed, provided, of course, there is no basis for continuing to search for other suspected items. Naturally, if a given search is based on a reasonably grounded suspicion that drugs will be found, the school official need not automatically stop upon the discovery of the first marijuana cigarette. Rather, the school official, as part of the initial search, may continue to look for other evidence of drugs in any place where such drugs or items might reasonably be concealed. The continuation of the search after the initial discovery of some incriminating evidence is justified by the initial suspicion that some drugs might be discovered.

If, on the other hand, the initial search was based on the suspicion that the student was in possession of a particular stolen textbook, the search should stop upon the discovery of that textbook, unless, based on all of the known circumstances, the school official has since developed a reasonable suspicion that the student is also in possession of other stolen items. Furthermore, if, during a search of reasonable scope, the school official unexpectedly discovers a different prohibited item or evidence of yet a different infraction, he may remove that item or evidence as well.

In a similar vein, the evidence or information discovered during the course of a reasonable search, when viewed in relation to other reliable facts and information known to the school official, may suddenly provide a reasoned basis for an entirely new suspicion of wrongdoing. If that occurs, the newly developed reasonable suspicion might, in turn, justify either a new search, or else a more expansive continuation of the initial one. Thus, for example, a school official who is reasonably searching a student's purse for cigarettes and who unexpectedly comes upon a package of cigarette rolling papers or a small glass pipe might at that point develop a reasonable suspicion that the purse may contain marijuana in addition to conventional cigarettes. In such event, the school official could thereafter continue to search for both cigarettes and marijuana. By the same token, a reasonable search which reveals evidence which, when viewed in relation to other known facts, leads to a reasonable concern for safety, the teacher or school administrator may continue to search for any item which could endanger the safety of the school official or others. But in any case, the scope of this new or expanded search must, of course, continue to be reasonably related and limited in scope to its new or modified objective(s).

D. Summary

1. A "search" entails conduct by a public school official which involves peeking, poking or prying into a private area or closed, opaque container, such as a purse, knapsack, briefcase or clothing.
2. All searches entail a balancing of competing interests: a student's Fourth Amendment right of privacy and security, weighed against the interest of school officials in maintaining order, discipline and safety.
3. Any teacher or school official who seeks to conduct a search of a student and his or her personal possessions must first satisfy the requirements of reasonableness and common sense.
4. In order to survive constitutional scrutiny, a search must be reasonable not only at its inception, but also in its scope.
 - a) 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) A search will be reasonable in its scope and intensity where it is reasonably related to the objective of the search and is not excessively intrusive in light of the age and sex of the student and the nature of the suspected infraction.

5. Any doubts which a school official may have as to the propriety of a contemplated search should ordinarily be resolved in favor of respecting the student's privacy interests.



IRWIN I. KIMMELMAN
Attorney General