3. SEARCHES BASED ON INDIVIDUALIZED SUSPICION

School officials will often want to conduct a search (i.e., open a locker or inspect the contents of a student's bookbag) based upon a suspicion that a particular student has committed or is committing an offense or infraction, and the belief that the search of the particular location will reveal evidence of that offense or infraction. This kind of individualized search must be kept legally and analytically distinct from a search where school officials do not have reason to believe that evidence will be found in a specific locker or other particularly identified location. The law governing more generalized searches and inspections, which are sometimes called "sweep," "dragnet," or "blanket" searches, such as a plan to periodically open every locker or to have a drug-detector canine sweep through the hallways in search of drugs or firearms, is discussed in Chapter 4 of this Manual.

3.1. School Searches Entail a Balancing of Competing Interests.

The United States Supreme Court in the landmark case of New Jersey v. T.L.O. employed a balancing test, weighing the constitutional rights of students against the need for school officials to maintain order and discipline. The most important Fourth Amendment right, and the one that lies at the heart of the T.L.O. decision, is the right of privacy. It is well-recognized that one of the primary purposes of the Fourth Amendment is to safeguard the privacy and security of individuals — including schoolchildren — against arbitrary invasion by government officials. In this way, the Constitution imposes definite limits on the ability of school administrators and teachers to peek, poke, or pry into a student's private effects, such as purses/handbags, clothing, briefcases, backpacks, and even lockers and desks that are technically owned by the school district. School officials, in other words, must always respect a student's legitimate and reasonable expectations of privacy.

It is against this constitutionally-guaranteed right of privacy that the of right of school officials to conduct searches must be balanced, since a "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 of drugs, weapons, and violence, and that is conducive to education. See N.J.A.C. 6:8-2.1. 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 in T.L.O. recognized that maintaining order and discipline in the classroom has never been an easy task and has become especially

difficult in view of the recent proliferation of drugs and violence. Even in schools that have been spared the most serious security problems, the preservation of order and of a proper educational environment often requires close supervision of schoolchildren. The New Jersey Legislature has already given school officials broad authority to maintain order, safety, and discipline. (See Chapter 2.12.)

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. Even minor infractions or breaches of technical rules can quickly work to disrupt a school environment. (In the broader context of preserving safe neighborhoods, criminologists today often refer to the so-called "broken window" effect: the notion that the failure by government officials to respond promptly and decisively to comparatively minor problems or transgressions signals a lack of interest, thereby permitting if not encouraging more serious offenses and a further deterioration of the quality of life in the affected neighborhood.) For this reason, the United States Supreme Court in T.L.O. expressly recognized that a school may enforce *all* of its rules and code of conduct, not just those rules designed to deter the most severe forms of misconduct, such as violence and the use of weapons, substance abuse, and drug trafficking.

Finally, the Court in T.L.O. recognized that enforcing rules and preserving decorum require a high degree of flexibility. School officials will always want to maintain the informality that characterizes student-teacher relationship. Teachers in New Jersey are — first and foremost — educators. They are not, nor should they be viewed as, adjunct law enforcement officers. Nor should they be deemed to be student "adversaries."

3.2. Applying the Standard of Reasonableness Established by the United States Supreme Court.

While children assuredly do not "shed their constitutional rights ... at the schoolhouse gate," Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), the United States Supreme Court recently reaffirmed that the nature of those rights is what is appropriate for children in school. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2395, 132 L.Ed 2d. 564, 580 (1995). After balancing the competing interests, the United States Supreme Court in T.L.O. concluded that while the Fourth Amendment applies to searches conducted by teachers and school administrators, these non-law enforcement officials need not follow the strict procedures that 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. The Court concluded that the warrant

requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures that are needed in a school. 105 S.Ct. at 742.

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. See State v. Waltz, 61 N.J. 83, 87 (1972). 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 Supreme Court has adopted a different and more flexible standard to justify searches conducted by school officials.

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.

In order for a search to be reasonable, for example, a school official must satisfy two separate inquires: First, the intended search must be justified at its inception. This means that 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. The search should be no more intrusive than is reasonably necessary to accomplish its legitimate objective. School officials conducting a search based upon a particularized suspicion of wrongdoing are not allowed to conduct a "fishing expedition."

In analyzing this two-part legal standard, we will first discuss how to determine whether an intended search is reasonable at its inception.

A. When Can School Officials Initiate a Search? Under ordinary circumstances, a search would 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. 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 that — 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.

The decision to initiate a search entails a four-step analytical process. First, the school official must have reasonable grounds to believe that a law or school rule has been broken. Second, the official must have reasonable grounds to believe that a particular student (or group of students whose identities are known) has committed the violation or infraction. Third, the official must have reasonable grounds to believe that the violation or infraction is of a kind for which there may be physical evidence. (This physical evidence — the object of the search — may be in the form of *contraband* [e.g., drugs, alcohol, explosives or fireworks, or prohibited weapons]; an *instrumentality* used to commit the violation [e.g., a weapon used to assault or threaten another or burglar tools]; the *fruits* or spoils of an offense [e.g., the cash proceeds of a drug sale, gambling profits, or a stolen item]; or other evidence, sometimes referred to in the law as "mere" evidence [e.g., "crib" notes or plagiarized reports, gambling slips, hate pamphlets, "IOU's" related to drug or gambling debts, or other records of an offense or school rule violation].)

Finally, the school official must have reasonable grounds to believe that the sought-after evidence — the type of which the official should have in mind *before* initiating the search — would be found in a particular place associated with the student(s) suspected of committing the violation or infraction.

(1) The "Totality of the Circumstances." 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 in artificial isolation 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. The whole, in other words, may be greater than the sum of its parts.

(2) Direct versus Circumstantial Evidence. 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 include an observation by a school official that the student had placed contraband in the handbag, or a reliable statement made by another student 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.

This is sometimes referred to as "circumstantial evidence." Despite popular misconceptions about the law, circumstantial evidence can be compelling, and is often used in court to establish proof beyond a reasonable doubt — a standard of proof far more demanding than probable cause or reasonable suspicion. Thus, if a student was observed to have been smoking in a lavatory 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, if a student is determined to be under the influence of alcohol or drugs (see Chapter 13), it would be reasonable to infer that alcohol or controlled substances would be found in the student's locker, even though it is equally conceivable that the student came to school already in an inebriated state or had obtained the intoxicating substance from another student rather than from a stash of drugs or alcohol kept in the student's locker.

(3) Relying on Hearsay. 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 "second hand" information provided by others, even if done in confidence, provided that a reasonable person would credit the information as reliable. (See Chapter 5 for a more detailed discussion about the use of confidential sources of information.)

In State v. Moore, 254 N.J. Super. 295 (App. Div. 1992), for example, the court had little difficulty in concluding that a report by a specific student to a guidance counsellor that the defendant possessed a controlled dangerous substance provided reasonable grounds for the assistant principal to conduct a search of a bookbag believed to belong to the defendant, especially since the information was bolstered by the fact that the assistant principal knew that the defendant had previously been disciplined for possessing a partially-burned marijuana cigarette that had been found in defendant's jacket pocket. 254 N.J. Super. at 296, 299.

So too, in State v. Biancamano, 284 N.J. Super. 654 (App. Div. 1995, certif. denied 143 N.J. 516 (1996), the court, without elaboration, held that when the vice-principal was "informed by a confidential informant that [a particular student] was distributing drugs," the vice-principal "certainly had a reasonable suspicion that [the identified student] might have such drugs in his possession." 284 N.J. Super. at 660. The court in its published decision did not probe deeply into the background of the confidential informant or how the informant had become aware of the drug-distribution scheme.

As a matter of practical common sense, a 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 that might corroborate (or contradict) the information at issue and that would thereby tend to make the source of that information seem more (or less) trustworthy and reliable.

(4) Information Learned From the Suspect or His/Her Behavior. It is obviously not possible to list all of the facts that might provide a school administrator or teacher with reasonable grounds to believe that a particular student is violating the law or the school's code of conduct. Some facts or suspicious circumstances may develop during the course of conversing with a student. (As a general proposition, when a school official has a suspicion of wrongdoing but does not yet believe that there is a factual basis to conduct a search, the better practice is to conduct a further investigation to gather more facts, such as by talking to the student involved or other students or school staff members who may have information that can confirm or dispel the suspicion of wrongdoing.) (See Chapter 6 for a more detailed discussion of the rules governing interviews or interrogations conducted by school officials.)

For example, a student during a conversation may become nervous, excited, or even belligerent. These reactions may in appropriate circumstances constitute evidence of a consciousness of guilt. So too, a student may make a so-called "furtive" movement, such as clutching a bookbag or attempting to conceal an item from the school official's view. Again, these reactions may add to the official's initial suspicion, especially if in response to questioning, the student denies making movements that the school official personally observed. (Lying is always a relevant factor that should be considered as a part of the "totality of the circumstances.")

It is important to note that in the landmark T.L.O. case, the student, in response to questioning by the assistant vice-principal, denied that she was carrying any cigarettes in her purse. The United States Supreme Court ruled that the school official was not unreasonable in suspecting that a search of the purse would reveal evidence of the alleged smoking infraction, notwithstanding the student's denial. 105 S.Ct. at 744. As a general proposition, however, school officials should consider any plausible, innocent explanations that the student may offer in response to allegations of wrongdoing. These explanations, in other words, should be considered as part of the "totality of the circumstances." Of course, if a student at any time offers a statement known by a school

official to be untrue, the official may use that falsehood to discredit any or all additional exculpatory statements made by the student. (This notion is aptly captured in the legal adage: "false in one, false in all.") By the same token, if the source of information used to support a suspicion of wrongdoing is found to be untruthful (or even merely mistaken), the same principle would apply, and school officials should be cautious to accredit or rely upon any information provided by an untrustworthy or unreliable source unless there is strong corroboration of the information from yet another source. See Chapter 5.

(5) Flight. In some instances, students may flee or "scatter" upon the approach of a teacher, coach, or other school official. In State v. Tucker, 136 N.J. 158 (1994), the New Jersey Supreme Court held that flight from approaching police officers does *not*, by itself, create a reasonable suspicion of criminal activity that would justify police in giving chase to the fleeing suspect(s). This controversial ruling (a New York judge who more recently issued a similar opinion was widely criticized by national political leaders) may not apply in the context of students running for no apparent reason from school officials. For one thing, the New Jersey Supreme Court's holding in Tucker was based to some extent upon a finding that some citizens, especially in urban neighborhoods, are mistrustful of police and may therefore have an innocent reason to run when a police officer comes around the corner. It is doubtful, however, that the same argument can be fairly made with respect to teachers, coaches, and principals.

In any event, in most instances, there will be other facts known that give the circumstances of flight special meaning. The Tucker case is unusual if not unique in that the *only* fact relied upon by the police officers who gave chase was that the defendant ran from them for no apparent reason. There was no indication in the record that the police officer knew or had any prior dealings with the defendant — a situation that would be unlikely in a school setting. The Court in Tucker commented on the scant record that was before it, and even suggested that were all of the facts known, the officers' decision to chase the defendant might have been held to be lawful.

Police officers (and school officials) should consider, for example, whether a fleeing student has previously been involved in criminal activity or school infractions, any information provided from a confidential source or anonymous "tip," or whether a warning signal was given that is commonly associated with unlawful activity. See State in the Interest of J.B., 284 N.J. Super. 513 (App. Div. 1995) and State v. Doss, 254 N.J. Super. 122 (App. Div. 1992), certif. den. 130 N.J. 17 (1992).

If students scatter from a place known to be used to commit frequent infractions, such as a room or outdoor location where students frequently congregate to smoke, a

school official could reasonably infer that students fleeing from that location had been engaged in that prohibited conduct. Note also that if a student flees in response to an imminent locker inspection or canine drug-detection sweep, there would seem to be reasonable grounds to believe that the fleeing student is trying to conceal, discard, or destroy some form of contraband before it can be discovered by school authorities or police officers.

(6) *Relying on Sense of Smell.* In determining whether reasonable grounds to search exist, school officials may use all of their senses, including their sense of smell. New Jersey courts have ruled that the distinctive odor of burning marijuana coming from the passenger compartment of a vehicle, or from a small porch, provides police with full probable cause to believe that an offense is being committed. See State v. Judge, 275 N.J. Super. 194 (App. Div. 1994) and State v. Vanderveer, 285 N.J. Super. 475 (App. Div. 1995). Since the recognized smell of marijuana constitutes probable cause, it is clear that school officials would have reasonable grounds to conduct a search if they detect the smell of marijuana or burning tobacco.

(7) *Stolen Items.* Before a school official may undertake a search to look for a stolen object, there should be a reliable report that something is missing. See M.M. v. Anker, 477 F.Supp. 837, 839 (E.D. NY 1989), aff'd 607 F.2d 588 (2nd Cir. 1979). Absent such a report, it is hard to imagine how a school official could have a reasonable basis upon which to launch a search for stolen items. The report should be specific enough so that the school official would be able immediately to recognize the missing item(s), and so that the official would know what to search for and when to stop searching upon discovering and securing the sought-after evidence.

(8) *Staleness.* The information available must provide the school officials with reasonable grounds to believe that the sought-after evidence is *presently* located at the place or container to be searched. The test, after all, is whether there is reason to believe that the sought-after item(s) will be found at the place where the search is to be conducted. School officials should therefore carefully consider whether any or all of the bits of information relied upon are "stale."

This determination will hinge on the nature of the suspected infraction as well as the nature of the source of information. Some offense are of a fleeting nature or are likely to be a one-time event. For example, in the case of some infractions, such as the theft of school equipment or tools, the evidence is more likely to be taken home relatively soon after the theft, rather than being stored for long periods of time in a locker or elsewhere on school grounds. Other offenses, in contrast, may be of a more

protracted and ongoing nature, such as school-based drug dealing or the operation of a gambling enterprise.

School officials presented with reliable information that a weapon was ever brought on to school property by a particular student should proceed as if the weapon is still on school grounds unless there is more recent evidence to suggest that the weapon has since been removed from the school. In other words, where a weapon and especially a firearm is involved, school officials should not assume that otherwise reliable information is stale, even if a significant period of time has lapsed since the last time that the weapon was seen or reported to be on school grounds.

In any event, school officials should always try to determine from their information source when was the last time that the suspect student was engaged in the alleged unlawful behavior, and when was the last time that someone actually saw the sought-after evidence or had reason to believe that evidence was at the location to be searched.

(9) *Reasonable Grounds is Less Than Proof Beyond a Reasonable Doubt.* It is critically important to recognize that the standard of reasonable grounds is not one that requires either absolute certainty or proof beyond a reasonable doubt. Nor does it require the level of proof that would be necessary before a school official could actually impose a disciplinary sanction. Consequently, a school administrator can entertain and act upon a perfectly reasonable suspicion that ultimately (or even quickly) turns out to have been mistaken.

With respect to the above illustration of the student observed smoking in a lavatory, 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 therefore turn out to be mistaken, and a search of the purse might therefore fail to reveal any 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 principal of our law that an unreasonable search is not made good by what it fortuitously reveals. 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 that approaches absolute certainty.

(10) *Focusing on Particular Suspects.* Ordinarily, a search should be founded on a suspicion based on reasonable grounds to believe that the *particular individual* who is

to be searched has violated the law or school rule, and that evidence of the infraction would 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 a suspicion that is limited to a single individual. In other words, a school official may develop and act upon a reasonably-grounded suspicion of wrongdoing that, 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 that confirms that such a fight has indeed taken place, but the school official is nonetheless uncertain as to which two individuals among the several 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 general description of the belligerents.

The search of those students who fit the description of the combatants should be considered to be a search based on individualized suspicion. This kind of search must be kept analytically distinct from a sweep search of all of the lockers in the school based on a generalized suspicion that unidentified students have brought drugs or weapons on to school property. As noted above, a discussion of the legality of such generalized searches can be found in Chapter 4 of this Manual.

Recently, the Hawaii Supreme Court, in the case of In the Interests of Doe, 887 P.2d 645 (Haw. 1994), held that it was reasonable for school officials to search a student based upon the odor of burning marijuana emanating from a confined area in which several students were present. The court held that the official's suspicion was reasonably narrowed to the four students found in the culvert area, and further narrowed to this particular student because she was one of two students carrying a purse that might be used to conceal suspected drugs. The court thus found, ultimately, that the facts known to the officials constituted sufficiently-individualized suspicion to justify the search.

More recently in DesRoches by DesRoches v. Caprio, 974 F.Supp. 542 (E.D. Va. 1997), the federal district court addressed whether school officials could search a large group of students for stolen property when school officials suspected that a student

within the group was guilty of the larceny, but the officials lacked individualized suspicion as to any particular student. The court noted that:

> In some situations, the number of suspects may be so small that the entire group of students may be searched without violating the requirement of individualized suspicion because "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment ... ." A school is not required to muster evidence that a student to be searched is the only potential suspect before a search may be conducted. For example, if two students were in a sealed room when a theft occurred, it is reasonable to search both these students because enough suspicion as to each student exists to support a search based upon reasonable suspicion. At the other extreme, if one hundred students were in the sealed room, a search of all of them for a single stolen item surely would be unreasonable. 974 F.Supp. at 449-550 (citation to New Jersey v. T.L.O. and other United States Supreme Court authority omitted).]

In terms of figuring out the maximum number of students who can be subject to an "individualized" search, courts will also look to whether school officials have used other, less intrusive means to pursue the investigation and thus to begin a process of elimination, excluding from the group to be searched those for whom a reasonable suspicion of wrongdoing has been dispelled. In Burnham v. West, 681 F.Supp. 1160 (E.D. Va. 1987), for example, the court ruled that the search of a group of students was unconstitutional in part because of the "striking paucity of investigative measures reasonably calculated to narrow the field of suspects." 681 F.Supp. at 1166.

Perhaps even more importantly, courts in determining how many students may be lawfully searched will look to the nature of the evidence being sought and the seriousness of the suspected infraction. Most cases where non-individualized searches of students have been upheld involved searches for drugs or weapons, where there is a demonstrated need to protect the safety and welfare of student. See e.g., In re Alexander B., 220 Cal. App.3d, 1572, 270 Cal.Rptr. 342 (2nd Dist. 1990) (upholding search of five or six students when one student in the group reportedly had a gun). In the above-quoted DesRoches case, the court ultimately ruled that a search of all nineteen students in a class, especially when it was not even certain that one of them was the guilty party, casts too wide a net when the offense that had been committed was a petty larceny of an object that could not harm others. 974 F.Supp. at 550.

Although there is little caselaw in New Jersey dealing with the issue of how many students may be searched to find evidence of an offense committed by a solitary actor in the context of the school setting, in Drake v. County of Essex, 275 N.J. Super. 585 (App. Div. 1994), a New Jersey court in a roughly analogous situation ruled that the reasonable suspicion standard used to justify the drug testing of corrections officers does not require evidence that focuses only on a single individual. Rather, reasonable suspicion can be established by evidence that focuses upon a particular group of individuals. 275 N.J. Super. at 591-593. In that case, an informant had detected the odor of marijuana in a bathroom to which only a limited number of jail employees had access. Based upon this information, the warden ordered the drug testing of the entire group of employees who had access to the restroom pursuant to a policy that permitted such drug testing only where there is an "individualized" reasonable suspicion to believe that an employee may have been under the influence of an illegal drug. Id. at 587-588. The Appellate Division found that the warden indeed had a "sufficiently individualized suspicion" of drug use to justify the drug testing of all of these employees, even though the information he had relied upon was not specifically directed at one person, but rather was directed to the entire group. Id. at 593.

The court, citing to United States Supreme Court precedent, noted that the term "individualized," like "particularized," is used in the law of search and seizure simply to refer to evidence of wrongdoing at a particular time and place, as distinguished from suspicion based on general group characteristics. Id. at 591. Obviously, as noted in subsection (12), a person's membership in a group commonly thought to be suspicious is insufficient by itself to establish reasonable suspicion. See e.g, Reid v. Georgia, 448 U.S. 438, 441, 100 S.Ct. 2752, 2754, 65 L.Ed.2d 890, 894 (1980).

(11) Impermissible Criteria for Conducting a Search. Any search conducted under the authority of T.L.O. must be reasonable — that is, based upon articulable reasons — and must not be arbitrary. Under no circumstances may a search be based on a school official's personal animosity toward an individual or group of students. Nor may searches be based on such impermissible 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.

(12) Gang Membership. Ordinarily, a search may not be based solely on the fact that a student is a member of a particular group, even if other members of that group are often associated with criminal offenses or violations of school rules. The courts have consistently held that a person's membership in a group commonly thought to be suspicious is insufficient by itself to establish reasonable suspicion. Drake v .

County of Essex, 275 N.J. Super. 585, 591 (App. Div. 1994), citing to Reid v. Georgia, 448 U.S. 438, 441, 100 S.Ct. 2752, 2754, 65 L.Ed.2d 890, 894 (1984) (drug "profile" alone does not establish reasonable suspicion). However, school officials may consider, as part of the totality of the circumstances, the fact that a student is a member of a youth or street gang, especially if members of that particular gang are known to carry (or are expected to carry) concealed weapons.

Any school official who suspects that students are participating in gang activities, or are being recruited to become gang members, is strongly encouraged to contact the local police department or county prosecutor's office. (School authorities should be aware that graffiti is often used by gangs to mark their turf and as a form of communication. Hence, the presence of graffiti is a telltale indication that gangs are operating in the school or surrounding neighborhood.)

B. The Manner in Which School Officials May Conduct a Search. 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 or poke around a student's belongings. A search must be no broader in scope nor longer in duration than is reasonably necessary to accomplish its legitimate objective. School officials will generally be expected to use the least intrusive means available to accomplish the legitimate objectives of the search, although the United States Supreme Court has repeatedly rejected the idea that a search is unreasonable merely because there may have been a less intrusive option available to accomplish the objectives of the search. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2395, 132 L.Ed 2d. 564, 581 (1995). (See also Chapter 2.8.) *Before conducting a particularly invasive search, such as one that involves physically touching a student's person, school officials should carefully review the provisions of Chapter 10 of this Manual.*

(1) Developing a Search Plan. Even if a particular search occurs on the spur of the moment based upon information just learned, the school official conducting the search should follow a logical strategy designed to minimize the intrusiveness of the search and to complete the search as quickly and easily as the circumstances allow. The search, in other words, should be viewed as a step-by-step process.

The better practice often is to confront the student suspected of committing the violation and to explain precisely what you are looking for before you being to conduct a physical search. (This practice is roughly analogous to the so-called "knock and announce" rule, whereby police officers conducting a search are generally required to announce their identity and purpose before entering a residence. See Wilson v.

Arkansas, 514 U.S. ___, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995).) This would give the student an opportunity to confirm where the sought-after item is located (thus making it unnecessary to search other locations), or better still, to surrender the object (thus making it unnecessary for school officials to open a locker or container and rummage through its contents). It is especially important to afford this option to the student before subjecting him or her to a physical search of his or her person. (See Chapter 10.1.)

There may be circumstances, however, where this practice should not be followed, as where there is a suspicion that a firearm is being kept in a locker and where it would be imprudent to afford the suspect student an opportunity to handle the weapon. (Note that in that event, the better practice would be to call the police rather than to confront the student.)

Where the school official does conduct the actual search, he or she should begin at the location where the sought-after item is most likely to be kept, based upon available information, reasonable inferences, and customary practices. (Often there will be reasonable grounds to search more than one place, such as a regular locker, a gym locker, and a backpack being worn by the student, etc.). Note, however, that depending on the available information and the nature of the infraction, it may in any event be appropriate to search all of these locations, even if the student has surrendered contraband. (See discussion in ¶ 6.) Thus, for example, a school official who has reasonable grounds to believe that a student is selling drugs in school may ordinarily search that student's locker even if the student has surrendered drugs kept on his person and denies that more drugs are being kept in his locker. Note also that when a student submits to a demand and surrenders drugs to a school official, that act does ***not*** constitute the voluntary, self-initiated turning over of drugs within the meaning of the amnesty provision of the Memorandum of Agreement Between Education and Law Enforcement Officials (1992) and N.J.A.C. 6:29-10.5(a)(1). Hence, all information concerning the "chain of custody" of drugs turned over to school officials in these circumstances must be reported to the police. (See discussion in Chapter 14.1C.)

Because a physical search of a student constitutes the most serious (and risky) form of Fourth Amendment privacy intrusion, school officials should not begin by searching a student's person where there are also reasonable grounds to believe that the sought-after item(s) is being kept in a locker or in a backpack or other container that can easily be separated from the student, unless, of course, the information relied upon to conduct the search suggests that the item(s) will most likely be found in the clothing that the student is wearing. (Even then, where possible, the student should be asked to remove an outer garment before the school official begins searching through its pockets

and comes into direct physical contact with the student.)

In Jenkins by Hall v. Talladega City Bd. of Educ., 95 F.3d 1036, (11th Cir. 1996), the Federal Court of Appeals for the Eleventh Circuit attempted to devise a meaningful scale or ranking of the seriousness of offenses that might justify various levels of privacy intrusion. The court noted:

> It is obvious that an infraction that presents an imminent threat of serious harm — for example possession of weapons or other dangerous contraband — would be the most serious infractions in the school context. Thus, these offenses would exist at one end of the spectrum. Thefts of valuable items or large sums of money would fall a little more toward the center of the spectrum. Thefts of small sums of money or less valuable items and possession of minor, non-dangerous contraband would fall toward the opposite extreme of the spectrum. Such infractions would seldom, and probably never, justify the most intrusive searches.
> [95 F.3d at 1046-1047.]

Finally, when school officials do open a locker or container, they generally should conduct a visual inspection for the sought-after item(s) before rummaging through and removing personal possessions that clearly are not the sought-after evidence or are not immediately recognized to be contraband or other evidence. (See discussion of the "plain view" doctrine in Chapter 11.)

(2) Identifying the Object of the Search. 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. This presupposes, of course, that the official conducting the search has firmly in mind what he or she expects to find. The official must therefore be able to articulate the object of the search. (Physical evidence — the object of the search — may be in the form of *contraband* [e.g., drugs, alcohol, explosives or fireworks, or prohibited weapons]; an *instrumentality* used to commit the violation [e.g., a weapon used to assault or threaten another or burglar tools]; the *fruits* or spoils of an offense [e.g., the cash proceeds of a drug sale, gambling profits, or a stolen item]; or other evidence, sometimes referred to in the law as "mere" evidence [e.g., "crib" notes or plagiarized reports, gambling slips, hate pamphlets, "IOUs" related to drug or gambling debts, or other records of an offense or school rule violation].) School officials are never permitted to undertake a "fishing expedition."

(3) Relationship Between the Object Sought and the Place/Container Searched. Obviously, there must be some logical and reasonable connection between the thing or place to be searched and the item that is expected to be found there. A school official's reasonable suspicion that a particular student has stolen a textbook, for example, would not justify a search of that student's clothing or even a purse if that container is simply too small or otherwise ill-suited to conceal the missing textbook.

If reasonable grounds exist to believe that a student may be in possession of a weapon, before opening a handbag or backpack, the school official should determine whether the container is heavy enough or otherwise suited to hold the evidence being sought. Although probably not required in a strict constitutional sense, it would not be inappropriate for school officials to carefully probe the outside of a soft container to determine whether it may conceal the object being sought, since the act of subjecting the container to this form of touching, while technically a search under the Fourth Amendment, constitutes a lesser degree of intrusion than does the act of opening the container, thereby revealing *all* of its contents, including non-contraband items that might be embarrassing to the student if revealed. See In re Gregory M., 82 N.Y.2d 588, 606, N.Y. S.2d 579, 627 N.E.2d 500 (1993) (court concluded that the student had only a minimal expectation of privacy regarding the outer touching of his school bag by school security personnel, even though the touching was done for the purpose of learning something regarding its contents). Compare Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 LEd.2d 334 (1993) (holding that police officers conducting a protective "frisk" for weapons may not squeeze, slide, or otherwise manipulate the contents of a suspect's pocket before removing an object that is not believed to be a weapon.)

Furthermore, a search should be no broader in scope nor longer in duration than is reasonably necessary to fulfill its legitimate objective. A suspicion that a student's bookbag conceals drugs would not permit a school official to read a diary or journal kept in the bookbag (unless these were reasonable grounds to believe that the journal documented debts owed in drug transactions). Furthermore, school officials should be careful not to damage property belonging to the student.

(4) Searches Should be Conducted in Private. One important way that school officials can minimize the intrusiveness and negative consequences of a search is to take steps to make certain that the search is not conducted in the presence of other students. The discovery of contraband or personal objects in the presence of one's classmates may subject a student to unnecessary ridicule. Moreover, any distress or stigma arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential. (See Chapter 2.8.) A search of a student's personal belongings, such as a purse or backpack, should therefore ordinarily be done in private in the principal's office

or some other suitable location away from the general student body. (From a practical perspective, moreover, it is generally appropriate to conduct searches out of the presence of classmates, since this might remove an incentive for the student who is the subject of the search to resist or otherwise to "show off" or display machismo. It also reduces the risk that other students involved in unlawful behavior might try to rescue contraband or otherwise interfere with the search.) Similarly, a search of a locker should ordinarily be conducted under circumstances where other students are not present.

Although searches should be conducted in private, it is generally preferable to conduct the search in the presence of the student who owns or controls the property being searched. This approach is useful for a number of reasons. First, as noted in ¶ (1), supra, the student can assist in the search, thus minimizing the degree of intrusion or "poking" and "prying." (This assumes that there is no reason to believe that the student will resist or interfere in the search process, try to conceal or destroy evidence, or reach for and use a concealed weapon. If such concerns exist, the student should not be present, or at least should not be allowed to enter the place or handle the object to be searched.)

Second, the student may be able to answer questions concerning the nature or ownership of any objects discovered during the search, making it easier to conduct prompt follow-up investigations and to identify other students who may be involved in unlawful activity on school grounds. (Note that if the search is conducted by or in the presence of law enforcement officers, it may be necessary and appropriate to issue the so-called Miranda warnings. Compare United States v. Finch, 998 F.2d 349, 356 (6th Cir. 1993) (court held that asking suspect to show where cocaine was hidden during execution of search warrant was the functional equivalent of interrogation) with State v. Chapee, 211 N.J. Super. 321, 333 (App. Div. 1986), certif. denied 107 N.J. 45 (1986) (police action of confronting defendant with marijuana "roach" discovered during search of car was *not* the functional equivalent of express questioning for purposes of Miranda). See Chapter 6 for a more detailed discussion of the Miranda rule, which in any event does not apply to questioning conducted solely by school officials.

It should also be noted that if the search is based upon the consent doctrine, then the student giving consent may have the right to be present and, in that event, should be asked to knowingly waive that right if for any reason he or she is not present throughout the execution of the consent search. See State v. Santana, 215 N.J. Super. 63 (App. Div. 1987). (See Chapter 8 for a more detailed discussion of the consent doctrine.)

Finally, although searches should be conducted in private and away from other students, it is generally advisable that at least one other school official be present to serve as a witness, especially if the search will entail a physical touching of the student. (See Chapter 10 for a more detailed discussion of searches of persons.)

(5) Consider the Psychological Effect of the Search. One need not be a constitutional scholar to recognize that students should not be subjected to any conduct even approaching the intensity of a full strip search except in the most urgent, extraordinary, and life-threatening situations. In fact, the New Jersey Legislature has recently enacted a statute that flatly forbids school officials from conducting strip searches of students. P.L. 1987, c. 242 (N.J.S.A. 18A:37-6.1), which took effect on September 5, 1997. (See Chapter 10 for a more detailed discussion of searches of persons and strip searches.) 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 items of personal hygiene, contraceptives, personal notes from friends, fragments of love poems, caricatures of school authorities, or other highly-personal items or implements might embarrass a sensitive adolescent.

(6) Avoid Reading Private Materials. During the course of a lawful search, school officials may come across letters, notes, journals, diaries, address books, appointment calendars, and other items that are likely to include private correspondence or ruminations. School officials should not open a book, access an electronic diary, or read any written material unless there are reasonable grounds to believe that such materials are evidence of a violation of the law or school rules. If, for example, the legitimate objects of the search are "crib" notes, stolen homework or tests, plagiarized reports, hate pamphlets, or other written materials, then school officials should conduct a cursory initial inspection of any written materials discovered to determine if they are the items being sought, and the school officials must stop reading these materials immediately upon determining that they are not the objects of the search.

Note that under the plain view doctrine, discussed in more detail in Chapter 11, a school official may not open, peruse, or seize a book or other item that is not the object of the initial search unless it is *immediately apparent* that such book or item is evidence of another heretofore unsuspected infraction. See Minnesota v. Dickerson, 508, U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). Thus, for example, a school official searching a locker for a suspected weapon could not open a book unless it was immediately apparent from a visual inspection of its exterior that it is evidence of an infraction, or, unless judging by its weight or other information, there are reasonable grounds to believe that it has been "hollowed out" to conceal the sought-after weapon. Note, however, that were a student is suspected of selling drugs or engaging in gambling

activities, the object(s) of the search might include records of drug transactions and debts. In fact, in New Jersey v. T.L.O., the assistant vice-principal discovered and seized a slip of paper that recorded "IOU's" for marijuana purchases.

(7) Avoid Damaging Student Property. Obviously, school officials during the course of conducting a search should to the greatest extent possible avoid causing damage to any property belonging to the student. Thus, for example, in the absence of compelling reasons, a school official should not break open a locked container without first providing the student an opportunity to surrender the key or provide the combination. (Note, however, that many schools have promulgated policies that require students to report the combinations of privately-owned locks used to secure school lockers, and a student's failure to comply with such a rule would seem to constitute an implicit waiver of the right to complain about any damage that school officials may cause to the lock while conducting an otherwise lawful search.)

(8) Avoid Using Force. As noted in Chapter 2.12, school officials are expressly authorized by statute "to use and apply such amounts of force as is reasonable and necessary ... to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil." N.J.S.A. 18A:6-1. Even so, school officials are urged to avoid using force to effectuate a search wherever possible, and where force must be used, it should be no greater than that necessary to restrain the student and protect against the destruction of evidence or the use of a weapon. Furthermore, before actually deploying physical force, school officials should warn the student that force will be used to effectuate the search or seizure, thus providing the student a last opportunity peacefully to submit to authority.

School officials are reminded that where force or threat of force is necessary and appropriate, the better practice would be to summon the police. Furthermore, as noted in ¶ 4, supra, one way to reduce the likelihood that actual or threatened force will be necessary is first to confront the student and conduct the search in the principal's office or at some other location away from the student body. By isolating the student, school officials can eliminate the incentive for the student to try to impress peers by resisting. This tactic also serves to reduce the possibility that other students might come to the suspect's rescue, create a disturbance, or otherwise try to interfere with the search or intimidate outnumbered school officials. In a closely-related vein, police departments when making arrests, and especially when conducting house searches or "raids," will often use what is called a "show of force" (sometimes also referred to as "overwhelming force") as a means to convince outnumbered suspects that resistance is futile. This tactic has in the law enforcement context proven successfully to reduce the need to resort to actual force, resulting in fewer injuries to suspects as well as police officers.

(9) *Searches are Not a Legitimate Form of Punishment.* It is important to note, even at the risk of stating the obvious, that the method chosen to execute a search (or the decision to undertake a search in the first place) must never be used to harass, intimidate, or punish a student. The *only* legitimate objective of a search is to find evidence of a criminal violation or school rule infraction. A search may not be used as a form of discipline or, worse, retribution. School officials must never subject a student or his or her property to a more intensive, intrusive, or protracted form of search than that necessary to reveal the sought-after evidence because the student "mouthed off," refused to cooperate, or otherwise embarrassed or undermined the authority of a school official. Any search undertaken in anger is more likely than not to be unreasonable and unlawful. (That is not to suggest that discipline may not be imposed swiftly. In Goss v. Lopez, 419 U.S. 565, 582, 95 S.Ct. 729, 740, 42 L.Ed.2d 725 (1975), the United States Supreme Court noted that "in the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred.")

(10) *When to Stop Searching.* Because every search must be geared to its legitimate objective, a search should ordinarily cease when the particular item(s) being sought has been found and taken into custody, provided, of course, that 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, for example, of the first marijuana cigarette or packet of white powdery substance. Rather, the school official, as part of the initial search, may continue to look for other evidence of drugs or drug paraphernalia 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 a 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 or some other form of contraband.

Furthermore, if, during a search of reasonable scope, the school official unexpectedly or inadvertently discovers a different prohibited item or evidence of yet a different infraction, the school official may seize that item as well. Under Fourth Amendment law, this is sometimes referred to as a "plain view" discovery. (See Chapter 11 for a more detailed discussion of the plain view doctrine.) Similarly, 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 small glass pipe might at that point have reasonable grounds to believe that the purse or handbag contains marijuana or cocaine in addition to conventional cigarettes. In that event, the school official could continue to search for *both* cigarettes and drugs. Thus, in T.L.O., it was not unreasonable for the assistant vice-principal who was looking for cigarettes to suspect that the student was also concealing marijuana in her purse when he discovered rolling papers (which were often used by students to produce marijuana cigarettes) at the same time that he found the sought-after pack of conventional cigarettes. Based upon this new suspicion of wrongdoing, the official was permitted to continue his search, notwithstanding that the sought-after pack of cigarettes had already been located and seized. 105 S.Ct. at 745.

By the same token, a reasonable search that reveals evidence that, 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 that could endanger the safety of the school official or others. But, in any case, the scope of this new or expanded search must continue to be reasonably related and limited in scope to its new or modified objective(s).

(11) Same Rules Apply to Any Property Searched. When a search is to be conducted of a specific location based upon a particularized suspicion that evidence of an offense or infraction will be found in that place, it does not matter whether the place to be searched is a regular locker, gym locker, purse, bookbag, or article of personal clothing. The same rules and legal standards apply without regard to who owns the property to be searched. (In T.L.O., in fact, it was a search of a student's purse that revealed the drugs and drug paraphernalia.)

(12) Searches of Vehicles. One question that sometimes arises is whether school officials may search the contents of a vehicle owned or operated by a student and parked on school grounds. While there is little caselaw on point, it would seem that an automobile brought on to school property is subject to no greater protection than a student's purse or bookbag and, thus, may be subject to a search conducted by school officials, provided, of course, that the facts meet the legal test announced in T.L.O.. However, the better practice would be for school authorities to provide advance notice

to students that any vehicles brought on to school property are subject to search by school officials when there is a particularized reason to believe that evidence of a crime or a violation of school rules will be found in the vehicle. (Note that schools probably do not have the authority to conduct a non-consensual search of a student-owned or operated vehicle that is not parked on school grounds.)

A number of schools provide parking decals and have adopted and enforce rules and regulations that govern when student-owned or operated vehicles may be parked in a school-owned lot. While providing notice of the school's right to search a vehicle kept on school grounds does not mean that students who use these parking facilities have impliedly consented to any such search (see Chapter 2.4), such advance notice does provide an opportunity for students either to keep highly-personal items out of these vehicles or to choose another means of transportation to get to and from school.

3.3. Summary.

A. All searches entail a balancing of competing interests. A student's Fourth Amendment right of privacy and security must be weighed against the interest of school officials in maintaining order, discipline, and safety.

B. Any teacher or school official who seeks to conduct a search of a particular student or of the student's personal possessions or locker must first satisfy the requirements of reasonableness and common sense.

C. In order to survive constitutional scrutiny, a search must be reasonable not only at its inception, but also in its scope.

(1) 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.

To satisfy this standard to initiate a search, the school official:

(a) must have reasonable grounds to believe that a law or school rule has been broken;

(b) must have reasonable grounds to believe that a particular student (or group of students whose identities are known) has committed the violation of law or school rule infraction;

(c) must have reasonable grounds to believe that the violation or infraction is of a type for which there may be physical evidence of the violation or infraction; ***and***,

(d) must have reasonable grounds to believe that the sought-after evidence would be found in a particular location associated with the student(s) suspected of committing the violation or infraction.

(2) A search will be reasonable in its scope and intensity where it is reasonably related to the objectives 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.

D. Physical evidence — the object of the search — may be in the form of ***contraband*** (e.g., drugs, alcohol, explosives or fireworks, or prohibited weapons); an ***instrumentality*** used to commit the violation (e.g., a weapon used to assault or threaten another or burglar tools); the ***fruits*** or spoils of an offense (e.g., the cash proceeds of a drug sale, gambling profits, or a stolen item); or other evidence, sometimes referred to in the law as "mere" evidence (e.g., "crib" notes or plagiarized reports, gambling slips, hate pamphlets, "IOUs" related to drug or gambling debts, or other records of an offense or school rule violation).

E. School officials should carefully document all of the facts known before the search was undertaken. The key to meeting the test of reasonableness is to establish precisely the ***reasons*** that justify the decision to undertake the search. School officials should be prepared to document ***all*** of the facts and circumstances that, taken together, led to the initial suspicion that the search would reveal evidence of a crime or a violation of school rules.

F. School officials should use the least intrusive means to accomplish the legitimate objectives of the search, which should be no broader in scope nor longer in duration than is necessary to confirm or dispel the suspicion of wrongdoing and to find and retrieve the object(s) being sought. Steps should be taken to minimize the effect of the search on the student by conducting the search, where feasible, out of the presence of other students.

G. Any doubts that 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.