

## 12. EXIGENT CIRCUMSTANCES

### *12.1. General Considerations.*

Government officials may conduct a warrantless search or seizure when an emergency justifies the intrusion upon a citizen's Fourth Amendment rights. The so-called "exigent circumstances" exception to the warrant requirement is really a collection of exceptions, all reflecting the general rule that the Fourth Amendment only prohibits unreasonable governmental action. Courts recognize that in a number of situations, police must respond immediately and without an opportunity to seek prior permission from a judge.

The exigent circumstance cases can be divided into two general types: those that involve the enforcement of the criminal law, and those that involve the community caretaking function of a police department. (Most people do not realize that police officers spend much if not most of their time responding to calls for service, rather than conducting investigations or actively enforcing criminal laws.) Examples of the first type of exigent circumstances (involving the enforcement of the criminal law) include situations where suspected evidence of a crime is an imminent danger of being lost or destroyed; where police are engaged in a "hot pursuit" of a suspect; or where a suspect is likely to flee before police can obtain a warrant.

The community caretaking type of exigent circumstance arises in situations where the safety of law enforcement officers or members of the general public is threatened. Under the so-called "emergency aid" doctrine, for example, police are allowed to enter a private premises and conduct a search without a warrant where they reasonably believe that a person is in need of assistance or that there is a need to prevent serious harm to that person or another.

To fall within this "non-criminal" type of exigent circumstance exception to the warrant requirement, (1) police must reasonably believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property, (2) the search must not be primarily motivated by an intent to arrest and seize evidence, and (3) there must be a reasonable basis to associate the emergency with the area or place to be searched. In determining whether an emergency situation exists that would excuse police from having to obtain warrant before entering a premises or otherwise conducting a search, courts use what is known as an "objective" test. This means that courts will consider whether a reasonable and prudent person would have perceived the need to take swift action to prevent death or injury.

It seems likely that these same principles would apply to school officials who must also perform a caretaking function and are responsible for the safety and welfare of students in their charge. Thus, school officials are permitted, if not required, to render aid to a child in distress, to respond to cries for help, and to enter rooms or lockers in response to a fire or smoke.

When police lawfully enter a residence or conduct a warrantless search under the exigent circumstances exception, they may seize any object or item they may come upon where it is immediately apparent that the object is contraband or evidence of a crime. Because the exigency authorizes police to be present or “legitimately on the premises,” the inadvertent discovery of evidence of a crime falls under the “plain view” exception to the warrant requirement. Once again, these basic principles would also apply to school officials, so that a school official, for example, who opens a smoking locker in response to a smoldering fire or “smoke bomb” would be permitted to seize drugs observed in the locker provided that the official immediately recognized the incriminating character of the evidence while legitimately responding to the fire. (For a more complete discussion of the “plain view” doctrine, see Chapter 11.)

It must be noted that the second general category of exigent circumstances, relating to suspected violations of criminal law and the need to preserve incriminating evidence, would seem to have comparatively little application in the context of searches conducted by school officials. After all, school officials who are acting independently and on their own authority to maintain order, safety, and discipline are not in any event required to obtain a warrant before conducting a search. Hence, there is no need for an “exception” to the warrant requirement. If a school official has reasonable grounds to believe that evidence of a crime or school rule infraction will be found in a particular place, the official may, under the authority of New Jersey v. T.L.O., immediately proceed to conduct a warrantless search to find and take control of that evidence, whether or not an “emergency” situation exists. (Presumably, any item that would, by its very presence, create an emergency situation, that is, threaten the health, safety, or well-being of any student or faculty member, would, by virtue of its inherent dangerousness, constitute a violation of school rules.) Thus, as a general proposition, school officials need not be concerned with meeting all of the traditional elements of the exigent circumstance exception.

This is not to suggest that the question whether exigency exists is irrelevant even with respect to a search conducted by school officials. The courts in New Jersey have traditionally afforded government actors greater leeway in conducting searches for objects that are inherently dangerous, such as firearms. In State v. Esteves, 93 N.J. 498 (1983), the New Jersey Supreme Court “stressed the significance of weapons when these

are the object of the search.” 93 N.J. at 505, citing to State v. Alston, 88 N.J. 211, 234 (1981). See also State v. Wright, 213 N.J. Super. 291, 295 (App. Div. 1986) (analyzing United States Supreme Court cases that had “highlighted the special significance of the existence of firearms and the threat to public safety which they represent”). Thus, it is conceivable that reviewing courts will be more likely to defer to the reasoned judgment of school officials in cases involving a search for firearms or other inherently dangerous objects. In other words, in a close case, reviewing courts are less likely to second-guess a school official and find that the official did not have reasonable grounds to conduct a search where the school official acted in a good-faith belief that the search was necessary to reveal and remove a firearm or other inherently dangerous object that posed a risk of harm to children.

### *12.2. Protection of Evidence.*

Police may conduct a warrantless search to preserve evidence of a crime when they reasonably believe that unless they act immediately and without a warrant, evidence is in imminent risk of being removed or destroyed. See Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973). Courts recognize, moreover, that some types of evidence are easily destroyed, such as narcotics, which can be flushed down a drain or toilet. In all cases, however, courts will carefully examine whether the police have less intrusive options to respond to the situation and to protect the evidence from loss or destruction. Thus, for example, police officers are strongly encouraged whenever possible to secure the scene or premises to prevent the destruction or removal of evidence and then to obtain a warrant, as opposed to conducting a warrantless search. See Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984).

In the specific context of a schoolhouse and lockers, where police have probable cause to believe that drugs or firearms or other weapons will be found in a particular place, the better practice is to secure the locker (i.e., replace the lock or secure the latch with a plastic cable-tie so that the student assigned to the locker cannot retrieve his or her possessions), or, better still, stand guard over the locker until a regular or telephonic search warrant can be issued by a judge.

Note that the risk that the student might enter his or her locker to remove or destroy evidence is especially remote if the student is in police custody, although courts will consider the risk that other students may enter the locker to remove or destroy evidence. That risk is somewhat more pronounced where a student has been publicly taken into custody, since, in that event, other students will know that the arrested student is not able to protect any drugs, weapons, or drug-related cash that may be stored within the locker. Compare State v. Colvin, 123 N.J. 428, 435 (1991)

(acknowledging that a public arrest of a suspected drug dealer creates a risk that others may try to steal narcotics believed to be stored in the drug dealer's parked automobile). It bears repeating, however, that should police officers choose to conduct a warrantless search under the exigent circumstances exception, they may be required to show why they could not have used a less intrusive tactic (such a standing guard over the locker) to prevent the imminent destruction or removal of the contraband until a warrant could be obtained.

Furthermore, police should never ask school officials to open a locker to retrieve suspected contraband or evidence of a crime. For one thing, it is inappropriate to bring school officials unnecessarily into the "chain of custody," and it is especially inappropriate to ask school officials to handle a firearm or other dangerous object, such as an explosives device. Police are far better trained and equipped to deal with these potentially dangerous situations. In any event, and as noted throughout this Manual, if a police officer were to direct or request a school official to conduct a search or to seize an item, the school official will be deemed to be an "agent" of law enforcement, and the legality of the search or seizure will be determined by applying the stricter rules that govern searches conducted by police. Note, however, that it would not be inappropriate for police to ask school officials to stand guard over a closed locker or to take other steps to prevent anyone from gaining access to the locker until police can arrive at the scene or return to the scene with a warrant.

### *12.3. Explosives and Bomb Threats.*

It is well-settled that where police reasonably believe that the safety of law enforcement officers or the general public is threatened, they may enter a private residence and conduct a warrantless search. See Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). The scope of any such warrantless search may be "as broad as may reasonably be necessary to prevent the dangers" inherent in the situation. Id. at 299. Notably, police are authorized to search any place where they reasonably believe that inherently dangerous items are present. See e.g., United States v. Johnson, 9 F.3d 506 (6th Cir. 1993), 512 U.S. 1212, cert. denied 114 S.Ct. 2690, 129 L.Ed.2d 821 (1994) (police conducted a valid warrantless search where they reasonably believed that there was a bona fide threat to public safety due to the potential presence of an explosive device on the premises); United States v. Boettger, 71 F.3d 1410 (8th Cir. 1995) (repeated warrantless search of an apartment over a two-day period was reasonable where police did not have a safe means of disposing an explosive device; the exigency created by the device did not dissipate until the device was safely removed).

Unfortunately, it is not uncommon for persons to call in bomb threats to schools. Although this subject goes well beyond the purview of this Manual, school districts are strongly encouraged to work with local police departments and county prosecutors to adopt and implement policies to deal with these disruptive and potentially catastrophic situations. It is essential that school officials consider the most appropriate response to these kinds of situations before a crisis develops.

In 1995, the Union County Prosecutor's Office developed a monograph entitled "*Bomb Threat Management Planning for Schools*," which sets forth detailed guidelines for how school officials can handle a bomb threat. Appropriate school authorities and administrators are strongly urged to review this monograph, which follows nationally-recognized standards and practices that have been developed and adopted by the Federal Bureau of Investigation's Bomb Data Center and the Federal Bureau of Alcohol, Tobacco and Firearms.

For the limited purposes of this Manual, it should be noted that a sweep search for explosives, as described in the Union County bomb threat planning monograph, may not even constitute a "search" for Fourth Amendment purposes, since the act of moving from room-to-room within a school looking for suspicious packages or misplaced objects does not necessarily invade any protected privacy interests. (Obviously, school authorities and even police are permitted to patrol hallways and to enter classrooms and other places within the school and are permitted to closely observe any objects or packages that are in "plain view." See Chapter 9.)

But even where a bomb sweep involves actually opening drawers, desks, or lockers — conduct that clearly qualifies as a "search" for Fourth Amendment purposes — such warrantless inspections are permissible under the exigent circumstances exception to the warrant requirement provided that the search is conducted in a manner reasonably designed to reveal an explosive device mentioned in a bomb threat, and further provided that this type of inspection is not used as a pretext or subterfuge to search for other items. (Note that if during such an inspection police inadvertently come upon objects that are immediately recognized as contraband or evidence of a crime, such as drugs or drug paraphernalia, those objects may lawfully be seized. See Chapter 11 for a more detailed discussion of the "plain view" doctrine.)