8. CONSENT SEARCHES

8.1. The Burden of Proving a Valid Consent.

An individual may consent to a search of his or her belongings, thereby eliminating the need for police to obtain a warrant. Consent, in other words, is one of the judicially recognized exceptions to the warrant requirement. Many courts, especially in New Jersey, are nonetheless skeptical of consent searches, especially where the search uncovers evidence of a crime. After all, why would a person voluntarily give police permission to search knowing that evidence of a crime would be revealed? Some courts thus seem to tacitly assume that police used coercive or overbearing tactics to induce a suspect to consent to the search. For this and other reasons, the courts have established a strong presumption that permission to search was not freely and voluntarily given.

The legal issues that arise in consent searches involving students and school officials are especially difficult to resolve. For one thing, the law concerning consent that is given by a minor is unsettled. It is not certain, for example, whether police who are asking a juvenile for permission to search are first required to locate the juvenile's parents or legal guardians, although, for the reasons discussed below, the better practice for police would be to make reasonable efforts to find a parent or legal guardian and to obtain their permission to conduct the search of the minor's property.

It is also not clear under the law whether school officials who are seeking permission to search a locker or the contents of a student's handbag are subject to the same rules that apply to police-initiated consent searches. In New Jersey v. T.L.O., the United States Supreme Court authorized school officials, acting on their own authority and independently from law enforcement, to conduct searches without a warrant and based on a more flexible and less stringent standard of proof. It is not certain, however, whether that principle can be extrapolated to mean that school officials will be subject to relaxed standards concerning the voluntariness and validity of a consensual search.

In State v. Biancamano, 284 N.J. Super. 654 (App. Div. 1995) certif. denied 143 N.J. 516 (1996), the court acknowledged that school officials must be afforded greater leeway or latitude than police officers when it comes to questioning students. In holding that school officials need not provide Miranda warnings before questioning students about their possible involvement in criminal activity, the court ruled that students may waive constitutional rights (in that case, the Fifth Amendment right against compelled self-incrimination) at the request of school officials under circumstances where the waiver would have been invalid if the request had instead been made by police officers. The court in Biancamano reached this practical and common-sense

result by extending the general principle announced in T.L.O. — a Fourth Amendment case — that school officials must be given more flexibility than police in initiating or conducting a search. 284 N.J. Super. at 662.

Arguably, therefore, courts will not hold school officials who are seeking consent-to-search under the Fourth Amendment to the same exacting standards that apply to requests made by law enforcement officers. In the absence of any controlling or even persuasive Fourth Amendment legal precedent, however, the better practice in this state would be for school officials to comply whenever possible with the same basic rules that govern police requests for permission to conduct a search.

8.2. When Can Consent to Search Be Sought?

Police officers (and school officials) are authorized to seek permission to search even though they do not have probable cause or even a reasonable articulable suspicion to believe that the search would reveal evidence of a crime. See State v. Abreu, 257 N.J. Super. 549 (App. Div. 1992); State v. Allen, 254 N.J. Super. 62 (App. Div. 1992). Police and school officials, in other words, are *always* allowed to ask for permission to search, provided, of course, that the person being asked to give consent has the apparent authority to do so and further provided that the consent is knowingly and voluntarily given. See also DesRoches by DesRoches v. Caprio, 974 F.Supp. 542, 551 (E.D. Va. 1997) (confirming that "nothing prevents the school from asking students to voluntarily consent to a search" notwithstanding that the school officials do not have an individualized suspicion as to each student the school wants to search).

It should also be noted that if school officials are aware of facts that would provide reasonable grounds to conduct a search, school officials need not be concerned with the consent doctrine and may proceed to conduct the search under the authority of New Jersey v. T.L.O. even in the face of the objection of the student or his or her parents. See e.g., State v. Biancamano, 284 N.J. Super. 654 (App. Div. 1995), certif. den. 143 N.J. 516 (1996) (court declined to address defendant's contention that consent search was invalid; the court instead ruled that the search was lawful because the school official conducting the search had reasonable grounds to believe evidence would be found).

8.3. Awareness of the Right to Refuse.

To be valid, the consent must be a *knowing* and *voluntary* waiver of Fourth Amendment rights. Under New Jersey law, this means that the person giving consent to police must be aware that he or she has the right to refuse to give permission to police

to conduct a search. State v. Johnson, 68 N.J. 349 (1975). (Under federal law, in contrast, knowledge of the right to refuse is not absolutely required, but is merely one of several factors courts will consider in deciding whether the consent was given voluntarily. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).) As a practical matter, the only way to establish that the person giving consent knew that he or she had the right to refuse is to inform the person of this right. This notice can be given orally, or can be printed on a consent-to-search form. (If a form is used, the official obtaining consent must make certain that the person giving consent has read and understood the notice printed on the form.)

It is not certain whether school officials are required to comply with State v. Johnson, 68 N.J. 349 (1975), when seeking permission to search. In other words, it is not clear whether school officials have an affirmative duty to advise the student that he or she has the right to refuse to give permission to search. In State v. Biancamano, 284 N.J. Super. 654 (App. Div. 1995), certif. denied, 143 N.J. 516 (1996), the defendant alleged on appeal that the search that had revealed LSD tablets secreted in a fountain pen "was not justifiable as a consent search because [the student who was in possession of the pen] was not aware of his right to refuse." 284 N.J. Super. at 658. The court in its opinion did not address the question whether a valid consent can only be obtained by a school official from a student if the student is advised that he or she has the right to refuse. Apparently, there was no need for the court to tackle this issue since the vice-principal had reasonable grounds to seize and search the cartridge pen, thus making it unnecessary in any event to rely on the consent doctrine to sustain the legality of the search.

Even so, school officials should proceed on the assumption that (1) courts in New Jersey will not sustain a consent search unless it can be reliably established that the person giving consent was aware of the right to refuse to give permission to search, and (2) the best if not only way to meet this burden of proof is to be able to document that the person giving consent was expressly advised by the official seeking consent that he or she has the right to refuse.

In addition, the better practice would be for school official to inform the student and/or parent why permission to search is being sought, and what the school official believes will be revealed. Thus, for example, if consent is being sought to open a locker because a drug-detection dog has alerted to the locker, it would be advisable to explain to the student and his or her parents that the dog has alerted to the locker. Providing this information, while not necessarily required as a matter of constitutional imperative, will help to demonstrate that the consent is informed or "knowing," to use the phrase often found in the caselaw. Courts might be especially skeptical of the validity of a

consent if officials refuse to explain to a student or parent why permission to search is being sought in response to a direct question posed by the student or parent.

Because the student or parent has the right to refuse consent, the fact that he or she declines to give consent cannot be used as evidence that the person has "something to hide." A refusal, in other words, cannot be used in any way to establish probable cause or, in the context of a school search, "reasonable grounds" to conduct a warrantless search under the authority of New Jersey v. T.L.O..

8.4. Implied Versus Express Consent.

Permission or consent to search can be implied from all the attending circumstances. See State v. Koedatich, 112 N.J. 225 cert. denied 488 U.S. 1017, 109 S.Ct. 813, 102 L.Ed.2d 803 (1988). Thus, for example, permission to search can be inferred from the fact that a student did not object to a search conducted in his or her presence where it would be reasonable to interpret the student's silence or acquiescence as the functional equivalent of consent. (Many literature students may recall Sir Thomas More's eloquent defense at trial in the play *"A Man for All Seasons,"* where More explained that under the law, silence does not betoken objection, but rather assent.) It is nonetheless strongly recommended that permission to search be *expressly* obtained — preferably in writing — since consent cannot be implied from a person's silence or acquiescence under New Jersey search and seizure law absent a showing that the person was aware that he or she had the right to object and that such objection would be respected and the search discontinued. See discussion in Chapter 8.3. It is not enough that a student shrugs his shoulders indicating that he is resigned to the fact that a search will occur whether he consents or not. The police officer or school official obtaining consent to search bears the burden of establishing that the student was indeed voluntarily giving up a right that could have been exercised and enforced, that is, the right to prevent the official from conducting the search.

Because a person's consent to search must be clear and unequivocal, a *written* waiver is the preferred method of obtaining permission to search, although a search will not be invalid merely because the permission was given orally. Police departments have developed consent-to-search forms that are used to memorialize the circumstances under which a suspect has given police permission to conduct a search. Importantly, the printed form establishes a means by which police can show that the person giving consent was accurately advised of the rights that were being waived. Although not required in a strict constitutional sense, school districts are encouraged to develop and use their own consent-to-search forms, which are essentially a kind of "permission slip."

These forms should clearly spell out a student's rights under the Fourth Amendment. For example, a written form could be used to explain:

- That the student/parent has the right to refuse to give consent, and that there can be no recriminations for doing so;

- That the student has the right to withhold consent until a parent or guardian arrives or can be consulted;

- That the student/parent has the right to limit the scope of the consent search to particular places or things to be searched, and the right to withhold consent as to particular places and things;

- That the student/parent may terminate consent at any time without having to give a reason for doing so; and,

- That the student/parent can ask to be present during the execution of the search.

Note that if a student is directed (or even asked) to open a locker or hand luggage, or to empty his or her pockets, and the student complies without objection, this conduct constitutes a "search" within the meaning of the Fourth Amendment and this Manual, notwithstanding that the student himself or herself physically opened the locker or the handbag. See United States v. DiGiacomo, 579 F.2d 1211, 1215 (10th Cir. 1978) ("an examination of the contents of a person's pocket is clearly a search, whether the pocket is emptied by [a police] officer or by the person under the compulsion of the circumstances"). It bears repeating that complying with an order or request does *not* constitute a valid implied consent unless the facts or circumstances clearly show that the student knew that he or she had the right to refuse to comply with the request or command.

8.5. Determining the Voluntariness of the Consent.

The question whether consent was freely and voluntarily given must be determined from the totality of the circumstances. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); State v. Brown, 282 N.J. Super. 538 (App. Div. 1995). In determining the validity and voluntariness of a waiver of constitutional rights by a juvenile, courts will consider the student's age, level of education, mental capacity, background, prior experience that the juvenile has had with the juvenile or criminal justice systems, whether the student is distraught or mentally agitated, and whether the student appeared to be under the influence of alcohol or drugs.

The courts will also examine the nature and circumstances of the request to search, including a consideration of who made the request, whether the request was made in an inherently intimidating or coercive environment, whether the request was made by a number of authority figures, whether coercive tactics were used, and whether police officers were present Under no circumstances may the official seeking consent threaten a student with punishment if the student refuses to give permission to search. As noted above, it is unlawful to punish or draw negative inferences from the exercise of a constitutional right.

8.6. The Role of Parents in Obtaining Consent. (See Also Chapter 8.9)

It is not completely clear under the law whether permission must also be sought from a student's parent or legal guardian before consent can be obtained. (Without question, the presence of a parent is highly relevant in determining the voluntariness of the consent, since a parent, by his or her comforting presence, can help to overcome the psychological pressures inherent in this type of situation. The issue, rather, is whether the presence of a parent or legal guardian is *required* before police or school officials can obtain a valid consent to search.)

In the context of the waiver of Fifth and Sixth Amendment rights under Miranda v. Arizona, New Jersey courts have held that law enforcement officers are required to make a good faith effort to contact parents or legal guardians, and that questioning of a juvenile by police may proceed in the absence of a parent or legal guardian only if the child refuses to divulge their names and addresses, if they cannot be located after a good faith effort has been made to do so, or if the parents or legal guardians refuse to attend. (See cases discussed in Chapter 6.)

These Fifth and Sixth Amendment cases presuppose that children are more easily subjected to psychological coercion than adults, especially when confronted by authority figures. It is not certain whether the rule ordinarily requiring parental involvement that was developed in Fifth Amendment self-incrimination cases will also apply with respect to a juvenile's waiver of Fourth Amendment rights. As noted above, the defendant raised this very issue on appeal in State v. Biancamano, 284 N.J. Super. 654 (App. Div. 1995), certif. den. 143 N.J. 516 (1996), but the court did not reach the issue in its published decision.

Even so, it would seem evident that Miranda protections are addressed to constitutional rights that are analytically distinct from Fourth Amendment privacy rights. A cogent argument can thus be made that the rule concerning parental ratification of a juvenile's waiver of Miranda rights was developed because, in the Fifth

Amendment context, courts were concerned not only with the voluntariness of the initial waiver of the right to remain silent, but also with the manner in which the ensuing police interrogation would be conducted. (Recall that parents must generally be present throughout the interrogation, not just at the time that the Miranda rights are initially read and waived.) After all, Miranda rights are designed to safeguard the reliability of the truth-finding process of the criminal justice system.

The issue in Fifth Amendment cases, ultimately, is whether the student's confession or statement is voluntary and trustworthy (i.e., not the product of police coercion). An ongoing and potentially lengthy interrogation — in contrast to a comparatively quick waiver of Fourth Amendment rights by signing a consent-to-search form — provides an opportunity for police throughout the course of the interrogation to exert unfair pressure or to employ subtle or gross tactics designed to overbear the detained suspect's will. While a confession can be untrustworthy, the same cannot be said for physical evidence of a crime seized pursuant to a consent search. Thus, prosecutors in a motion to suppress would be free to argue that a consent to search obtained by police from a juvenile is not invalid merely because the juvenile's parents were not present or invited to attend. In the absence of definitive Fourth Amendment precedent, however, the safer course is to assume that the courts in New Jersey will conclude that the same procedural safeguards required for a valid waiver of Fifth and Sixth Amendment rights will apply to a waiver of Fourth Amendment rights, at least in circumstances where children are "in custody" or are otherwise in an inherently coercive environment. Accordingly, it is recommended that where police officers seek permission to search, reasonable efforts be made to locate a parent or guardian before a consent search is executed.

It is even less clear, however, whether school officials will be required to follow this procedure. After all, the Fifth and Sixth Amendment cases that require that parents participate in the waiver of a juvenile's Miranda rights would seem to be inapposite, since it is now clear under New Jersey law that school officials may question students without having to provide the Miranda warnings. See State v. Biancamano, supra. Presumably, school officials may pose questions to students suspected of committing school rule infractions or even criminal law violations without first having to contact a parent or legal guardian, although the court in Biancamano did not expressly address that issue, and there seems to be no other published court decision that has definitively resolved this question. (See Chapter 6 for a more detailed discussion of whether school officials must invite parents to be present before a student can waive a constitutional right.)

It should also be noted that in the context of Fifth and Sixth Amendment cases involving custodial interrogations of juveniles, courts will consider whether someone else close to the juvenile is available to serve in lieu of a parent or legal guardian. See State in the Interest of A.B.M., 125 N.J. Super. 162 (App. Div. 1973), aff'd 63 N.J. 531 (1973); State in the Interest of S.H., 61 N.J. 108, 114-15 (1972); State in the Interest of J.F., 286 N.J. Super. 89, 98 (App. Div. 1995). Presumably, this same principle will apply in the context of a waiver of Fourth Amendment rights. When permission to search is being sought by police, a school official, especially one who has responsibility to maintain order and discipline in the school, should *not* be relied upon in lieu of a parent, notwithstanding that school officials are often said to stand in loco parentis. Although a school official may earnestly be trying to protect the legal interests of the student, the fact remains that the official also has a competing if not conflicting interest in enforcing school rules and in protecting the school environment by finding and removing drugs and weapons.

It would seem more certain that permission to search need not be obtained from a parent or legal guardian if the property belongs to an adult student (i.e., one who is eighteen years of age or older). This would be true even if the consent is being sought by police officers in a custodial setting.

Finally, if a parent of a minor student does attend, he or she should be advised of the right to refuse consent or to terminate a consent previously given. Compare State v. Douglas, 204 N.J. Super. 265 (App. Div. 1985) (third-party consenter must know that he or she has the option to refuse to give permission to search).

8.7. Who Has "Apparent Authority" to Give Consent.

Besides the knowing and voluntariness requirements, a consent search is valid only if the person giving consent has the "apparent authority" over the specific place to be searched. This usually means that consent must be limited to places or objects that are owned or controlled by the person being asked to give consent.

It is critical to note that school officials may *not* give permission to police to search a student's locker, even though the locker is owned by the school and the school district retains an interest in the contents of the lockers. School officials simply do not have the authority to consent to a law enforcement search of a locker in which a student retains a reasonable expectation of privacy; rather, the consent must be given by the student and/or his or her parents. Compare State v. Coyle, 119 N.J. 194 (1990) (confirming that hotel and motel landlords have no authority to give consent to search to police, notwithstanding that the landlord retains the right to enter the room, and does so

frequently to clean the room and to change linens); Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964).

By the same token, a student who denies ownership of an object would not have the authority to consent to a search of that object. Compare State v. Allen, 254 N.J. Super. 62 (App. Div. 1992) (third-party consent invalid as to container over which the third party disclaims ownership). (See also Chapter 8.10.)

Ordinarily a student *would* have the apparent authority to give consent to search (1) his or her locker, (2) any containers or objects belonging to the student that are kept in the locker, (3) the student's clothing or any objects or containers that are owned, used, or carry by the student, and (4) a vehicle lawfully operated by the student. Note, however, that if the student shares a locker with another student, great care must be taken to make certain that the search is limited to those objects that are reasonably believed to be owned or controlled by the student giving consent. School officials or police should not ask a student for permission to search a locker that is shared with another student where the object being sought is believed to be owned by that other student. But see State v. Kelly, 271 N.J. Super. 44 (App. Div. 1994), where the court upheld the validity of the consent given by a "third party" because the defendants were "jointly engaged" in the transportation of narcotics.

8.8. Places or Objects Under Joint Student Control.

As a general proposition, school officials and police officers should avoid situations where two more students who jointly control an area disagree about giving consent. The better practice is to obtain consent (express or implied) from all students present who control the area or thing to be searched. Note, moreover, that if school officials or police ask a student to retrieve an object in a shared locker that is believed to belong to the student's locker mate, that conduct constitutes a search, since the student retrieving the object is acting at the behest of government officials and is essentially an "agent" of the government. If, on the other hand, a student on his or her own initiative presents to school officials evidence of a crime committed by another student, the Fourth Amendment is not implicated, even if the student who turned over the evidence opened someone else's locker or bookbag and thus engaged in conduct that, if undertaken by a police officer or school employee, would have been an unlawful search.

Where a student reveals to officials that a locker mate or other student is in possession of contraband, the student providing this information should not be asked or encouraged by school officials to go back and retrieve the object belonging to another.

(As a general proposition, students should not be encouraged to handle contraband or become part of the "chain of custody," particularly with respect to weapons and drugs, and especially with respect to firearms!) Rather, the appropriate response is to use the information provided by the student to conduct a search pursuant to New Jersey v. T.L.O., provided that the information is reliable and constitutes reasonable grounds to believe that evidence of a crime or school rule infraction will be found in a particular location.

8.9. Can a Juvenile Overrule a Parent's Consent?

The law is less than clear in explaining how school officials should respond in the event that a parent or legal guardian gives consent over the student's express objection. (A student's failure to interpose an objection to a parent giving consent would seem to constitute an "implied consent" by the student.) As a general proposition, under New Jersey law, the state need not show that a defendant was inaccessible before a so-called "third party" can give a valid consent to search the defendant's property, so long as the third-party consenter has the apparent authority to give consent, that is, exercises "common authority" or joint control over the place or object to be searched. See State v. Douglas, 204 N.J. Super. 265 (App. Div. 1985). Indeed, in at least one case, a New Jersey appellate court ruled that police may validly rely on the permission to search given by a third party, and may even continue to search in the face of another's objections, provided that the consenting party has "equal or superior rights" over the place or thing to be searched. See State v. Santana, 215 N.J. Super. 63 (App. Div. 1987).

Therein lies the problem. The vast majority (but not all) of the courts that have considered the validity of a parent's consent to search have held that a parent may give consent to search a child's belongings, even if the child is no longer a minor. However, these cases invariably deal with a search conducted within the consenting parent's home at which the child resides. This relationship has lead most courts to find that the parents have a superior interest over the premises, including the child's room.

It is far less certain, however, whether parents exercise sufficient "common authority" with the child over the child's locker and objects stored therein, especially since, as a practical matter, parents rarely if ever actually exercise whatever legal right they may have to gain access to the locker. Even so, it is conceivable that a parent or legal guardian can give a valid, binding consent to search a child's locker, even over the child's stated objection. Where the student is an adult or an "emancipated minor," however, the better practice would be to refrain from conducting or continuing the search if the student objects. Moreover, where the search is to be undertaken by police, the safer course to pursue in the face of the student's objection would be to secure the

scene and apply for a warrant (assuming, of course, police have probable cause to search). If the search is to be undertaken by school officials, it must be remembered that consent is not necessary, and thus the child's objection would be irrelevant, where school officials have reasonable grounds to believe that evidence of a crime or school rule infraction will be found in the locker.

If, in contrast, the student consents to the search but a parent or legal guardian objects, police or school officials should *not* undertake the search, at least under the authority of the consent doctrine. After all, the whole point of inviting a parent to attend and to assist the student in making an intelligent and voluntary waiver of constitutional rights would be lost if the parent's advice were to be ignored or disregarded. If the parent arrives after an otherwise lawful consent search has already begun, and the parent objects to the search, the search should be terminated immediately unless there is some other lawful basis (besides the consent doctrine) to continue to search. Note that even if the search must be halted, any evidence that was seized before the parent's objection was made will be admissible and, in the case of a search conducted by school officials (who are never required to obtain a search warrant), the discovery of evidence of a crime or school rule infraction would in most cases justify a continuation of the search, even over the parent's objection, unless there were no reasonable grounds to believe that a further search would reveal still more like evidence of the offense or infraction. (See Chapter 11 for a more detailed discussion of the "plain view doctrine.")

8.10. Denial of Ownership.

When a student denies ownership of a particular object, such as a bookbag, the student enjoys no expectation of privacy in its contents even if, as it turns out, the student's denial of ownership is a lie. In those circumstances, school officials may seize and search the object without violating *that* student's Fourth Amendment rights. See State v. Moore, 254 N.J. Super. 295, 299 (App. Div. 1992). (Note that in those circumstances, the search of the bookbag would not be justified under the consent doctrine, since by denying ownership, the student would have no authority to give permission to open the bookbag. See discussion in Chapter 8.7. Rather, the opening of that object would be justified on the grounds that the student has no expectation of privacy in its contents, and so, technically, the act of opening the knapsack would not constitute a "search" within the meaning of the Fourth Amendment and this Manual.)

Note, however, that the act of opening the bookbag *would* constitute a search as to other persons who might have a reasonable expectation of privacy in its contents, such as the true owner of the bookbag. Because the student who denies ownership does not

have the authority to give permission to search the container, that search could not be justified under the consent doctrine, and evidence found in the container would be inadmissible at the trial of the bag's true owner (if that turns out to be someone other than the student who disclaimed ownership) unless the search falls under some other exception to the warrant requirement. See State v. Allen, 254 N.J. Super. 62 (App. Div. 1992) (third-party consent was invalid as to a container over which the person giving consent disclaimed ownership).

8.11. Terminating Consent.

A student and or parent giving consent may terminate that consent at any time, and the student's (or parent's) request to terminate the search must be scrupulously honored. This means that when the permission to search is withdrawn, the authority to continue searching under the consent doctrine automatically terminates, and the school official must *immediately* stop searching unless there is some *other* lawful basis to continue the search. Any evidence discovered after consent is withdrawn will be subject to the exclusionary rule. However, any evidence observed prior to the withdrawal of consent may be seized.

Furthermore, if during the lawful execution of the consent search (i.e., before consent is withdrawn) a school official develops reasonable grounds to believe that evidence of an offense or school rule infraction will be found in the place being searched or any other place, considering the totality of the then-known circumstances (including information first obtained during the course of executing the consent search), then the school official may continue to search under the authority of New Jersey v. T.L.O. even after the consent has been withdrawn and over the student's or parent's objections.

Thus, for example, if a consent search reveals a controlled dangerous substance, the school official may continue to search for additional drugs or drug paraphernalia even though the student at this point withdraws permission to search. In effect, a search that begins as a consensual one may quickly develop into a "reasonable grounds" search if incriminating evidence is discovered. (Note that if police officers are involved in the search, the discovery of some drugs or paraphernalia would provide probable cause to believe that a more thorough search for additional contraband would be fruitful, but police must nonetheless stop searching when consent is withdrawn unless a continuation or expansion of the search would fall under one of the recognized exceptions to the warrant requirement.)

Just as school officials or police may not draw a negative inference from a person's refusal to give consent in the first place, so too, school officials and police may not infer

from a person's exercise of the right to terminate consent that they were "getting close" to finding contraband. Furthermore, at least one court has suggested that the right to terminate consent implies that the person giving consent also has the right to be present during the execution of the consent search. See State v. Santana, 215 N.J. Super. 63 (App. Div. 1987). If, for any reason, the student and/or parent will not be present to witness the execution of the search, the better practice in light of Santana is to make certain that the student and/or parent *knowingly* waives any such right to be present.

8.12. Limitations in Executing the Consent Search.

As noted throughout this Manual, a search must not only be reasonable at its inception, but also must be conducted in a reasonable manner. Obviously, permission to search a place or container does not mean that police or school officials are authorized to damage the property to be searched. Furthermore, school officials or police officers acting pursuant to a valid consent are only authorized to search those places or areas where consent to search has been given. The scope of the search, in other words, must be limited to the scope of the consent. Thus, a student and/or parent can give consent to search a locker, but may expressly withhold consent to search a handbag being carried by the student, or even any or all containers located in the locker. (Once again, school officials or police may not draw a negative inference from any such limitation on the permission to search. They may not, in other words, use the refusal to a give consent as to a particular place or object as evidence to establish reasonable grounds or probable cause to believe that the contraband being sought is concealed in the object for which consent to search has been withheld.)

Ordinarily, a person's general consent to search an area impliedly permits a search of all closed containers within that area. See Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). Because the State bears a heavy burden of proving the voluntariness of the search, the better practice is to make clear before the search is conducted what places and objects therein may be searched.

If during the course of a valid consent search school officials discover contraband or evidence of a crime or violation of school rules, they may seize that object. Furthermore, the discovery may provide probable cause (in the case of law enforcement searches) or reasonable grounds (in the case of a search conducted by school officials) to conduct a search that goes beyond the scope of the consent that was given initially. (See Chapter 11 for a more detailed explanation of the "plain view" doctrine.) Note, however, that where the search is conducted by police officers, they may *not* continue to search beyond the scope of the consent unless the expanded search is authorized by

a warrant or is justified under another one of the judicially-recognized exceptions to the warrant requirement.