THE NEW JERSEY SCHOOL SEARCH POLICY MANUAL

Christine Todd Whitman
Governor

Peter Verniero
Attorney General

David C. Hespe
Commissioner of Education

1998

THE NEW JERSEY SCHOOL SEARCH POLICY MANUAL
1998

"The first right of the individual is to be protected from attack. That is why we have government, as the preamble to the Federal Constitution plainly says."

Chief Justice Joseph Weintraub
State v. Bisaccia, 58 N.J. 586, 590 (1971)

"Every school in New Jersey will be free of drugs and violence and offer a safe, disciplined environment conducive to learning."

Goal established by the State Board of Education, N.J.A.C. 6:8-2.1

"The government is charged with protecting the privacy and security of the citizen, just as it is charged with apprehending those who violate criminal laws."

Associate Justice William J. Brennan, Jr.
New Jersey v. T.L.O., 496 U.S. 325, 364, n.5, 105 S.Ct. 733, 754 n.5
(Brennan, J., dissenting in part and concurring in part)

This Policy Manual is dedicated to the memory of William J. Brennan, Jr., who served for many years as a member of the New Jersey and United States Supreme Courts. Justice Brennan was a tireless and eloquent advocate of individual rights, and spoke on many occasions of a school teacher's task to imbue students with an understanding of our system of constitutional democracy.

* *This Manual is intended for use by school administrators and teachers, local police departments, sheriffs, the State Police, and county prosecutors' offices. It is designed to enhance the knowledge of school officials and law enforcement officers in New Jersey. This Manual does not create any rights beyond those established under the Constitutions, statutes, and regulations of the United States and the State of New Jersey, and shall not be construed to preclude the Attorney General or a county prosecutor from making any argument in the course of litigation.*

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
CN-001
TRENTON
08625
(609) 292-6000

CHRISTINE TODD WHITMAN
GOVERNOR

Dear Fellow New Jerseyan:

As part of my Administration's Drug Enforcement, Education and Awareness Program, I asked Attorney General Peter Verniero to develop a manual that would explain how and under what circumstances educators and law enforcement officers could conduct lawful searches to ensure that our schools remain free of weapons and drugs. I firmly believe that one of the best ways to protect children is to make clear that school officials will be vigilant and will take appropriate, prompt, and lawful action where there is reason to believe that dangerous weapons or illicit drugs are present in a school.

This Manual can serve as an important reference tool, explaining the steps that educators and law enforcement professionals are authorized to pursue as part of our concerted effort to make every school in New Jersey a safe haven for our children. It is our responsibility to do everything that we can to provide children with an educational environment that is conducive to learning and free of the disruptive influence of weapons, violence, and illicit drugs.

Yours sincerely,

Christine Todd Whitman
Governor

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 080
TRENTON, NJ 08625-0080
(609) 292-4925

CHRISTINE TODD WHITMAN
Governor

PETER VERNIERO
Attorney General

Dear Friend:

As Attorney General and as a parent, I know that there can be no more urgent priority than to protect our children from harm and to provide them with a safe educational environment where they can learn, work, and play without fear of violence. Recent tragic events in other states teach us that we must be prepared to use all lawful means to keep firearms, other deadly weapons, and illicit drugs out of our schools and away from children.

In 1985, the United States Supreme Court decided a landmark case known as New Jersey v. T.L.O. In that case, the nation's highest court upheld the constitutionality of a search of a student's purse that had been conducted by the assistant vice-principal of the Piscataway High School in Middlesex County. This seminal case stands for the proposition that while school officials must know and comply with the requirements of the Fourth Amendment, they are authorized to conduct reasonable searches to maintain order and discipline.

Since T.L.O. was decided, a myriad of questions have been raised concerning the lawfulness of various investigation techniques that are designed to keep our schools safe and drug-free, including the use of random locker inspections, metal detectors, and drug-detection canines. When Governor Christine Todd Whitman announced her Drug Enforcement, Education and Awareness Program, she called upon me to publish a comprehensive manual to assist schools in conducting lawful searches. I am convinced that education and law enforcement professionals can achieve safe and drug-free schools for the benefit of our children and, at the same time, respect the rights guaranteed to all citizens, including schoolchildren, by our State and Federal Constitutions.

I thank the Governor for her support of our efforts and also appreciate the work of my staff, particularly Assistant Attorney General Ron Susswein, for making this Manual possible.

Sincerely yours,

Peter Verniero

Peter Verniero
Attorney General

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

DAVID C. HESPE
Commissioner

Dear Colleagues:

Since 1994, when the State Board of Education adopted a resolution supporting implementation of the Department of Education's Safe Schools Initiative, we embarked on various activities designed to assure that our students are safe from violence, permitting schools to provide a thorough and efficient education for all students.

Although, the department's 1995-1996 "Report on Violence, Vandalism, and Substance Abuse in NJ Schools" indicates a reduction in incidents of violence and vandalism, we cannot diminish our efforts. As the Governor outlined in her Drug Enforcement, Education, and Awareness Program, we must continue to work together to develop coordinated responses to evolving issues.

One collaborative effort has been the development of this School Search Policy Manual, in cooperation with the Attorney General's Education and Law Enforcement Working Group. I applaud the Attorney General for the effort and resources expended on the development of this document, which provides necessary guidance and direction to law enforcement and education professionals, who deal with the legal issues surrounding student searches. Together we can work towards providing safe and drug free schools for our students in New Jersey.

Sincerely,

David C. Hespe
Commissioner

TABLE OF CONTENTS

1. INTRODUCTION AND OVERVIEW

1.1. The Governor's Drug Enforcement, Education and Awareness Program.

On October 8, 1996, Governor Christine Todd Whitman announced a Drug Enforcement, Education and Awareness Program ("Governor's Program") spelling out a comprehensive plan for addressing the state's drug and alcohol problem. The Governor's Program responds decisively to recent surveys of New Jersey high school and middle school students that show that drug use by adolescents is on the rise. Much of the Governor's Program is dedicated to making schools a safe environment for children, where they can learn why and how to resist drugs, and where they can enjoy the full benefits of a thorough and efficient education that is guaranteed to all students by the New Jersey Constitution. Providing a safe and disciplined environment is essential. Every school should be free of drugs, alcohol, violence, and the unauthorized presence of firearms and other weapons.

The Governor's Program recognizes that one of the best ways to keep weapons, drugs, and alcohol out of our schools and away from children is to make clear that school officials will keep a watchful eye and will intervene decisively at the first sign of trouble. The Governor instructed the Attorney General to develop a comprehensive school search manual that would outline the law and policies concerning searches and seizures conducted by school officials or by law enforcement authorities working in conjunction with schools. The Governor directed that this plain-language school search manual cover a broad range of topics, including the constitutional use of drug detector canines and random locker inspection programs. The Governor further directed that the manual stress the need for all school staff members to be vigilant to the telltale indications of illicit drugs and dangerous weapons, and to take appropriate, prompt, and lawful action where there is reason to believe that illicit drugs or dangerous weapons are present in a school.

1.2. Nature of the Problem.

The most recent drug and alcohol survey of New Jersey's high school students conducted by the Division of Criminal Justice in cooperation with the Department of Education revealed that in 1995, 14% of all students surveyed reported that they had used an illicit drug *during school hours*. This figure represents a significant increase over the 10.4% of students who reported using drugs during school hours in 1992. Even more disturbing, of those students who had ever used marijuana or other illicit drugs, more than one out of four (27.4%) reported in 1995 that they had used an illegal substance during the school day.

The recent increase in drug use by adolescents is especially disturbing because, as noted recently by United States Supreme Court Justice Anton Scalia, school years are the time when the physical, psychological, and addictive effects of drugs are most severe. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2395, 132 L.Ed 2d. 564, 580 (1995). Justice Scalia further noted that, "maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor." Id. quoting Hawley, *"The Bumpy Road to Drug-Free Schools,"* 72 Phi Delta Kappan 310, 314 (1990).

Aside from the tragic consequences from drug use visited upon individual users and addicts, the Court in Vernonia aptly noted that the effects of a drug-infested school are visited upon the entire student body and faculty, as the educational process is disrupted. Id. "The necessity for the state to act," the Court held, "is magnified by the fact that this evil is being visited ... upon children whom it has undertaken a special responsibility of care and direction." Id.

According to the most recent study conducted by the National Center on Addiction and Substance Abuse (CASA) at Columbia University, middle and high school students are more likely to encounter drug deals on school grounds than in their neighborhoods. The nationwide survey released by CASA in September 1997 found that 41% of the students surveyed said that they had seen drugs sold at their school. Only 25% reported seeing drugs sold in their neighborhood. More than three-quarters of the high school students said that a student had been expelled or suspended from school in the past year for using or selling drugs.

These statistics are deeply disturbing and demonstrate clearly that the modern drug problem strikes at the very heart of our system of education. As Justice Powell noted in his concurring opinion in New Jersey v. T.L.O., "[w]ithout first establishing discipline and maintaining order, teachers cannot begin to educate their students." 469 U.S. 325, 350, 105 S.Ct. 733, 747, 83 L.Ed.2d 720 (1985) (Powell, J., concurring).

In announcing her new drug program, Governor Whitman clearly echoed the concerns of the United States Supreme Court in its landmark decisions in New Jersey v. T.L.O. and Vernonia, and she issued a call to action, urging every school official and law enforcement agency to work together, as appropriate, to employ measures to address the substance abuse crisis. The problem, however, is certainly not limited to the sale and use of alcohol and illicit drugs. The Department of Education's system for monitoring incidents of violence, vandalism, and substance abuse revealed that between 1990 and 1994, the number of incidents reported annually tripled from 4,932 to 14,749. Two in

ten students (18%) reported that they had carried a weapon — a gun, knife, or club — in the past month. Nine percent of the students surveyed reported that they had carried a weapon *on school grounds* during the month preceding the survey, and one-third of those students reported that they had carried a weapon on school grounds six or more times in the month preceding the survey. Overall, 5% of New Jersey's high school students reported that they had carried a gun.

In light of these statistics, it is not surprising that many students report that they are not safe in school. Nine percent of the students surveyed said that they had been injured or threatened by someone with a weapon while on school property at least once during the past year. Five percent of the students surveyed said that they had not gone to school at least once in the past thirty days because they felt unsafe at or on the way to school.

On June 4, 1997, the Department of Education released a *"Report on Violence, Vandalism and Substance Abuse in New Jersey Schools"* for the 1995-1996 school year. This latest report shows that there were fewer incidents of vandalism and violence in public schools in the last year. While the most recent numbers reported by the Department of Education are encouraging and offer a reason to be hopeful, we cannot rest on our laurels.

Indeed, today more than at any time in our history, it is essential for school officials to pursue all lawful means to keep guns and other weapons, drugs, and alcohol off of school grounds. The need to keep order and to maintain a safe, well-disciplined school environment — one that is conducive to learning — must, however, be balanced against the rights that students enjoy under the State and Federal Constitutions to be free from unreasonable searches and seizures. The challenge, therefore, must be to achieve a delicate and appropriate balance: to protect the right of students to be safe and, at the same time, to respect their rights guaranteed under the Fourth Amendment of the United States Constitution and under Article I, Paragraph 7 of the New Jersey Constitution. These constitutional provisions impose significant limitations on the authority of police — and school officials — to conduct searches and to seize property, including weapons, drugs, and other contraband.

In balancing these rights and competing interests, school officials must never lose sight of the lesson that we hope to teach our students. As United States Supreme Court Justice Brennan (a New Jersey native and former Associate Justice of the New Jersey Supreme Court) once noted:

> We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one the teacher had hoped to convey ... Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.
> [Doe v. Renfrow, 451 U.S. 1022, 1027-1028, 101 S.Ct. 3015, 3018-3019, 69 L.Ed.2d 395 (1981) (Brennan, J., dissenting from denial of certiorari.]

The message we send to schoolchildren must be clear and unambiguous: we will not tolerate drugs, alcohol, firearms, or other weapons on school property, and appropriate authorities will use all lawful means to detect, discipline and, where appropriate, punish those students who break the rules and who thereby endanger their classmates and teachers. The law governing searches and seizures provides more than enough flexibility for school officials and law enforcement officers to protect students from harm and to enforce school codes of conduct without running afoul of the Fourth Amendment and its state's constitutional counterpart. Indeed, the landmark United States Supreme Court decision — which upheld a search conducted in a New Jersey high school — expressly authorizes school authorities to conduct reasonable searches of students and their property. See New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). The Court's ruling provides school officials with an important tool with which to identify and discipline students who use, possess, or distribute drugs, alcohol, or weapons.

While most school officials and teachers serve a number of diverse roles, including disciplinarians, they are — first and foremost — professional educators. They should ***not*** be thought of as adjunct law enforcement officers. Nor should they be impressed into service as cops or prosecutors. However, given the number of students who report having used or purchased illicit drugs on school property and during school hours, and who feel unsafe in school hallways and on school grounds, it is important that all school administrators and teachers be fully apprised of the provisions and ramifications of the T.L.O. decision and more recent search and seizure cases. School officials must also be aware of their specific responsibilities to report promptly information concerning crimes committed on school grounds. It is incumbent upon the law enforcement community,

in turn, to work closely with education professionals to develop cooperative enforcement programs and to establish appropriate offense-reporting procedures, such as those spelled out in regulations promulgated by the State Board of Education and the Memorandum of Agreement Between Education and Law Enforcement Officials (1992). (See Chapter 14.)

1.3. Remedies to Redress Constitutional Violations.

A. The Exclusionary Rule. The United States Supreme Court in New Jersey v. T.L.O. concluded that the protection against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution does indeed apply to students while they are on school grounds. This conclusion can lead to certain collateral consequences that public school teachers and administrators should carefully consider before undertaking any search.

For one thing, evidence of a crime discovered during an improper search will be subject to the "exclusionary rule," which is a court-created doctrine that often requires the suppression of otherwise probative evidence. Under the exclusionary rule, reliable evidence of guilt or delinquency may be inadmissible at trial because of the manner in which the evidence was discovered. The exclusionary rule is meant to serve as a deterrent — a form of punishment — that is designed to provide a strong incentive for government officials to comply with the rules of arrest, search, and seizure.

In New Jersey v. T.L.O., the United States Supreme Court declined the New Jersey Attorney General's invitation to rule that the exclusionary remedy should not apply to evidence of a crime that was unlawfully seized by school officials. (Traditionally, this remedy applied only to searches conducted by police.) Because the United State Supreme Court ultimately ruled that the search conducted in that case by the assistant vice-principal was lawful, the Court saw no need to resolve the question. 105 S.Ct. at 738, n.3. However, the New Jersey Supreme Court in that very case had earlier ruled that the evidence was inadmissible in a juvenile delinquency proceeding, and so it seems clear, at least in New Jersey, that the exclusionary rule indeed applies to searches conducted by public school officials. Hence, a school official's unreasonable error in judgment can unwittingly interfere with the orderly administration of the criminal and juvenile justice systems — systems in which we *all* have a stake and a responsibility to support.

B. Civil Liability. The so-called "exclusionary rule" may not seem to be of much concern to school officials, especially since that particular remedy does not apply to school-based disciplinary proceedings, such as actions to suspend or expel a student

who has brought drugs, alcohol, or weapons on to school property. School administrators and teachers must recognize, however, that if they violate a student's constitutional rights, the school district and the individual school officials involved may be sued under a federal statute, 42 U.S.C. § 1983, that protects the civil rights (i.e., constitutional rights) of all citizens, including students. These cases are sometimes referred to as "1983" actions.

In most cases, public school officials and other government actors enjoy what is known as "good faith" immunity from liability. Administrators or teachers will not lose a lawsuit and will not be required to pay compensatory damages, even if they participate in an unlawful search, provided that they were acting in the good faith belief that their conduct was lawful.

This doctrine is sometimes also referred to as "qualified immunity." In Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the United States Supreme Court held that governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known. In Anderson v. Creighton, 483 U.S. 635, 639 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987), the Court further observed that the question whether an official can be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time the action was undertaken. (Note that one of the critical objectives of this Manual is to consider and explain these "clearly established" legal rules and the constitutional and statutory rights enjoyed by students.)

The United States Supreme Court's qualified immunity doctrine attempts to strike a balance between two competing concerns: The necessity for constitutional damages actions against public officials because such actions may offer the only realistic avenue for vindication of constitutional guarantees, and the need to limit the costs to individuals in society created by litigation against public officials, including diversion of official energies from pressing public issues, deterrence of able citizens from acceptance of public office, and the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." See Jenkins by Hall v. Talladega City Bd. of Educ., 95 F.3d 1036, 1039 (11th Cir. 1996), quoting Harlow v. Fitzgerald, supra, 457 U.S. 800, 814, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982).

In Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), the United States Supreme Court outlined a two-step process for evaluating qualified

immunity claims: (1) was the law governing the public official's conduct clearly established, and (2) under the law, could a reasonable official have believed the conduct to be lawful. Other courts have remarked that individual defendants in a "1983" civil rights suit are immune from liability if reasonable public officials could differ on the lawfulness of their actions. See Blackwell v. Barton, 34 F.3d 298 (5th Cir. 1994). For a constitutional right to be "clearly established," however, there does *not* have to be a prior case directly on point, so long as the unlawfulness of the official's conduct is apparent in light of existing law. Anderson v. Creighton, supra, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523.

Hence, if a government official, including a school administrator or teacher, violates a clearly established legal rule, or, worse still, conducts a search *knowing* that the search is unlawful, the good faith immunity provision will not apply, and such violations may result not only in the award of compensatory damages, but also can result in the award of far greater "punitive" damages, which are designed to deter unlawful conduct.

Unfortunately, some officials, fearful of lawsuits and the risk of liability, mistakenly believe that the safest course of action is to do nothing, to ignore facts, for example, that provide a lawful basis to contact the police or to undertake a search under the authority granted to school officials by state statute and New Jersey v. T.L.O.. Teachers and administrators cannot afford, however, to be so concerned about civil liability that they begin to practice what could be called "defensive" education. In reality, it makes no sense for a school official to put his or her head in the sand. Under the law, a person can not only be sued for committing an unreasonable act (a so-called "commission"), but can also be held liable for failing to take action when a reasonable school official would have intervened. This type of breach of duty to act is called an "omission," and can result in civil liability and significant monetary awards.

The point is simply that school officials have a legal duty to keep their eyes open, to report suspicious circumstances to appropriate school and law enforcement authorities, and to conduct searches when those searches are necessary to keep students or other members of the school community from being injured. By way of example, a school coach who negligently fails to recognize that a student is using anabolic steroids, or who chooses to take no action on a reasonable suspicion that a student is using steroids, may subject himself or herself and the school district to significant liability if the steroid-abusing student is subsequently injured, or injures someone else on the playing field. See N.J.S.A. 18A:40A-12b.

Notably, state law expressly requires all persons, including school officials, to report suspected child abuse. See N.J.S.A. 9:6-8.10. The failure to make such a report

to appropriate law enforcement or child protection authorities constitutes a clear breach of a legal duty and, in fact, the failure to report suspected child abuse is punishable as a disorderly persons offense. N.J.S.A. 9:6-8.14. So too, school officials are required to report suspected substance abuse. N.J.S.A. 18A:40A-12.

In sum, the best way for government actors or employees to protect themselves from a lawsuit is simply to act reasonably, mindful of the duty to keep their eyes open and to protect students, as well as the duty to comply with the rules governing searches and seizures. Teachers and administrators should keep in mind that a person can only be held liable when a court or jury finds that he or she was behaving unreasonably. Complying with state laws, rules and regulations, and departmental policies and procedures, such as those spelled out in this Manual, offer strong if not compelling evidence that school officials were neither negligent nor unreasonable.

C. *School Officials as Role Models.* There is yet another compelling reason to motivate school officials to learn, understand, and comply with the requirements of the Fourth Amendment besides the need to avoid imposition of the exclusionary rule or civil liability. Perhaps most importantly, school officials must learn and respect the bounds of constitutional behavior if they are to remain faithful to their duties as teachers and role models. As Justice Stevens noted in his separate opinion in New Jersey v. T.L.O., "[s]chools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry." 469 U.S. 325, 373, 105 S.Ct. 733, 759 (Stevens, J., concurring in part and dissenting in part).

Our State and Federal Constitutions, and the Bill of Rights in particular, are not merely empty words to be memorized by rote from the pages of a social studies textbook. Rather, these charters set forth the basic tenets that define and limit the power of government in its dealings with private citizens. Our public schools often provide a young citizen with his or her first exposure to the practical workings of our Government and notions of authority and justice. Schools thus emerge as a particularly appropriate forum in which to demonstrate to our children how our system of Government is intended to work. Teachers or school officials who choose to ignore the requirements of the Constitution provide an unacceptable lesson and a poor example for the students in their charge.

This Policy Manual is intended to help school officials and teachers (and prosecutors and police officers as well) to find that delicate balance between the obligation to respect students' constitutional rights under the Fourth Amendment as against the duty to provide a school environment that is free of drugs, violence, and weapons.

1.4. Purpose and Approach of this Manual.

This Manual attempts to answer some of the most frequently asked questions about the law of search and seizure as it relates to students and school officials. At the outset, however, it must be recognized that it is not possible to address, much less to resolve, every legal issue that can or will arise. Even so, we hope in this document to give meaningful and practical advice to school officials and their law enforcement colleagues, and to do so in a format that is clear and easily understood. We have included abbreviated checklists that are designed to summarize major legal principles as succinctly as possible and to assist school officials, police officers, and prosecutors in quickly locating the applicable provisions of this Manual.

While voluminous and fairly detailed in its treatment of difficult legal issues, this Manual is not meant to be a scholarly treatise and, whenever possible, we have avoided the use of lengthy citations to legal authority and distracting footnotes that are often found in legal briefs and published court decisions that are written by and for lawyers and judges. Instead, this Manual is designed for use by *non*-lawyers. When more specific legal advice is needed, school officials are encouraged to contact their county prosecutor, who is expressly authorized by Attorney General Directive to render legal opinions and to resolve disputes. (See Chapter 14.5.) School officials are also strongly encouraged to seek the advice of the school board attorney or school district solicitor, especially with respect to "planned" searches or inspection programs.

This Manual provides guidance as to certain types of enforcement activities that are allowed under the New Jersey and Federal Constitutions. It also describes those investigative activities that are likely to be prohibited by the courts.

Under the Fourth Amendment, a search or seizure must not only be reasonable at its inception, but must be carried out in a reasonable manner. A certain type of search or inspection program can thus be either lawful or unlawful, depending upon the facts and the way in which the search was carried out. Consider, for example, that school officials and law enforcement agencies are allowed to work together to bring drug-detection dogs into a school to inspect lockers for the presence of illicit drugs. Such canine sweeps, however, must be done carefully and in accordance with certain definite rules, which are discussed in Chapter 4.5.

When it is possible to divine a clear set of rules from the caselaw, those rules are spelled out in the Manual. This Manual goes further in that it also sets out recommended procedures and preferred practices that are not necessarily based upon clear and binding legal precedent, but rather depend upon an interpretation or extrapolation of

generally accepted legal principles, or reflect commonly-held notions of reasonableness and fair play in communities across New Jersey. While some may not always agree with our advice, we caution that those who disregard these recommendations do so at their peril, especially if they choose to undertake a search in a manner that is expressly discouraged.

It is important to understand that the law governing the use of drug-detection dogs in schools, and many other types of so-called "suspicionless" searches, is unsettled and evolving. For this reason, there is ample room for reasonable people to disagree about what is allowed and what is prohibited. Surprisingly, there are very few published court decisions in New Jersey and the rest of the nation upon which we can confidently rely. Ostensibly, the dearth of published precedent is due to the fact that most school searches are conducted in a reasonable fashion, are not challenged in court, and thus offer no opportunity for a court to issue a landmark decision.

Given the paucity of published school search decisions, more often than not in trying to answer direct questions or to offer practical advice, there is no legal precedent directly on point. School officials and police officers (and the prosecutors and other lawyers who offer them legal advice) must therefore tread carefully through a sparse but thorny legal thicket. All too often, there are simply no "clearly established" rules to follow. (As noted above, the one benefit in this situation is that public officials will usually not be held civilly liable for their mistakes unless they are found to have violated a clearly established rule that a reasonable person would have been aware of. See Harlow v. Fitzgerald, supra, and Anderson v. Creighton, supra).

This point was underscored by an obviously exasperated court in Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991). The court, while trying to determine the reasonableness of a search conducted by school officials, lamented that:

> A diligent but unsuccessful search for additional guidance from the designated jurisdictional pool leads us to a troubling conclusion: the reasonableness standard articulated in New Jersey v. T.L.O. has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. § 1983 [a federal "civil rights" law suit] cause of action.
> [936 F.2d at 886.]

The federal district court in DesRoches by DesRoches v. Caprio, 974 F.Supp. 542 (E.D. Va. 1997) was even more frank when it recently explained:

> This Court regrets that it cannot lay down a precise rule giving schools guidance about how many students may be searched in particular circumstances without running afoul of the Fourth Amendment. Such an opinion would be impermissibly advisory and inherently arbitrary, for the touchstone of Fourth Amendment analysis is "reasonableness," a standard which defies precise explication because it is wholly dependent upon the particular, unique facts of each case.
> [974 F.Supp. at 550.]

It is especially frustrating that the courts that do address school search issues in published opinions sometimes go off in decidedly different directions. This makes it that much more difficult to figure out what is permitted and what is prohibited, and to predict how the New Jersey Supreme Court would rule if it were to be presented with a certain set of facts.

When relying on cases that were decided in other jurisdictions, moreover, we must be especially mindful that the New Jersey Supreme Court has on a number of recent occasions construed Article I, Paragraph 7 of the State Constitution to provide citizens with greater protections than are afforded under the Fourth Amendment of the United States Constitution, as interpreted by the United States Supreme Court. The New Jersey Supreme Court has the final word under the State Constitution. As a result, police conduct that would be perfectly lawful if undertaken in other states has been held by the New Jersey Supreme Court to be unlawful. Even more curious, the search and seizure rules governing state, county, and municipal law enforcement agencies in New Jersey are, in some important respects, different (and stricter) than the rules governing federal law enforcement agencies operating in this state.

This so-called "divergence" between federal and New Jersey search and seizure law has led to the development of what is sometimes referred to as the "silver platter" doctrine. State and municipal police officers in New Jersey are generally not allowed to work closely with federal agencies and to have those federal agencies collect evidence for use in a state court prosecution by using techniques that are deemed by the United States Supreme Court to be lawful under the Fourth Amendment, but that are unlawful under Article I, Paragraph 7 of the State Constitution. State law enforcement officials, in other words, are not allowed to use certain information provided to them on a "silver platter" by federal law enforcement agencies, even though the federal agents were acting lawfully, by their standards, when they collected the evidence.

This rule, unique to New Jersey search and seizure jurisprudence, is designed to ensure that state law enforcement officials do not use their federal counterparts to

circumvent the stricter rules that have been developed by the New Jersey Supreme Court. Were this same doctrine to be applied in the context of school searches, it is conceivable that the New Jersey Supreme Court might rule that school officials cannot conduct a warrantless search based upon information provided to them by law enforcement agencies, even though the information, putting aside its source, would establish reasonable grounds to open a locker under the law that ordinarily would apply to searches conducted by school officials. (As will be discussed in Chapter 2.5, the rules governing searches by law enforcement officers are much more stringent than the rules governing searches conducted by school officials who are acting on their independent authority to maintain order and discipline.)

The issue, then, is whether and to what extent school officials and law enforcement officers in this state can work cooperatively in planning or conducting a search or seizure, and at what point will the New Jersey Supreme Court say that the stricter rules governing police searches and seizures apply, even though the act of searching was physically carried out by a school administrator or teacher.

Unfortunately, this is an unsettled area of law, and there seems to be no precedent directly on point. (For a more detailed discussion of the "silver platter" problem, see Chapter 4.5 D(4)(a).) We must, therefore, use our best judgment in trying to figure out what the law is in New Jersey. One thing is clear: We cannot rely uncritically on cases decided in other jurisdictions where the "silver platter" issue has never been developed because those states have harmonized their state and federal search and seizure law.

Even when the legal standards are well settled, reasonable people may still disagree about whether the facts in a given situation satisfy the applicable legal test. Most cases, and especially those involving search and seizure issues, are said to be "fact sensitive." Consider that in the T.L.O. case, the United States Supreme Court decided that the assistant vice-principal's search of the student's handbag was lawful, based on reasonable grounds to believe that the search would reveal evidence of an infraction of a school rule that prohibited students from possessing cigarettes on school grounds. The New Jersey Supreme Court, however, reviewing the very same facts, and using essentially the same legal standard, had earlier concluded that the search was *un*lawful because the assistant vice-principal had acted on unreliable information that did *not* establish reasonable grounds to believe that cigarettes would be discovered in the student's handbag. In this landmark decision, we see two different Supreme Courts reviewing the same record, but reaching opposite conclusions. (Interestingly enough, the United States Supreme Court offered an uncharacteristically candid rebuke to the New Jersey Supreme Court, commenting that the "New Jersey court's application of that [legal] standard reflects a somewhat crabbed notion of reasonableness." 105 S.Ct. at 744.)

It is not unusual, moreover, for an appellate court comprised of several members to be divided in search and seizure cases. In New Jersey v. T.L.O., three of the nine Justices of the United States Supreme Court disagreed with the majority holding, whereas at the state level, two of the seven Justices of the New Jersey Supreme Court dissented. The inability of judges and justices to agree on the lawfulness of a single search episode provides ample proof that the law of search and seizure is hardly an exact science. There are, however, steps that can be taken that will greatly increase the chances that school officials and police will prevail in any legal challenge, and those steps are spelled out in this Manual.

1.5. Basic Definitions.

A. Search. A "search" entails conduct by a government official that involves an intrusion into a student's protected privacy interests by, for example, examining items or places that are not out in the open and exposed to public view. This is usually accomplished by "peeking," "poking," or "prying" into a place or item shielded from public view or a closed opaque container, such as a locker, desk, purse/handbag, knapsack, backpack, briefcase, folder, book, or article of clothing. The act of opening a locker or bookbag to inspect its contents — however brief and cursory the intrusion — constitutes a search under the Fourth Amendment. For purposes of this Manual, the tactile examination or manipulation of an object, sometimes referred to in a law enforcement context as a "frisk" or "patdown," would also be a search if conducted by school officials. (Note that such conduct by police, if undertaken to reveal a concealed weapon, technically is not a full-blown search, but rather is subject to a lesser standard of judicial review than full probable cause. Since the standard governing a so-called "Terry frisk" by police is essentially the same as the legal standard used to determine the reasonableness of a full-blown search conducted by school officials, for purposes of this Manual, a frisk conducted by a school official, a form of "poking," is tantamount to a search.) The act of reading material in a book, journal, diary, letters, notes, or appointment calendar is also a search.

Note that an "inspection," a term often used in this Manual, is essentially the same as a search in terms of the Fourth Amendment if it involves peeking, poking, or prying into a private area or closed container. So too, ordering a student to empty his or her pockets or handbag constitutes a search within the meaning of this Manual. This is true even though the school official never physically touched the student's property, because if the student complies with the school official's request or command, objects that are not out in the open or already in plain view will be exposed to the school official's scrutiny, thus achieving the ultimate objective of a search. 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").

Merely watching students while they are in class or in school hallways does not intrude on any recognized privacy interest, and this form of surveillance does not constitute a search within the meaning of the Fourth Amendment. (See Chapter 9.) Similarly, the use of video cameras to monitor most places within a school building, such as hallways, does not constitute a search, provided that the monitoring equipment does not capture sound that might intercept or overhear a private conversation. (In that event, the monitoring would implicate the provisions of New Jersey's electronic surveillance law, which imposes significant limitations on the ability of government officials and even private citizens to intercept private conversations.) So too, the act of looking through the transparent windows of a parked automobile — if done *without* opening the door or reaching into the vehicle to move or manipulate its contents — is not a search for the purposes of this Manual.

B. Seizure. The term "seizure" is used to describe two distinct types of governmental action. A seizure occurs (1) when a government official interferes with an individual's freedom of movement (the seizure of a person), or (2) when a government official interferes with an individual's possessory interests in property (the seizure of an object).

In the law enforcement context, a seizure occurs under the first definition when a police officer orders a pedestrian or vehicle to "stop" or "pull over," when an officer makes a full-blown "arrest" or takes a juvenile "into custody," or when an officer begins to chase after a suspect under circumstances where the suspect would reasonably believe that he or she is not free to terminate the encounter with the pursuing police.

As a general proposition, the right of freedom of movement enjoyed by school-aged children is far more limited than the right of liberty enjoyed by adult citizens. Children between the ages of six and sixteen, after all, are required by law to attend school, see N.J.S.A. 18A:38-25, and minors are also subject to reasonable curfews imposed by local governments.

School officials can certainly compel students to attend particular classes and to be present at certain events or assemblies without in any way implicating the rights embodied in the Fourth Amendment. Students, of course, are subject to the daily routine of class attendance, and the times and locations for each class period are determined by school officials, not by students. See Doe v. Renfrow, 475 F. Supp. 1012, 1019 (N.D. Ind. 1979), aff'd in part, remanded in part, 631 F.2d 91 (7th Cir. 1980), cert. den. 451 U.S. 1022, 101 S.Ct. 3015, 59 L.Ed.2d 395 (1981) (district court flatly

rejected the claim that a scent dog operation constituted a "mass detention and deprivation of freedom of movement"; school officials maintain the discretion and authority for scheduling all student activities each day).

For this reason, the act of ordering a student to go to the principal's office, or to sit in a given room or "detention" hall, does not constitute an unreasonable "seizure" within the meaning of the Fourth Amendment or this Manual. Compare Wise v. Pea Ridge Sch. Dist., 855 F.2d 560 (8th Cir. 1988) (holding that in-school confinement to a small room did not violate a student's substantive due process rights) and Hayes Through Hayes v. Unified Sch. Dist., 669 F. Supp. 1519 (D. Kan. 1987), rev'd on other grounds, 877 F.2d 809 (10th Cir. 1989) (holding that it was not a violation of the Constitution for school authorities to order a disruptive student to sit in a small "time out" room). (Note that this citation does not constitute an endorsement by this Manual of "seclusionary time out" as a form of discipline.) See also Edwards for and in Behalf of Edwards v. Rees, 883 F.2d 882 (10th Cir. 1989) (holding that it was reasonable for a vice-principal to remove a student from class and conduct a twenty-minute interrogation in the vice-principal's office concerning the student's role in calling in a bomb threat based upon statements given by two other students implicating the interrogated student). But compare Rasmus v. Arizona, 939 F.Supp. 709 (D. Ariz. 1996) (unresolved issues of fact precludes summary judgment on Fourth Amendment claim that student was subject to an unreasonable seizure that was excessively intrusive in light of the student's age and emotional disability where the eighth grade student, who suffered from attention deficit disorder, was confined in a 3′ x 5′ time-out room that was equipped with double steel bolt locks and a peephole which allowed teachers to look into the room but prevented students from looking out).

It should be noted, however, that a student who is brought to a principal's office for questioning to be conducted by a police officer will almost certainly be deemed to be "in custody" for the purposes of the law concerning police interviews and interrogations. (See Chapter 6 for a more detailed discussion of the law governing interrogations.)

Schools may impose significant restrictions not only on students' freedom of movement, but also on their ability to use and possess personal property. School authorities may, for example, prohibit students from bringing on to school property objects or items that are not per se illegal were they to be carried by adults, such as personal stereos, cellular telephones, pagers, pocket knives, tobacco products, or any other object that might conceivably disrupt the educational environment. The United States Supreme Court in New Jersey v. T.L.O. made clear that schools can enforce rules "against conduct that would be perfectly permissible if undertaken by an adult." 469 U.S. at 339, 105 S.Ct. at 741.

Similarly, schools may regulate and impose significant restrictions on the *use* of student property that is allowed to be brought on school grounds. Schools may require students to keep and store certain items in designated areas during the school day. Schools authorities, for example, may prohibit students from carrying backpacks into a classroom and may require students to keep their backpacks stored safely in assigned lockers while school is in session.

C. Public Official. The terms "public official" or "government official" as used in this Manual refer to anyone who is employed by, or acting under the direction or authority of an employee of, the State of New Jersey or any of its political subdivisions, including any county, local, or regional school district. The Fourth Amendment protections against unreasonable searches and seizures apply only to the conduct undertaken by *governmental* officials, and do not apply to searches or seizures conducted by private citizens. Arguably, therefore, the Fourth Amendment and Article I, Paragraph 7 of the State Constitution do not apply to administrators, teachers, or other employees of independent, private or parochial schools. (Note, however, that the Legislature may enact a statute that imposes limits on the authority of *both* the public and private school employees, such as, for example, the law that prohibits the use of corporal punishment, N.J.S.A. 18A:6-1, or that requires any citizen to report suspected child abuse, N.J.S.A. 9:6-8.10. See discussion in Chapter 10.2 concerning whether the recently-enacted prohibition against strip searches applies to nonpublic school employees.)

Administrators of these independent, private or parochial schools may nonetheless want to follow the search and seizure rules and procedures recommended in this Manual, especially because these rules are premised on notions of "reasonableness," which is the foundation of all Fourth Amendment jurisprudence. Nonpublic schools, moreover, may want to impress upon their students the values and ideals of our constitutional democracy. In any event, if a private school administrator undertakes a search at the direction of or in conjunction with a law enforcement officer, the law enforcement officer's participation will make the search subject to the requirements of the Fourth Amendment.

D. School Official. The terms "school official" or "school authorities" as used in this Manual refer to any employee or agent of a county, local, or regional public school district, including, but not limited to, a school superintendent, principal, vice-principal or other administrator; teacher; substitute teacher; counsellor; athletic director or coach; teaching assistant; nurse; any other professional staff member whether certified or not; clerical employee; janitor or custodian; a school bus driver employed by the district; and any private security officer (other than a law enforcement officer) employed by a school district. Note that no distinction is drawn between administrators and

teachers. Note further that the term generally does not include employees of nonpublic schools. (See the immediately preceding definition of "public official.")

E. Law Enforcement Officer. The term "law enforcement officer" as used in this Manual means any sworn employee of any federal, state, bi-state, county, or municipal law enforcement or prosecuting agency who has police powers under the laws of New Jersey or the United States, without regard to whether the person is on or off-duty, or is working temporarily in the capacity of a private security officer. The term "law enforcement officer" includes, but is not limited to, State Police members; county or municipal police officers; Special I or Special II police officers; officers hired by school districts pursuant to N.J.S.A. 18A:6-4.2 et seq.; sheriff's officers; state investigators, county investigators or detectives; and assistant prosecutors or deputy or assistant attorneys general.

F. Individualized Search. The terms "individualized search" or "suspicion-based search" as used in this Manual refer to a search that is based on a suspicion that a particular, identified student has committed an offense or has violated school rules, and that evidence of the offense or infraction would be found in a specific location, such as the suspect student's handbag or knapsack or in the locker assigned to that particular student. An individualized search is distinct from a "sweep" or "suspicionless" search.

G. Suspicionless Search. The terms "sweep search," "suspicionless search," "generalized search," and "inspection program" as used in this Manual refer to searches of lockers or student possessions that are not limited to a single or specific location and that are not based upon a particularized suspicion that a specific, identified student has committed an offense or infraction of the school rules, or that evidence of any such offense or infraction would be found in a particular location associated with the student who is suspected of wrongdoing. Rather, a sweep search involves subjecting all or some number of lockers or other places to opening and inspection, pursuant to a neutral plan (e.g., by random selection), based upon a generalized belief that drugs, weapons, or other contraband are being routinely brought on to school property by an unspecified number of students whose exact identities are not known.

The terms "sweep search" or "suspicionless search" as used in this Manual also include the act of subjecting the exterior surface or air surrounding unopened lockers, or other objects containing student possessions, to examination by a drug or weapons detection canine, even though, technically, the examination by a scent dog of the outside of a locker or other container does not constitute a search under the Fourth Amendment, because the dog cannot reveal anything private about the contents of the locker or container. It should be noted, however, that once the drug-detection canine alerts to the

presence of controlled dangerous substances in a locker, the ensuing act of opening that locker in response to the animal's alert constitutes an "individualized" search as that term is used in this Manual. (See Chapter 4.5.)

A sweep search or suspicionless search is distinct from an individualized search, which is targeted to a specific individual suspected of wrongdoing and the property owned by or otherwise linked to the student who is suspected of a criminal offense or violation of the school rules.

H. Drugs. The terms "drugs," "illicit drugs," and "controlled dangerous substances" as used in this Manual shall have the same meaning as the term "controlled dangerous substance" as defined in N.J.S.A. 2C:35-2, and includes any drug, substance, or immediate precursor listed in Schedules I through V of the Schedules set forth in N.J.S.A. 24:21-5 through 24:21-5.8 as may be modified by the Commissioner of Health. The terms include, but are not limited to, anabolic steroids, marijuana, cocaine, "crack" cocaine, heroin, PCP ("angel's dust"), methamphetamine ("speed" or "ice"), ketamine ("Special K"), LSD, and mescaline.

I. Drug Paraphernalia. The term "drug paraphernalia" as used in this Manual shall have the same meaning as that term is defined in N.J.S.A. 2C:36-1. The term includes all equipment, products, and materials of any kind that are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, ingesting, inhaling, or otherwise introducing into the human body a controlled dangerous substance.

J. Weapons. The terms "weapons," "deadly weapons," and "dangerous weapons" as used in this Manual shall have the same meaning as the term "weapon" as defined in N.J.S.A. 2C:39-1(r), and includes anything readily capable of lethal use or of inflicting serious bodily injury. The term includes, but is not limited to, all (1) firearms, even though not loaded or lacking a clip or other component to render them immediately operable; (2) components which can be readily assembled into a weapon; (3) gravity knives, switchblade knives, daggers, dirks, stilettos, or other dangerous knives, billies, blackjacks, bludgeons, metal knuckles, sandclubs, slingshots, cestui or similar leather bands studded with metal filings or razor blades imbedded in wood; and (4) stun guns; and any weapon or other device that projects, releases, or emits tear gas or any other substance, including, but not limited to, "mace" or "pepper spray," intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispensed in the air.

K. Firearm. The terms "firearm" or "gun" as used in this Manual shall have the same meaning as the term "firearm" as defined in N.J.S.A. 2C:39-1(f), and includes any handgun, rifle, shotgun, machine gun, automatic or semi-automatic rifle, assault weapon, or any gun, device or instrument in the nature of a weapon from which may be fired or ejected any solid projectile ball, slug, pellet, missile or bullet, or any gas, vapor or other noxious thing, by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances. It shall also include, without limitation, any firearm which is in the nature of an air gun, spring gun or pistol, or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person.

THIS PAGE LEFT INTENTIONALLY BLANK

2. GENERAL PRINCIPLES

Although there are comparatively few published cases that define the rules governing school searches, and although this area of law remains unsettled, there are several fundamental principles that are well established. We can, therefore, draw some legal conclusions with a fair degree of confidence, even though the outcome of these kinds of cases are generally said to be "fact sensitive," and will depend to a large extent on the specific facts unique to each case. (Recall that in the landmark T.L.O. cases, the United States Supreme Court and the New Jersey Supreme Court reached completely different conclusions in applying essentially identical legal standards to the same set of facts.)

Certain general, overarching principles should be carefully considered by any school official or law enforcement officer before undertaking any conduct that might be deemed to be a "search" or a "seizure." These general principles include the following:

2.1. Privacy Rights Versus Property Rights.

A search entails an invasion of privacy. The United States Supreme Court recognized in New Jersey v. T.L.O. that the situation in schools is not so dire that students may claim no expectation of privacy while on school grounds. Nor was the Court prepared to equate schools with prisons for purposes of the Fourth Amendment. The Court, yielding to the practical realities of modern school life, observed that:

> Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them on to school grounds.
> [469 U.S. at 338-339, 105 S.Ct. at 741.]

At least one state court, however, has held that students do not enjoy a reasonable expectation of privacy *in their lockers* where a school district approves a written policy retaining ownership and possessory control of school lockers. See In the Interest of Isiah

B., 500 N.W.2d 637, 641 (Wis. 1993). In that case, students were given notice not only that lockers are the property of the school district, but also that lockers could be inspected by school officials "for any reason at any time." Id. at 639, n.1. The Wisconsin Supreme Court's apparent willingness to permit a school district unilaterally and completely to extinguish students' Fourth Amendment privacy rights in their lockers is hard to reconcile with the vast majority of published court decisions. Most courts have consistently found that students maintain some reasonable expectation of privacy in a locker. See Berman, *Students' Fourth Amendment Rights: Defining the Scope of the T.L.O. School-Search Exception,* N.Y.U. L. Rev. 1077, 1003-1104 (1991). As one Pennsylvania court observed:

> We are unable to conclude that a student would have an expectation of privacy in a purse or jacket which a student takes to school, but would lose that expectation of privacy merely by placing the purse or jacket in [the] school locker provided to the student for storage of personal items. [In the Interest of Dumas, 357 P.A. Super. 294, 515 A.2d, 984, 985 (1986).]

Indeed, both the United States and New Jersey Supreme Courts in T.L.O. made clear that students may have a reasonable expectation of privacy in property that the students do not actually own. The legal question concerning the validity of a search, in other words, cannot be decided merely by reference to arcane notions of property law. Rather, courts will also consider whether the search violated a reasonable expectation of privacy. The mere fact that a school technically "owns" a locker does not mean that the locker can be opened at any time and without regard to the Fourth Amendment or Article I, Paragraph 7 of the State Constitution. The New Jersey Supreme Court in T.L.O. concluded in this regard that:

> We are satisfied that in the context of this case the student had an expectation of privacy in the contents of his locker. "[T]he Fourth Amendment protects people, not places."
>
> * * *
>
> For the four years of high school, the school locker is a home away from home. In it the student stores the kind of personal "effects" protected by the Fourth Amendment. A student is justified in believing that the master key to the locker will be employed at either his request or convenience.

> That a master key exists to gain access to a hotel room does not make it any less entitled to privacy.
> [State in the Interest of T.L.O., 94 N.J. 331, 348-349 (1983) rev'd sub nom., New Jersey v. T.L.O., 469 U.S. 325 (1985) (citations omitted).]

Although the legality of a search will thus turn on questions of privacy rather than property law, this is not to suggest that the issue of who owns the property or place to be searched is irrelevant. Obviously, school officials have more control and authority over property that the school owns, such as lockers and desks, than they have over a student's vehicle that happens to be parked in a school-owned lot or over personal property such as bookbags, purses, and knapsacks that are brought by students on to school grounds. Property owned by students and brought on to school grounds is nonetheless subject to lawful search and seizure by school officials in accordance with the standards established in T.L.O.. (Indeed, the specific property at issue in T.L.O. was a student's purse.) School officials can also impose reasonable restrictions on the use of student property while it is on school grounds or at school functions.

Furthermore, when a student in response to questions posed by a school official denies ownership or possessory interest in a particular object such as a bookbag, the student has little or no expectation of privacy with respect to the contents of that bookbag, and he or she cannot later complain that the school official opened and searched that container. See State v. Moore, 254 N.J. Super. 295 (App. Div. 1992).

A student also loses any legitimate expectation of privacy in property or belongings that he or she "abandons." In the Fourth Amendment context, a person is said to abandon property when he or she voluntarily discards, leaves behind, or otherwise relinquishes control under circumstances where it appears that the person has no intention of reclaiming the property. See e.g., State v. Farninch, 179 N.J. Super. 1 (App. Div. 1981). Thus, for example, a student who discards a package while fleeing from police (or school officials) loses his expectation of privacy in its contents and the subsequent act by police of opening such a discarded package is technically not a "search" for Fourth Amendment purposes. Note, of course, that the act of abandonment must be volitional as well as unequivocal. A school official could not order a student to discard an object and then rely upon the student's compliance as if it were an act of abandonment. This is true even if the object is contraband and the student had no legal right to bring or keep it on school grounds in the first place.

Furthermore, the New Jersey Supreme Court in State v. Hempele, 120 N.J. 182 (1990) ruled that under the State Constitution, a person retains an expectation of privacy in garbage that is placed out for collection. This is one of the cases where the

New Jersey Supreme Court has "respectfully parted company" with the United States Supreme Court, which had earlier held that garbage is a form of abandoned property for Fourth Amendment purposes. See California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed. 30 (1988). Although the exact parameters of the Hempele rule are unclear, it would appear that school officials could not rummage through wastepaper baskets absent reasonable grounds to believe that evidence of an offense or infraction would be found therein, at least where the true purpose of the examination is to find evidence. Note that this strict rule would *not* apply if a school custodian, while performing his or her function to empty wastebaskets, came across an object that was immediately recognized as contraband or evidence of an offense. See Chapter 11 for a more complete discussion of the "plain view" doctrine. So too, the Hempele rule would not apply if a student while being chased happened to discard an object into a waste receptacle rather than onto the ground. Of course, in that event, the facts justifying the pursuit would probably satisfy the reasonable grounds standard needed to justify the seizure and opening of the discarded object, thus rendering academic whether the act by school officials of opening such an object constitutes a "search" for purposes of constitutional analysis.

2.2. Seize Before Opening.

Under the Fourth Amendment and its state constitutional counterpart, a search — the act of opening a locker or closed container — entails an invasion of privacy, whereas a seizure — the temporary dispossession of personal property — involves somewhat less important constitutional rights, especially in the context of the school setting. Therefore, when in doubt, it is often better from a legal perspective for a school official to seize an object or to "secure" a locker (i.e., prevent students from gaining access to the locker), and then to contact law enforcement authorities. Responding police officers, in turn, should obtain a search warrant, rather than open the locker on their own authority. In sum, when a school official is uncertain how to proceed, the better practice would be to take steps to maintain the status quo and to contact the police and prosecutor for advice.

2.3. Critical Importance of Providing Notice of the Right and Intention to Conduct Searches.

One of the best ways to reduce or minimize a student's "expectation of privacy" is to announce to all students and to their parents and/or legal guardians that school authorities expressly retain the right to conduct searches of lockers, desks, or other property, including property owned by the students and brought on to school grounds. School authorities should do more than merely reserve the right to conduct a search.

They should announce that they intend to conduct such inspections or searches as often as may be necessary to maintain order and discipline and to protect the safety and well-being of the entire school community.

State law codified at N.J.S.A. 18A:36-19.2 expressly provides that:

> The principal or other officials designated by the local board of education may inspect lockers or other storage facilities provided for use by students so long as students are informed in writing at the beginning of each school year that inspections may occur. (emphasis added)

Providing advance notice of the right and intention to conduct searches serves two distinct and important purposes. First, advance or "fair" notice provides students with an opportunity to limit the effect of the privacy intrusion by not bringing or keeping highly personal items (such as implements of personal hygiene, contraceptives, evidence of sexual orientation, etc.) on to school grounds. Second, advance notice promotes school safety by serving as a deterrent, discouraging students from bringing or keeping dangerous weapons, drugs, or other contraband on school property, since students would know that these items would be subject to discovery and that such discovery might result in school discipline or even criminal prosecution. After all, the whole point of an inspection program would be lost were it to be kept a secret.

We should keep firmly in mind that our ultimate goal is *not* to seize drugs and other contraband, or to catch students in actual or constructive possession of drugs or weapons so that we can prosecute or discipline them. Rather, we hope to ensure the safest possible environment for all students by preventing and discouraging students from engaging in dangerous conduct on school grounds that might subject them to school suspension, expulsion, or criminal prosecution. (See Chapter 4.4D for a more detailed discussion of whether and to what extent the lawfulness of a search depends on the "purpose" of the official undertaking the search.) To accomplish this critical deterrent objective, it is essential that school officials make clear their intention to conduct reasonable searches and seizures as a means to enforce school rules.

All members of the school community benefit when students are fully aware of their rights and their responsibilities. Moreover, the debate on how best to respond to the problem and on what tactics to use provides an excellent opportunity for law enforcement and education officials to reach out to members of the school community and parents to discuss the scope and nature of a particular district's or school's drug problem, and the efforts being undertaken to respond to that problem. See Chapter

4.5F(2) for a discussion on the need to solicit parent input in designing a program to use drug-detection dogs.

2.4. Providing Advance Notice is not the Same as Obtaining Consent to Search.

A few courts and commentators have suggested that providing advance notice of the school's intention to conduct searches is tantamount to obtaining "consent" to conduct these searches. Consent is one of the recognized exceptions to the probable cause and warrant requirements imposed upon law enforcement officers. Police officers, for example, are allowed to ask for permission to conduct a search even if they do not have probable cause or even a mere reasonable articulable suspicion to believe that the consent search will reveal evidence of crime. See State v. Abreu, 257 N.J. Super. 549 (App. Div. 1992).

Law enforcement and school officials should not, however, proceed under the assumption that a student has actually or impliedly consented to the search of a locker or other property merely because the student has agreed to use the locker subject to certain conditions, or has agreed to such inspections as a condition of bringing the property, such as a vehicle, on to school grounds. (The law of consent is discussed in more detail in Chapter 8.) For present purposes, it is enough to note that given the tender age and lack of maturity and sophistication of primary and even secondary school students — most of whom are considered under the law to be minors or "juveniles"— reviewing courts, especially in New Jersey, are likely to be skeptical of any claim that a student has consented to a search or inspection.

Even if that particular hurdle is overcome (i.e., by obtaining consent from a parent or legal guardian in addition to or in lieu of getting permission from the student), it is doubtful that any such general consent, given in advance of a specific request to search, would be deemed to be "voluntary" under New Jersey law. This is one of the areas where the New Jersey Supreme Court has diverged from federal precedent and has provided persons charged with criminal offenses with far greater protections under the State Constitution than are afforded to defendants under the United States Constitution, as interpreted by the United States Supreme Court and other federal courts. The New Jersey Supreme Court has made clear, for example, that any person giving consent must be aware that he or she has the *right to refuse* consent, and that such refusal would be respected by government authorities. See State v. Johnson, 68 N.J. 349 (1975). (Under federal law, in contrast, knowledge of the right to refuse is not absolutely required, and is only one of several factors used by federal courts to determine whether a consent was voluntary. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).) If, in fact, the student or legal guardian is not really free to

refuse to give consent, it is likely that any such permission would be deemed by New Jersey courts to be coerced or "involuntary" under New Jersey law.

Similarly, it is unlikely that the New Jersey Supreme Court would embrace the concept of "implied consent." The doctrine of implied consent has been used to authorize police, for example, to demand a driver who has been lawfully stopped to produce certain credentials (e.g., driver's license, vehicle registration, rental agreement, or insurance identification card) and to require suspected drunk drivers to submit to breath testing to confirm or dispel an officer's reasonable suspicion that the motorist is under the influence of alcohol or other intoxicating substances. These law enforcement actions are said to be impliedly consented to in advance by those who elect to use New Jersey's roads and highways. It is critical to note, however, that the implied consent doctrine does *not* allow police to conduct unreasonable credential searches. Nor does it allow police to stop a vehicle absent a reasonable suspicion that the driver is impaired, or to arrest a suspected impaired driver unless there is probable cause to make the arrest.

In the context of school searches, under the theory of implied consent, students would be deemed to have consented to searches, at least those undertaken by school officials to enforce general school regulations or particular rules and regulations concerning the use of lockers, when the students agree to accept the assignment of a locker at the beginning of a school year or semester. Students who refuse to accept these conditions are simply denied access to a locker, and, by the same token, students may elect not to waive their Fourth Amendment rights in advance simply by declining to apply for or accept a locker assignment.

Some commentators have referred to this theory as a "legal fiction." According to one noted Fourth Amendment scholar:

> The fiction of implied consent is inconsistent with the established rule that even privileges may not be conditioned upon the surrender of constitutional rights... . It has no place in the analysis of searches directed at students, for it diverts attention from the fundamental inquiry into the reasonableness of the particular search procedures at issue.
> [4 LaFave, Wayne R., *"Search and Seizure: A Treatise on the Fourth Amendment"* (3rd. ed. 1996) § 10.11(e) at p. 842.]

Indeed, the dubious validity of the implied consent doctrine is underscored by the United States Supreme Court's decision in T.L.O.. The New Jersey Attorney General in that case had argued that given the pervasive supervision to which children in school are subjected, they can have no legitimate expectation of privacy in articles of personal

property that are "unnecessarily" carried into a school. 106 S.Ct. at 741. The Court was not impressed by this argument, which it dismissed as being "severely flawed." Id. "Schoolchildren," the Court reasoned, "may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them on to school grounds." Id. (emphasis added).

In light of this portion of the Court's decision in T.L.O., school officials would be hard pressed to argue that students have impliedly consented to a search of personal belongings when they choose to bring such items into the schoolhouse, when they apply for a locker in which to store these legitimate, noncontraband items, or when they drive a vehicle on to a school-owned parking lot.

In one case, a court in another jurisdiction did rule that students have no reasonable expectation of privacy at all in their lockers once they were advised of a school district policy whereby the school retained ownership and possessory control of school lockers and where students were warned that lockers could be inspected by school officials "for any reason at any time." See In the Interest of Isiah B., 500 N.W.2d 639, 641 (Wis. 1993). The Wisconsin Supreme Court in that case concluded that because students had no reasonable expectation of privacy in their lockers, the act by school officials of opening lockers to look for weapons did not constitute a "search" for Fourth Amendment purposes. Id. at 641.

That conclusion, however, may not carry much precedental weight in New Jersey. As was noted by the dissent in In the Interest of Isiah B.:

> While notice that a locker may be searched might diminish the reasonableness of a student's expectation that items stored there will be kept secret, numerous courts have repeatedly stated that a government proclamation cannot eradicate Fourth Amendment rights. "The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped, or that all homes would be searched." The school's ownership or partial control of the lockers cannot negate the students' expectation of privacy in the contents of the lockers. [500 N.W.2d at 645 (Abrahamson, J., concurring and dissenting) (citation to quoted authority and footnote omitted).]

See also Jones v. Latexo Ind. Sch. Dist., 499 F.Supp. 223, 234 (E.D. Tex. 1980) ("mere announcement by school officials that individual rights are about to be infringed upon cannot justify the subsequent infringement ... .")

In sum, although the New Jersey Supreme Court has not had the opportunity to address this issue, it is unlikely that it would permit school officials to require students to waive *all* Fourth Amendment privacy rights as a condition of being provided the use of a locker. Consider the following example: school officials clearly announce at the beginning of the school year that lockers provided to students are subject to periodic inspections. Given this advance notice, school officials could lawfully open and inspect the contents of lockers pursuant to a "neutral plan." (See Chapter 2.11.) The fact that such advance notice was given would not, however, authorize a principal to search a particular locker based on an unsubstantiated rumor that the student to whom the locker was assigned may have used drugs. Before the principal may open that particular locker, he or she would first have to meet the test established in New Jersey v. T.L.O., that is, the school official must be aware of facts that, taken as a whole, provide reasonable grounds to believe that a search of that particular locker would reveal drugs or other evidence of a criminal offense or violation of school rules.

The student in this case could not be said to have impliedly consented to any and all searches that the school might want to conduct of his locker merely because the student agreed to accept the locker assignment and to abide by the school's rules and regulations governing the use of a locker. Were it otherwise, the ruling in New Jersey v. T.L.O. would be largely meaningless, at least as applied to the searches of students' personal belongings that happen to be kept in lockers, and schools could easily circumvent the T.L.O. reasonable grounds standard simply by announcing at the start of the school year that the Fourth Amendment does not apply to lockers or perhaps even to other property that the school permits to be brought on to school grounds.

For the foregoing reasons, it would appear that the implied consent theory is not especially helpful in determining the lawfulness of a particular search. Rather, as Professor LaFave notes, the lawfulness of a given search will depend upon whether the search was conducted in a reasonable fashion.

2.5. Law Enforcement Searches Require a Higher Standard of Justification Than Searches Undertaken by School Officials.

When a search is conducted by a law enforcement officer or by a civilian or non-law enforcement government official acting under the direction of or in concert with a law enforcement officer, the search must be based upon "probable cause" to believe that evidence of a crime will be discovered. This is a higher standard of proof than the "reasonable grounds" or "reasonable suspicion" standard used to justify a search conducted by school officials acting independently and on their own authority to maintain order and discipline. In addition, where a search is conducted by or at the

behest of a law enforcement officer, the officer must first obtain a search warrant from a Municipal or Superior Court judge, unless the search falls into one of the narrowly drawn "exceptions" to the warrant requirement (such as a search "incident to a lawful arrest," the "automobile exception," "plain view," "consent," or "exigent circumstances").

The strict standards governing law enforcement searches apply at all times to all law enforcement officers, without regard to whether they are on or off-duty. Furthermore, a law enforcement officer who is employed by a school district is still a law enforcement officer and must always comply with the stricter rules governing law enforcement searches and seizures, even if the officer is acting under the direction of a school official.

A school official has no legal authority to order a law enforcement officer, other than one employed by a school district pursuant to N.J.S.A. 18A:6-4.2 et seq., to conduct a search. If any law enforcement officer undertakes a search at the request of a school official, the legality of that search will be judged by the standards governing law enforcement searches (i.e., full probable cause and a warrant issued by a judge, or facts establishing a recognized exception to the warrant requirement). This does not mean that a principal or other school official cannot ask a police officer to conduct a search, or that a police officer is precluded from complying with any such request. To the contrary, regulations promulgated by the State Board of Education and an Attorney General Executive Directive expressly authorize school officials to request a law enforcement agency to assume responsibility for conducting a search or seizure. See N.J.A.C. 6:29-10.3B4(ii). Rather, the rule is only that in these circumstances, the lawfulness of the search conducted by a law enforcement officer will doubtless be tested by applying the legal standard governing police searches.

In other words, a law enforcement officer is not permitted to become an agent of the school so as to take advantage of the less stringent and more flexible standard that applies to searches conducted by school officials. The converse, however, is not true. If a law enforcement officer asks or directs a school official to open a locker or otherwise conduct a search, the school official *will* be deemed to be an agent of law enforcement, and the legality of the search — even though technically undertaken by the school official — will be judged under the stricter rules governing law enforcement agencies. (See Chapter 4.5D(4)(a) for a more detailed discussion of when and under what circumstances law enforcement and school officials may work cooperatively to maintain school discipline without converting a search conducted by school officials into a law enforcement activity subject to the stricter rules that apply to law enforcement officers.)

2.6. Warning Concerning the Use of Private Drug Detection Dogs.

Some private companies make drug-detection canines available to schools for a fee. Because these animals and their handlers are not part of the law enforcement community, their use does not automatically invoke the stricter rules governing searches undertaken by law enforcement officers. But see Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982), cert. denied, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 and Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980) (in both cases, the courts held that the Fourth Amendment applies even though the drug-detection dogs were privately owned).

The Attorney General, the county prosecutors, and other law enforcement agencies in this state cannot vouch for the effectiveness of these private services. For one thing, it is not always clear how these animals were trained, and whether their training regimen meets the high-quality standards governing the training of drug-detection canines used by law enforcement agencies. It is conceivable that some of the animals used by private companies have "washed-out" of law enforcement training schools.

In addition, it is not always clear how the scent recognition skills of these dogs are reinforced. The process of reinforcement must occur on a routine if not daily basis. Not all private security companies, however, have lawful access to Schedule I and II controlled dangerous substances such as marijuana, cocaine, heroin, and LSD. (Under federal law and regulations, persons may register with the Drug Enforcement Administration to obtain and use certain controlled substances for animal training and research purposes. See 21 U.S.C. § 823 and 21 C.F.R. 1301.21. See also N.J.S.A. 2C:35-18, which places the burden of proof on any individual who claims to be exempt from criminal liability by virtue of being registered to lawfully manufacture, procure, possess, or dispense a controlled dangerous substance.) School officials should be especially cautious before accepting and relying upon the services of animals that were trained or reinforced with "synthetic" drugs. (See Chapter 4.5C for a more detailed discussion of the factors used to establish the reliability and "track record" of a particular scent dog and handler.)

In sum, the Attorney General, the county prosecutors, and law enforcement agencies in this state offer no claim that a positive alert by a privately-owned and handled drug-detection animal constitutes probable cause or even reasonable grounds (the lesser standard of proof established in T.L.O.) to believe that the locker or other area identified by the animal contains a controlled dangerous substance.

It is critical to note, finally, that should schools elect to use privately-owned drug-detection canines, a school official or any other person who seizes or takes custody of an object or substance suspected to be a controlled dangerous substance or drug paraphernalia *must turn the substance or object over to the police or prosecutor's office*. See N.J.A.C. 6:29-10.5(a). It is a criminal offense in New Jersey to dispose of any controlled dangerous substance by any means other than by delivering the substance to a law enforcement officer. N.J.S.A. 2C:35-10c.

Under no circumstances may a school official destroy or "flush" suspected drugs. Nor may an employee of the private drug-detection company do so, even if the person is permitted under federal law to lawfully procure, handle, and even destroy drugs for canine training and research purposes. (Note that the federal exemption applies only to drugs that were obtained lawfully from another Drug Enforcement Agency (DEA) registrant, and does *not* apply to illicit drugs found in a search. In addition, the federal DEA requires that an application to register for purposes of training or using dogs in drug detection must include procedures for reporting any findings of illicit drugs to law enforcement officials. See K-9 Drug Detection Service of Florida, Inc., Denial of Application for Registration, 56 FR 5238 (1991).) Furthermore, the act of disposing any substance found in a search would not only constitute an offense under New Jersey's drug laws, but would also constitute the indictable crime of concealing or destroying evidence of a crime committed by another. See N.J.S.A. 2C:29-3a(3) and N.J.S.A. 2C:28-6. Note also that school officials (or an employee of the private company) would be required to tell police exactly where the drugs or paraphernalia were discovered, since the "amnesty" feature, codified at N.J.A.C. 6:29-10.5(a)(1) and discussed in more detail in Chapter 14.1C, would not apply in circumstances where the drugs were discovered in a search conducted by school officials or by any other person.

2.7. Err on the Side of Protecting Privacy Rights.

As a general proposition, this Manual adopts the principle, first announced by the New Jersey Attorney General in the *1985 School Search Guidelines* (see Appendix 1), that 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. In other words, when in doubt as to the lawfulness of a search, the better practice is to secure the scene and to seek legal advice from a prosecutor or school board attorney, rather than to undertake the search and possibly commit a violation of the Fourth Amendment or of Article I, Paragraph 7 of the State Constitution. (Note that preserving the status quo and seeking objective advice as to how best to proceed is *not* tantamount to ignoring the problem or doing nothing to respond.) This deliberate approach is consistent with the training that is provided to law enforcement officers, who are

instructed, for example, that when they have an opportunity to obtain a search warrant from a judge, they should pursue that option rather than to take it upon themselves to conduct a warrantless search.

We expect that not everyone will agree with this cautious approach. Many educators, parents, and law enforcement executives believe it is necessary to send the strongest possible message to children about our resolve to enforce rules and laws concerning drugs and weapons, and that this requires that school officials respond decisively when confronted with facts that suggest that such contraband is present in the schoolhouse. While school officials are permitted *and are expected* to react promptly and decisively, their response should never disregard the consequences of violating a student's constitutional rights.

Certainly when a firearm or explosive device is the object of a search, public safety issues arise that make it especially imperative for swift action. New Jersey courts have long recognized the significance of weapons, and especially firearms, when these are the objects of the search, and, for this reason, law enforcement officers are afforded greater flexibility in conducting a search for weapons under the so-called "exigent circumstances" doctrine. (See Chapter 12 for a more detailed discussion of this doctrine.) Of course, in any instance where students' safety is directly and imminently in peril, school officials would be well advised in any event to call the police and secure the area until the police arrive to make certain that no one enters the area who might remove, destroy, or use the suspected weapon or explosives device.

2.8. Using the "Least Intrusive Means."

It is a general principle of search and seizure law that reviewing courts will look to whether government actors had alternative options that they could have pursued to address the situation at hand. This principle, discussed in more detail later in the Manual, is sometimes referred to as "minimization," whereby police are encouraged to use the "least intrusive means" to accomplish their legitimate investigative objective.

The United States Supreme Court has repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2395, 132 L.Ed 2d. 564, 580 (1995). Thus, the fact that a less intrusive option was available does not automatically mean that the searching technique that was chosen by school officials or police will be found to be unconstitutional. The legal test, ultimately, is whether the search at issue was reasonable, not whether a different tact would have been preferable. Even so, using the least intrusive method available in the circumstances demonstrates

an earnest effort to balance competing interests: the need to find evidence, to enforce the law and to protect the safety of the school community on the one hand, as against the duty to respect a student's constitutional rights on the other hand.

In the context of school searches, it is conceivable, for example, that school officials will be asked to explain why they chose to invite police to bring drug-detection dogs into a school, rather than to employ a locker inspection program whereby school lockers are randomly selected and searched for drugs or other contraband by school officials acting independently and without any law enforcement assistance. (These issues are addressed in detail in Chapter 4.5, and this Manual offers several options for school administrators who are trying to keep students from bringing drugs or weapons on to school property.)

This is not at all to suggest that it is either unlawful or inappropriate as a matter of policy to use drug-detector dogs. To the contrary, while the use of police-owned canines is controversial, arguably, this tactic constitutes *less* of an intrusion on students' privacy rights, as compared to a random locker inspection program, precisely because a drug-detection dog cannot reveal anything private about the contents of students' lockers. If anything, the dogs serve as a screening device, much like a metal detector, limiting the number of lockers that will have to be physically opened and searched. In Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998), for example, the Pennsylvania Supreme Court recently upheld the use of trained drug-detection dogs to conduct a schoolwide locker inspection. The court emphasized that the dogs were specifically employed to limit the intrusion occasioned by the principal's decision to search the entire school. Because the dogs were used as a screening device, only a few of the 2,000 lockers subject to inspection were actually opened. Id. at 352-53, 362.

Furthermore, drug or weapons-detection dogs are an extremely useful tool that can be used, among other things, to send an appropriate message to students — one likely to get their attention — that school officials will not stand idly by while some students endanger the school community by bringing drugs or weapons on to school property.

In sum, while school officials are afforded considerable latitude in selecting among different options to respond to a particular problem, they should always try to minimize the negative effects of the tactic they ultimately choose. Thus, for example, this Manual strongly recommends that searches be done in private and away from the general student population to minimize the stigma associated with the search, and to lessen the possibility that a student might be embarrassed by the inadvertent discovery in the presence of classmates of non-contraband objects, such as implements of personal hygiene, birth control devices, or items that reveal sexual preferences or orientation.

Furthermore, as Justice O'Connor aptly observed in her dissenting opinion in Acton, "any distress arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential." 515 U.S. at __, 115 S.Ct. at 2402, 132 L.Ed.2d at ___ (O'Connor, J., dissenting).

For this same reason, representatives from the electronic and print media should not be invited to observe actual searches of students or students' possessions in circumstances where the identity of the students involved might be revealed. Compare Doe v. Renfrow, 631 F.2d 91, 93 (7th Cir. 1980) (Swygert, Circuit Judge, dissenting) (commenting that the "extraordinary atmosphere" at the school was exacerbated when representatives from the news media were invited by school authorities to observe a scent dog raid and observed searches of the students in progress). See also R. 3:5-4 (requiring that search warrants be issued with all practicable secrecy, and declaring that disclosure, prior to its execution, that a search warrant has been applied for or issued may constitute contempt of court). While school officials may want to publicize the inspection event to achieve the maximum deterrent effect, and while media scrutiny might conceivably assuage concerns that such sweep inspections are conducted in a capricious or discriminatory way, the manner in which the inspection and any resultant searches are done must minimize privacy invasions, including breaches of confidentiality. Note in this regard that the New Jersey Legislature had adopted express provisions to ensure the confidentiality of information concerning suspected acts of delinquency committed by persons under the age of eighteen. (See N.J.S.A. 2A:4A-60 and Chapter 14.3.) Of course, law enforcement agencies must at all times scrupulously comply with the requirements of Executive Order 69, which spells out when and under what circumstances the public and representatives from the media are entitled to have prompt access to information about criminal activities occurring in the community.

2.9. The Need to Make Findings.

It cannot be emphasized strongly enough that the key to meeting the "reasonableness" test under the Fourth Amendment is for school officials to be able to articulate the *reasons* for their course of conduct. This is true with respect to both individualized or suspicion-based searches and generalized or suspicionless inspection programs. Obviously, if school officials are to conduct a search of a particular place in accordance with New Jersey v. T.L.O., they must be prepared to articulate and document the facts that provided reasonable grounds to believe that the search would reveal evidence of a crime or school rule infraction. By the same token, if, for example, school officials want to use police drug-detector dogs to sniff students' bookbags in addition to sniffing the outside of lockers, school officials should be prepared to explain, on the basis of recent experience and general information learned from students, that some students have

begun to carry drugs on their persons or in their knapsacks or bookbags for convenience or as a means of avoiding detection.

It is especially incumbent upon school officials to make a careful record explaining the reasons for any planned search, that is, a search that is not conducted on the spur of the moment based upon information just learned. In deciding search and seizure cases, courts recognize that police or school officials are sometimes required to act swiftly and without the opportunity for abstract contemplation that judges enjoy. When, in contrast, school officials have the opportunity to carefully plan a search by conducting, for example, a random locker inspection program or by inviting police to bring drug-detection dogs into the school, courts are likely to expect and require school officials to undertake a more careful and deliberate balancing of competing interests, and to conduct the search in a manner that best achieves its objectives while causing the slightest possible intrusion on students' legitimate privacy interests.

Indeed, the United States Supreme Court recently reaffirmed that to justify a suspicionless inspection program, school officials should be able to make a "showing of a prior demonstrated need." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2395, 132 L.Ed 2d. 564, 580 (1995) (emphasis added). This suggests that school officials would do well to make a careful record in support of any planned inspection program *before* the program is challenged in court by an aggrieved student or parent. Reviewing courts are more likely to be skeptical of post hoc justifications that were thought up or researched by lawyers, rather than by school officials, only after a lawsuit had been filed.

Whether a search is planned in advance or takes place on the spur of the moment based on facts just learned, a reviewing court will always perform its own balancing test, but must do so based solely upon the facts set out in the record before the court. School officials and police will fare better in litigation if they are able to demonstrate the exact nature and extent of the interests weighed on both sides of the scales, and especially if they can document the *practical* problems and concerns that explain and justify the challenged search or inspection. While courts will never abdicate their responsibility to decide questions of law and fact, and thus may not defer to the judgment of school authorities or police officers, they will take into account the experience and expertise of government officials who are charged with the difficult task of maintaining order, discipline, and a safe drug-and-weapons-free environment in our schools. After all, the United States Supreme Court in New Jersey v. T.L.O. held that a child's interest in privacy must be balanced against "the substantial interests of teachers and administrators in maintaining discipline in the classroom and on school grounds." 105 S.Ct. at

741. It is therefore important that school officials be able to articulate the nature and extent of their interests in adopting a particular policy.

In making their findings to justify or explain a search or random inspection program, school authorities need not be concerned that their district has not experienced the severe crime or discipline problems associated with some schools. There is no minimum number of acts of violence, vandalism, or substance abuse in a particular school that must be documented before the school can adopt a particular search policy, and officials in these more fortunate schools or districts have a legitimate if not compelling interest in maintaining, not just restoring, a climate of safety and security. Indeed, the United States Supreme Court in T.L.O. expressly recognized that close supervision of students and the enforcement of school rules is necessary even in school systems that have been spared the most severe disciplinary problems. T.L.O., supra, 105 S.Ct. at 741.

Thus, in Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370, 379 (App. Div. 1993), the court flatly rejected the argument that the school's policy of searching hand luggage carried by middle-school students on class trips was unreasonable simply because this was a suburban school system that had not faced the most serious disciplinary problems. The court also rejected the argument that the policy was unreasonable merely because the resulting searches of student hand luggage conducted between 1978 and 1991 had turned up contraband in only six instances. The plaintiff challenging the search policy pointed to that statistic as evidence that there was no problem at the school serious enough to justify these suspicionless searches. In rejecting that argument, the court in Desilets noted that it was equally possible that the search policy had been an effective deterrent. See also Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1985) (a low incidence of detection in a drug testing program "far from impugning the validity of the scheme ... is more logically viewed as a hallmark of success.")

2.10. Search Policies Must be Reasonable, Not Perfect.

One of the important recurring themes in school search law is that school policies should be designed — first and foremost — to discourage students from bringing drugs, alcohol, weapons, and other contraband on to school grounds. The fact that the deterrent effect of a particular program or policy is not perfect due to gaps or loopholes in the policy does not mean that the policy is unreasonable under the Fourth Amendment. Just because it is possible for students to evade detection under a particular program hardly means that the program is unconstitutional.

Lawyers sometimes describe such policies as being "underinclusive." In the Fourth Amendment context, however, school authorities should not be criticized for their failure to "push the envelope." It is not a valid criticism under the Fourth Amendment that the particular policies or procedures adopted by a school do not go far enough in detecting contraband or in precluding students who are bent on violating the law or school rules from bringing or keeping drugs or weapons on school grounds. Regrettably, some offenders will always be able to find a way to get past our efforts to interdict harmful substances and weapons — a point that is underscored by the presence of drugs and weapons in prisons, which are far more secure than schoolhouses.

The issue, ultimately, is whether the policies or procedures employed are a reasonable response to the problem that exists in the school. Of course, school authorities should be mindful that if a particular policy or program has little or no actual, documented benefits, there would be little to balance against the intrusion on students' Fourth Amendment privacy interests. Ill-conceived and totally ineffective procedures, in other words, are not likely to fare well in the balancing test used by the courts to decide whether the Fourth Amendment has been violated.

It is nonetheless important to remember that the utility and benefits of a particular program or procedure should not be measured solely by reference to how many students have been "caught" violating the law or school rules, since the failure to reveal evidence may indicate that the policies or procedures have been effective in deterring students from engaging in prohibited conduct. Indeed, courts have recognized that established search procedures may be more valuable for what they discourage than for what they discover. See Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370, 379 (App. Div. 1993) (quoting United States v. Herzbrun, 723 F.2d. 773 (11th Cir. 1984) (the fact that a school has adopted a policy of inspecting hand luggage, but not student clothing or pockets, cannot be successfully challenged merely because students could easily circumvent the inspection process simply by concealing drugs, weapons, or other contraband in their pockets).

2.11. The Importance of Developing a "Neutral Plan" in Conducting an "Administrative Search."

When school officials conduct a so-called "suspicionless" search, they must provide safeguards that take the place of the particularized suspicion standard announced by the United States Supreme Court in T.L.O.. Specifically, a suspicionless search or inspection program should be done pursuant to a "neutral plan" that imposes significant limitations on the discretion of the school officials who will be selecting

lockers for inspection. By limiting discretion, a neutral plan decreases the chance that a search will be based upon capricious or discriminatory criteria.

The body of law that describes these "neutral plans" is sometimes referred to as the law governing "administrative" searches. There is considerable authority in the caselaw for so-called administrative searches, which are not designed to find evidence of crime, but rather are used to protect public health and safety. Such inspections are allowed provided that they are conducted pursuant to a reasonable plan supported by a valid public interest. See Marshall v. Barlow's, Inc., 436 U.S. 307, 320-21, 98 S.Ct. 1816, 1824, 56 L.Ed.2d 305 (1978) (OSHA searches were found to be reasonable because the warrants were based on a general plan for enforcement of a statute derived from "neutral principals").

There is every reason to believe that in this state, the principles established in these administrative search cases can be applied to inspection programs designed and implemented by school authorities. Indeed, the New Jersey Supreme Court in T.L.O. expressly noted that, "[w]e are satisfied that the legislative scheme for public education in New Jersey contemplates a narrow band of administrative searches to achieve educational purposes." 94 N.J. 331, 343-344 (emphasis added).

As a general proposition, government officials may not use an administrative search to uncover evidence of criminal activity. See Michigan v. Clifford, 464 U.S. 287, 294, 104 S.Ct. 641, 647, 78 L.Ed.2d 477 (1987). The presence of both administrative (i.e., health and safety) and criminal investigative purposes, however, does not necessarily invalidate an otherwise lawful administrative search, provided that the "primary object" of the search is not to gather evidence of criminal activity. See Michigan v. Clifford, 464 U.S. 287, 294 (1984) and New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) ("The discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect.") That is why it is so important that school officials emphasize that a locker inspection program is designed principally to enhance safety in the school by discouraging students from keeping drugs or weapons on school grounds, rather than to apprehend and prosecute juvenile offenders. By the same token, it is well settled that if a valid administrative search does disclose evidence of criminal activity, that evidence may be seized and admitted in a criminal prosecution. See Michigan v. Clifford, 464 U.S. 287, 294 (1984).

Most of the above-cited cases involved administrative searches that were authorized by a warrant or an entry and inspection order issued by a judge. See also State v. Hempele, 120 N.J. 182, 221-223 (1990) (discussing standards in New Jersey

for obtaining administrative search warrants). The United States Supreme Court has also upheld reasonable *warrantless* administrative searches of "pervasively regulated" business premises. See e.g., New York v. Burger, 482 U.S. 691 (1987). This exception to the warrant requirement is justified by the important role of periodic inspections in enforcing health and safety regulatory schemes, coupled with the reduced expectation of privacy flowing from "pervasive regulation." Id. at 704-707.

Arguably, these same factors are relevant in the context of school locker inspection programs. Indeed, the New Jersey Supreme Court in T.L.O., in analogizing school searches to administrative searches, recognized that government officials may not conduct warrantless administrative searches of property except in certain carefully defined classes of cases, most notably, those involving pervasively regulated businesses. The Court noted that, "although the school setting does not at first glance fit that general mode, within that matrix we examine the statute and conduct of the [school official] in this case." 94 N.J. at 342. (citations omitted). After carefully reviewing the statutory responsibility of schools to maintain order, safety, and discipline, and their broad authority over schoolchildren, the New Jersey Supreme Court concluded, ultimately, that school officials may conduct a search without having to obtain a warrant. Given the New Jersey Supreme Court's mode of analysis in T.L.O., it would seem that it would not be unreasonable to assume that the general principles governing administrative searches can be applied to searches conducted by school officials. (This will become especially important later in this Manual when we discuss the authority of schools to conduct a *suspicionless* inspection program. See Chapter 4.2 and 4.4.)

In New York v. Burger, supra, the United States Supreme Court held that a warrantless administrative search of a pervasively-regulated industry is reasonable provided that: (1) there is a substantial governmental interest behind the regulatory scheme being enforced; (2) the search is necessary to further that scheme; and, (3) the authorizing statute is an adequate substitute for the warrant in giving notice to owners and limiting the discretion of those conducting the search. Id at 702-703. These should be the guiding principles that school officials use to design and implement a suspicionless inspection program, and these principles are discussed in far greater detail in Chapter 4.4.

2.12. Broad Supervisory Authority of Schools.

Public school officials exercise considerable control and authority over schoolchildren. In State in Interest of T.L.O., the New Jersey Supreme Court recognized that the "Legislature has specifically charged school officials to maintain order, safety and discipline." 94 N.J. at 342-343. Statutes give school officials the authority to prevent

disorderly conduct by pupils, N.J.S.A. 18A:25-2, and students are required to submit to such authority. N.J.S.A. 18A:37-1. The same statute that prohibits both public and private school employees from inflicting corporal punishment also expressly authorizes such employees to "use and apply such amounts of force as is reasonable and necessary:

(1) to quell a disturbance, threatening physical injury to others;
(2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
(3) for the purpose of self-defense; and,
(4) for the protection of persons or property. (N.J.S.A. 18A:6-1).

Furthermore, a regulation adopted by the State Board of Education declares the goal that "every school in New Jersey will be free of drugs and violence and offer a safe, disciplined environment conducive to learning." N.J.A.C. 6:8-21.

Although the authority exercised by school officials over students is pervasive and sweeping, it is not without limitation. While taking note of the inherent difficulty in maintaining discipline in schools, the United States Supreme Court in T.L.O. found that the situation is not so dire that students may claim no expectations of privacy that serve to circumscribe the authority of school officials to conduct searches whenever they want to. Notably, the Court rejected the idea that the Fourth Amendment rights of schoolchildren were comparable to the minimal rights afforded to prison inmates. The Court had already ruled that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells. The Court concluded that, "it goes almost without sayings that '[t]he prisoner and the schoolchild stand in wholly distinct circumstances, separated by the harsh facts of criminal conviction and incarceration.'" New Jersey v. T.L.O., supra, 105 S.Ct. 733, 741, quoting Ingraham v. Wright, 430 U.S. 651, 657, 97 S.Ct. 1401, 1410, 51 L.Ed.2d 711 (1977). The Court in T.L.O. stated emphatically that, "we are not yet ready to hold that schools and prisons need to be equated for purposes of the Fourth Amendment." 105 S.Ct. at 741.

Despite statistics that document the nature and scope of the modern day drug and violence problems in our schools, it is highly unlikely that the United States Supreme Court, much less the New Jersey Supreme Court, would adopt a different view today.

THIS PAGE LEFT INTENTIONALLY BLANK

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.

THIS PAGE LEFT INTENTIONALLY BLANK

4. GENERALIZED OR SUSPICIONLESS SEARCHES

4.1. Introduction and Overview.

Given the serious security and discipline problems that exist in a number of school districts, many education professionals believe that it is appropriate and even necessary to conduct routine searches that are not based upon a suspicion that a particular, identified student has committed an offense or violation of the school rules. These suspicionless searches or inspection programs are sometimes referred to as "sweep," "dragnet," or "blanket" searches.

It should be noted that this portion of the Manual includes a detailed discussion concerning the use of drug-detection dogs, see Chapter 4.5, since schoolwide canine sweeps are often characterized as a form of generalized, suspicionless or "blanket" search. However, once a drug-detection canine alerts to the presence of drugs in a particular locker or other location, the ensuing act of opening the locker constitutes an individualized, suspicion-based search.

Suspicionless searches are not designed to facilitate the taking into custody or prosecution of student offenders, but rather serve to *prevent* students from bringing or keeping dangerous weapons, drugs, alcohol, and other prohibited items on school grounds. These inspection programs, in other words, are intended to send a clear message to students that certain types of behavior will not be tolerated. These programs discourage inappropriate conduct by enhancing the risk that those who violate the law or school rules will be detected and will thereupon be subject to appropriate discipline or even criminal prosecution. It is somewhat ironic that by sending this message, school officials hope to minimize the likelihood that drugs or dangerous weapons will actually be discovered in the course of a sweep search.

Some of these generalized or suspicionless searches are conducted by school officials acting entirely on their own authority, without any assistance from a law enforcement agency. In those circumstances, the law enforcement role might be as limited as providing drug and weapons recognition training to those school officials who will conduct the inspections. However, a law enforcement officer would neither direct nor actually participate in the searching conduct.

It is critical to note that where a law enforcement agency does participate in the search, for example, by providing the services of a drug-detection canine, the rules governing the legality of the search could be quite different. The procedures for conducting searches involving active or even passive law enforcement participation are

discussed in Chapter 4.5D(4), which deals specifically with the use of drug-detection canines.

This Manual offers several different options for school officials who desire to implement some form of suspicionless inspection program. Some of these options are likely to be more effective than others in discouraging students from bringing or keeping drugs, alcohol, weapons, and other prohibited items on to school grounds. Certain options discussed in this Chapter are also more efficient in terms of the use of limited personnel resources that may be available to a school district. By the same token, however, some options, while demonstrably effective, may pose a greater risk of a successful legal challenge, especially because the state of the law remains unsettled. (As a general proposition, the greater the involvement or participation of a law enforcement agency in the search, the greater the likelihood that the law enforcement involvement will trigger stricter rules and subject the entire inspection program to enhanced scrutiny by the courts.)

For this reason, school officials must balance the risks and benefits of any suspicionless search policy, and should carefully select the most appropriate option or options that are discussed in this Manual. Note, moreover, that the options presented in this Manual are not mutually exclusive and, in fact, it would be prudent for school administrators to develop a comprehensive security program that may include several if not all of these options.

Because all legal challenges will turn on the individual facts of the case presented to the court, the so-called "attending circumstances," a search policy that is perfectly suitable for one school district facing certain problems may be less suitable or even unreasonable if undertaken by a different school district or building facing less severe problems. The use of drug-detection canines, for example, may be appropriate in a high school with a known drug problem. The same tactic, however, would probably be inappropriate in the context of an elementary school in the same district (other than as a "show-and-tell" demonstration in an assembly). For this reason, throughout this Manual, school authorities are strongly encouraged to make specific "findings" that justify the district's course of action and that can be reviewed and relied upon by a court in the event that the policy is challenged by a student or parent on constitutional grounds.

4.2. Legal Standards and History.

The landmark T.L.O. case involved a search of the handbag of a student who was suspected of committing a school infraction. The case did not address directly the

question whether and under what circumstances school officials may search a locker or other property where there is no particularized suspicion to believe that evidence of a crime or school rule infraction would be found in the specific location to be searched.

Indeed, the United States Supreme Court in T.L.O. expressly declined to issue any firm ruling on the legality of such a suspicionless search. The Court noted that:

> We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure [,] ... [t]he Fourth Amendment imposes no irreducible requirement of such suspicion." ... Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by the search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" ... Because the search of T.L.O.'s purse was based upon an individualized suspicion that she had violated school rules ... we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion.
> [105 S.Ct. 733, n.8 (citations omitted).]

Although the United States Supreme Court in T.L.O. expressly declined to consider whether and under what circumstances a search could be conducted lawfully in the absence of an individualized suspicion, the question was addressed, if only in dicta, in a companion case to T.L.O. that was decided by the New Jersey Supreme Court: State v. Engerud, 94 N.J. 331 (1983). (The companion case involving Engerud was not reviewed by the United States Supreme Court and thus was not affected by the United States Supreme Court's decision in New Jersey v. T.L.O.. Accordingly, Engerud continues to be controlling precedent in New Jersey.)

The Engerud case involved a search of a student's locker. The search in that case was not part of a random inspection program, but rather was based on an individualized suspicion that Engerud was selling drugs in the school. (The New Jersey Supreme Court ultimately ruled that because the suspicion in that case was based only upon an "anonymous tip," the school official who conducted the search "lacked the necessary factual predicate for a reasonable ground to believe that his [Engerud's] locker contained evidence ..." 94 N.J. at 348.) Even though the search in that case was based on a particularized (albeit inadequate) suspicion that Engerud was dealing drugs, the New

Jersey Supreme Court in its discussion of whether Engerud enjoyed an "expectation of privacy" in his locker observed that, "[h]ad the school carried out a policy of regularly inspecting students' lockers, an expectation of privacy might not have arisen." 94 N.J. at 349 (citations to New York authority omitted).

It is not clear why the Court included this cryptic phrase, since the Somerville High School had no such policy. The Court's observation therefore had no direct bearing on the outcome of the case. (Lawyers sometimes refer to such tantalizing observations as "dicta."). It appears that the Court was suggesting an alternative strategy that school officials could use to respond to the growing problem of crime and drugs in the schoolhouse.

Based on this language, an argument could be made that had the school implemented such a policy of regularly inspecting students' lockers, and if as a consequence of that policy Engerud had no reasonable expectation of privacy, then it would appear that the Fourth Amendment would have provided him with *no protection*. In that event, so the argument goes, *any* search of his locker conducted by school officials, even if unsupported by facts constituting reasonable grounds, would be permitted.

A similar argument was actually accepted by the Wisconsin Supreme Court in In the Interest of Isiah B., 500 N.W.2d 639, 641 (Wis. 1993). In that case, the school had adopted a written policy retaining ownership and possessory control of school lockers. Students were advised not only that the lockers are the property of the school, but also that lockers could be inspected by school officials "for any reason at any time." Id. at 639, n.1.

The majority of the Wisconsin Supreme Court accepted the prosecutor's argument that in light of the school district's policy, the student charged in that case with possession of a firearm and cocaine found during a general locker inspection had no reasonable expectation of privacy in his locker, and, thus, no "search" for Fourth Amendment purposes took place. Id. at 641. The majority of the Wisconsin Supreme Court expressly rejected the defendant's argument that school officials were required under the Fourth Amendment "to promulgate and conform to written guidelines governing locker searches." Id. at 641, n.3. Because the majority had concluded that the student had no reasonable expectation of privacy in his locker, they essentially held that school district officials were not at all constrained by the Fourth Amendment, and thus could, just as the school's announced policy declared, open this or any other student's locker at any time and for any reason.

The dissent, following on a long line of precedent, reached a decidedly different conclusion, observing:

> While notice that a locker may be searched might diminish the reasonableness of a student's expectation that items stored there will be kept secret, numerous courts have repeatedly stated that a government proclamation cannot eradicate Fourth Amendment rights. "The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped, or that all homes would be searched." The school's ownership or partial control of the lockers cannot negate the students' expectation of privacy in the contents of the lockers. [500 N.W.2d at 645 (Abrahamson, J., concurring and dissenting) (citation to quoted authority and footnote omitted).]

It is unlikely that the New Jersey Supreme Court would follow the lead of the Wisconsin Supreme Court and accept the argument that school officials can adopt and announce a policy that effectively and completely extinguishes students' reasonable expectations of privacy in their lockers so that the Fourth Amendment simply does not apply, notwithstanding the dicta in the Engerud case. Indeed, if this argument were to be carried to its logical extreme, then it would seem that police officers as well as school officials would be permitted to search these lockers on a whim and for no reason at all. Rather, it is more likely that New Jersey courts will take a middle ground, permitting school officials to conduct general searches of lockers, but requiring them first to document the need to employ such tactics, and then to establish and follow neutral criteria to make certain that the power to search is not abused and is exercised in a reasonable fashion.

In sum, the better approach is to assume that courts in this state will only tolerate searches that are undertaken by school officials who are acting independently of law enforcement and that are actually conducted in accordance with and pursuant to any such "policy of regularly inspecting students' lockers." In other words, the fact that a school adopts a routine inspection policy or program does not mean that school officials can thereafter conduct any searches they want, without regard to individualized suspicion or some neutral plan (i.e., random inspections). Were it otherwise, schools could circumvent and all but emasculate the specific rule established in New Jersey v. T.L.O. by simply adopting a pervasive search policy. It is unlikely that the New Jersey Supreme Court meant to imply in Engerud that otherwise unconstitutional searches will be permitted so long as they are conducted routinely. Indeed, that conclusion would stand the constitutional protection against unreasonable searches and seizures on its head.

Two years after Engerud was decided and shortly after the United States Supreme Court announced its landmark decision in T.L.O., the New Jersey Legislature seized upon the above-quoted dicta in the Engerud decision, adopting a law now codified at N.J.S.A. 18A:36-19.2. That law provides that:

> The principal or other official designated by the local Board of Education may inspect lockers or other storage facilities provided for use by students so long as students are informed in writing at the beginning of the school year that inspections may occur.

The Assembly Education Committee's statement to the bill that eventually became N.J.S.A. 18A:36-19.2 explained that:

> In a recent decision, the New Jersey Supreme Court held that a search of a high school student's locker by school officials was improper because "in the context of this case the student had an expectation of privacy in the contents of his locker." Later in the opinion, the Court stated, "[h]ad the school carried out a policy of regularly inspecting students' lockers, an expectation of privacy might have not arisen."
>
> This bill clarifies the situation and permits boards of education to provide for inspection of students in a manner consistent with the New Jersey Supreme Court's ruling in State v. Engerud, 94 N.J. 331 (1983), decided August 8, 1983.

The question that logically arises is whether and to what extent school officials can rely on the specific authorization set forth in N.J.S.A. 18A:36-19.2 to develop a locker inspection program. Obviously, a statute cannot authorize conduct that violates the Constitution, since the State and Federal Constitutions establish minimum standards of privacy protections for all citizens, including schoolchildren. In other words, while a statute can afford citizens, including students, greater protections than are provided by the Constitution, it cannot work to authorize governmental actions that would otherwise be unconstitutional.

However, a statute can be extremely useful in authorizing so-called "administrative" health and safety inspection. (The utility of these so-called "administrative" searches, as opposed to criminal investigation searches, is described in Chapter 2.11.) Compare N.J.S.A. 30:4C-12, which authorizes Division of Youth and Family Services' (DYFS) workers to apply to a court for an order compelling parental cooperation to an in-home investigation — the functional equivalent of a "search" — concerning possible

child abuse or neglect. See also New Jersey Div. of Youth & Family Serv. v. Wunnenberg, 167 N.J. Super. 578 (App. Div. 1979), which upheld such in-home DYFS inspections as valid administrative searches.

As importantly, the locker inspection statute adopted by the New Jersey Legislature is both relevant and helpful in explaining what constitutes a "reasonable expectation of privacy," that is, a subjective expectation of privacy that society is prepared to accept as reasonable. This is so because the legislative pronouncement presumably reflects the will and understanding of the general public, and puts all citizens on clear notice.

N.J.S.A. 18A:36-19.2 was obviously intended to explain when and under what circumstances students would be deemed to have lost any reasonable expectation of privacy in the contents of their lockers. By the same token, the Legislature appears to have openly declared that regular locker inspections are a reasonable means by which school officials can protect the safety and security of schoolchildren and other members of the school community. Recall in this regard that ultimately, the legality of any search conducted by school officials depends upon the *reasonableness* of the search, considering all of the circumstances and balancing all of the competing rights and interests involved.

In 1989, the United States Supreme Court decided two landmark Fourth Amendment cases involving random drug testing of certain private railroad workers and federal Customs Service employees. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), and National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). Under the Skinner/Von Raab line of cases, a suspicionless search may be permissible when the search serves "special needs, beyond the normal need for law enforcement." Skinner, supra, 489 U.S. at 619, 109 S.Ct. __, 103 L.Ed.2d at 661. "In limited circumstances," the United States Supreme Court observed, "where the privacy interests implicated by the search are minimal, and where an important government interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." Id. at 624, 109 S.Ct. at 1417, 103 L.Ed.2d at 664. Most recently, the United States Supreme Court in Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), applied this principle to sustain the constitutionality of random, suspicionless drug testing of high school students participating in interscholastic athletic competitions. (See Chapter 13 for a more detailed discussion of drug testing.)

In late September 1997, Chief Justice Deborah Poritz, writing for a unanimous New Jersey Supreme Court, found that the "special needs" test established in the

Skinner/Von Raab line of federal cases "provides a useful analytical framework for considering the protections afforded by Article I, Paragraph 7 of the New Jersey Constitution... ." New Jersey Transit PBA Local 304 v. New Jersey Transit, 151 N.J. 531, 556 (1997). The Court in that case thus flatly rejected the argument that the State Constitution's guarantee against unreasonable searches precludes a police drug-testing program that did not require a particularized suspicion before an officer can be ordered to submit to a drug test. In embracing the "special needs" exception to the general rule that searches must be predicated upon an individualized suspicion, Chief Justice Poritz found that the analytical approach used by the United States Supreme Court "enables a court to take into account the complex factors relevant in each case and to balance those factors in such manner as to ensure that the right against unreasonable searches and seizures is adequately protected." Id. at 556.

The United States Supreme Court and other courts have noted that several factors bear upon the reasonableness of the suspicionless search at issue. These factors include: (1) the relevancy of the incidence of detection; (2) a showing of the prior demonstrated need for the search; and (3) the role of less restrictive or intrusive alternatives. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2395, 132 L.Ed 2d. 564, 580 (1995).

The first of these factors, the incidence of detection, simply refers to the likelihood that an inspection program will reveal evidence of crime. As a general proposition, when the incidence of detection of criminal behavior is low in proportion to the number of persons who are subjected to the search, the policy is more subject to criticism. However, given the deterrent objective of a school-based locker detection program (which is designed principally to discourage students from bringing drugs and weapons on to school property) and given the serious risks posed to students' well-being in the educational environment of a school, it should not be a problem that locker inspection programs only infrequently reveal evidence of criminal activity.

In Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998), the Pennsylvania Supreme Court sustained the legality of a drug-dog search of student lockers because school officials had articulated reasonable grounds for believing that drugs would likely be found on school property among the students' paraphernalia commonly brought to school and normally keep within their lockers. Id. at 362, n. 13. The analysis of the Pennsylvania Supreme Court thus suggests that when making findings to justify a general search program, school officials should meet the basic T.L.O. "reasonable grounds" standard, although in the context of a general schoolwide search, school officials need not have reasonable grounds to believe that drugs or other prohibited items would be found in any particular location. The Pennsylvania Supreme Court concluded

that since the principal reasonably suspected the evidence of drug use to be schoolwide rather than limited to a certain group of students, the decision to implement a schoolwide search was reasonable.

It should be noted that under federal and New Jersey law, an examination by a scent dog is *not* a "search," see Chapter 4.5B, and thus, school officials in New Jersey would not have to establish "reasonable grounds" to believe that drugs would be detected before they could invite law a enforcement agency to bring drug-detection canines into a school to inspect the exterior surface of lockers. (The Pennsylvania Supreme Court had earlier held that under the Pennsylvania Constitution, a canine sniff is a "search" that must be justified. See, Commonwealth v. Johnson, 515 Pa. 454, 465, 530 A.2d 74, 79 (1987).) Even so, school officials in New Jersey would be well-advised to document the reasons that lead them to invite police to bring drug-detection dogs on school grounds, even if it should turn out that they are not required by the federal or New Jersey Constitutions to establish reasonable grounds to believe that drugs would be detected and seized as a result of the canine sweep inspection.

In any event, the key is that these programs are conducted in good faith, pursuant to a neutral plan and in accordance with the rules discussed in the following section. In Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 674-675, 109 S.Ct. 1384, 1395, 103 L.Ed.2d 685 (1989), a case involving the drug testing of United States Custom Service employees, the United States Supreme Court aptly noted that, "when the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success." 489 U.S. at 676 n.3. Similarly, in Desilets v. Clearview Reg'l Bd. of Educ. 265 N.J. Super. 370, 379 (App. Div. 1993), a New Jersey appellate court recently rejected the argument that a school's policy of searching students' hand luggage brought on class trips was unreasonable merely because these searches had turned up contraband in only six instances over the course of thirteen years of routine inspections. The court concluded that the low incidence of detection could mean that the school's well-publicized school trip search policy had been an effective deterrent. 265 N.J. Super. at 379.

The second factor identified in recent court decisions, a showing of the prior demonstrated need for the search, strongly suggests that school administrators should make specific findings to explain why it is necessary and appropriate to implement a locker inspection program. (See discussion in Chapter 2.9.) School officials, for example, should be prepared to point to particular incidents or to a developing pattern involving drugs or weapons possession by students on school grounds. The statistics cited in the opening chapter of this Manual, detailing the scope and magnitude of the

problem throughout New Jersey's middle and high schools, are the kind of facts that would seem to justify strong action by school officials to discourage students from bringing drugs or weapons on to school property. It is incumbent upon local school authorities to show that a problem warranting a response exists in their particular district or school building.

This burden should not be difficult to meet because, while the nature and magnitude of the problem varies from jurisdiction-to-jurisdiction, no community in New Jersey is immune from the proliferation of drugs and violence. The recent Desilets case is again useful in pointing out that there is no minimum number of acts of violence, vandalism, or substance abuse that must occur before a school can lawfully adopt a particular search policy. In that case, the Appellate Division rejected the argument that the rare incidence of detection (recall that the school's policy of searching all hand luggage brought on a class trips had revealed contraband on only six occasions over the course of thirteen years) was evidence that there was no problem at that particular middle school serious enough to justify these suspicionless searches. 265 N.J. Super. at 379.

As the Pennsylvania Supreme Court recently observed, the goal of providing safe, drug-free schools "is often impeded by the actions of a few students which interfere with the ability of the [state] to achieve this goal." Commonwealth v. Cass, 709 A.2d 350, 364 (Pa. 1998). The United States Supreme Court in Vernonia also emphasized that:

> It is a mistake ... to think the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concerns ... . Rather, the phrase describes an interest which appears *important enough* to justify that particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met. [515 U.S. at ___, 115 S.Ct. at 2394-2395 (italics in original).]

In Commonwealth v. Cass, supra, the Supreme Court of Pennsylvania recently listed several reasons that justified the school official's "heightened concern" as to drug activity in the school. These factors include:

- information received from unnamed students;
- observations from teachers of suspicious activity by the students, such as passing small packages amongst themselves in the hallways;

- increased use of the student assistance program for counselling students with drug problems (See Chapter 14.2 concerning the confidentiality of information that could reveal the identity of specific students participating in drug or alcohol counselling programs);
- calls from concerned parents;
- observation of a growing number of students carrying pagers;
- students in possession of large amounts of money; and,
- increased use of pay phones by students.

The principal in the Pennsylvania case also testified that he had personally observed students exhibiting physical signs of drug use, such as dilated pupils, while in the nurse's office. In Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115, S.Ct. 2386, 132 L.Ed.2d 576 (1995), the United States Supreme Court referred to several additional factors or circumstances that supported the school district's decision to require student athletes to submit to random urinalysis. These include a marked increase in disciplinary problems and classroom disturbances, more common outbursts of profane language and rude behavior in classes, and direct school staff observations of students using and glamorizing drug and alcohol use. 515 U.S. at ___, 115 S.Ct. at 2388-2389.

Finally, the third factor announced in Vernonia Sch. Dist. 47J v. Acton requires that school officials carefully consider whether there are less restrictive or intrusive alternatives to accomplish their legitimate objective, which is to discourage students from bringing drugs or weapons on to school grounds. Although it would seem to be a well-settled principal of law that the failure to employ a less restrictive alternative will not alone violate the Fourth Amendment requirement of reasonableness, see Vernonia Sch. Dist. 47J v. Acton, supra, 115 S.Ct. at 2396, school officials should be prepared to explain why they thought it necessary to adopt a particular inspection program, and why that program was designed to achieve its objectives while minimizing invasions of privacy, disruption of the school environment, and other negative consequences to the greatest extent possible. (See also discussion in Chapter 2.8.)

4.3. Announced Versus Unannounced Inspections.

In some instances, it might be appropriate to provide members of the school community with advance notice as to the *specific date and time* when lockers will be inspected. (This is commonly done when the purpose of the inspection is to encourage students to "clean out" their lockers, to take home soiled athletic clothing, or to remove and discard food products that might spoil or attract vermin.) The practice of providing advance specific notice would afford students both the opportunity and practical incentive to remove prohibited (and highly personal) items.

Given such specific notice, it seems unlikely that students would be able to claim that they retain a reasonable expectation of privacy in their lockers, and students in these circumstances would certainly not be able to claim that they reasonably believed that the contents of their lockers would remain private on the day of the planned inspection. However, providing specific advance notice of a search could actually backfire were students to come to believe that they are always entitled, by custom and practice, to such prior, specific notification. In other words, receiving advance specific notice could conceivably become part of their "reasonable expectations." That is why it would be important to make clear at the outset of any such program that the school also reserves the right to conduct *un*announced inspections.

In any event, many school officials strongly believe that as a practical matter, such announced inspections, even if conducted frequently, could not realistically achieve one of the critical objectives of an inspection program that is geared to address more serious misconduct involving drugs, alcohol, and weapons, namely, to discourage children from bringing these prohibited items back on to school property. Those students who carry weapons or drugs could all too easily modify their behavior by temporarily removing weapons or guns in advance of the announced inspection, and then bring the prohibited items back to school once the announced inspection episode is completed.

For all of these reasons, school officials may want to develop a program involving "unannounced" locker inspections. By "unannounced," we mean only that a student would not be advised in advance of the specific date and time when his or her locker would be opened and subject to inspection by school authorities. Clearly, pursuant to the express requirements of N.J.S.A. 18A:36-19.2, students and their parents must be given some notice — at least in general terms — that the school intends to inspect lockers on a periodic basis. As used in this Manual, the terms "notice" or "advance notice" mean simply that students and their parents would be alerted to the possibility that lockers or other places will be inspected in accordance with law.

4.4. Model Locker Inspection Program.

Because there is little caselaw on point, school officials should make every reasonable effort to dot all of the *i's* and cross all of the *t's* in designing and implementing any locker inspection program. (Note that for the purpose of this Manual, no distinction is drawn between regular lockers and gym lockers.) Such care in designing the program will demonstrate the school district's regard for the privacy rights embodied in the Fourth Amendment and in Article I, Paragraph 7 of the New Jersey Constitution. Any locker inspection program conducted pursuant to the authority of N.J.S.A. 18A:36-19.2 should at a minimum include the following components and features:

A. Findings. The local board of education, school district superintendent, and/or school principal should adopt and memorialize specific findings that detail the nature, scope, and magnitude of the problem sought to be addressed by the locker inspection program. The T.L.O. decision contemplates a balancing act, weighing the need to preserve order, discipline, and safety on the one hand against the need to respect students' privacy interests on the other hand. The findings should therefore explain why it is necessary and appropriate to adopt an inspection program, and why the program chosen constitutes a reasonable if not least intrusive means available to ensure the health, safety, and security of students and other members of the school community. (For example, the findings could establish that the contemplated locker inspection program is less intrusive, disruptive, and burdensome than other techniques that are now used in several school districts, including point-of-entry inspections and metal detectors.)

In Commonwealth v. Cass, 709 A.2d 350, 357 (Pa. 1998), the Supreme Court of Pennsylvania recently listed several reasons that justified the school official's "heightened concern" as to drug activity in the school. These factors include:

- information received from unnamed students;
- observations from teachers of suspicious activity by the students, such as passing small packages amongst themselves in the hallways;
- increased use of the student assistance program for counselling students with drug problems (See Chapter 14.2 concerning the confidentiality of information that could reveal the identity of specific students participating in drug or alcohol counselling programs);
- calls from concerned parents;
- observation of a growing number of students carrying pagers;
- students in possession of large amounts of money; and,
- increased use of pay phones by students.

The principal in the Pennsylvania case also testified that he had personally observed students exhibiting physical signs of drug use, such as dilated pupils, while in the nurse's office. In Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115, S.Ct. 2386, 132 L.Ed.2d 576 (1995), the United States Supreme Court referred to several additional factors or circumstances that supported the school district's decision to require student athletes to submit to random urinalysis. These include a marked increase in disciplinary problems and classroom disturbances, more common outbursts of profane language and rude behavior in classes, and direct school staff observations of students using and glamorizing drug and alcohol use. 515 U.S. at ___, 115 S.Ct. at 2388-2389.

The findings should emphasize that the goal of the program is to prevent and discourage students from bringing or keeping dangerous weapons, drugs, alcohol, tobacco, or other prohibited or unsafe and unsanitary objects on school property, and that the program is *not* principally designed to result in the apprehension or prosecution of students who violate the law or school rules. (Clearly, the inspection program need not be limited to drugs, alcohol, firearms, and other weapons, but could also serve to discourage all forms of conduct that are detrimental to students' health, safety, and welfare.)

However, it should be made clear that any firearms or other dangerous weapons, illicit drugs, or other forms of contraband discovered during the course of a locker inspection will be turned over to law enforcement authorities, pursuant to rules and regulations promulgated by the State Board of Education, for appropriate handling by prosecutors and police. (See Chapter 14.1 for a more detailed discussion of the responsibility of school officials to refer matters and to turn over evidence to police.)

B. Advance Notice of Program. All students and members of the school community, including parents and legal guardians, should be afforded notice in writing of the nature and purpose of the locker inspection program. In addition to providing parents with written notification, students should be alerted to the program in their homeroom classes and/or in a school assembly.

At the beginning of the next school year, notice should also be provided in the student handbook and at the time that lockers are assigned for student use. In addition, an article or announcement could be placed in the school newspaper. In sum, school officials should use all available means to make certain that all students understand that the school retains a master key, and that lockers assigned to students will be subject to opening and inspection on a regular, periodic basis. Providing such warning is consistent with the true goal of the program, which is to deter students from bringing or keeping prohibited items on school grounds. The whole point of the exercise, after all, would be lost if the program were kept a secret.

Students and parents should be advised that any closed containers kept in lockers that are selected for inspection may be opened and their contents examined. Students should thus be warned that if they desire that the contents of closed containers (such as bookbags, purses, or knapsacks) be kept private, such containers should not be placed in lockers.

In addition, students and parents should be advised that drugs or weapons will be turned over to police in accordance with the requirements of state law and rules and regulations promulgated by the State Board of Education. (See Chapter 14.1.)

The notice provided to students and parents need not announce the specific details of the neutral inspection plan described below. Rather, it would be sufficient for purposes of the notification requirement to point out that all lockers and containers or objects kept in lockers are subject to inspection, and that the decision on a given occasion to search specific lockers will be determined in a random fashion pursuant to a neutral plan.

Finally, with respect to notice, all students should be alerted to the "amnesty" feature in the Memorandum of Agreement Between Education and Law Enforcement Officials (1992), which is designed to encourage students with a substance abuse problem to turn over drugs to school officials and to accept help. (See Chapter 14.1C for a more detailed discussion of this policy, which is codified in regulations promulgated by the State Board of Education and an Attorney General Executive Directive.) Students should be clearly advised that this provision applies only where a student voluntarily and on his or her own initiative turns over illicit drugs to a teacher or other school staff member. It does *not* apply where the drugs are discovered in a search, or where the drugs are turned over in anticipation of their imminent discovery in a search to be conducted by school officials. Nor does the amnesty feature apply to firearms or other dangerous weapons.

C. Neutral Plan. Each local board of education, school district superintendent, or building principal should develop a neutral inspection plan that is designed "to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field." New Jersey v. T.L.O., supra, 105 S.Ct. at 743. n.8. This planning approach is similar to the one that police must follow to justify so-called "field sobriety checkpoints." See State v. Kirk, 202 N.J. 28, 57-58 (App. Div. 1985). See also Michigan Dep't. of State Police v. Sitz, 496 U.S. 444 (1990), 110 S.Ct. 2481, 110 L.Ed.2d 412.

A "neutral plan" is one that is based on objective criteria established in advance by appropriate school authorities. These neutral or objective selection criteria are essential to provide the "other safeguards," to use the T.L.O. Court's phraseology, that will serve as a substitute for the individualized suspicion that is generally required before school officials may conduct a search. Establishing a neutral plan that reduces the discretion of school officials in selecting students who will be subject to a search also means that there will be less stigma attached to the search, since individuals are not

being singled-out based on a particularized suspicion. See Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370, 379 (App. Div. 1993).

Specifically, the plan should be developed by a high-ranking school official, such as a superintendent or building principal. The plan should be reviewed and approved by the board of education. The decision regarding what lockers to open on a given date should not be made on an ad hoc basis by subordinate school officials.

The plan should explain in precise detail how individual lockers or groups of lockers will be selected for inspection, taking into account that it is probably not feasible to open and inspect every locker in the school building every time that an inspection is undertaken. In other words, the plan should balance the need for pervasive inspection against the limitations on available personnel resources and the limited time available to undertake this activity.

It would be preferable, from both a policy and legal perspective, for school officials to use some *random* drawing method to select lockers or corridors for inspection, or else, where feasible, to inspect *all* lockers. In fact, courts have noted in the context of police road blocks that the use of fixed checkpoints at which all persons are stopped and questioned creates less concern and anxiety than selective random stops, and also eliminates the potential abusive exercise of discretion. See Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370, 379 (App. Div. 1993).

In any event, a "lottery" system would satisfactorily circumscribe discretion and thus provide adequate assurances that certain lockers have not been selectively and capriciously targeted for inspection. Random sampling is a statistical technique that ensures that any member of a population has an equal chance of inclusion in a sample for study. A random drawing scheme would ensure that inspections are not used to harass or punish individual students, and that specific lockers have not been targeted or selected on the basis of clearly impermissible criteria, such as race or ethnicity.

In addition, as noted above, by using a random selection technique to identify those lockers to be opened, there will be little if any stigma attached to the search, since individuals are not being singled out based upon a particularized suspicion. See Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370, 379 (App. Div. 1993). This type of program and neutral plan, in other words, dilutes the accusatory nature of the search, and because a random search is non-accusatory in nature, "the degree of insult to an individual's dignity and thus the extent of the invasion are reduced." In the Interest of Isiah B., 500 N.W.2d 637, 644 (Wis. 1993) (Abrahamson, J., concurring and dissenting).

Lockers should not be selected for inspection, or be subject to a greater probability of being selected, on the basis of associations (i.e., membership in "gangs" or troublesome groups or cliques). Note in this regard that inspections conducted pursuant to a suspicionless locker inspection program should *not* be based on individualized suspicion, that is, an articulable suspicion that weapons, drugs, or other prohibited items would be found in a particular locker. Rather, this random inspection program must be kept analytically distinct from the authority of school officials to search specific lockers based upon individualized suspicion of wrongdoing. (See Chapter 3.)

Accordingly, in any case where a particularized suspicion exists, the locker believed to contain drugs, weapons, or other contraband or evidence should only be searched in accordance with the legal standards spelled out in T.L.O. and described in Chapter 3. The random locker inspection program must *never* be used as a ruse or subterfuge to open a locker where reasonable grounds to search that locker exist or, worse still, where a school official suspects the presence of drugs or weapons in a particular locker, but believes that there are insufficient grounds to conduct a lawful search in accordance with the rule established in T.L.O.. Needless to say, school officials must never tamper with the random selection process or criteria established in the plan.

As a general proposition, the neutral plan should be designed so that all lockers in the school building are subject to inspection . Obviously, however, school authorities may exempt lockers assigned to very young students if the program is designed to address the problem of drugs and weapons and if there is no reason to believe that students in lower grades are involved in these violations. (School officials should note that according to recent surveys of New Jersey middle school students, the problem of the use and possession of drugs, alcohol, and weapons starts at a distressingly young age.) Furthermore, the plan may provide for a greater probability of selection based upon neutral criteria, such as grade level. Thus, for example, the inspection plan could provide that lockers assigned to seniors will be subject to a greater probability of being selected for inspection than those lockers that are assigned to freshman, at least if there is reason to believe that seniors are more likely to bring dangerous or prohibited items on to school property.

The plan certainly need not require that an equal number of lockers be opened during each inspection episode. The plan could provide, for example, that ten randomly-selected lockers will be opened on Mondays, whereas fifty lockers will be opened on Wednesdays. In fact, the plan need not specify the days or times when inspection episodes will occur, and could simply provide that inspections will occur on a periodic basis (i.e., weekly). Note also that school officials would retain the option at any time — and without the need to provide further notice — to increase (or decrease) the

number or percentage of lockers to be opened in any given inspection. School officials could, for example, decide at any time to open all of the lockers in the school, assuming that is logistically possible given the size of the school and personnel resources available to conduct the inspection. Obviously, the smaller the number or percentage of lockers to be inspected, the smaller the perceived risk of being "caught," thus reducing the deterrent effect. (However, school officials need not announce the exact number of lockers to be opened in any inspection episode.)

As noted above, the plan need not require that an inspection be conducted every day or every week. The plan need only provide that the inspections occur on a consistent and persistent basis. To use the New Jersey Supreme Court's characterization in Engerud, the inspections should be conducted on a sufficiently "regular" basis so that no student could claim an expectation of privacy in the contents of the lockers. Because each inspection episode could involve opening only a comparatively small number of randomly-selected lockers, the better practice would be to conduct inspections on a frequent basis. This would serve not only to satisfy the "regular basis" criterion mentioned in the Engerud case, but would also maximize the deterrent effect, since drug or weapons carrying students might be emboldened immediately following an inspection episode if they thought that it was unlikely that another inspection would be conducted any time soon.

Finally, and importantly, the plan should be reducing to writing. It is important for school authorities to be able to document all of the procedural safeguards that were used to prevent capricious or harassing inspections. School officials must expect that the plan will be challenged in court in a motion to suppress physical evidence in the event that an inspection were to reveal a weapon or drugs.

This does not mean that all of the details of the plan must be made public. In fact, the better practice would be to keep confidential those details (such as timing) that, if revealed, might make it possible for students bent on keeping drugs or weapons in their lockers to anticipate specific inspection episodes and thereby evade detection. However, in providing the student body and parents with general notice of the intention to use periodic random locker inspections, school authorities should describe the neutral plan in sufficient detail that students and parents can be confident that the program is based on a legitimate need to respond to a problem that exists in the school, and that the plan includes safeguards to make certain that inspections will not be used to harass or discriminate against any particular student or group of students.

D. Execution. All inspections should be conducted by those persons who are specifically "designated by the local board of education." See N.J.S.A. 18A:36-19.2. All

persons conducting the inspections should be thoroughly familiar with the neutral plan and must stick to it. Thus, for example, inspections should only be conducted with respect to those lockers that have been selected for opening in accordance with the selection criteria and method established in the plan.

The inspections should be conducted in a manner that minimizes the degree of intrusiveness. Inspections should be limited to looking for items that do not belong on school property or in a locker. Personal possessions should not be damaged, and school officials conducing the inspections should not read personal notes or entries in diaries or journals.

All persons conducting inspections should be thoroughly familiar with the procedures for handling (actually, for refraining from handling) suspected firearms. In addition, all school staff members involved in conducting these inspections must be familiar with the referral procedures set forth in N.J.A.C. 6:29-10, et seq. and the Memorandum of Agreement Between Education and Law Enforcement Officials (1992), which specifies when and under what circumstances school officials must turn over illicit drugs, firearms, or other items to law enforcement authorities. (These referral policies are described in more detail in Chapter 14.1.)

It is essential to remember, however, that law enforcement officers must not participate in the conduct of these inspections and should not even be present or "standing by" in the corridor in anticipation of such referrals. Under no circumstances should a law enforcement officer direct a school to undertake a locker inspection program or a specific inspection episode. Rather, it is critically important that any and all such inspections be conducted independently from law enforcement authorities, based solely upon the authority of school officials to take steps to preserve discipline, order, and security in the school.

E. Training. The county prosecutor's office and the local police department should be available to provide training to designated school personnel so that they will be able to recognize firearms, other dangerous weapons, illicit drugs, evidence of hate crimes, or other contraband or prohibited items. This training, which should be provided in advance of the inspection, will help to make certain that the program is conducted in a safe and efficient manner. Local law enforcement authorities can explain, for example, what drugs are thought to be most commonly used by adolescents in the jurisdiction, and police can show school officials how these substances are typically packaged and concealed. This minimal police involvement would not transform the subsequently executed inspection into a law enforcement activity subject to the far stricter rules governing police searches.

F. Referrals to Law Enforcement. The plan should expressly provide that all persons conducting an inspection pursuant to the program will comply with the referral procedures spelled out in the rules and regulations promulgated by the State Board of Education. (See Chapter 14.1 for a more detailed discussion of these regulatory obligations.) It is critical to note that it is an offense to dispose of any suspected controlled dangerous substance by any means other than by turning over the substance to a law enforcement officer. N.J.S.A. 2C:35-10c. In addition, it is an indictable crime in New Jersey to conceal or destroy *any* evidence of a crime, including, but not limited to, drugs or any other type of contraband. See N.J.S.A. 2C:28-6 and 2C:29-3a(3).

G. No Pre-emption of Individualized Searches. The plan should make clear that nothing in this program should be construed in any way to prohibit or limit the authority of school officials to conduct a search of a specific locker or other property where there are individualized, reasonable grounds to believe that evidence of a crime or school rule infraction will be found therein. As noted above, random locker inspection programs are only one of the several options or tools available to school officials to maintain order and to keep weapons and drugs off school property.

H. Limitations. The plan ordinarily should provide that the inspection program be limited to lockers, desks, or similar storage facilities provided by the school for use by students. Note in this regard that N.J.S.A. 18A:36-19.2 specifically refers only to "lockers or other storage facilities provided for use by students." The inspection plan, therefore, should not extend to knapsacks, briefcases, handbags, or other personal possessions that are being carried by students. The authority of school officials to conduct searches and inspection of such containers is discussed in Chapter 4.5E.

Note, however, that school officials are authorized and permitted to open and inspect any closed containers or objects that are stored in a locker that has been selected and opened pursuant to the neutral plan, provided that the object or container can be opened without causing permanent damage to the object or container. (The inspection itself must be conducted in a reasonable manner. School officials should not damage objects or containers found in lockers that are subject to lawful inspection.)

It would make no sense, after all, to permit school authorities to inspect the contents of a locker, but prohibit them from inspecting the contents of a bookbag stored in the locker and in which drugs or weapons could easily be concealed. (Indeed, it is unlikely that drugs would be strewn loosely or haphazardly in a locker; rather, it is far more likely that a drug selling or using student would further conceal and store the drugs in some form of portable container.) In providing students and parents with advance

notice of the intention to implement a locker inspection program, school authorities should clearly announce that closed containers that are kept in lockers will be subject to inspection.

4.5. Drug-Detection Canines.

A. Overview. In many school districts throughout New Jersey and the rest of the nation, school administrators have invited law enforcement agencies to bring drug-detection canines into schools to ferret out controlled substances that may be stored in lockers.

Because drug-detection canines are usually used to conduct a schoolwide inspection or "sweep," such programs are often thought of as a form of "general" or "suspicionless" search, distinct from the kind of searches governed by New Jersey v. T.L.O., which dealt with searches conducted by school officials that focus on a particular location based upon a pre-existing suspicion that evidence of a violation of law or school rules would be found at that particular location. It is more precise, however, to say that the use of a drug-detection dog represents a hybrid form of search; the legal nature of this governmental conduct (and hence the applicable legal standard) will usually change during the course of the inspection episode. At the outset, the schoolwide canine inspection falls neatly within the definition of a general or suspicionless search, and this conduct need not be justified under the T.L.O. reasonable grounds test, much less the stricter probable cause standard. See Chapter 4.5B (noting that most courts have concluded that the canine sniff of the exterior surface of a locker is not a "search" for Fourth Amendment purposes). Once a drug-detection dog alerts to the presence of controlled dangerous substances, however, the ensuing act of opening the locker in response to the dog's alert clearly constitutes a particularized, suspicion-based "search" for purposes of Fourth Amendment analysis.

As is true with respect to the resolution of all search and seizure issues, when considering the lawfulness of the deployment of drug-detection canines, the timing and sequence of events becomes critical. Police and school officials must be prepared to document the precise moment within an unfolding chain of events when the Fourth Amendment requirement of probable cause (or reasonable grounds in the case of a search conducted independently by school officials) is triggered. Because the overwhelming majority of lockers that will be examined or "sniffed" by a drug-detection canine will not produce an alert, and thus will not be opened, we have chosen to include our discussion of drug-detection canines in that portion of the Manual that relates to general or suspicionless searches. This allocation is also appropriate given the overriding goal sought to be accomplished by using drug-detection canines, which is to discourage

students from bringing drugs on to school grounds, and not to actually find and seize drugs or other contraband.

Although the legal issues concerning the appropriate use of drug-detection canines are complicated and not fully settled, one thing at least is certain. The use of scent dogs is a dramatic tactic designed to convey to students in the strongest possible terms that neither school authorities nor law enforcement agencies will tolerate illicit drugs or other dangerous substances or devices on school property. The goal is not to find drugs or to catch drug abusing or dealing students, but rather to get the attention of the entire student body through the use of this highly visible and aggressive tactic. In addition, the planning for the use of this technique affords law enforcement and education officials with an excellent opportunity to engage parents and members of the school community in a frank discussion of the nature of the drug and alcohol problem in the school. See Chapter 4.5F(2) for a discussion of the need to solicit parental input.

Scent dogs are an extremely valuable and versatile law enforcement asset. Training requirements for drug-detection dogs are strict, and the animals are carefully screened throughout their training regimen. Usually, the dog will work with the same handler, so that the handler can learn which movement or reaction by the dog — the "alert" or "key" — indicates the presence of illicit substances or explosives. A number of different alert cues are used, including snarling, barking, circling, sitting, scratching or pawing at the object suspected to contain illicit substances or explosives.

The effectiveness of the use of drug-detection canines in schools will depend upon a number of factors, including, notably, how often school lockers are subjected to this type of inspection. The use of scent dogs on infrequent, isolated occasions may not be enough to convince students that school authorities are willing to undertake routine and persistent efforts to find concealed substances that pose a danger to the school community. School authorities should also carefully consider the possibility that a well-publicized inspection by a scent dog may fail to undercover drugs that are, in fact, secreted in lockers. (This is sometimes referred to as a "false negative" result.) The unintended effect can be to embolden student drug users and dealers by leading them to believe that they can "beat the system," and that they face only a comparatively small risk of being caught. The whole point of an inspection program would be lost if students come to believe they can use and sell drugs with impunity.

School authorities should also consider that the "zero tolerance" message that they may hope to convey by inviting scent dogs into schools could unwittingly be undermined if the particular method used to conduct the inspection requires that those students who are found to be in constructive possession of a large quantity of drugs —

an amount consistent with drug *distribution* activities — are immune from criminal prosecution. (See Chapter 4.5D(4) concerning limitations on the ability to initiate a criminal prosecution when a scent dog's positive alert is used as the factual basis to authorize a school official to open the locker to inspect its contents.)

For all of these reasons, school officials should not view drug-detection canines as a panacea or a "quick fix." Indeed, in Vernonia Sch. Dist. 47J v. Acton, the United States Supreme Court noted that school officials in that troubled district had "even brought in a specially trained dog to detect drugs, but the drug problem persisted." 515 U.S. 646, ___, 115 S.Ct. 2386, 2389, 132 L.Ed.2d 564, ___ (1995). The inability of the use of drug-detection canines to stem the tide of drug abuse prompted school officials in that district to resort to random drug testing. Given the inherent limits on the effectiveness of a scent dog program, the better policy and practice is to use periodic canine searches to supplement, not to supplant, other methods and procedures available to school officials to discourage students from bringing and keeping drugs and prohibited weapons on school grounds.

Occasionally, a drug-detection dog will be used to examine a specific locker assigned to a student who is already suspected of possessing or distributing controlled dangerous substances. The scent dog in those circumstances would be used as a criminal investigation technique to corroborate information already known to school officials and/or law enforcement officers. This is typically done to establish sufficient probable cause so that a law enforcement agency can apply for a warrant to search the contents of the locker suspected of containing illicit drugs.

In fact, most of the reported court decisions dealing with the use of drug-detection canines involve cases where a dog was brought to the scene of a lawfully-stopped motor vehicle to corroborate a detaining officer's suspicion that the vehicle was being used to transport illicit drugs. Less frequently, law enforcement canines are used to conduct "sweep" or "dragnet" searches involving large areas. Sometimes, the dogs sniff for nitrates and explosives as part of a security detail or in response to a bomb scare. In the context of lockers and school searches, however, it is far more common for scent dogs to be used to sweep for concealed drugs. These inspections do not focus on and are not limited to any particular locker. Accordingly, the use of scent dogs for this purpose would constitute a "suspicionless" or "generalized" search as that term is used in this Manual, although, for the reasons discussed below in subsection B, the better reasoned view is that the use of a dog to examine the exterior surface of a locker is technically not a "search" at all under the Fourth Amendment.

This Chapter generally assumes that the drug-detection canines that will be used in schools are trained, owned, and operated or "handled" by a law enforcement officer or agency. Note that for legal purposes, it makes no difference whether the law enforcement dog handler is on or off-duty at the time of the inspection. Whenever a drug-detection canine that is owned by a police department and that is handled by a law enforcement officer is brought into a school to examine lockers or student property, that operation will be subject to the rules governing law enforcement searches and seizures, and not the more flexible rules governing searches undertaken by school officials.

As noted in Chapter 2.6, some private companies make scent dogs available to schools, and because these animals and handlers are in no way connected to a law enforcement or prosecuting agency, their use would not appear to implicate the stricter rules governing searches conducted by or under the direction or auspices of a law enforcement officer, although several courts have ruled that searches of students were unconstitutional, notwithstanding that the scent dogs were owed and operated by private security companies. See e.g., Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980; Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982) cert. denied, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1982).

In any event, the use of privately-owned drug-detection canines is neither endorsed nor encouraged, and no claim is made as to the effectiveness or accuracy of these privately-owned animals. Furthermore, should privately-owned dogs be used, school officials should clearly understand that any suspected drugs discovered as a result of the inspection must be turned over to the police, and that the "amnesty" provision, codified at N.J.A.C. 6:29-10.5(a)(1) and discussed in Chapter 14.1C, would *not* apply in these circumstances. The failure by school officials, or by an employee of the private company that owns the scent dogs, to turn over suspected drugs to the police would not only constitute a violation of New Jersey's drug laws, see N.J.S.A. 2C:35-10c, but would also constitute a violation of the state's evidence tampering statute. See N.J.S.A. 2C:28-6 and 2C:29-3a(3). (For a more detailed discussion of the legal and practical problems in using privately-owned drug-detection dogs, see Chapter 2.6.)

Finally, it should be noted that sophisticated new technologies, such as ion mobility spectrometry, are now available to the law enforcement community to perform some of the drug-and-explosives detection functions that heretofore could only have been performed by specially trained canines or other domesticated animals with an acute olfactory sense. These electronic devices produce semi-quantitative results and, in some applications, appear to be more accurate and objective than scent dogs. (Unlike canines, these devices do not tire, and their attention cannot be distracted by extraneous

influences, such as food or the scent of other dogs in heat.) It is expected that these instruments will become more available and accessible over time.

For purposes of this Manual, the use of such electronic devices implicates essentially the same legal issues that arise when scent dogs are deployed. This is true despite the United States Supreme Court's characterization, discussed in the next section, that a scent dog's sniff is "sui generis." When the Court in 1983 decided United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), it may not have been aware of and could not have envisioned any other investigative procedure that results in as limited a privacy intrusion as a dog sniff. The fact remains, however, that emerging technologies may well in the not-too-distant future provide a suitable substitute for drug-detection dogs in a number of applications, including sweeps conducted in schools.

At present, some of these electronic devices make use of a portable, hand-held vacuum cleaner to "sniff" the subject or object being inspected. (Molecules lifted by the vacuum from the exterior surface of the object being examined are trapped in a specially designed nylon filter, which is then inserted into the electronic device for molecular analysis.) The act of subjecting a person or object to this form of inspection, for purposes of this Manual, is tantamount to subjecting the object (or person) to examination by a scent dog. The use of these hand-held vacuum collectors is decidedly different from the use of a scent dog in one important legal and policy respect: A detection canine has the potential to become excited, overreact, and attack or at least frighten a person who comes in direct contact with the animal. The hand-held vacuum collectors, in contrast, are no more intimidating and threatening than the hand-held metal detectors or "wands" that are now commonly in use in a number of settings, including airports and courthouses. Accordingly, the rule announced in this Manual generally prohibiting scent dogs from being used to sniff students or clothing while being worn by students (see Chapter 4.5F(9)) does not apply to these electronic devices or their collection apparatus.

B. An Examination by a Scent Dog is Not a "Search." In United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), the United States Supreme Court held that the use of a law enforcement drug-detector dog to sniff the exterior surface of a container is, at most, a "minimally intrusive" act — one that does not constitute a "search" for purposes of the Fourth Amendment. The Court concluded that the act of subjecting property to inspection by a law enforcement-handled canine simply cannot reveal anything private about the contents of the object being sniffed. The dogs, in other words, are trained only to alert to selected controlled dangerous substances (or

explosives residue) and, therefore, will not react to non-contraband items that might be of a highly private or personal nature.

Specifically, the United States Supreme Court in Place stated:

> We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A canine sniff by a well-trained "narcotics" detection dog, however, does not require opening the luggage. It does not expose non-contraband items that otherwise would remain hidden from public view... . Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited... . In these respects, the canine's sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.
> [462 U.S. at 706-707.]

Although the Court in Place held that a canine sniff reveals something about the contents of the closed container being examined, it is important to recognize that, from a scientific perspective, a drug-detection animal does not and cannot react to molecules that are still located within the closed container that is the subject of the inspection (unless the dog's sniffing by a vent or small opening happens to draw out airborne particles from inside). Rather, the animal usually can respond only to molecules on the exterior surface or in the air surrounding the closed container. (Arguably, these molecules are in "plain view.")

When a dog "hits" on a particular place or container, the conclusion that drugs or explosives are concealed therein must therefore be premised on an inference. Specifically, the dog's handler must deduce from the nature of the dog's alert that the molecules the dog is reacting to had at some point in time escaped from inside the locker or other closed and opaque receptacle. (Alternatively, the molecules the dog has alerted to may have been placed on the exterior surface by someone who had recently handled narcotics or explosives. This occurs most often with respect to the inspection of door knobs and car door handles. In that event, the inference that drugs are concealed inside the container or vehicle is based on the assumption that a person who had been in direct

contact with illicit substances or explosives had recently opened or exercised control over the object or container being examined.)

The United States Supreme Court's decision in Place does not mean that the use of drug-detection dogs is permissible in all circumstances. The Court held only that, "the particular course of investigation that the agents intended to pursue here — exposure of respondent's luggage, which was located in a public place, to a trained canine — did not constitute an internal search within the meaning of the Fourth Amendment." If the encounter between the dog and the object subject to inspection could only be achieved by bringing the dog into an area entitled to Fourth Amendment protection, such as by opening a car door or trunk or a locker, that entry is itself a full-blown "search" that is subject to significant limitations imposed by the Fourth Amendment. In other words, the canine must be lawfully in place at the time the inspection is made. (See Chapter 11 for a more detailed explanation of the "plain view" doctrine.)

In State v. Cancel, 256 N.J. Super. 430 (App. Div. 1992), a New Jersey court quoted extensively and approvingly to the United States Supreme Court's decision in Place. The Appellate Division explained why the warrantless use of a narcotics-sniffing dog is permitted not only under the Fourth Amendment, but also under Article I, Paragraph 7 of the New Jersey Constitution. In light of Cancel, it would seem that narcotics-detection dogs can be used in New Jersey to sniff the air surrounding or the exterior surface of a student's locker, vehicle, or other container without running afoul of the Fourth Amendment or its state constitutional counterpart, even though that inspection is not based upon full probable cause or even a mere reasonable suspicion to believe that drugs are concealed in the locker or object subject to inspection.

It must be noted, however, that the New Jersey Supreme Court has not had occasion to issue a definitive ruling on this question. Furthermore, not all courts agree that the use of a scent dog falls short of conduct constituting a search. In neighboring Pennsylvania, for example, the state's highest court held that under the Pennsylvania Constitution, a canine sniff of a place is a "search," but that because it involves a minimal intrusion and is directed to a compelling state interest in eradicating illegal drug trafficking, the sniff of a place may be carried out on the basis of an articulated "reasonable suspicion," not probable cause. See Commonwealth v. Johnson, 515 Pa. 454, 465, 530 A.2d 74, 79 (1987). The Pennsylvania Supreme Court viewed this as a constitutional "middle ground" between requiring full probable cause to believe that evidence of a crime would be discovered, and the federal law approach of requiring nothing at all before police would be permitted to conduct a canine sniff examination.

The Pennsylvania Supreme Court recently embraced the Johnson "middle ground" standard when presented directly with the issue of what standard of judicial review should apply to the use of drug-detection dogs to examine school lockers. In Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998), the court approved the use of drug-detection canines to conduct a schoolwide locker inspection program and ruled that under the Pennsylvania Constitution, school officials need not have full probable cause to believe that the canine sniff would reveal contraband or evidence of a crime. Rather, the court used the more flexible "reasonable grounds" standard announced in T.L.O.

In Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993), the Pennsylvania Court adopted an even stricter rule with respect to a canine examination of a person, as opposed to a place. The Court in Martin ultimately ruled that to examine a person (in that case, a satchel being carried by the suspect), police must have full probable cause to believe that a canine sniff will reveal contraband or evidence of a crime. Id. at 560.

Curiously, the court in Martin apparently drew no distinction between an actual canine examination of the "person" (i.e., articles of clothing being worn by the suspect at the time of the scent dog examination) and hand luggage being carried by the suspect, since the defendant in that case had been directed by police to place the satchel on the ground, at which point it was first examined by the drug-detection canine. 626 A.2d at 558. There is no indication in the reported decision that the animal at any time came into direct contact with any of the suspects. The court, in other words, assumed, without explanation or citation to authority, that an examination of the exterior surface of a portable container constitutes as great an intrusion as an examination of a person's body.

Other courts have held that the use of a narcotics-detection dog amounts to a "search" in the specific context of canines brought in to a schoolhouse. In Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980), for example, the court found that the use of a drug-detection dog was unreasonable and thus unconstitutional, even though the dog in that case was owed by a private security company. The court noted that while the degree of intrusion committed by a dog that sniffed students and their property was somewhat less extensive than that associated with a more traditional physical search, the court nonetheless recognized that "the use of an animal ... to conduct a search may offend the sensibilities of those targeted for inspection more seriously than would an electronic gadget." Jones at 233.

The court further noted that the drug-detection dog that was used in that case, a German Shepard, was a large animal that had first been trained as an attack dog. The court observed:

> Testimony by the school's principal ... indicated that the dog "slobbered" on one child in the course of a search. The dog's trainer acknowledged that [it] might physically touch a child during a search if the dog became overly excited. Such a tool of surveillance would prove intimidating and frightening, particularly to the children, some as young as kindergarten age, enrolled at Latexo. Hence, the degree of intrusion caused by the search was significant... .
> [Jones at 324.]

In Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir) cert. denied, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1982), the court likewise concluded that the sniff by a drug-detection canine constituted a search, even though the animal in that case, as in the Jones case, was owned by a private security corporation.

It is critical to note that the Jones and Horton opinions were written before Place was decided, and that in both cases, the animals were used to sniff students, not just the exterior surfaces of lockers. The court in Horton aptly noted that, "society recognizes the interests in the integrity of one's person, and the Fourth Amendment applies with its fullest vigor against any indecent or indelicate intrusion on the human body." 677 F.2d at 480. It is likely that this principle remains intact, especially in New Jersey, notwithstanding the subsequent rulings in Place and Cancel.

In light of the Jones and Horton cases and the recent decision of the Pennsylvania Supreme Court in Martin, and in the absence of a definitive ruling to the contrary by the New Jersey Supreme Court, the better practice would be to assume that the use of a canine to examine students and clothing being worn by them would constitute a full-blown "search." Accordingly, and for compelling policy as well as legal reasons, this Manual requires that in conducting an operation involving drug-detection dogs, *the law enforcement agency involved must develop and follow an operational plan that makes certain that the animals do not come into direct contact with students.* (See Chapter 4.5F(9).)

Finally, it must be clearly understood that the act of *opening* the locker or *entering* any part of a vehicle or container, whether in response to a dog's alert or to provide the dog access to a location to facilitate its examination, would clearly constitute a "search" for purposes of the Constitution and this Manual. (An act by the dog of "poking" or "prying" goes beyond mere sniffing, and falls within the definition of the term "search,"

as used in this Manual.) It bears repeating at this point that all searches made by law enforcement officers must be conducted pursuant to a warrant issued by a judge unless the search implicates one of the narrowly-drawn and jealously-guarded exceptions to the warrant requirement, such as "consent," "exigent circumstances," or the so-called "automobile exception."

C. Does a Scent Dog Alert Constitute Probable Cause or Reasonable Grounds to Conduct a Search? It is still not completely clear under the law whether an alert by a drug-detection dog by itself constitutes probable cause to believe that evidence of a crime will be found in a specific location. Most published scent dog cases involve automobile stops where the drug-detector dog's alert was considered by the court in conjunction with additional facts known to the police that indicated that illicit drugs were present. Presumably, an officer during a routine motor vehicle stop would not bother to request assistance from a drug-detection canine unit unless the officer had some factual basis for believing that the animal might alert to the presence of illicit drugs. Because courts use what is known as a "totality of the circumstance" test to determine whether probable cause exists, it is difficult to figure out from reading these cases whether the dog alert — by itself and viewed in artificial isolation — would have been sufficient to justify the issuance of a warrant or to conduct a warrantless search under the so-called "automobile exception" to the warrant requirement.

The question is even more difficult to resolve with respect to school lockers than it is with respect to lawfully-stopped automobiles. Because drug-detection animals are extremely sensitive, it is conceivable that a dog that alerts to the outside of a given locker may actually be responding to drugs or nitrates concealed in an adjacent or nearby locker. School lockers, after all, are lined up in a row and are not hermetically sealed.

For legal purposes, each locker must be viewed as a separate and distinct "premises." A judge would not be authorized to issue a warrant to search a locker unless the judge was satisfied that there was probable cause to believe that evidence of crime would be found in that particular locker. This is not to suggest that a judge could not find probable cause to believe that drugs are concealed in any of several contiguous lockers. (Recall that the probable cause standard, by definition, deals with probabilities, not absolute certainty.) The point, however, is that in order to comply with the constitutional requirement that the warrant specifically identify the place to be searched, the judge would have to make a finding that there was probable cause to believe that drugs would be found in each and every locker to be searched. (It is common practice that where separate premises to be searched are owned or controlled by different suspects, police apply for and obtain separate search warrants, each identifying a single

place or premises, so that a copy of the warrant and a receipt for any property seized can be provided to each suspect.)

It is interesting to note that in Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998), the Pennsylvania Supreme Court recently sustained the legality of a search in which school officials opened not only the lockers that were actually alerted to by the drug-detection dogs, but also the lockers adjacent thereto. Id. at 352. In a dissenting opinion, Justice Zappala concluded that the fact that the drug-detection dog had alerted on the defendant's locker, by itself, failed to establish probable cause. (The majority of the court had ruled that probable cause was not required and that the lawfulness of the search should be measured against the more flexible "reasonable grounds" standard announced in T.L.O..) Justice Zappala added:

> Implicit in the fact that it was necessary to search any lockers adjacent to those alerted on by the drug-detection dog is the conclusion that the police officers could not reasonably rely upon the dog's particularized detection. Otherwise, there would have been no reason for the officers to search the adjacent lockers.
> [709 A.2d 366, 371 (Zappala, J., dissenting).]

Some courts have expressed skepticism about dog alerts because it is thought that most of the cash in circulation in the United States contains sufficient quantities of cocaine on its surface to alert a trained dog. See United States v. $639,558.00 in U.S. Currency, 955 F.2d 712 (D.C. Cir. 1992). See also United States v. Carr, 25 F.3d 1194, 1214-1218 (3rd Cir. 1994) (Becker, C.J., concurring and dissenting) (discussing cases and studies that suggest that a substantial portion of United States currency now in circulation is tainted with sufficient traces of controlled substances to cause a trained canine to alert). Some of these cases that question the validity of a scent dog's positive alert involve situations where canine alerts were admitted as substantive evidence of guilt in a jury trial, as opposed to evidence of the existence of probable cause relied upon in a motion to suppress. Moreover, these cases involve situations where drug-detection canines were used to examine large bundles of currency to determine whether the cash was tainted or "drug related."

In the context of the school setting, however, these concerns should not be a problem, since it is not likely in any event that students (other than those engaged in significant drug trafficking or gambling operations) would keep large bundles of cash in their lockers for legitimate purposes. Indeed, the cases and studies that are critical of the use in certain specific contexts of drug-detection canines are generally based on the finding that these animals are extremely sensitive and may be alerting to slight traces of controlled substances.

It should also be noted that the failure to discover actual controlled substances in a locker alerted to by a drug-detection dog does not necessarily mean that the dog was in error. As noted in Chapter 3.2A(8), it is a well-settled principle of search and seizure law that the reasonableness of a search cannot be judged by what it turns up or fails to turn up. Drug-detection dogs react to the odor of controlled substances, not the actual concealed substances themselves. It is thus conceivable if not likely that a dog would alert to a locker in which controlled substances were recently kept, even if the cache of drugs has since been removed and is not physically present at the moment that the dog alerts and the locker is opened.

In any event, many, if not most, of the courts that have addressed the issue have ruled that a positive alert by a well-trained drug-detection dog does indeed constitute probable cause to believe that illicit substances or explosives are present. In Doe v. Renfrow, 475 F.Supp.1012 (N.D. Ind. 1979) aff'd in part 631 F.2nd at 91 (7th Cir. 1980), cert. den. 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981), for example, the court concluded that a scent dog's alert established probable cause to believe that a student was carrying drugs, although as it turned out, the student was not carrying drugs and the dog had apparently alerted because the student had recently handled another dog in estrus.

One respected Fourth Amendment expert has concluded that, "in light of the careful training which these dogs receive, an 'alert' by a dog is deemed to constitute probable cause for an arrest or search if a sufficient showing is made as to the reliability of the particular dog used in detecting the presence of a particular type of contraband." 1 LaFave, Wayne R., *"Search & Seizure: A Treatise on the Fourth Amendment"* (3d ed. 1996) §2.2(f) at 450.

Unfortunately, there is as yet no reported New Jersey opinion dealing with this precise issue. In a somewhat related context, however, New Jersey courts have permitted the admission of evidence concerning "tracking" by dogs. In State v. Parton, 251 N.J. Super. 230 (App. Div. 1991), for example, the court upheld the admission of testimony by a bloodhound handler that the dog had tracked the defendant from a mattress, where it was believed that the suspect had slept, to a building that had been set on fire. The court held that as a foundational basis, the proponent of the evidence must establish (1) the dog handler's skill, training, or experience to evaluate the dog's actions; (2) the dog is of a stock characterized by acute scent and power of discrimination, and that the particular animal performing the test possessed those qualities; (3) the dog was trained and reliable; and (4) the test in the particular circumstances was performed in a reliable manner.

In an unreported Appellate Division decision, which technically has no precedental value, the court viewed the Parton standards as useful in determining whether an "alert" by a drug-detection dog is deemed to constitute probable cause for an arrest or search. See State v. Lorenzo Medina, (Dkt. No. A-3683-90-T2) (Oct. 29, 1991). The court in that unreported case cited to numerous published decisions from other jurisdictions where the police had made extensive use of specially-trained dogs to detect the presence of contraband, and especially narcotics. Borrowing heavily from the standards described in Parton, the court ruled that the relevant criteria in evaluating the efficacy of a "canine sniff" test for the purpose of determining whether probable cause exists include: (1) the exact training the detector dog has received; (2) the standards employed in selecting dogs for detection training; (3) the standards the dog was required to meet to successfully complete its training program, (4) the "track" record of the dog; (5) the dog handler's qualifications; and (6) the circumstances under which the test occurred.

In that case, the prosecutor attached an extensive "resume" to the affidavit in support of the search warrant, describing in great detail the expert qualifications of the State Police dog handler, the vigorous training program that the dog underwent, and the record of the dog in detecting the presence of controlled dangerous substances. Based upon that information, the court concluded that the dog's alert constituted probable cause, even though as it turned out the dog had erred in its reaction to the defendant's automobile, in which no controlled dangerous substances were ultimately found. (As noted in Chapter 3.2A(8), just as an unreasonable search is not made good by what it happens to turn up, a reasonable search is not made unlawful merely because it fails to disclose evidence of crime.)

In light of the foregoing, it would seem that under both Federal and New Jersey law, an alert by a properly-trained and handled drug-detection canine can and does constitute probable cause, provided that all of the above-enumerated factors are clearly documented in the record. If there is any doubt in a particular instance whether the alert constitutes probable cause, the better practice would be to conduct some supplemental investigation to corroborate or bolster the alert.

In addition, before seeking a search warrant, it would be prudent for the law enforcement agency to inquire whether school officials are aware of any facts or circumstances that might suggest that the student assigned to the locker to which the dog alerted may be involved in drug activities. It would also be appropriate for the officer to check with the juvenile bureau and the prosecutor's office to determine whether there is any information in the possession of the law enforcement community

concerning that particular student. (Note that the juvenile officer should be present to provide this kind of background information [see Chapter 4.5F(3)].)

In establishing the drug-detection dog's "track record," the law enforcement agency applying for a warrant should be mindful that school lockers are, by their nature, different from other places, vehicles, or containers that are more frequently examined by drug-detection canines. As noted above, it will be necessary to establish to the satisfaction of the court issuing a warrant that probable cause exists to open a particular locker. For this reason, law enforcement officials might want to arrange controlled "test" runs in which drugs are secreted by law enforcement authorities in a few lockers to determine whether a particular dog (1) is capable of detecting the presence of drugs, and (2) is able to distinguish the locker(s) in which the drugs are actually concealed from surrounding lockers that do not contain illicit substances. The results of these practice runs should be carefully documented and made part of the affidavit in support of the warrant application.

Law enforcement authorities who volunteer the use of their drug-detection animals to aid school officials should always be mindful that the results of these inspections will become part of the animal's "track record," and that "false positive" or "false negative" alerts could undermine the future utility of the animal in criminal investigations. It bears restating, however, that the reliability of a drug-detection canine should not be called into question merely because the search of a locker alerted to by the dog fails to disclose a detectable and retrievable amount of controlled dangerous substance. Given the sensitivity of these animals, dogs can and will alert to controlled substances that were recently stored in lockers, but which have been removed and are not present at the time of the alert or ensuing search. This phenomenon must be taken into account in scrutinizing the animal's "track record."

Finally, although there are comparatively few cases that hold definitively that a dog alert — standing alone — constitutes probable cause, it would seem even more likely that the alert would meet the less stringent and more flexible "reasonable grounds" standard used to justify a search conducted by school officials. The question whether school officials may act upon the dog's alert by opening the locker in accordance with New Jersey v. T.L.O. is discussed in Chapter 4.5D(4).

D. What To Do When a Scent Dog "Alerts." In the event that a drug-detection canine alerts to the presence of illicit substances in a locker, the law enforcement handler has several options. It is critical to note that the law enforcement officer or any person acting under the direction or supervision of a police officer *is not permitted to open the locker in response to a scent dog's alert*. Rather, the officer is authorized to do one of the

following: (1) apply for a search warrant; (2) initiate further investigation to elicit additional facts indicating that illicit drugs or other contraband are concealed in the locker, or that otherwise corroborate that the student assigned to that locker is engaged in illegal conduct; (3) obtain permission or "consent" from the student and/or one of the student's parents or legal guardians to search the locker; or (4) provide information concerning the dog's alert to the principal of the school so that school authorities, acting independently of law enforcement, can take appropriate action in accordance with New Jersey v. T.L.O..

Some of these options rest on firmer legal grounds than others. It is unlikely, for example, that a reviewing court would exclude evidence or impose civil liability in any case where the search (the opening of the locker that the dog alerted to) was conducted pursuant to a warrant issued by another judge. In contrast, and for the reasons discussed in subsection 4 below, it is far less certain whether courts in this state will permit school officials to open a locker under the authority of New Jersey v. T.L.O. based upon an alert provided by a law enforcement drug-detection canine, and if that option is to be exercised, special precautions must be taken to make absolutely clear that school officials are acting independently and not as the agents of law enforcement. *Given the strong judicial preference for searches conducted pursuant to warrants, it is strongly suggested that when a scent dog alerts to the presence of illicit substances in a locker — thereby providing probable cause to believe that drugs are contained therein — the law enforcement agency conducting the operation should secure the scene and apply for a warrant*.

(1) Opening a Locker Pursuant to a Search Warrant. Before bringing a scent dog into a school to conduct a generalized inspection of the exterior surface of lockers, preparations should be made to facilitate obtaining a search warrant in the event that the dog alerts to a specific locker(s). The judge who will be called upon to issue the warrant should be put on notice of the operation so that he or she will be available to review the application expeditiously. Preferably, the application should be made "in person" pursuant to Court Rule 3:5-3(a), rather than by telephone pursuant to R. 3:5-3(b). Where feasible, the law enforcement agency should apply to a Superior Court judge, rather than a Municipal Court judge, since reviewing courts tend to provide greater deference to the probable cause determinations of Superior Court judges. See State v. Kasabucki, 52 N.J. 110 (1968). (Note also that Municipal Court judges have no authority to issue telephonic search warrants.)

Pursuant to a joint Directive from the Attorney General and the County Prosecutors' Association, an application for *any* search warrant must be reviewed and approved by an assistant prosecutor or deputy attorney general. Given the legal uncertainties in cases involving drug-detection dogs, it is especially important that these

applications be carefully reviewed by an experienced assistant prosecutor or deputy attorney general. (As noted below, the county prosecutor must in any event approve of the use of the drug-detection dog in a school, and the prosecutor's office should therefore already be directly involved in the planning and execution of the entire canine operation.)

If the assistant prosecutor or deputy or assistant attorney general reviewing the application has any doubts concerning the existence of probable cause, additional investigation should be conducted to bolster or corroborate the drug-detection dog's alert. Any additional information concerning the likelihood that the student assigned to the locker is involved in illegal activity should, where feasible, be included in the sworn application for a search warrant. Note that pursuant to the so-called "four corners" doctrine, the validity of a search warrant will be judged solely on the basis of the information provided to the issuing judge. The prosecutor is not permitted in a motion to suppress to present additional information that might have supported a finding of probable cause, but that was not provided to the judge who issued the warrant as part of the sworn application.

Information concerning the training of the drug-detection canine and the animal's "track record" should be prepared in advance and should be ready to be included in the affidavit in support of the application for a search warrant. As a practical matter, almost all of the information necessary to apply for the search warrant will be known *before* the dog alerts, and so this information should be carefully documented and stored in a word processing system so that these background facts can easily be made part of the search warrant application. Indeed, in most cases, the only facts in the application that will not be known before the drug-detection operation begins will be those that identify the specific lockers that the dog has alerted to, and those that describe the nature and intensity of the alert(s) from which the handler deduced the presence of illicit drugs in these specific locations.

The application for the search warrant should specifically identify each and every locker that is to be opened. The application must contain facts establishing probable cause to believe that drugs will be found in each locker that is to be searched. The warrant should be drafted to authorize a complete search of the contents of the locker(s), including any closed containers in the locker(s) that are capable of concealing controlled dangerous substances or drug paraphernalia.

Pending the issuance of the search warrant, the law enforcement officers involved in the operation should secure the locker or lockers for which authorization to search is being sought, so as to prevent any person from gaining access to those lockers to destroy,

conceal, or remove any contents. This may be done by replacing the original lock or by securing the latch mechanism with a plastic cable tie so that the student assigned to the locker no longer has access. Preferably, however, the scene should be secured by standing guard over the locker or hallway until a warrant is issued. This function can be performed by either police or school personnel. In some jurisdictions, police academy recruits are used to watch over the suspect lockers. (As noted above, by proper planning, the time needed to prepare an application and to appear before a judge can be kept to a minimum.) In addition, in order to minimize the intrusiveness of the search, schoolchildren ordinarily should not be present during the execution of the search warrant. (See Chapter 2.8.) It would not be inappropriate, however, and may even be preferable to have the student assigned to the locker present when the locker is opened pursuant to the warrant.

Once the locker is opened, it is advisable to take photographs of the locker before objects inside are removed and disturbed. A complete photographic (or videotape) record of the search will make it easier to establish exactly where and how any seized drugs were concealed and packaged. This information can be helpful in the event that the search results in a prosecution or trial.

(2) Obtaining Consent to Search From Students and Parents. In lieu of applying for a search warrant, law enforcement officers are authorized to obtain a knowing and voluntary consent to open a locker that has been alerted to by a drug-detection canine. (For a more complete discussion of the law governing consents, see Chapter 8.) It is important to understand that the New Jersey Supreme Court has established rules governing consent searches that are significantly stricter than the rules developed by the United States Supreme Court under the Federal Constitution.

In light of these strict rules and procedures, it is conceivable if not likely that it could actually require more time and effort to secure a lawful consent to search than to obtain a search warrant as part of a well-planned canine operation. Obtaining consent may be necessary, however, where there is a question as to whether the dog's alert constitutes probable cause to open a particular locker. (As noted in the preceding section, the canine may be alerting to drugs in adjacent or nearby lockers so that it cannot be shown to the necessary degree of probability that drugs are concealed in a specific locker.)

Under Federal and New Jersey law, law enforcement officers do not need probable cause or even reasonable suspicion to ask permission to conduct a search. See State v. Abreu, 257 N.J. Super. 549 (App. Div. 1992.) It is critical to note that permission to search a locker *cannot* be given by a school official, even though the locker is owned by

the school and the school district retains an interest in the contents of the locker. 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. In addition, a consent search should generally not be executed without first obtaining permission from a parent or legal guardian of the student if the student is a minor under New Jersey law (i.e., under 18 years of age). (Note that if the student is 18 years of age or older, or is an "emancipated minor" under the law, a parent or legal guardian might not have the authority to consent to a search. For this reason, permission to search should ordinarily not be sought from a parent or legal guardian of a student who has attained the age of majority.)

The student and parent giving consent must know that they have the right to refuse. See State v. Johnson, 68 N.J. 349 (1975). For all practical purposes, this means that the official asking for permission to search must advise the student and parent of this right. It is critical to note that the fact that the student or parent refuses to give consent cannot be used as evidence that the person has "something to hide," since any such inference would effectively and impermissibly negate the constitutionally-based right to refuse. In addition, the better practice would be to inform the student and parent that a drug detection dog has alerted to the presence of controlled substances in the student's locker. Providing this information will help to make certain that the consent is informed or "knowing," to use the phrase often found in the caselaw.

Although not required by law, the permission to conduct the search should be reduced to writing, and the form used should clearly state that the person(s) giving consent have the right to refuse. In addition, at least one New Jersey case suggests that the person or persons giving consent have the right to be present during the execution of the search. See State v. Santana, 215 N.J. Super. 63 (App. Div. 1987). This would allow the person giving consent the practical opportunity to terminate or withdraw consent at any time during the execution of the search. Any such request to discontinue the search must be respected by law enforcement. If, for security reasons, the student and/or parent is not present during the execution of the search, the better practice in view of State v. Santana, supra, would be to advise the person of the right to withdraw consent and to be present during its execution so that the prosecutor could thereafter establish that the person had knowingly waived the right to be present. (Note that *other* students ordinarily should *not* be present when the locker is opened. See Chapter 2.8.)

(3) Exigent Circumstances. Under both state and federal law, police officers are permitted, indeed, are sometimes required to enter premises and conduct searches in response to a bona fide emergency or life-threatening situation. (See Chapter 12 for a more detailed discussion of the exigent circumstances exception to the warrant

requirement.) These warrantless searches are permitted only when the circumstances are such that police officers could not reasonably have been expected to obtain prior judicial authorization or valid consent to conduct the search. In the context of planned drug-detection canine inspections, it is difficult to conceive of a situation where the police would be authorized under the exigent circumstances doctrine to open a locker in response to a drug-detection dog's positive alert. In determining the reasonableness of the police officer's conduct, reviewing courts will consider, among other things, whether that law enforcement officer used the least intrusive means to respond to the emergent situation. When a drug-detection canine alerts, the obvious and appropriate course of action would be to secure the locker, thus preventing any other person from opening it to remove or destroy evidence. Securing and watching over the locker would seem to dissipate the "exigency" of the situation, and certainly constitutes a far lesser intrusion than opening the locker without a warrant.

Accordingly, the rule is that unless the animal has clearly alerted to the presence of an explosive device, the handler or other law enforcement officer should not open the locker without obtaining a warrant or a consent to search from the student and/or parent or legal guardian. Even if the dog was trained to alert to firearms, the locker should ordinarily not be opened without a warrant or consent, since the more appropriate way to minimize both the degree of the intrusion and the danger to students or other persons would be simply to secure the locker. (Recall that as a general proposition, members of the general student population should not be present during the canine operation or subsequent execution of the search, and thus students should not be in harm's way.) Under no circumstances should a school official be asked by a law enforcement officer to open the locker to remove an object believed to be a firearm or explosives device.

(4) Using a Canine Alert to Justify a Search Conducted by School Officials. As noted in subsection C of this section, a positive alert by a properly-trained and well-handled scent dog most likely constitutes probable cause to believe that drugs or drug paraphernalia will be found in the locker or container that the dog has alerted to. It is even more likely that the dog's alert would satisfy the "reasonable grounds" standard established in New Jersey v. T.L.O. to justify a search conducted by school officials, because the standard applicable to searches conducted by school administrators is said to be more flexible and less stringent than the legal standard governing police searches.

The question thus arises, when and under what circumstances may school officials undertake a warrantless, non-consensual search on their own authority when the reasonable grounds to conduct the search is based in whole or in part upon information provided by police, such as a drug-detection canine's alert to the presence of drugs in a particular location? If school officials open a locker in response to a scent dog's alert,

will that search be governed by the rules that apply to school authorities, or to the stricter rules that must be followed by police? If a school official does open a locker in response to the alert by a law enforcement drug-detection canine, will evidence subsequently found during the course of the search be admissible in a juvenile prosecution?

There is no easy or definitive answer to these questions. The reasonableness and hence the lawfulness of any search conducted by school officials that is based in whole or in part on information provided by a law enforcement officer will depend upon the nature and degree of involvement and participation by the law enforcement agency and, to some extent, on the purpose of the search. While there are steps that can be taken to minimize the risk that a court would find the ensuing search by a school official to be unconstitutional, the safer practice is simply to avoid the problem entirely by having a law enforcement officer conduct the search in response to the canine's alert pursuant to a warrant or a recognized exception to the warrant requirement.

Recently, the Pennsylvania Supreme Court sustained the legality of a school locker search that would likely fail to pass muster under New Jersey law. In Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998), a school official enlisted the aid of two police officers and a trained drug-detection dog in order to expedite the process of inspecting all 2,000 lockers in the school. When the dog alerted, a police officer, along with school officials, would open that locker and any lockers adjacent thereto. Evidence discovered in one locker was used as the basis for a criminal prosecution. Curiously, the Pennsylvania Supreme Court in a footnote concluded that although the school principal had "enlisted the aid of two police officers in conducting the search herein, we agree with the factual finding of the trial court that this search was undertaken by the school officials." Id. at 353, n.5.

Given the facts recited in the court's decision, it is highly unlikely that the New Jersey Supreme Court would similarly conclude that any such search was conducted by school officials and should thus be governed by the standards announced in New Jersey v. T.L.O.. Notably, Associate Pennsylvania Supreme Court Justice Zappala took issue with the majority's willingness to accept the "factual finding" by the trial court that the search in Cass had been undertaken by school officials. Justice Zappala observed that this finding was refuted by the record and concluded that, "to characterize the locker search in this case as a search by school officials is to engage in subterfuge. Appellee's school locker was searched by police officers and the contraband seized as a result thereof formed the basis of a criminal prosecution." Justice Zappala thus concluded that:

> A search conducted by police officers in a public school setting for the purposes of penal law enforcement, even when conducted at the request of school officials, must be supported by probable cause in order to comport with the Fourth Amendment.
> [Id. at 371 (Zappala, J., dissenting).]

It is probable if not certain that if the New Jersey Supreme Court were to be presented with facts similar to those in Cass, it would rule that the act by a police officer of opening lockers in response to the drug-detection dog's positive alert must be judged according to the stricter standards governing police searches. (The search in Cass would likely be found to be unconstitutional under New Jersey law not because of a failure to establish probable cause, but rather because the locker was opened by police without a warrant or a recognized exception to the warrant requirement.)

Even so, the question remains unsettled as to the exact nature and extent of law enforcement involvement that is necessary to trigger the full probable cause and warrant requirements. For one thing, the United States Supreme Court in New Jersey v. T.L.O. expressly declined to provide advice concerning the lawfulness of searches conducted by school administrators that involve some direct or indirect participation by law enforcement authorities, since the search at issue in that case was conducted by a school official acting without any involvement or assistance by police. The United States Supreme Court in T.L.O. remarked in a footnote that:

> We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of a search conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.
> [New Jersey v. T.L.O., supra, 105 S. Ct. at 743 n.7.]

The New Jersey Supreme Court, however, did not hesitate in its opinion in that case to issue a stern warning to school officials. Specifically, the New Jersey Supreme Court observed, "if it should occur that a police-initiated search employs school officials for law enforcement purposes, courts will have little difficulty in finding a subterfuge." State v. Engerud, 94 N.J. 331, 344 (1983).

In light of this admonition, Attorney General Directive 1988-1 and the Memorandum of Agreement Between Education and Law Enforcement Authorities (1992) expressly provides that:

> No law enforcement officer will direct, solicit, encourage, or otherwise actively participate in any specific search conducted by a school official unless such search could be lawfully conducted by the law enforcement officer acting on his or her own authority in accordance with the rules and procedures governing law enforcement searches.

This Attorney General Directive should not be interpreted to preclude a law enforcement officer from providing lawfully-obtained information to appropriate school authorities, even under circumstances where it is likely that school officials would use that information as the basis to conduct a search pursuant to the school official's independent authority to enforce school rules and to maintain order and discipline. Recently, the New Jersey Legislature amended and relaxed the confidentiality provisions of the Code of Juvenile Justice to make it easier for police and prosecutors to share information with schools precisely so that school officials can use that information to undertake appropriate disciplinary proceedings, to provide appropriate interventions (such as to require substance-abusing students to participate in school-based counselling programs), or otherwise to maintain order and discipline and to protect the school environment for the benefit of the entire school community. See P.L. 1994, c. 56, (N.J.S.A. 18A:37-6). These recent amendments reflect a conscious policy decision by the Legislature to permit and to encourage close cooperation and the reciprocal sharing of information between education and law enforcement professionals. (The amended confidentiality provisions codified at N.J.S.A. 2A:4A-60c are more fully discussed in Chapter 14.3 and in a joint memorandum from the Attorney General and Commissioner of Education, attached as Appendix 8 to this Manual.)

Furthermore, the Memorandum of Agreement (1992) expressly provides that:

> Nothing in this agreement shall be construed in any way to require any school official to actively participate in any search or seizure conducted or supervised by a law enforcement officer; nor shall this agreement be construed to direct, solicit or encourage any school official to conduct any search or seizure on behalf of law enforcement, or for the sole purpose of ultimately turning evidence of a crime over to a law enforcement agency. Rather, it is understood that any search or seizure conducted by school officials shall be based on the school officials' independent authority to conduct reasonable investigations as provided in New Jersey v. T.L.O.. [Memorandum of Agreement (1992), Art. II (I) ¶ 5).]

Despite this carefully worded caveat, the existence of the Attorney General Directive and the complementary rules and regulations promulgated by the State Board

of Education (N.J.A.C. 6:29-10 et seq.) give rise to a potential legal issue. New Jersey has led the nation in promoting close cooperation between education and law enforcement officials. This high degree of cooperation, which is entirely appropriate and beneficial as a matter of policy, might make it more difficult for school administrators to demonstrate to the satisfaction of a reviewing court that they are acting independently of their law enforcement colleagues, rather than as agents of the law enforcement community, when they undertake a search based on information provided by police. Consider, for example, that state law and regulations unambiguously require school officials to turn over all suspected controlled dangerous substances, drug paraphernalia, and other contraband or evidence of crime to police and to provide the police with all known information concerning where the evidence was discovered and who was in actual or constructive possession of it. See N.J.A.C. 6:29-10.4. The obvious purpose in requiring school officials to disclose the so-called "chain of custody" is to make it possible to use the seized evidence in a juvenile or adult prosecution.

This statutory and regulatory obligation invites the argument that law enforcement officers turned over information to school officials reasonably believing, if not actually knowing, that school officials would proceed to use that information to conduct a search that would reveal evidence that would then have to be turned over to police. This reciprocal arrangement might lead a reviewing court to believe that the police were essentially using school officials to conduct a search for the eventual and ultimate benefit of the law enforcement community, in which event the lawfulness of the search undertaken by the school officials would likely be judged according to the more stringent standards governing police-initiated searches.

However, a recent New Jersey Supreme Court decision strongly supports the proposition that the existence of a statute or regulation that requires civilian authorities to turn over information to law enforcement does *not* mean that the lawfulness of a search or interview conducted by those civilian authorities must be judged according to the stricter standards and rules governing police-initiated searches or interrogations. See State v. P.Z., 152 N.J. 86 (1997). The P.Z. case involved a noncustodial interview conducted by a Division of Youth & Family Services' (DYFS) worker. The Court noted that in child abuse cases, DYFS, the civil authority, must provide information about suspected abuse and neglect to the county prosecutor, the criminal authority. See N.J.S.A. 9:6-8.30a. See also N.J.A.C. 10:129-1.1a, which requires that DYFS officials "refer to county prosecutors all cases that involve suspected criminal activity on the part of a child's parent, caretaker, or any other person." (This statutory and regulatory requirement that DYFS officials turn over information to appropriate law enforcement authorities is roughly analogous to the regulatory duty that school officials have

pursuant to N.J.A.C. 6:29-10.5 to report to law enforcement authorities information concerning firearms and controlled dangerous substances. (See Chapter 14.1).)

The New Jersey Supreme Court in P.Z. rejected the defendant's argument that when "parallel" civil and criminal systems are both operating, a person must receive Miranda warnings before being interviewed in a noncustodial setting by a DYFS employee. While the Court was "sensitive to the potential for manipulation," 152 N.J. at 119, it did not find any such manipulation in the exchange of information between DYFS and the county prosecutor. In short, the statutory duty to turn over incriminating information to law enforcement did not, by itself, make the DYFS caseworker an agent of law enforcement.

In a somewhat different context involving police interrogations under the Fifth and Sixth Amendments, the United States Supreme Court has ruled that conduct by police constitutes an interrogation, which is not permitted once a suspect who is in custody has requested the assistance of a lawyer, if the police conduct is "designed or reasonably likely" to elicit an incriminating response. See Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), cert. denied, 456 U.S. 930, 120 S.Ct. 1980, 72 L.Ed.2d 447. See also Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). The basic idea is that police may not use clever or subtle means or "ploys" to circumvent constitutional rules if their conduct is designed or likely to accomplish that which they are prohibited from doing. If a court were to use a similar analysis in deciding whether police were using school officials to conduct searches and to find evidence that police could not obtain on their own, then it is at least conceivable that a court would conclude that school officials in these circumstances are acting as de facto agents of the law enforcement community, or at least "dual agents."

(a) The "Silver Platter" Problem. The legal issues are especially complicated in New Jersey because our courts have developed what is known as the "silver platter" rule. This doctrine deals with the situation when one government agency turns over evidence to another agency on a so-called "silver platter." The question, then, is whether the receiving agency may use that evidence in a criminal investigation and prosecution. The problem arises only when the two cooperating agencies are subject to different search and seizure rules. Recall that the New Jersey Supreme Court has on a number of occasions interpreted Article I, Paragraph 7 of the State Constitution to provide citizens with greater rights and protections than are afforded by the United States Supreme Court under the Fourth Amendment of the United States Constitution. Essentially, the search and seizure rules governing state, county, and municipal law enforcement agencies in New Jersey are different and more stringent than the rules that must be followed by federal law enforcement officers operating in this state. The

question thus arises, when can state prosecutors use evidence discovered by federal law enforcement agencies that was obtained in a way that complies with federal law, but that would have violated the stricter rules established by the New Jersey Supreme Court if the search or seizure had instead been conducted by state, county, or local police officers?

The answer, not surprisingly, depends on whether the federal law enforcement officers were acting as de facto agents for state law enforcement officers, and whether the state officers were using their federal colleagues as a clever means to circumvent the stricter rules governing searches established by the New Jersey Supreme Court. Most other jurisdictions throughout the country have not had to address this issue because their courts have harmonized their state search and seizure law with federal precedent. The "silver platter" problem only arises in jurisdictions such as New Jersey where there are two different sets of rules governing different government agencies that work together in a cooperative fashion.

The situation in which there are different search and seizure rules — one set for state, county, and local law enforcement officers and another for federal officers — is roughly analogous to the situation in which school officials are allowed to undertake searches that would be unlawful if undertaken by police. (Recall that under New Jersey v. T.L.O., school officials, in contrast to their law enforcement colleagues, do not have to meet the probable cause standard; nor are they required to obtain a search warrant before opening a student's locker or handbag.)

The silver platter cases may thus provide some indication as to how the New Jersey Supreme Court might go about determining whether school officials were truly acting independently, or whether instead they had been impressed into service by their police colleagues and were acting essentially as adjunct law enforcement officers in an effort to circumvent the probable cause and warrant requirements — what the New Jersey Supreme Court referred to in T.L.O. as a "subterfuge." 94 N.J. at 345.

In the leading silver platter case, State v. Mollica, 114 N.J. 329 (1989), the Court focused specifically on "intergovernmental agency" in determining whether for constitutional purposes the federal agents who conducted the search and seizure were acting under the "color of State law." The Court noted that the resolution of the "agency" issue requires "an examination of the entire relationship between the two sets of government actors, no matter how obvious or obscure, plain or subtle, brief or prolonged their interactions may be." 114 N.J. at 354. Moreover, the Court held that not only the reasons but "the *motives* as well for making any search must be examined." Id. (emphasis added).

The Court explained that mere contact, awareness of ongoing investigation, and the exchange of information need not "transmute the relationship into one of agency." Id. The Court warned, however, that the existence of "antecedent mutual planning" may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law.

The Court's emphasis on the existence of "antecedent mutual planning" may create problems in the school search context, since scent-dog sweep operations necessarily require a high degree of planning and coordination if they are to be done properly and safely. (See discussion in subsection F(3).) Indeed, were a court to use this "silver platter" analysis in the context of school searches, the "antecedent mutual planning," evidenced by the invitation by school officials to bring in drug-detection dogs, coupled with the express understanding that information derived from the dog's alert would be turned over by the handler to school officials for the purpose of justifying a locker inspection, might well be enough to establish "agency," especially since school officials are thereafter required by law and regulation to turn over any seized suspected controlled substances to law enforcement authorities. Compare Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 621, n.5, 109 S.Ct. 1402, 1415, n.5, 103 L.Ed.2d 639 (1989) (discussing whether a drug testing regulation was a "pretext" to enable law enforcement authorities to gather evidence of penal law violations) with Commonwealth v. Snyder, 413 Mass. 521, 597 N.E.2d 1363 (1992) (a case cited in State v. Biancamano, 284 N.J. Super. 654 (App. Div. 1995), and in which the Supreme Judicial Court of Massachusetts held that "the fact that the school administrators had every intention of turning the marihuana over to the police does not make them agents or instrumentalities of the police in questioning [the defendant].")

Accordingly, if the search is to be conducted by school officials, careful steps should be taken to make absolutely clear that these school officials are acting independently, and that law enforcement scent dogs are being used only to assist school authorities to fulfill their bona fide educational mission, that is, to protect the school environment and to leverage substance-abusing students into counselling programs.

Preferably, the record should clearly indicate that school officials initiated the request to bring drug-detection dogs into the schools, and any correspondence to that effect should be kept on file and made part of the record in any court challenge. (Recall that the New Jersey Supreme Court in T.L.O. referred specifically to "police-initiated" searches. 94 N.J. at 345.) Needless to say, however, there is and should be no blanket policy that prohibits a law enforcement agency from soliciting such an invitation, or that otherwise prevents police departments from making known to education officials that drug-scent dogs can be made available upon their request.

Furthermore, if the operation provides that lockers are to be opened by school officials, then the record should make clear that school officials have sought out the services of police scent dogs for the principal and dominant purpose of maintaining order and discipline and to identify substance-abusing students who are in need of school-based interventions and counselling. Under no circumstances may a law enforcement agency direct that dogs be brought into schools to conduct suspicionless sweep searches. Nor may law enforcement officials plan or execute any such operation over the objection of school authorities, which objection may interposed at any time, including after the operation has commenced. (See subsection F(7).)

It is also recommended that the canines and their handlers and other law enforcement officers that may be participating in the operation not be present or even "standing by" when the locker(s) is actually opened by school officials, since such attendance or proximity — "waiting in the wings" — could foster the appearance that school officials were merely acting as agents of the law enforcement community.

Under no circumstances should the scent dog be allowed to conduct a further warrantless examination of containers or objects such as bookbags or knapsacks that were revealed and exposed after a locker has been opened by school officials in response to the dog's initial alert to the exterior surface of the locker. In other words, the police-owned or handled canine should not be used after the locker is opened by school officials to focus their ongoing warrantless search to containers founds within the locker, even if school officials facilitate the subsequent canine inspection by removing the containers from the locker so that the canine does not have to physically enter the locker.

For one thing, such further direct involvement by police in the ongoing search is not necessary because if school officials may lawfully open the locker in response to the dog's initial alert (which is not certain), then they may further search any object or container within the locker that could reasonably conceal the drugs or drug paraphernalia that are the object of the search.

Furthermore, while it could be argued that the use of a drug-detection dog at this point actually serves to minimize the intrusiveness of any further search by making it unnecessary for school officials to open any objects or containers found in the locker that the dog does not specifically alert to, see Commonwealth v. Cass, 709 A.2d 350, 362 (Pa. 1998) (court in upholding canine search emphasized that dogs were specifically employed to limit the intrusion occasioned by the decision to search all lockers in the school), it is more likely that courts will construe the continued use of the dog in these circumstances as proof that police were integrally involved in the entire search episode, blurring if not emasculating the distinction between searches conducted by school

officials and those conducted by police. In other words, keeping the police canines on the scene after the locker is opened and using the dogs as a screening device at this juncture — after a true "search" had already been initiated — would likely lead courts in this state to conclude that the canine sniffs and the searching conduct by school officials were all "part of a single transaction as connected units of an integrated incident." Compare State v. Bradley, 291 N.J. Super. 501 (App. Div. 1996) (using the above-quoted phrase to determine whether a search incident to an arrest is contemporaneous with the arrest). Any such "integration" of education and police functions is likely to transform the operation, for Fourth Amendment purposes, into a law enforcement search.

(b) The Problem of "Parallel" Criminal and Non-Criminal Investigations. Several New Jersey cases have discussed another variation of the "silver platter" problem that can arise when there are simultaneous or "parallel" criminal and civil investigations into the same conduct. As noted in Chapter 14.4, school officials are permitted to conduct their own investigations and to initiate appropriate disciplinary proceedings even where a formal juvenile (or adult) prosecution is still pending. In other words, it in no way constitutes "double jeopardy" for law enforcement and school officials to conduct independent, "parallel" investigations and disciplinary/prosecution proceedings. School officials should, of course, always be cautious not to inadvertently undermine an ongoing law enforcement investigation or juvenile prosecution, and the existence of parallel investigative proceedings may implicate a degree of cooperation and interaction that would lead a court to conclude that school officials and law enforcement officials were acting in concert, so that a resultant search or interview conducted by a school official would be judged by the stricter legal standards that apply to searches or interviews conducted by police and prosecutors.

In State v. P.Z., 152 N.J. 86 (1997), the New Jersey Supreme Court cautioned that in cases where there is an interrelationship between criminal and civil actions against the same person, courts must be "sensitive to the potential for the state's deliberately manipulating a civil procedure in order to obtain evidence against a criminal defendant." 152 N.J. at 118. The P.Z. case involved a child abuse investigation by the Division of Youth and Family Services (DYFS). Pursuant to statute and regulations, DYFS, the civil authority, is required to provide information about suspected abuse and neglect to the county prosecutor, the criminal authority. See N.J.S.A. 9:6-8.36a and N.J.A.C. 10:129-1.1a. As noted above, the New Jersey Supreme Court in P.Z. expressly rejected the contention that because "parallel civil and criminal systems are both operating against a defendant," DYFS officials must provide the so-called Miranda warnings to the defendant before conducting a noncustodial interview. While the New Jersey Supreme Court was sensitive to the potential for manipulation, it found no

impropriety in the exchange of information between DYFS and the county prosecutor in that case.

Critical to that determination was that at the time of the interview, the DYFS worker was acting within the scope of her duties to investigate and establish a placement plan for defendant's infant daughter, who was shortly to be released from the hospital following injuries suffered at the hands of the defendant. The interview, in other words, was done in furtherance of a bona fide DYFS investigation and was done to obtain information relevant to the proper discharge of that civil agency's responsibilities.

As importantly, there was no indication that the DYFS worker interviewed defendant with the purpose of aiding in the criminal prosecution, or that she had a "hidden agenda" to obtain an incriminating statement on behalf of the prosecutor's office. The Court noted that the record in that case contained no reference to regular interaction between the civil and criminal authorities, let alone "manipulation" of the DYFS caseworker by the prosecutor to obtain information specifically to help the criminal authorities. The Court nonetheless cautioned that had there been evidence that the DYFS worker had met with the defendant simply as a subterfuge to achieve a law enforcement purpose, it might well have reached a different result. 152 N.J. at 120.

Justice Pollock in his dissenting opinion, which was joined by Justice Coleman, read the record differently, concluding that the caseworker had been acting for *both* DYFS and the county prosecutor. According to Justice Pollock, even if the caseworker was acting primarily to protect the best interests of the injured child, she was also acting on behalf of the county prosecutor. "In sum," Justice Pollock concluded, "[the DYFS caseworker] was a dual agent." The "proof of the pudding," according to Justice Pollock, was that the county prosecutor had *authorized* the DYFS worker to take a statement. 152 N.J. at 128-129. (Pollock, J., dissenting).

In light of the P.Z. Court's clear warning, and especially in view of the concerns raised by the dissent, it is critically important that county prosecutors or other law enforcement officials never attempt to use or manipulate school officials to undertake a search (or to conduct an interview) for the purpose of aiding the county prosecutor in conducting a criminal investigation. Any search or interview undertaken by school officials must be done in furtherance of the school official's independent responsibility to maintain order, discipline, and safety within the school. Although county prosecutors are expressly authorized to provide legal advice to school officials pursuant to Attorney General Directive 1988-1, see also Chapter 14.5, a county prosecutor should never direct, recommend, or even "authorize" school officials to undertake a search or conduct

an interview. Rather, the prosecutor should only advise the school officials whether the contemplated search (or interview) is likely to be judged to be lawful or unlawful.

(c) Determining the "Purpose" of the Search — The Immunity Problem. The United States Supreme Court in its recent landmark opinion dealing with student athlete drug testing programs distinguished between searches undertaken for "prophylactic and distinctly *non*punitive purposes" and those that the Court characterized as "evidentiary" searches. Vernonia Sch. Dist. 47J v. Acton, 115 S.Ct. 2386, 2393 n.2 (1995) (emphasis in original). This analytical distinction appears to be consistent with the reasoning used by the New Jersey Supreme Court in the "silver platter" case discussed in subsection (a), wherein the state court carefully examined the "motivations" of the participants.

A number of well-reasoned and frequently-cited cases in other jurisdictions similarly suggest that the "purpose" of the search undertaken by school officials in response to a police scent dog's alert is relevant if not of critical importance in determining whether the search is lawful. In Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981), an assistant district attorney contacted the principal of a school who in turn received permission from the school superintendent to use drug-detection dogs to conduct a general sweep. The resulting search was done pursuant to a state board of education regulation that prohibited the sale, possession, transportation, or use of marijuana on school premises. The state board of education regulation included a provision that authorized general searches of school property, including lockers and school buses, declaring that such inspections may be conducted at any time with or without students being present. Students were advised of this policy by means of a publication that was provided to students at the beginning of the school year.

The United States Court of Appeals for the 10th Circuit found in that particular case that:

> Although the search of the lockers and use of the dogs was brought about by the district attorney, the district attorney assured the school officials that he was not doing it in any official capacity; that no charges or arrests would be made as a result of the demonstration; and that if marijuana was found the decision as to action against the offender would be left to the school authorities. The search (so it was argued) was performed under the sole control and direction of [the principal] and not the assistant district attorneys, who were just there as observers.
> [639 F.2d at 666.]

The 10th Circuit Court of Appeals ultimately decided that this search did not violate students' Fourth Amendment rights, and that the plaintiff in the civil action suffered no compensable injury when he was transferred to another school after marijuana was discovered in his locker during a warrantless search by school officials that was based upon the drug-detector dog's alert to the presence of marijuana inside his locker.

A similar result was reached by a federal district court in Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979) remanded in part and affirmed in part, 631 F.2d 91 (7th Cir. 1980), cert. den. 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981). In that case, a drug-detection canine was used to walk up and down classroom aisles to inspect students. The district court's opinion in Renfrow, which was described as "scholarly" and adopted by the 7th Circuit Court of Appeals and has since been cited by a number of other courts and commentators, ultimately concluded that school officials may rely on general information to justify the use of law enforcement canines to detect drugs, and that the "probable cause" standard governing police searches does not apply in this situation. The district court in Renfrow observed:

> Acting alone, each school administrator could have unquestionably surveyed a classroom to prevent drug use. Because those administrators now acted with assistance of a uniformed officer does not change their function. The officers were merely aiding in the inspection, at the request of the school administrators. Their presence does not change the actions of the school officials from that of supervision in loco parentis to that of an unwarranted search. Although they were obviously clothed with their state authority, they [law enforcement officials] had previously agreed that no arrests would be made as a result of any drugs found that morning. No police investigations took place on that day nor had any arrests or prosecutions been initiated as a result of the March 23, 1979 inspection. [Renfrow, 475 F. Supp. at 1020 (emphasis added).]

The court concluded that there is nothing improper in having school officials use dogs as aides to supplement and assist basic human senses. "In doing so," the court noted, "it should be emphasized that the defendants [the school officials] proceed as school officials and not, per se, as policemen." Id. at 1026.

The court in Renfrow nonetheless issued a warning that the results might have been different had law enforcement agencies made any arrests or pursued criminal prosecutions:

> It should be noted at this point that had the role of the police been different, this Court's reasoning and conclusion may well have been different. If the search had been conducted for the purpose of discovering evidence to be used in criminal prosecution, the school may well have had to satisfy a standard of probable cause rather than reasonable cause ... [Id. at 1024.]

The Renfrow case is often cited for the proposition that school officials may rely on a drug-detection canine's alert to undertake a search provided that no criminal prosecution is initiated based upon any evidence discovered during the search. It is unclear under this line of precedent whether it matters that there was a secondary or incidental purpose to the search, or whether police and prosecutors are indeed flatly prohibited from initiating a prosecution that relies on any such evidence found by school officials in these circumstances, although these cases strongly suggest that evidence would *not* be admissible in a criminal prosecution.

This approach, however, seems to conflict with the principle that the presence of both administrative (i.e. health and safety) and criminal investigative purposes does not automatically invalidate an otherwise lawful administrative search, provided that the "*primary object*" of the search is not to gather evidence of criminal activity. See Michigan v. Clifford, 464 U.S. 287, 294, 104 S.Ct. 641, 647, 78 L.Ed.2d 477 (1984). It must be recognized, of course, that in the context of a schoolwide inspection — especially one that involves a sweep by drug-detection canines — the "object" of the search, illicit drugs, happens also to constitute evidence of criminal activity. Where scent dogs are used, it can hardly be argued that the ensuing discovery of drugs was inadvertent within the meaning of the "plain view" doctrine. This is not a situation, in other words, where the administrative inspection is undertaken to find one type of object, but another type is revealed, although it certainly could be argued that a canine sweep designed to find drugs should not foreclose prosecution for possession of firearms or other deadly weapons. In sum, it is not clear whether courts will focus on the primary *objective* or *purpose* of the inspection program (compare the New Jersey Supreme Court's reference in T.L.O. to a "narrow band of administrative searches to achieve educational purposes," 94 N.J. 331, 343-344), or the primary *object* of the inspection which, in this context, is illicit substances that constitute not only a violation of school rules and a threat to the educational process, but also constitute a violation of the criminal law.

There are several other difficulties in relying on these school search cases that were decided in other jurisdictions. For one thing, the courts in both Renfrow and Zamora relied to some extent on the special relationship between school administrators and students under the doctrine of "in loco parentis" — the notion that school officials

at times are acting not as governmental agents, but rather in the stead of parents. In Zamora, for example, the court observed:

> The particular relationship between Vidal [the student who brought the civil rights action] and the school authorities serves to distinguish this case from the search and seizure cases which are relied on by the plaintiff-appellant. The basic theory is that although a student has rights under the Fourth Amendment, these rights must yield to the extent that they interfere with the school administration's fundamental duty to operate the school as an educational institution and that a reasonable right to inspect is necessary in the performance of its duties, even though it may infringe, to some degree, on a student's Fourth Amendment rights. The courts which have considered this question have noted that the doctrine in loco parentis expands the authority of school officials, even to the extent that it may conflict with the rules set forth in the Fourth Amendment. Some cases have gone so far as to say that school authorities have an affirmative duty to search the lockers.
> [Zamora, 639 F.2d at 670.]

The problem with this analysis is that the United States Supreme Court in New Jersey v. T.L.O., which was decided four years after Zamora, questioned if not outright rejected the argument that the doctrine of in loco parentis provides a basis for conducting a search under the Fourth Amendment. While the United States Supreme Court ultimately imposed a different and less stringent standard for searches conducted by school officials, as compared to searches conducted by police, the Court did *not* embrace the notion that school officials are acting in the stead of parents, who are, of course, free to conduct searches of their minor children's property and possessions without any constitutional limitations. The United States Supreme Court in T.L.O. noted in this regard:

> If school authorities are state actors for the purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students ... in carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the state, not merely as surrogates for the parents, and they can not claim the parents' immunity from the strictures of the Fourth Amendment.
> [New Jersey v. T.L.O., 105 S.Ct. at 733, 740.]

Our ability to rely confidently on Doe v. Renfrew and the cases that cite to it is also called into question by the blistering dissent of Justice Brennan to the decision by the United States Supreme Court to deny certiorari in that case. (Denying certiorari means that the Court decided not to review the case on its merits.) Justice Brennan in his dissent to the denial of certiorari in Renfrow wrote:

> Moreover, even if the Fourth Amendment permits school authorities, acting in loco parentis, to conduct exploratory inspections if they have "reasonable cause" to believe contraband will be found, that standard could not apply where, as here, the school officials planned and conducted the search with the full participation of local police officials. Once school authorities enlist the aid of police officers to help maintain control over the school's drug problem, they step outside the bounds of any quasi-parental relationship and their conduct must be judged according to the traditional probable cause standard.
> [Doe v. Renfrow, 451 U.S. 1022, 1026, 101 S.Ct. 3015, 3018, 69 L.Ed.2d 395 (1981).]

To further complicate the situation, there are yet other practical as well as legal problems that must be addressed if law enforcement agencies are to provide the services of drug-detection dogs with the understanding that school officials — not police officers — will eventually open lockers in the event of a positive alert, and with the further understanding that any evidence of crime found in the lockers will not be used in either a juvenile or adult prosecution.

First, the decision to decline prosecution, which can *only* be made by a county prosecutor or the Attorney General, presupposes that the need to use this particular technique (i.e., having school officials rather than police open lockers in response to a scent dog's positive alert) outweighs the benefits of preserving the option of pursuing full prosecution. This means that officials must rely entirely on school-based disciplinary proceedings to achieve the desired deterrent effect, since a criminal prosecution would no longer be a viable option. Prosecutors and school officials must proceed cautiously before taking this tact, since it might unwittingly send a mixed signal to students, undermining the state's "zero tolerance" policy.

As importantly, county prosecutors must be extremely careful before agreeing to give up the option to initiate a prosecution before all (or, in this context, any) of the facts are known. Ordinarily, the decision to grant immunity from prosecution is made only after thoughtful deliberation and a careful assessment of all of the attending circumstances, including, notably, the culpability of the person who is being afforded protection from criminal prosecution. Under state law, prosecutors who seek to provide formal immunity must apply to a court and must first receive express permission from the Attorney General. See N.J.S.A. 2A:81-17.3. In the context of a school search, in contrast, a prosecutor is being asked to give up the right to use evidence even before that evidence is found and before any facts or even the identities of putative defendants are known.

Note, moreover, that if the prosecutor broadly agrees not to use evidence found in a search conducted by a school official pursuant to a drug-detector dog's alert, that prosecutorial decision would seem to extend to *any* evidence found in the locker that would be deemed to be a "fruit" of the search. This might include large quantities of drugs that suggest major drug *distribution* activities, and any weapons or firearms found in "plain view" during the execution of the locker suspected of concealing drugs and alerted to by the scent dog.

Such "blanket" immunity stands in sharp contrast to the carefully-drawn amnesty feature set forth in the Memorandum of Agreement Between Education and Law Enforcement Officials (1992) and N.J.A.C. 6:29-10-4(a)(1), which is discussed in Chapter 14.1C of this Manual. That feature is expressly limited to cases involving the simple possession of drugs for personal use, *not* the distribution or possession with intent to distribute controlled dangerous substances. Nor does the amnesty feature apply at all to firearms or other dangerous weapons.

Pursuant to this so-called amnesty provision, the Attorney General and the State Board of Education have adopted a policy whereby law enforcement has agreed to give up its right to pursue a criminal investigation and prosecution of comparatively minor drug offenses. This is done to achieve a compensating benefit, that is, to provide a strong incentive for substance-abusing students to voluntarily and on their own initiative turn over drugs and to seek help for their substance abuse problem. The New Jersey Legislature has since embraced a similar policy when it adopted N.J.S.A. 2C:35-10c, as interpreted by State v. Patton, 133 N.J. 389 (1993), which held that a person who voluntarily turns over drugs to law enforcement authorities is afforded implied immunity and may not be prosecuted for the simple possession of those drugs.

For all of these reasons, if school employees rather than police are to conduct searches in response to a scent dog's alert (which is *not* recommended), the better practice would be for the county prosecutor to agree only that his or her office will not prosecute a student for a violation of the statute that prohibits simple possession of illicit drugs. The county prosecutor is strongly encouraged to retain and expressly preserve the option of using any evidence found by school officials to prosecute for more serious crimes, including distribution or possession with intent to distribute illicit drugs, or the unlawful use or possession of a firearm or other dangerous weapon. This must be done, of course, with the understanding that a defendant will almost certainly move to suppress *any* evidence of serious criminal activity discovered in the search and that it is conceivable if not likely that the defendant would prevail in a motion to suppress under the authority of Renfrow, Zamora, and other cases that suggest that criminal prosecution is foreclosed. (As noted above, it is somewhat more likely that a prosecution for possession of firearms or other deadly weapons would *not* be precluded where the "primary object" of the sweep inspection was to find drugs, not weapons. The ensuing discovery of weapons in a locker alerted to by a drug-detection dog would seem to meet the elements of the "plain view" exception, which is discussed in more detail in Chapter 11. See Michigan v. Clifford, 464 U.S. 287, 294, 104 S.Ct. 641, 647, 78 L.Ed.2d 477 (1984).)

Given the legal uncertainties involved and the distinct possibility, if not probability, that a prosecution for serious offenses might be precluded, prosecutors are strongly urged to employ other search techniques in response to a scent dog's alert, such as obtaining a warrant or a valid consent. It must be recognized, however, that some school officials believe that it is preferable to rely entirely on school-based disciplinary proceedings, and they will not invite law enforcement officers and dogs on to school grounds if their students will be subject to prosecution. In these districts, the only way to make use of scent dogs is for the prosecutor to agree to forego prosecution. Prosecutors and police departments would seem to have little to lose in agreeing to these terms, since in the absence of such a blanket concession, drug-detection dogs would not be allowed to examine the exterior surfaces of lockers or other property and would thus not be in the position to alert to the presence of drugs, which would remain concealed and undetected.

Even so, this approach seems to be based on a misunderstanding of the nature and workings of the juvenile justice system, and may even reflect an implicit lack of respect and trust for that system and the ability of police, prosecutors, and juvenile courts to handle cases properly and fairly. It is simply inappropriate, as a matter of state policy, for school officials to insist that major drug dealers or those who carry firearms on to school grounds be guaranteed immunity from juvenile or (where applicable) adult

criminal prosecution. Accordingly, county prosecutors are strongly urged not to give up the right to prosecute for serious drug distribution or weapons offenses, even if this means that drug-detection canines will not be invited into a school to conduct a sweep.

Finally, it almost goes without saying that prosecutors cannot give up the right to pursue a prosecution because they know or believe that a planned search — one that has not yet taken place — will be unlawful and that any evidence seized will be inadmissible on those grounds. Thus, for example, a prosecutor may not direct, encourage, or permit law enforcement officers to conduct or actively participate in a search conducted without a warrant unless there is a good faith reason to believe that the search would fall under one of the judicially-recognized exceptions to the warrant requirement. Any government official who knowingly or purposely violates a student's constitutional rights is subject to *punitive* damages, departmental discipline, or even criminal prosecution for misconduct, notwithstanding that the official fully intended to minimize the adverse effects on the students whose rights were violated by agreeing in advance not to use seized evidence against these students in a juvenile or adult criminal prosecution.

E. Using Canines to Examine Student Property Other Than Lockers or Desks. Ordinarily, the use of drug-detection canines to conduct suspicionless or "sweep" examinations should be limited to the exterior surfaces of lockers, desks, and other fixed or immovable property in the school. Some school officials are justly concerned, however, that drugs are routinely carried by some students from class-to-class in portable containers or in students' clothing. Some drug using or selling students are afraid to leave controlled substances in their lockers for fear that they will be discovered by school officials through the use of drug-detection dogs or random locker inspection programs. Drug-dealing students are even more reluctant to leave valuable stashes of drugs or the proceeds of drug sales behind in unprotected lockers for fear that their drugs and drug-related cash would be "ripped-off" by other students or competitors. For this reason, many school administrators think it is necessary and appropriate to conduct suspicionless examinations of students' handbags/purses, bookbags, knapsacks, and clothing.

As noted in Chapter, 4.5.B, using a drug-detection canine to examine the exterior surface or air surrounding an opaque, closed container or article does not reveal anything private about its contents, and thus constitutes an extremely limited form of privacy intrusion. Some school officials would therefore prefer to use scent dogs as a screening device to assist them in conducting these initial examinations of moveable property, since a program that subjects such property to examination by a canine is *less* intrusive than a program that permits school authorities to open randomly-selected handbags,

bookbags, or knapsacks, or that allows school officials to conduct searches of these kinds of containers when students enter or leave a school building or a designated area within the school, such as the library or media center. (See discussion of "Point of Entry" Inspections in Chapter 4.6.)

(1) Using Canines to Search Persons and Clothing. It is a regrettable fact of modern day life that some students carry drugs and weapons on their persons from class-to-class throughout the course of the school day. Concealing contraband is especially easy for students who wear multiple layers of baggy or loose-fitting clothing, which has become fashionable in recent years. This fashion trend, ironically, was initiated or at least embraced by gang members in California who realized that loose-fitting clothing could be used to conceal firearms and other deadly weapons. (This is not to suggest, of course, that all or even a substantial percentage of students who wear oversized clothes are trying to conceal drugs or weapons.)

Despite the severity of the drug and weapons problem facing our schools, it is inappropriate in this state to use scent dogs to examine student's persons, including articles of clothing while such clothing is being worn by a student. In New Jersey, as in most states, scent dogs are generally trained to use active or aggressive alert cues or "keys," including scratching, pawing, barking, and growling. Allowing dogs with active alert cues to sniff students poses an unacceptable risk to the safety and well-being of students.

In the case of Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980), the court ruled that it was unreasonable and thus unlawful to use a scent dog to examine children. Interestingly enough, it made no difference in that case that the dog was owned and handled by a private security company, rather than by a law enforcement agency. The court in Latexo noted that, "the use of a 'sniffer' dog by defendant [school district] in the instant case was a substantially greater intrusion upon the personal privacy of plaintiffs ... first, the students themselves, not merely their vehicles or possessions, were subjected to canine scrutiny." 499 F.Supp. 223, 232. Professor LaFave, a noted expert on the Fourth Amendment, has commented that the court in Jones seems to have been strongly influenced by the fact that school authorities used especially poor judgment in that case by having the dog inspect virtually the entire Latexo student body, including even kindergarten children. 4 LaFave, supra at 819.

School officials and law enforcement agencies that own and handle drug-detection canines must also be mindful that police dogs, even scent dogs, may evoke painful memories of past governmental overreaching in Europe and the United States. In some communities, the use of police-controlled animals to search or intimidate persons —

especially children — will be met by a visceral negative reaction. It is incumbent upon the county prosecutor before approving the use of a police canine to anticipate and account for any such reactions and any civil disturbances in the school or the community-at-large that might result from the proposed use of a police canine. As noted in Chapter 4.5F(2), law enforcement officials are strongly encouraged to solicit parental input before undertaking *any* canine operation in a school.

The next question that arises is whether school officials are authorized to order children to remove their outer garments and to leave those garments behind so that they can be examined by a drug-detection dog. This conduct would appear to be a "seizure" — the temporary dispossession of the use and enjoyment of personal property. The legality of ordering children to leave behind personal articles is discussed in more detail in the following section regarding the use of canines to inspect handbags, backpacks, and other portable containers. For present purposes, it is enough to note that the lawfulness of the conduct will depend on several factors, including the need to undertake this form of inspection (the specific findings) and the degree of intrusion.

School officials should carefully document the reasons that necessitate this type of inspection based on the nature and extent of the drug or firearms problem in the particular school or district. (Note that the scope of the firearms problem will be relevant only to the extent that the canines to be used are trained to alert to the presence of firearms or ammunition.) Any such orders to partially disrobe and to leave clothing behind for examination by a scent dog must be limited to students' outer garments, such as jackets and coats. Under no circumstances may a school require students to remove clothing to a degree or in a manner that would constitute a "strip search" for the purpose of exposing the removed clothing to a suspicionless "sweep" inspection by a drug-detection dog. Recently, Governor Whitman signed a law that flatly forbids school officials from conducting strip searches of students even in cases where school officials have an individualized suspicion that a particular student is carrying a weapon or illicit drugs. (See Chapter 10 for a more detailed discussion of strip searches conducted by school officials.)

Presumably, school administrators have the authority to impose reasonable restrictions on the use of certain forms of clothing, and can, for example, impose an appropriate dress code. A school may also require students to keep outer garments stored in lockers or other places or facilities that are provided by the school for student use during the school day. If the drug problem that exists in a school is such as to justify the use of drug-detection dogs to examine students' outer garments, it might be appropriate for the school to adopt and enforce a rule requiring that such articles of clothing be kept in lockers and out of classrooms. By requiring students to keep such

garments stored in lockers, school authorities can make it more difficult or at least more inconvenient for drug dealers to conceal controlled substances or weapons during the course of the school day. Any such policy, if consistently enforced, is likely to have a greater beneficial impact than a policy to subject outer clothing to comparatively infrequent inspections by drug-detection canines.

In the event that school officials nonetheless wish to establish a program that requires students to remove clothing only during the course of a canine inspection, any such order addressed to a student to remove or leave behind outer garments must be done pursuant to a neutral plan. The class or classes subject to this type of inspection should be selected at random, or else all classes (or at least those with children of an appropriate age given the documented nature of the problem) should be subjected to equal treatment. Individual students within a classroom should *not* be singled out for this form of inspection. If school officials have reason to suspect that a particular student or group of students is carrying concealed drugs or other contraband, the appropriate response is to conduct an individualized search in accordance with the standards established in New Jersey v. T.L.O. and discussed in detail in Chapter 3.

The plan should include provisions to ensure the security of student garments that are left behind, protecting them against the risk of theft, loss, or destruction. The plan should ensure that the movement of students during the operation is done in a safe and orderly way, and the plan should include provisions to make certain that students avoid direct contact with drug-detection animals.

In directing or controlling the movements of children pursuant to this type of inspection program, school officials should always be mindful that while schools exercise considerable authority over students for their benefit and protection, *schools are not prisons, and students are not inmates*. (See Chapter 2.12.) The plan should avoid using terms that are more appropriate for correctional institutions, such as "lock-downs." Prisoners are afforded comparatively few rights under the Fourth Amendment because they have been convicted of serious crimes and have been sentenced to custodial terms. See Ingraham v. Wright, 430 U.S. 651, 657, 97 S.Ct. 1400, 1411, 51 L.Ed.2d 711 (1977); Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). School officials and law enforcement agencies must never lose sight of the fact that most students do *not* use, carry, or sell illicit drugs or dangerous weapons on school property, and that suspicionless inspection programs are designed to deter and to ferret out the comparative handful of students whose unlawful and dangerous behavior disrupts the sanctity of the educational environment. The Pennsylvania Supreme Court recently recognized that the goal of safe, drug-free schools "is often impeded by the actions of a few students which interfere with the ability of the [state] to achieve this goal."

Commonwealth v. Cass, 709 A.2d 350, 364 (Pa. 1998). School officials in their zeal to deter the dangerous and unlawful behavior of a few troublemakers should not use tactics that serve unwittingly to breed disrespect for authority or that unduly disrupt the educational process.

Finally, it is essential that students and their parents or legal guardians receive advance notice that the school intends to use — or at least retains the right to use — this particular inspection technique, and that students may be required without further notice to vacate a classroom and to leave behind outer garments that will be subject to inspection by a drug-detection canine.

(2) Using Canines to Examine Backpacks, Handbags, and Other Portable Containers. As noted in the preceding subsection, some students routinely carry drugs and other prohibited items from class-to-class in bookbags, backpacks, and similar containers. In several districts throughout New Jersey, school officials have invited law enforcement agencies to bring in drug-scent dogs, and, during these operations, students in randomly selected classrooms have been directed to vacate the room, leaving their personal possessions behind to be examined by the canines.

Once students leave the room, the drug-detection canine is brought in to inspect the exterior surfaces of the student's bookbags and other similar containers. If the dog alerts to the presence of controlled substances, law enforcement officers secure the scene or seize the objects suspected to contain illicit drugs. Law enforcement officers immediately apply to a judge for a warrant to open these containers to inspect their contents to confirm or dispel the suspicion that they contain evidence of crime. (Note also that because a bookbag or knapsack can be moved and separated from nearby containers, unlike a fixed locker, a scent dog's alert is especially likely to establish probable cause, since there is little chance that the dog is actually alerting to drugs concealed in a separate but adjacent container.)

In some operations, the dog's alert is communicated to school officials, who then open the container on their own authority, without a warrant, pursuant to the rule established in New Jersey v. T.L.O.. For the reasons expressed at length in Chapter 4.5D(4), the preferred practice is to have law enforcement officers conduct the search pursuant to a warrant or a recognized exception to the warrant requirement.

This use of drug-detection canines to inspect handbags, backpacks, and similar articles that students were ordered to leave behind raises a number of additional issues beyond those that arise in scent dog operations that are limited to inspecting lockers. For one thing, the act of ordering students to leave their possessions behind during an

operation so that those possessions can be examined by a scent dog would seem to constitute a type of "seizure," which must itself be reasonable under the Fourth Amendment.

In defending this type of inspection program, it is first critical to note that this approach — requiring children to leave their personal possessions in place and to vacate the room — is less intrusive and thus preferable to an operation that permits a drug-detection dog to enter a classroom while students are still present. As noted in the preceding subsection, a dog handler should never allow a scent canine to come into direct contact with school-aged children, except as part of an assembly or classroom demonstration where the handler is certain that the dog will not attack or frighten children.

Although the act of ordering students to leave their possessions behind constitutes a type of seizure, it must be remembered that not all seizures are unreasonable under the Fourth Amendment. Indeed, as noted in Chapter 2.2, a seizure generally represents a far less serious intrusion on Fourth Amendment rights than a search. Furthermore, the law does not always require that government officials have a particularized suspicion of wrongdoing before a person or vehicle can be seized or ordered to stop. Indeed, the concept of temporarily dispossessing luggage from a passenger and subjecting that luggage to routine examination by means of metal detectors and x-ray machines is universally accepted in the context of airports, where bona fide security concerns are especially pronounced.

It is also well-settled under both federal and state law that law enforcement officers may set up sobriety checkpoints where vehicles selected at random are ordered to stop for a brief inspection to determine whether the persons operating these vehicles are driving under the influence of an intoxicating substance or without proper credentials. These temporary detentions or "seizures" are permitted so long as the law enforcement agency has identified a need for the operation; the detention is limited to roads and times where drunk driving is a special problem based upon documented facts; the seizures are done in a safe manner that reduces the risk of injury to motorists and law enforcement officers; and the operation is conducted pursuant to a neutral plan, developed and approved by appropriate superiors, and designed to minimize the discretion of officers in the field. See State v. Kirk, 202 N.J. Super. 28 (App. Div. 1985) and Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990).

Arguably, the temporary dispossession of property that occurs when students are required to move to a different classroom and to leave their belongings behind represents

a lesser intrusion on Fourth Amendments rights than occurs when police order a vehicle to pull over as part of a DWI checkpoint and credentials inspection. While in school, students enjoy only limited rights of freedom of movement and to enjoy the use of personal property. (See cases cited in Chapter 1.5B defining the term "seizure" as used in this Manual.) School officials, for example, may, without running afoul of any constitutional provision, order students to attend specified classes or assemblies, or to go to designated places within the school for safety and security purposes, such as during fire drills. So too, school districts may promulgate rules that require students to keep personal possessions in lockers or other designated areas during the course of the school day.

If schools are to conduct this type of canine inspection program, it is nonetheless strongly suggested that they carefully document the reasons that justify this particular inspection technique, setting out factual findings that demonstrate why it is thought that unknown students routinely carry drugs or other contraband from class-to-class in portable containers. School officials should also carefully document existing rules and regulations governing the use of these containers, since the existence and enforcement of these regulations provide evidence of the authority of the school to control their use and movement.

The decision to order students to vacate a classroom and to leave their personal possessions behind should be done pursuant to a neutral plan that minimizes the discretion of school employees. The classroom(s) subject to this form of canine inspection should be selected at random, or else all classrooms (or at least those used by children of an appropriate age given the documented nature of the problem) should be subjected to equal treatment. Individual students within a targeted classroom should *not* be singled out for this form of inspection. If school officials have reason to suspect that a particular student or group of students is carrying concealed drugs or other contraband, the appropriate response is to conduct an individualized search in accordance with the standards established in New Jersey v. T.L.O..

The plan should include provisions to ensure the security of students' possessions that are left behind, protecting those possessions against the risk of theft, loss, or destruction. The plan should ensure that the movement of students during the operation is done in a safe and orderly way, and the plan should include provisions to make certain that students avoid direct contact with drug-detection animals.

In directing or controlling the movement of students pursuant to this type of inspection program, school officials should always be mindful that while schools exercise considerable authority over students for their benefit and protection, *schools are not*

prisons, and students are not inmates. (See Chapter 2.12.) The plan should thus avoid using terms that are more appropriate for correctional institutions, such as "lock-downs." Prisoners are afforded comparatively few rights under the Fourth Amendment because they have been convicted of serious crimes and have been sentenced to custodial terms. See Ingraham v. Wright, 430 U.S. 651, 657, 97 S.Ct. 1401, 1410 51 L.Ed.2d 711 (1977); Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393. School officials and law enforcement agencies must never lose sight of the fact that most students do *not* use, carry, or sell illicit drugs or dangerous weapons on school property, and that suspicionless inspection programs are designed to deter and to ferret out the comparative handful of students whose unlawful and dangerous behavior disrupts the sanctity of the educational environment. The Pennsylvania Supreme Court recently recognized that the goal of safe, drug-free schools "is often impeded by the actions of a few students which interfere with the ability of the [state] to achieve this goal." Commonwealth v. Cass, 709 A.2d 350, 364 (Pa. 1998). School officials, in their zeal to deter the dangerous and unlawful behavior of a few troublemakers, should not use tactics that serve unwittingly to breed disrespect for authority, or that unduly disrupt the educational process.

Finally, it is essential that students and their parents or legal guardians receive advance notice that the school intends to use — or at least retains the right to use — this particular inspection technique, and that students may be required without further notice to vacate a classroom and to leave their personal possessions behind so that those objects and containers can be examined by a drug-detection canine.

(3) Using Canines to Examine Vehicles Parked on School Property. In some school districts, students in upper grades are permitted to park their vehicles on school property. These vehicles, in turn, can then be used to store drugs, alcohol, weapons, or other prohibited items. As a general proposition, schools have a lesser interest in regulating (and thus in inspecting) the contents of student-owned or operated vehicles than they have with respect to the contents of lockers, desks, bookbags, or similar containers that are brought into school buildings. Even so, schools have the right to impose reasonable restrictions and conditions on student use of school-owned and maintained parking facilities. These conditions and regulations should be clearly spelled out in the student handbook and at the time that the school provides parking decals or parking permits. Specifically, students and their parents and/or legal guardians should be advised if vehicles will be subject to inspection by drug-detection canines.

The fact that schools have the authority to impose regulations concerning the use of vehicles that are brought on school property does not mean that students have explicitly or implicitly waived their rights under the Fourth Amendment. Just as schools

cannot require students to waive all of their Fourth Amendment rights as a condition of accepting a locker assignment, so too, schools cannot condition parking privileges on a blanket waiver of Fourth Amendment protections. (See the discussion of "implied consent" in Chapter 2.4.)

The courts that have addressed the issue whether scent dogs can be used to sniff vehicles consider, among other things, whether students are afforded access to their vehicles during the school day. In Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980), the court ruled that the use of drug-detection canines to examine student vehicles as part of a suspicionless sweep search was unreasonable and thus unlawful, in part because pursuant to school regulations, students had no access to their vehicles while school was in session. Thus, the court reasoned, "the school's legitimate interest in what students had left in their vehicles was minimal at best." Jones at 235.

Clearly, moreover, if a vehicle is not parked on school property, school officials have no regulatory authority with respect to that vehicle. Even when the vehicle is kept on school grounds, the better practice is to permit a law enforcement officer to conduct any search of the interior of the vehicle in the event of a positive alert by a drug-detection canine.

Because the examination of the exterior surface or air surrounding an object by a drug-detection canine is not a search according to most federal and state published decisions, see Chapter 4.5B, a law enforcement agency may use these animals to examine the exterior surfaces of vehicles that are parked on public property, whether on the street or in a school-owned lot. Law enforcement officers may not, however, open a door, window, or trunk to facilitate the dog's inspection. The act of opening or entering any part of the vehicle, even if the windows or a convertible top were left open, constitutes a "search" under the Fourth Amendment, and any such conduct by a law enforcement officer or by a canine that is being handled by a law enforcement officer must only be done pursuant to a warrant or a recognized exception to the warrant requirement, such as consent or the so-called "automobile exception."

The "automobile exception" to the general rule that police must obtain a search warrant provides that an officer is permitted to conduct a warrantless search of an automobile provided that the officer (1) has probable cause to believe that the vehicle contains contraband or evidence of a crime, (2) the vehicle is at least potentially mobile, and (3) the facts and circumstances that establish probable cause were unforeseeable, meaning that the officer did not know in advance that he or she would have probable cause to search that particular vehicle. In the event that an officer does have pre-existing probable cause to believe that a particular vehicle contains contraband or other evidence

of a crime, the officer is generally required to obtain a search warrant before entering the vehicle or otherwise conducting a search of its contents.

Law enforcement officers in New Jersey should also be mindful that in State v. Colvin, 123 N.J. 428 (1991), the New Jersey Supreme Court held that when police intend to search a *parked* vehicle pursuant to the automobile exception to the warrant requirement, they must, in addition to satisfying all of the above-mentioned elements, have "articulable reasons to believe that the evidence may otherwise be lost or destroyed." If such articulable reasons do not exist, a search warrant is necessary.

The Court in Colvin made clear that a warrantless search of a parked vehicle by police under the authority of the automobile exception must be done "without advance planning." As noted above, if police already have reason to focus their attention on a specific vehicle, the better practice is to secure the vehicle (i.e., watch over it to prevent anyone from entering it or driving it away) while a warrant is obtained.

If police are at all uncertain whether a scent dog's alert to a vehicle constitutes probable cause, the officer should seek the advice and direction of a judge, rather than rely on the automobile exception and conduct a warrantless search. Police officers in these circumstances are strongly encouraged to conduct some further investigation to corroborate the dog's alert before undertaking a search.

F. Summary: Special Rules And Procedures Governing The Use of Law Enforcement Canines to Conduct Suspicionless Examinations. Special rules and procedures must be followed to ensure that scent dog "sweep" inspections are conducted in a reasonable and safe manner. Many of these special rules and procedures are discussed in the preceding sections of this Chapter. It is appropriate, however, to restate these rules succinctly:

(1) Advance Notice. Because the ultimate goal is to discourage students from bringing and keeping drugs on school grounds, students and their parents and/or legal guardians should be given written notice of the intention and authority of school officials to invite drug-scent dogs to conduct suspicionless inspections on school property. The whole point of the exercise, after all, would be lost if the program were to be kept secret. This notice should refer to all places or items that might be subject to such canine inspection, such as lockers, desks, handbags/purses, backpacks, and other portable containers, outer clothing removed from students, and vehicles brought on school grounds. Notice should also be provided if students may be ordered to vacate a room and to leave behind their outer clothing or other possessions to be examined by scent dogs. The notice should make clear that school officials reserve the right to use

other drug-detection techniques in addition to scent dogs, including random locker inspections.

(2) Soliciting Parental Input. The use of drug-detection canines represents an aggressive and dramatic technique — one that is designed to attract attention and make a powerful statement. This tactic, by its nature, is controversial. School authorities and law enforcement agencies should therefore be mindful that at least in some communities, the use of police canines evokes painful memories of governmental overreaching, especially if the dogs would be allowed to touch or confront students directly. (But see ¶ 9, generally prohibiting such conduct.) In many places, in contrast, police canines have actually been used to *promote* positive relations between the police department and the community it serves. (Comparatively few drug-detection dogs were trained as or even resemble "attack" dogs or traditional police canines. Most scent dogs are friendly and affectionate.) Indeed, in many places, concerned parents have *insisted* that police dogs be brought into schools.

In view of the inherently controversial nature of this inspection technique, school officials and law enforcement agencies are strongly encouraged to solicit input from parents, teachers, and other members of the school community before conducting a canine operation. In Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2395, 132 L.Ed 2d. 564, 580 (1995), the United States Supreme Court found it significant that school authorities held a parent "input night" to discuss the proposed student athlete drug testing policy. The Court seemed to be especially impressed that the parents in attendance gave their unanimous approval. 115 S.Ct. at 2389. The Court concluded its opinion by noting that the "primary guardians of Vernonia's schoolchildren appear to agree" that the policy was reasonable. Id. at 2397. The Court observed:

> The record shows no objection to this districtwide program by any parents other than the couple before us here — even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court as to what was reasonably in the interest of these children under the circumstances.
> [Id.]

Even if not legally required, it is a good idea to meet with parents and to provide them with input in the decision to resort to the use of drug-detection canines, since this provides law enforcement and education officials an excellent opportunity to discuss with parents and other members of the school community the scope and nature of the

school's drug problem and the need for a comprehensive response that goes far beyond relying on drug detection-dogs.

(3) *Careful Planning.* Inspections by canines must be done in accordance with a neutral plan that minimizes the discretion of the dog handler and other police officers and school officials executing the inspection. The plan should, to the greatest extent possible, minimize the degree of intrusion and inconvenience to students and faculty members. These inspections must not be used to harass individual students or groups or associations of students.

Besides circumscribing discretion and thus protecting against the possibility that the inspection would be used improperly to target or harass individual students, the neutral plan should be carefully designed to ensure that the operation unfolds in an efficient and safe manner. Importantly, all persons involved in the planning and execution of the operation must be aware of the need to keep the operation *strictly confidential* up to the moment that the canine units begin to conduct their sweep.

As part of the planning process, a room should be set aside in the school to serve as a command center from which to coordinate all activities. This room should be equipped with telephone, facsimile, wordprocessing, photocopying, and secure two-way radio communication facilities. This command post should be staffed with both law enforcement and education officials to oversee the operation and to respond to any problems that might arise.

The school officials assigned to the command center should bring with him or her a master list of all locker assignments and parking lot assignments or list of student-owned or operated vehicles that are allowed to be parked on school property. This official should also have access to the roster of enrolled students and a list of parents or legal guardians so that they can be contacted promptly in the event that a dog alerts to a locker assigned to their child or ward.

The local juvenile officer should also be stationed at the command center. Juvenile officers are usually familiar with those students who have had previous experience with the law, and these officers can serve as an invaluable source of information in confirming or corroborating a positive dog alert.

Prior to the sweep, all canine units and support teams should be thoroughly briefed on the layout of the school, the areas that are to be inspected or "swept," and any areas that may be "out of bounds" and that should not be entered or disturbed. A

map or floor plan of the school should be provided to each team, clearly marking the areas to be inspected and the routes to be taken.

During the operation, and at all times while canines are present on school grounds, students should be restricted to their classrooms or locations that will not be swept. It is especially important to carefully control student movements during the operation, so as to ensure their safety. In order to make certain that students do not come into contact with the canines, do not observe the canines in action (so that students cannot witness a positive alert), do not interfere with or disrupt the operation, and cannot gain access to their lockers for the purpose of removing, concealing, transporting, or destroying illicit drugs or other contraband, students should not be allowed to be or walk in hallways, lockers areas, or other places to be inspected unless they are escorted by designated school personnel.

(4) Findings. School officials should carefully document their findings to demonstrate why it is necessary and appropriate to use this particular tactic. These findings should spell out the nature and scope of the problem that exists in the school and why the proposed use of drug-detection canines will help to alleviate the problem. It should be noted that because a "sniff" or "sweep" inspection by a drug-detection canine does not constitute a "search" under federal or New Jersey law, see Chapter 4.5B, school officials would not be constitutionally required to establish "reasonable grounds" to believe that drugs would be detected and seized before they may invite law enforcement officials to bring a canine into a school to inspect the exterior surface of lockers or desks. Compare Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998) (under the Pennsylvania Constitution, school officials must establish reasonable grounds to justify the use of drug-detection dogs). Even so, the better practice is to make a careful and thorough record of the circumstances that make the use of this tactic appropriate. See Chapter 4.4A for a list of relevant facts and circumstances that would justify a general locker inspection program. Note also that where the canine inspection program contemplates the temporary "seizure" of student belongings that are not stored in lockers, see Chapter 4.5E, school officials may be required as a matter of constitutional imperative to document the reasons that would justify ordering students to vacate classrooms and to leave their possessions behind to be inspected by drug-detection canines.

(5) Subterfuge. Suspicionless or "sweep" canine inspections must never be used as a pretext or subterfuge to conduct searches of lockers or other places where there is a particularized suspicion that drugs or other contraband would be found therein. This does not mean, however, that police are precluded from using drug-detection canines as an investigative technique to inspect targeted lockers or other property for the

purpose of corroborating a pre-existing suspicion and to establish probable cause to apply for a warrant to search a locker or other container.

(6) County Prosecutor Approval. The county prosecutor, as the chief law enforcement officer in the county, or the Attorney General, through the Director of the Division of Criminal Justice, must approve any use of a drug or explosive-detection canine to conduct a suspicionless or "sweep" examination a school, whether public or private, even if the canine(s) is owned and operated by another law enforcement agency, such as a sheriff's office, municipal police department, or the New Jersey State Police. There are only two exceptions to this general rule requiring county prosecutor or Attorney General prior approval: (1) the canines are mustered on an emergent basis to search for explosives in response to a credible bomb threat, or (2) drug-detection dogs are used solely to perform a "demonstration" in an assembly.

The county prosecutor or the Director of the Division of Criminal Justice, or their designee, must review and approve the operational plan, which should be in writing. This approval procedure is patterned after the current practice concerning search warrant applications. (Pursuant to Attorney General directive, no law enforcement officer may apply to a Municipal or Superior Court Judge for a search warrant without first obtaining the approval of an assistant prosecutor, deputy attorney general, or assistant attorney general.)

If the county prosecutor or the Director of the Division of Criminal Justice rejects the plan, the use of a drug-detection canine in a school is prohibited. Prosecutors should carefully consider the specifics of the plan and should also anticipate the reaction to the operation by the school community and the community-at-large. (See ¶ 2.)

(7) Approval and Veto Authority of School Officials. No drug-detection canine may be brought on school grounds to conduct a suspicionless or "sweep" examination without the express prior approval of the appropriate education officials (i.e., the school board, district superintendent and/or the building principal). Preferably, the request to use drug-detection canines should be initiated by school officials. Nothing in this Manual should be construed, however, to prohibit a law enforcement agency from soliciting an invitation, or from otherwise offering this service to school officials. The county prosecutor should not approve the operation or allow it to proceed if there appears to be a significant dispute within the educational hierarchy. Ordinarily, it is expected that the operation will have been approved by the local board of education, school district superintendent, ***and*** building principal. (Note, however, that the board of education need ***not*** approve the exact date and time of the operations, and should not be advised as to the exact date and time when inspections will occur. As a general

proposition, and in order to ensure secrecy, the number of people aware of the exact time of these planned operations should be kept to an absolute minimum.)

Furthermore, school officials have an absolute right at any time to withdraw the invitation (whether before or during the course of an ongoing suspicionless inspection), in which event the inspection must immediately cease and the dog be immediately withdrawn from school property. For reasons of security, some school districts have chosen to provide blanket permission to a law enforcement agency to bring drug-detection dogs on to school property with little advance notice to school officials as to the actual time of the inspection. While this procedure is entirely appropriate, it is critical to note that school officials are ultimately responsible for ensuring that the operation causes minimal disruption to the educational environment and to previously-scheduled school activities. By way of example, a law enforcement agency may not be aware that high school proficiency testing or other sensitive activities are taking place on the day of the proposed drug-dog inspection that would make it inappropriate to undertake the operation.

It also bears noting that the above-stated rule that school officials have the absolute right to postpone or terminate a drug-dog sweep inspection does not mean that school officials may prevent or impede the use by law enforcement of a drug- or explosives-detection dog to conduct a particularized search (as opposed to a suspicionless "sweep" inspection) to corroborate a pre-existing suspicion that drugs or explosives would be found in a given place. Although the Memorandum of Agreement Between Education and Law Enforcement Officials (1992) contemplates cooperation between education and law enforcement authorities, school officials must not interfere with ongoing criminal investigations. (See Chapter 14.5 of this Manual for a more complete discussion of the appropriate procedures for resolving disputes between educators and law enforcement agencies.)

(8) *Notice to Local Police.* The local police department, if not otherwise directly involved in the drug-detection dog operation, should be provided with sufficient notice to enable the department to plan for and respond to any disturbance that might result from the operation. As noted in ¶ (2), when electing to use this tactic, careful consideration must be given to the anticipated reaction of the school community and the community-at-large.

(9) *No Contact Between Canines and Students.* The operational plan must include provisions to ensure that drug-detection dogs do not come into direct contact with students. Such contact or confrontations can not only disturb the animal's concentration, leading to false positive and negative results, but also poses an

unnecessary risk to the safety and well-being of students. Furthermore, it is inappropriate for children to be present during the course of an actual sweep search because a positive alert may subject the student whose property was identified to ridicule and stigma. (Recall that searches should generally be done in private and not in the presence of the general student body. See Chapter 2.8.) Notwithstanding the foregoing, direct contact between the canine and students is permitted during the course of a controlled "demonstration" of the drug-detection dog's abilities, provided that the handler is certain that the dog will not attack or frighten children witnessing or participating in the simulated demonstration, and further provided that the dog only makes direct contact with or examines students who have volunteered or otherwise agreed to participate in the demonstration.

(10) *Procedures to Expedite Approval of Search Warrant Applications.* The county prosecutor's office should take steps to facilitate the process of obtaining search warrants in anticipation that the drug-detection dog will alert to the presence of illicit substances. (See also ¶ (3).) A judge, preferably a Superior Court Judge, should be advised of the operation and should be standing-by to review search warrant applications. Provisions should be made to make a prompt, in-person appearance before the judge (as opposed to a telephonic application) to present the facts establishing probable cause. The track record of the animal, including a complete record of the canine's training and proficiency, should be fully documented and preferably should be stored in a word processing system so that a written search warrant application can be quickly prepared, sworn to, and presented to the judge for review and approval. In addition, an assistant prosecutor or deputy or assistant attorney general should be on the scene to personally review and approve the warrant application before it is submitted to the judge. Finally, school officials should have on hand a master list of locker assignments so that the identity of a student whose locker was alerted to can be quickly determined and included in the warrant application. (Note that in some cases, drugs will be stored in lockers that are supposed to be vacant and that have not been officially assigned to a student.)

(11) *Minimizing Disruption.* Steps should be taken to minimize the disruption of the educational environment. Law enforcement officers must at all times respect and defer to school officials as to the timing and conduct of any operation involving a suspicionless inspection by drug-detection canines. Some school officials may prefer that the dog be brought on to school grounds during the school day to enhance the visibility of the operation and to send a strong message to students. Other school administrators, however, may prefer that the inspection of lockers by scent dogs occur after school hours when children are not present. The law enforcement agency providing the drug-detection services should defer to school officials on this decision. (Recall also that with

respect to suspicionless sweep search by canines, school officials retain the right to cancel, suspend, or terminate the operation.)

Where feasible, and to the greatest extent possible, students should be permitted to remain in class to perform their customary work during the operation. If students are required to vacate a classroom, this should be done in an orderly way. If classrooms are to be inspected or "swept," each room should, where feasible, be evacuated in a manner that allows students and teachers to continue to perform their customary work for as long as possible during the course of the schoolwide operation.

In some cases, a "ruse" is used to get students to vacate a particular classroom. Ostensibly, this tactic is justified on the theory that students who are carrying drugs will simply refuse to abandon their contraband if they are told to leave their possessions behind as part of a canine drug-detection inspection. On a few occasions, a fire drill has been used to bring students out of the building so that drug-detection animals can be brought in.

Without question, the act of setting a "false" alarm seriously disrupts, indeed suspends, the educational process. Under no circumstances should a law enforcement agency activate a fire alarm in these circumstances except under the direction of the school building principal or other appropriate school official. Nor should a law enforcement officer direct or insist that school officials use this tactic to get students to vacate classrooms. Needless to say, however, the general prohibition against disrupting the educational environment that is established by Attorney General Directive and that is memorialized in the Memorandum of Agreement Between Education and Law Enforcement Officials (1992) is directed to law enforcement authorities, not to school officials. Accordingly, school officials are, of course, free to periodically test the fire alarm system and evacuation procedures by conducting unannounced "fire drills." See N.J.S.A. 18A:41-1.

In sum, police, acting unilaterally and in the absence of a bona fide emergency, should never order students out of their classrooms. However, the police, working in cooperation with school officials, are permitted to take advantage of a fire drill that was initiated by appropriate school officials, even if the evacuation was intended to facilitate a school-wide inspection of classrooms by drug-detection canines.

(12) Alerting News Media. Representatives from the news media should not be invited to observe an actual search of a locker or a student's belongings in circumstances where the identity of the student may be revealed. It is understandable that school officials might want to publicize the inspection event as a means of making a statement

about the school district's resolve to create a safe, drug-free environment, and as a means to enhance the deterrent effect of the operation. By the same token, media attention and scrutiny can be used to show that the inspection was indeed conducted in accordance with the neutral plan and in way that respects students' legitimate expectations of privacy.

Even so, in order to minimize the intrusiveness of the inspection episode, it is important that searches occur in private, so as to reduce any stigma that might be associated with a positive canine alert or the actual discovery of illicit drugs or other contraband. (Recall that the only legitimate purpose of a search is to find evidence, *not* to embarrass, expose to ridicule or peer condemnation, or otherwise punish a student who has violated the law or school rules. Any discipline imposed as a result of the discovery of contraband in a search must be done in accordance with rules and regulations promulgated by the State Board of Education.)

The New Jersey Code of Juvenile Justice includes specific provisions that are designed to make certain that investigations (and the results of investigations) involving alleged acts of delinquency committed by minors are kept confidential, and are only made public in limited and appropriate circumstances. See N.J.S.A. 2A:4A-60, which provides that records of courts and law enforcement agencies pertaining to juveniles charged as delinquent "shall be strictly safeguarded from public inspection." Permitting media representatives to witness ongoing investigations where the identity of a juvenile suspect might be revealed (or where the juvenile suspect is present so that his or her face is visible to media representatives even if school officials do not disclose his or her name) runs afoul of the spirit if not the letter of New Jersey's juvenile offender confidentiality laws.

Finally, it should be noted that aside from any concerns relating to confidentiality and privacy invasions, it is inappropriate, for practical reasons, to permit news media representatives, members of the general public, or members of the school community to witness any search episode where the person who is the subject of the search is present. One of the practical reasons for conducting searches or seizures in private is to eliminate any incentive or perceived need for a student to resist the search in order to "show off" or display anti-authoritarian machismo in front of peers and classmates. Such confrontations pose an unnecessary risk of physical injury to students, school officials, law enforcement officers, and bystanders, especially if school officials or police officers are required to use escalating force to overcome the resistance, or if the resistance provokes a civil disturbance involving spectators. It would also be highly inappropriate to permit a student who is suspected of having committed a serious offense involving drugs or weapons to "play" to a television camera.

(13) *Public Awareness Follow-Up.* In addition to soliciting parental input before conducting a canine operation, see ¶ (2), one or two weeks after a sweep operation is completed, the county prosecutor and school superintendent are strongly encouraged to hold a public awareness seminar at each school where the operation was conducted. These public meetings should be cosponsored by law enforcement and education officials. Parents as well as students should be invited to attend and to actively participate in the discussion. Where appropriate, the seminar should be held in the evening so as to make it possible for the greatest number of parents to attend. (If necessary, a separate seminar or assembly should be held for students during regular school hours.)

These meetings will not only enhance the deterrent effect of the operation, but will also give education and law enforcement professionals an opportunity to discuss with parents the nature and scope of the substance abuse problem in the school, and to describe the results of the sweep operation. (Of course, any such discussion must comply with the confidentiality provisions of the Code of Juvenile Justice; the identity of individual students whose lockers were found to contain drugs should not be revealed. It would, however, be appropriate to discuss the procedures that were used to deal with any students who were found to be in possession of illicit drugs or other contraband.)

During these meetings, the county prosecutor could arrange to demonstrate the capabilities of the canine(s) that were used in the actual sweep operation. Assistant prosecutors and narcotics detectives should also be available to answer questions from the audience. Most importantly, these public meetings should be used to discuss the substance abuse prevention, awareness, and counselling services available in the district to help children who abuse alcohol or other drugs, or who are at risk of abusing substances. This is consistent with the Governor's Drug Enforcement, Education and Awareness Program, which calls for a parent outreach campaign to enlist the support of PTAs, PTOs, municipal alliances, and civic and fraternal organizations to address some of the myths and misconceptions concerning present day drug use, including the so-called "it's not my kid" syndrome.

Finally, these follow-up public meetings should be used to solicit parental input and approval concerning the continued use of canine sweeps in schools. These seminars provide an invaluable opportunity to show how the operation was planned and executed, what steps were taken to ensure the safety of students, to consider whether, on balance, the operation was successful, and whether similar operations should be conducted in the future and, if so, how often they should be conducted.

4.6. Metal Detectors.

A. General Considerations. In some schools, officials have deemed it necessary to use metal detectors to discourage students from bringing firearms, knives, and other metal weapons on to school grounds. The use of metal detectors is now common in airports, courthouses, and other public buildings across the state and nation.

There are essentially two distinct types of metal detection equipment: stationary magnetometers that are strategically placed at entrances and through which students or visitors must pass; and portable, hand-held devices or "wands" that can be used to scan student clothing and packages. Often, the two types of detectors are used in conjunction with one another, since each performs a slightly different function. Both types of metal detectors are used as screening devices to determine whether a further physical search is appropriate. The use of metal detectors thus serves to reduce the number of persons who are subject to a physical "search," as that term is used in this Manual. Presumably, those who do not activate a metal detector would not be subject to any further delay or intrusion.

At one time, legal scholars argued that metal detectors can be used at airports without running afoul of the Constitution because travellers have the option not to board an airplane and thus can avoid passing through a magnetometer. This legal argument is dubious, and, in any event, would not seem to apply with respect to metal detectors that are located in courthouses, since many of the persons required to pass through them have been subpoenaed to appear in court and do not have the option simply to stay out of the courthouse.

More recently, courts have chosen to characterize the use of metal detectors as a type of warrantless "administrative" search. Using this analysis, "consent" is hardly necessary. In Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972), the court upheld a regulation requiring all persons entering a federal courthouse to submit to a search of their briefcases and packages for weapons without even discussing the issue of consent, and in People v. Dukes, 151 Misc.2d 295, 580 N.Y.S. 2d 850 (N.Y. Crim. Ct. 1992), the court upheld the use of metal detectors in a school in Manhattan, noting that the issue of consent has little application in the context of schoolchildren. "After all," the court in Dukes observed, "children are required by law to attend school. To allow students to walk away upon activating a scanning device would only encourage truancy: students not wishing to go to school that day could simply place metal objects in their pockets." 580 N.Y.S.2d at 853.

The better argument for permitting the use of metal detectors in schools, therefore, is simply that these devices pose only a minimal intrusion on any protected privacy rights, and that this minimal intrusion is more than outweighed by the need to detect the presence of firearms and other metal weapons. Arguably, the use of a magnetometer to scan the outer clothing or a container carried by a student for dense metal does not constitute a "search" within the meaning of the Fourth Amendment or Article I, Paragraph 7 of the State Constitution precisely because these examinations intrude only slightly on protected privacy interests. As noted in Chapter 4.5B, the United States Supreme Court has ruled that the use of drug-detection canines does not constitute a traditional "search" because canines cannot react to any non-contraband items in which private citizens may have a protected privacy interest. This argument would also seem to apply to metal detectors, although it must be noted that these devices will react to any dense metal, and not just to objects that are weapons or that are otherwise prohibited by law or school rules.

In Interest of F.B., 658 A.2d 1278 (Pa. Super. 1995), allocatur granted 666 A.2d 1056 (1995), a Pennsylvania court sustained the use of both metal detectors and handbag searches at a Philadelphia high school under both the Fourth Amendment and the Pennsylvania State Constitution, which had been construed to require a particularized suspicion of wrongdoing before drug-detector dogs could be deployed. (See discussion of Commonwealth v. Johnson and Commonwealth v. Cass in Chapter 4.5B.) The court in F.B. thus impliedly found that the degree of intrusion caused by a metal detector is less than that occasioned by a canine sniff. In any event, the court concluded that, "the school's interest in ensuring security for its students far outweighs the juvenile's privacy interest." 658 A.2d at 1382. Accord Interest of S.S., 680 A.2d 1172 (Pa. Super. 1996).

In determining whether to deploy metal detectors, school officials should note that the effectiveness of these devices depends to a large extent on the ability of school officials to maintain security at all entrances to the school building. Because it is often not possible to prevent students who are bent on bringing weapons into the school from using unauthorized (and unprotected) means of access to school buildings, to some extent, the use of metal detectors serves as a symbolic as well as practical response to the problem. It is hardly inappropriate, however, for school officials to send a clear message that they are taking affirmative steps to discourage students from bringing weapons on to school grounds.

School officials should nonetheless carefully consider whether the deployment of metal detection devices is a cost-effective response to the school's security problem. These devices are expensive to purchase. In addition, school employees must be

dedicated to operate them and to conduct inspections as appropriate when a device alerts. Experience in some communities has shown, moreover, that these devices provide only a temporary and perhaps even false sense of security. As noted above, law-abiding students may soon discover that their classmates who are bent on bringing weapons into the school are able to use unauthorized means of access to evade the metal detection stations. This, in turn, can undermine student confidence in the ability of school authorities to maintain appropriate order and discipline.

Before deploying metal detectors, school officials should consider whether there are other alternatives to deter students from trying to bring weapons into school buildings. School officials should nonetheless be mindful that modern firearms and other dangerous weapons are compact and easily concealed, and that given the significant restrictions imposed on the legal authority and practical ability of school officials to conduct searches (see, e.g., Chapter 10 discussing the recently enacted prohibition on strip searches), metal detectors can in some settings serve as a useful adjunct to other procedures that are designed to protect the safety and security of the school environment.

Even so, before deploying metal detectors in particular school buildings or school districts, school administrators are encouraged to make specific findings why it is necessary and appropriate to use this particular technique to deter students from bringing weapons on to school grounds. School officials, for example, should be prepared to point to particular incidents involving weapons possession by students, or to a developing pattern of weapons usage, presence, or availability. By carefully documenting their findings, school officials will not only be in a better position to make a reasoned judgment as to the cost-effectiveness of purchasing or renting metal detectors, but will also be able to provide a more suitable record that can be used to defend the use of metal detectors in any court challenges that might arise.

B. The Role of Police at Security Stations. It is not certain whether the same metal detector rules would apply if a security station at a point of entry is manned by a police officer rather than a non-sworn security guard or school staff member. (Note that the definition of "law enforcement officer" in this Manual would not only include municipal police who are assigned to schools as their post or as "school resource officers," but also includes sworn officers employed by school districts pursuant to N.J.S.A. 18A:6-4.2 et seq. See Chapter 1.5E.) In most other search and seizure contexts, the active or even passive participation of a sworn law enforcement officer would convert the search episode into a law enforcement activity that would be subject to the stricter search and seizure rules governing police. In the context of the use of metal detectors (and point-of-entry inspection discussed in Chapter 4.7, infra), however,

it is not uncommon for law enforcement officers to be directly involved, especially at courthouses, and their participation does not appear to invoke a stricter standard of review.

In In Interest of F.B., 658 A.2d 1378 (1995) allocatur granted, 666 A.2d 1056 (1995), a Philadelphia high school student was subjected to a metal detector scan and bag search by police officers who were employed by the school district. Upon entering the school, students were led to the gymnasium where they would be ordered to empty their pockets, surrender their jackets and bags, and submit to being scanned by metal detectors. The appellant emptied his pockets and discarded a Swiss-type folding knife, whereupon he was escorted to a holding room and arrested for possessing a weapon on school property.

The Pennsylvania court held that the student's rights had not been violated, and the court drew no distinction between such inspections conducted by police officers and those conducted by non-law enforcement school district employees. (In fact, the court in its legal analysis made no mention of the employee's status as a police officer.)

It would thus appear that police may participate in the implementation of an in-school metal detector policy. The key is that whoever is manning the metal detection or point-of-entry security stations must follow uniform procedures set forth in a neutral plan so that there is little or no discretion in selecting students for inspection. See Chapter 4.6D. (In the F.B. case, every student would be searched until the gymnasium becomes too crowded "at which time school administrators [would] randomly select students to be searched." 658 A.2d at 1380. The court did not address the issue whether this "random" selection process impermissibly subjected students to the discretion of school administrators because the student found in possession of a knife in that case had not been randomly selected.)

C. Advance Notice. One of the most important means to minimize the degree of intrusion caused by the use of metal detectors is to provide advance notice to students and their parents and/or legal guardians. In addition to providing notice to all enrolled students by means of publication in the student handbook, written warning notices should be posted conspicuously at the entrances of the school so as to provide notice to visitors that they will be subject to this form of inspection.

Although enrolled students below a certain age are required by law to attend school and, thus, unlike visitors, do not have the option simply to avoid passing through a metal detector, providing advance notice gives students an opportunity to remove dense metal objects other than weapons that might activate the devices and that, if

revealed in a subsequent search, might prove embarrassing, or that might trigger a physical search that would reveal non-metal objects, the discovery of which would prove embarrassing.

D. Neutral Plan in Selecting Students for Metal Detector Inspection. Appropriate school authorities should develop a neutral plan that carefully limits the discretion of school employees who operate metal detectors and that provides a very "detailed script" for these employees to follow as they search for weapons. See People v. Dukes, supra, 580 N.Y.S.2d at 852.

Preferably, the plan should be in writing. In Interest of F.B., 658 A.2d 1378 (Pa. Super. 1995), allocatur granted, 666 A.2d 1056 (1995), the court sustained a metal detector and bag search policy that was not reduced to writing only because the court was satisfied that there were "other safeguards" present, namely, that the officers who conducted the student searches "followed a uniform procedure ... . This uniformity served to safeguard the students from the discretion of those conducting the search." 658 A.2d at1382. Even so, the court commented that it would have been "prudent" for the school district to have issued written guidelines.

Although it is best to require *all* students entering the school to submit to examination by a metal detector, the neutral plan may authorize security personnel or other school employees assigned to a metal detection station to limit the number of students examined by using a random formula. This principle was succinctly described by the court in People v. Dukes when it noted that:

> For example, if lines become too long, the [school security] officers may decide to search every second or third student. The officers are prohibited, however, from selecting a particular student to search unless there is a reasonable suspicion to believe that the student is in possession of a weapon.
> [580 N.Y.S.2d at 851.]

It must be noted that any such method of selection is not really random in a strict mathematical sense, since students are likely to be able to determine the pattern of selection (i.e., searching only every other or every third student in line) and thus they can tamper with the selection process. In this way, a student carrying a concealed weapon may be able to manipulate his or her position in line so as to evade the metal detector inspection.

Special precautions should be taken with respect to the use of hand-held metal detectors or "wands," which are far more versatile than stationary units. These portable devices can be used in a number of applications, including (1) to conduct initial "sweep" inspections of students and their property as they enter the school building, (2) to verify and focus on the specific location of metal that was detected by a stationary walk-though unit, or (3) to examine the clothing or property of specific students who are suspected to be carrying concealed weapons. However these portable metal detection devices are used, it is important that school officials develop a neutral plan that guards against the arbitrary exercise of discretion. (As noted above, the best means of protecting against arbitrary discretion is simply to ensure the even-handed application of metal detectors to all students, visitors, and hand luggage entering the school.)

When metal detectors are used to scan students who are already in the school building (i.e., at locations other than points of entry), care must be taken to ensure that students are not subjected to unreasonable inspections. Even though a metal scan may not constitute a full-blown "search" for Fourth Amendment purposes, it is strongly recommended that individually selected students not be scanned unless school officials have some articulable suspicion that the student being examined may be carrying a weapon.

In determining whether to subject a specific student to a metal detection scan, school officials may consider whether the student is known to be a member of a gang or group that frequently carries or resorts to the use of firearms or other deadly weapons. Membership in a gang, in other words, is a legitimate fact that school officials may consider as part of the totality of the circumstances in determining whether there is a factual basis to conduct a metal detection inspection of a specific student suspected of carrying a weapon. It is less clear, however, whether a student can be subjected to a suspicion-based examination by a metal detector based *solely* on his or her affiliation with a gang. In any event, metal detectors may *never* be used to harass or single out students based upon their race on ethnicity.

E. What To Do When a Device Alerts. In addition to providing advance notice, there are other steps that school officials should take to minimize the degree of privacy intrusion whenever metal detectors are deployed. For example, if the metal detector is initially activated, the student should be provided with a second opportunity to pass through the device to determine whether there was an error, rather than immediately subjecting the student to a more intrusive form of physical search. Similarly, where feasible, a hand-held metal detector could be used to conduct a more focused inspection to verify and isolate the presence of metal that was detected by a

walk-though magnetometer. This technique might show, for example, that the walk-through device alerted to the student's belt buckle, thus obviating the need to conduct a search of the student's person or belongings. The hand-held devices use changing audible signals that can be interpreted by the operator, in contrast to the stationary metal detectors that essentially provide only a positive or negative reaction to the presence of metal objects.

Similarly, procedures should be in place so that the contents of student's hand luggage can be examined separately from the student's person or clothing. This technique will allow school security personnel or hall monitors to identify the object(s) that activated the metal detector's alarm, thus allowing any subsequent search to be limited to those containers. It would be unnecessary and inappropriate to conduct a physical search of a student's person (i.e., clothing) when it is possible to determine by means of a hand-held detector that the metal alerted to by a stationary unit is located in a handbag or backpack being carried by the student.

Needless to say, school officials in designing and implementing a metal detection program must carefully balance the need to be thorough in reacting to metal detector alarms, as against the need to permit students to enter the school building in an efficient and orderly manner.

Most importantly, school officials responding to a metal detection alarm should be instructed to limit any search (i.e., opening of a container carried by the student) to that which is necessary to detect weapons. This minimization can be accomplished in two distinct ways. First, where a hand-held device is used, any search or "patdown" must begin in the precise area or part of the student's person where the scanning device was activated. See People v. Dukes, supra, 580 N.Y.S.2d at 852.

Second, and even more importantly, the school official should, where at all feasible, request the student to indicate what metal object may be causing the alert, and should give the student the opportunity to remove that object for visual inspection. (Note that this does ***not*** constitute a "strip search" even if the student must reach into his or her own undergarments to retrieve the object. See Chapter 10.) This allows the student to minimize the intrusiveness of the search by making it unnecessary for school officials to peer inside or rummage through a backpack or bookbag. (Recall that "peeking," "poking," or "prying" constitutes a full-blown search under the Fourth Amendment.) Once the student has identified and removed the object that may be causing the alarm, he or she should be allowed to proceed a second time through the metal detector to determine whether, in fact, that object was responsible for activating the alarm.

If the student is unable or unwilling to identify or remove the metal object that triggered the alarm, school officials would be authorized to conduct a limited inspection of the student's property, or a limited "patdown" or "frisk" of the student's *outer clothing*, for the purpose of identifying a potential weapon. As noted above, reasonable efforts should be made to determine whether the metal that caused the alarm is located in a container being carried by the student, as opposed to an object concealed in the student's clothing. Any physical touching of the student should be conducted with a view toward minimizing the degree of intrusion, and ordinarily, the student should first be given the opportunity to remove metal object(s) on his or her person. Conducting a physical "frisk" or "patdown," in other words, should only be used as a means of last resort, and, where a hand-held scanner was used, any physical touching or patdown must be limited to the precise area of the person's clothing where the detector alerted to the presence of dense metal. (School officials are strongly urged to read and comply with the provisions of Chapter 10 of this Manual before conducting any search of a person in response to a metal detection alert.)

School officials must be especially cautious in touching a student's crotch area or female breasts. Unfortunately, in some jurisdictions, notably Los Angeles, firearms and other dangerous weapons are routinely concealed in these areas precisely because weapons-carrying students know that school officials are generally reluctant to conduct a thorough "frisk" that would entail a tactile probe of the outer clothing that covers these private parts of the human anatomy. To some extent, baggy, oversized trousers became popular with gang members precisely because such clothing makes it easier to conceal weapons. If school officials determine that this is a serious problem in their school building or district, it might be appropriate to invest in hand-held scanners that can be used to determine whether weapons are concealed in the crotch area without having to actually touch a student's clothing. These hand-held detectors will also indicate when it is not necessary to search at all for a weapon concealed in the crotch area.

Under no circumstances may a school official rearrange a student's clothing, or order a student to rearrange his or her own clothing, so as to reveal or expose to view the student's undergarments. This constitutes a "strip search" and is flatly prohibited by a recently-enacted statute. (See Chapter 10.2 for a more complete discussion of the prohibition against strip searches.)

The New Jersey legislature has expressly authorized public and private school employees to use as much force as is reasonable and necessary to obtain possession of weapons or other dangerous objects that are on the person or within the control of a student. See N.J.S.A. 18A:6-1. Even so, as a matter of rudimentary common sense,

school employees should *never* attempt to wrest a weapon away from a student, since this exposes the employee, the student, and innocent bystanders to an unnecessary risk of injury. The correct response in the event of a confrontation would be to call the police! Note that teachers and other school officials are not required by law or regulation to take a gun or other dangerous weapon away from a student. If a school official learns by any means that a student is carrying a firearm, the official should call the police immediately.

The fact that a metal detector has alerted to the presence of dense metal may provide reasonable grounds to conduct a full-blown search of the student or student's property, especially if the student is unable or refuses to remove the metal object to demonstrate that it is not a firearm or other type of weapon. Any such search should be conducted in accordance with the standards described in Chapters 3 and 10. Furthermore, if during the course of a lawful search of student property for weapons a school official observes (or smells) an item believed to be another form of contraband, such as drugs, then the school official would at that point have reasonable grounds to conduct a full-blown search for that evidence and to remove that object. (See Chapter 11 for a more detailed discussion of the "plain view" doctrine.)

Finally, in the event that a school official finds a firearm or other deadly weapon, the school official must comply with the offense reporting and referral procedures specified in N.J.A.C. 6:29-10.5, and described in more detail in Chapter 14.1.

4.7. Point of Entry/Exit Inspections.

In some school districts, school authorities require students to open their bookbags and knapsacks for cursory inspection by a security officer or other school employee before they are allowed to enter the school building. Sometimes, these suspicionless inspections are conducted in conjunction with the use of metal detectors. In addition, a number of schools require students to open their handbags and knapsacks for inspection before leaving the library or media center. This is done to discourage students from removing library books and other materials without proper authorization.

Requiring all students to submit to this form of search represents a somewhat greater intrusion on privacy interests than does the use of metal detectors, since this technique permits school officials to look inside closed containers. While more intrusive, this procedure can serve as a useful means to discourage students from bringing drugs and other non-metallic contraband that could not be revealed by a metal detector.

It is not clear whether participation by police officers at these inspection sites will affect the constitutionality of a point-of-entry inspection program. Some school districts

employ police officers pursuant to N.J.S.A. 18A:6-4.2 et seq., and it is becoming more common for police departments to detail their officers to schools to assist in maintaining security. Although there seems to be no published case discussing this specific issue, and despite the fact that New Jersey courts are especially sensitive to the potential for law enforcement agencies to manipulate civil authorities in order to further criminal investigations and prosecutions, see discussion in Chapter 4.5D(4)(a) and (b), it would seem that the presence or even active participation of a sworn police officer in manning a point-of-entry inspection site would not so transform the purpose or nature of the program as to render unconstitutional a policy that otherwise would not be unconstitutional if only non-law enforcement school personnel were involved. These issues are discussed in more detail in Chapter 4.6B concerning the use of metal detectors (which are often used in conjunction with point-of-entry visual inspections). Ultimately, the constitutionality of these programs will depend not on whether the inspection sites are staffed by sworn or non-sworn personnel, but rather on whether there are adequate safeguards to ensure that uniform procedures are followed and that serve to limit the discretion of officials in the field in selecting students for inspection.

As with metal detectors, it does not matter that students cannot, in most circumstances, be said to have expressly or impliedly consented to these inspections by reason of their electing to enter the school, since children below a certain age are required by law to attend classes. Compare People v. Dukes, 580 N.Y.S.2d 850, 853 (N.Y. Crim. Ct. 1992) (noting that the issue of consent has little relevance in the context of schoolchildren). (Note, however, that the implied consent theory would seem to be more relevant and persuasive where a student enters a school building or other school property (or property being used by the school) to attend a non-compulsory extracurricular event, such as a dance, prom, concert, or after-hours sporting event.) Even so, point-of-entry inspections are often reasonable and thus do not violate the Fourth Amendment.

While requiring a student to open a closed container for inspection clearly constitutes a "search" for purposes of the Fourth Amendment, this conduct is permissible provided that school authorities follow certain rules that are designed to minimize the discretion of school employees in determining which students are subject to this form of inspection. In addition, school officials must take certain steps to minimize the degree of intrusion to the greatest extent possible.

One of the most important safeguards is to provide students with advance notice as to when and under what circumstances they will be required to submit to this form of search. Accordingly, school officials should provide all students and their parents and/or legal guardians with written notice prior to the school year that these security

procedures will be implemented. In addition, notice should be provided to visitors by means of posting warning signs at points-of-entry to the school where these inspections will be conducted.

School officials are strongly encouraged to make specific findings to explain why this particular security technique is deemed necessary to discourage students from bringing prohibited items, including, but not limited to, drugs and weapons, on to school grounds. For example, school officials should point to particular incidents involving drug use and distribution and weapons possession by students, or to a developing pattern of security problems. Such findings would provide a record that would allow a reviewing court to balance the legitimate interests of the school in maintaining security, order, and discipline as against the privacy interests of students and visitors.

In many respects, the legal issue implicated by the use of this inspection technique are similar to the legal issues discussed in Chapter 4.4 concerning random locker inspections. Accordingly, before instituting a point-of-entry inspection policy, school officials should develop a neutral plan that complies with all of the requirements and recommendations spelled out in Chapter 4.4C.

The best means of protecting against arbitrary discretion is to ensure the even-handed application of the policy to all students and visitors entering the school. Courts have noted in the context of police roadblocks that the use of fixed checkpoints at which *all* persons are stopped and questioned creates less concerns and anxiety than selective random stops, and also eliminates the potential abusive exercise of discretion. See Desilets v. Clearview Reg'l Bd. of Educ. 265 N.J. Super. 370, 379 (App. Div. 1993). Furthermore, by subjecting everyone to this form of intrusion, there is no stigma attached to the search. Id. at 381.

If for any reason it is not possible to search every student entering the building, or if the lines become too long, school officials may choose to limit the number of students who searched by using a random formula. For example, school security personnel may decide to search every second or third student. If this is to occur, it must be done in accordance with the neutral plan developed in advance by appropriate school authorities. The plan, in other words, should specify when and under what circumstances school employees assigned to an inspection station are authorized to permit randomly selected students to enter without having to submit to a search. (Note that this method of selection is not really random in a strict mathematical sense since students are likely to be able to determine the pattern of selection (i.e., searching only every other or every third student in line) and thus tamper with the selection process. In this way, a student carrying a weapon or other contraband may be able to manipulate

his or her position in line so as to evade a search). See also the discussion in Chapter 4.6C concerning a similar drawback with respect to the use of metal detectors.

Under no circumstances may this selection technique or any type of point-of-entry inspection be used by any school employee as a ruse or subterfuge to search students who are suspected to be carrying drugs or weapons. Any such individualized search must be conducted in accordance with the "reasonable grounds" standard established in New Jersey v. T.L.O. and spelled out in Chapter 3.

THIS PAGE LEFT INTENTIONALLY BLANK

5. INFORMANTS AND CONFIDENTIAL SOURCES OF INFORMATION

In some cases, school officials develop their reasonable grounds to conduct a search based in part on information provided by a confidential source, which in the law enforcement context is sometimes referred to as an "informant" or "informer."

In the school setting, few students could be likened to the paid or professional informers who "work" for law enforcement agencies, or who are cooperating with law enforcement in consideration for a reduced sentence as part of a "plea bargain." Rather, information is typically provided to teachers and school administrators by students on an ad hoc and highly informal basis. For this reason, it is perhaps inappropriate to use an intimidating and colorful term such as "informant" to describe a student who reports facts or suspicious circumstances to school employees. That term is used in this Manual only for convenience and because this terminology is frequently used in the caselaw that discusses when police may rely and act upon information supplied by private citizens, and when police and prosecutors may refuse to divulge the identity of a confidential source of information.

The law distinguishes between two different types of information sources: (1) information provided by persons who are themselves involved in criminal activity, and (2) information provided by persons for whom there is no reason to believe that they have committed crimes or are otherwise untrustworthy. These distinct circumstances are discussed in §§ 5.1 and 5.2, respectively.

Although some students believe that it is inappropriate to "squeal" or "rat" on classmates, in fact, it is important that every member of the school community understand that they have a responsibility to contribute to the safety and security of their classmates and teachers. Students should be made to understand that it is not "cool" to engage in dangerous behavior, such as bringing drugs or weapons on to school grounds. Students must also understand that the best chance for ensuring a safe and secure environment is to let would-be offenders know that they face a significant risk of being caught precisely because their classmates have the courage to report offenses to their teachers and other appropriate school officials.

5.1. Information Reported by Persons Involved in Criminal Activities.

For purposes of Fourth Amendment law, the phrase "confidential informant" generally refers to a person who has knowledge about someone else's criminal behavior because the informant is also involved in the criminal conduct about which he or she is reporting. These informants are said to be "involved in the criminal milieu" and are

distinguished from so-called "citizen" informants, who are not believed to be in any way involved in criminal activity. (The law concerning the latter type of informer is discussed in § 5.2.)

When information is provided by a person who is himself or herself engaged in criminal activity, courts are naturally skeptical about the informant's motives and his or her capacity to be truthful. Consider that information given about a suspected drug dealer may be provided by another drug dealer who hopes to have his "competition" arrested or expelled.

When judging the reliability of information provided by confidential informants, that is, persons who are themselves engaged in criminal activity, courts will examine the "totality of the circumstances" to decide whether the information provided is credible, and whether that information establishes probable cause (in the case of a law enforcement search) or reasonable grounds (in the case of a search to be conducted by school officials under the less stringent legal standard announced in New Jersey v. T.L.O.). A determination of probable cause or, where appropriate, reasonable grounds, will always take into account *all* of the facts and attendant circumstances known to the police officer or school official, as well as all reasonable inferences that can be drawn from those facts or circumstances. Ultimately, the test under the Fourth Amendment is one of reasonableness: would a reasonable school official or police officer believe and rely upon the information provided by the confidential source, considering not only all information known about that source, but also other information that tends to support or contradict the informant's story.

Although the courts have rejected a rigid test to determine the reliability of confidential informants, it is still useful for analytical purposes to refer to what was once known as the "two-pronged" test of informant reliability. Although the United States Supreme Court has technically abandoned this "two-prong" test in favor of a more amorphous "totality of the circumstances" test, see Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the factors that constitute the "two-prongs" remain "highly relevant." See Alabama v. White, 496 U.S. 325, 328, 110 S.Ct. 2412, 2415, 110 L.Ed.2d 301 (1990).

The first "prong" to be considered requires the police officer (or school official) to examine the *basis* for the informant's knowledge. In other words, we must ask, how does the informant know about the suspected crime or incident that he or she is reporting? Was the informant present during an earlier criminal event or transaction? Did the informant actually see someone using or distributing drugs or carrying a

weapon? Did the informant actually see another student place drugs or a weapon into a particular locker or container?

The second "prong" requires police officers or school officials to examine the *veracity* of the informant. Why would a reasonable person believe that this particular confidential informant — who is him/herself involved in criminal activity — is telling the truth? Often, this question is answered by looking at the informant's reputation for truthfulness and his or her "track record" for providing information that has proven to be reliable and truthful in the past.

School officials or police officers should look closely to any motives that the informant may have to lie, as well as to the amount of detail that the informant can provide. When the informant is able to provide these so-called "self-verifying details" about the suspect's criminal conduct, then government officials are better able to determine whether the informant's information is accurate.

One way to bolster a weak "prong" is to conduct some kind of further investigation to corroborate the informant's story. This independent investigation should be conducted *before* a full-blown search is undertaken. Recall that the legality of a search will be determined on the basis of the information that was known to school officials or police officers at the time the search was conducted. An unlawful search cannot be justified by what it reveals, or by information that might have been available to the official conducting the search but that was not actually known and relied upon.

School officials or police officers should always try to determine whether there is any other information that is known or readily available that would lend credibility to the informant's story, including information provided by another independent source and/or an examination of the record or reputation of the person the informant alleges to be involved in criminal activity.

There are a number of other ways to corroborate information provided by an informant. In many cases, it may be appropriate to conduct a surveillance of the suspect (which is not a search under the Fourth Amendment) to see if the suspect engages in any suspicious conduct that would tend to corroborate the information provided by the confidential source, thus indicating that the informant was telling the truth. See Chapter 9 for a more detailed discussion of permissible surveillance techniques.

School officials and police officers should always consider whether the information provided by a confidential source is "stale." Information about a suspect may be so old that it no longer provides probable cause or even reasonable grounds to believe

that the suspect continues to be involved in criminal activity or that evidence of that criminal activity will be found in a particular location. For example, otherwise reliable information that a student kept drugs in a locker during the course of the last school year may not provide reasonable grounds to conduct a search of the locker today, although such information would certainly justify an investigation to determine whether any other information is available to support the suspicion that the student continues to be concealing drugs on school property. (See also Chapter 2.3A(8).)

5.2. Information Provided by Innocent Victims and Witnesses.

As noted above, and especially in the school setting, many if not most "informants," that is, persons who supply information to school officials, are not themselves involved in criminal activity or infractions of school rules. These sources are sometimes referred to in the caselaw as "citizen" informants. They may be innocent witnesses or even the victims of another's unlawful behavior.

There is no reason to assume that a citizen informant — one who is not part of the so-called criminal milieu — is lying when he or she reports suspicious behavior. For this reason, it is not necessary to establish the second "prong" of the above-described two-pronged analysis. Rather, when school officials learn that information is provided by a citizen informant, they can assume that the person is being truthful.

School officials should still consider whether there is some *basis* for the student's knowledge of the reported criminal activity. If, for example, the information learned of concerning a criminal violation or school rule infraction comes from yet another source (i.e., second-hand information), school officials should try to determine whether the original source of the information was reliable. As children, we all played the game "telephone," in which a story would be handed down from playmate-to-playmate until the final version bore little resemblance to the original. School officials in deciding whether information provided to them constitutes "reasonable grounds" must always consider the original source of the information.

Finally, it must be noted that in many cases, courts seem to tacitly assume that a confidential source of information is reliable, especially where there is no reason to believe that the informant is involved in criminal activity or is otherwise untrustworthy. 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 even how the informant had become aware of the drug-distribution scheme.

5.3. Anonymous Tips.

In common parlance, the terms "anonymous" and "confidential" are sometimes used interchangeably when referring to a source of information. News reporters, for example, will often refer to an "anonymous source" when they really mean a known source of information who has given information with the understanding that the reporter will not reveal the source's identity. In the law, and for the purposes of this Manual, the two terms have distinctly different meanings. An "anonymous" source, sometimes referred to as a "tipster," is one whose identity is unknown to the official receiving and relying upon the information. These kinds of sources are discussed in this subchapter. A "confidential" source, in contrast, is a person whose identity is known to the official receiving and relying upon the source's information, but the official has impliedly or expressly agreed not to disclose the person's identity to others as a practical means of encouraging the person to provide the information. The legal issues involved in preserving the confidentiality of an informant's identity are discussed in Chapter 5.4.

On some occasions, information about criminal activity or school rule infractions is provided to school officials anonymously (i.e., e.g., by means of a unsigned letter). When that occurs, there is no way to know if the individual providing the information was involved in the criminal activity or otherwise has a motive to lie. It may also be difficult if not impossible to demonstrate the tipster's basis of knowledge unless he or she happens to relate that information. (Obviously, when school officials do not know the identity of the source, it is usually not possible to contact the source to obtain more detailed information.) For this reason, as a general proposition, an anonymous tip, by itself, will *not* constitute reasonable grounds to justify an immediate search by school officials. Compare Alabama v. White, 496 U.S. 325, 328, 110 S.Ct. 2412, 2415, 110 L.Ed.2d 301 (1990) (holding that as a general rule, an anonymous tip provided to police

will not, by itself, constitute reasonable articulable suspicion to justify an investigative detention).

In State v. Engerud, the companion case to T.L.O., the New Jersey Supreme Court ruled that the search of the student's locker was unconstitutional because the anonymous tip the school official relied upon did not satisfy the reasonable grounds test. 94 N.J. 331, 348 (1983). Accordingly, when a school official receives information anonymously or "through the grapevine," the better practice would be to conduct some independent investigation — short of conducting a search — to try to confirm or dispel the information provided in the anonymous tip.

This does not mean that in all cases an anonymous tip is not enough to justify a search conducted by school officials. Rather, the reasonableness of the search will depend upon all of the known circumstances and must be decided on a case-by-case basis. The point, however, is that before conducting a search, school officials should pursue all available investigative options that do not entail an invasion of a student's privacy, such as checking with others to determine whether they may be aware of information that corroborates (or refutes) the anonymously-provided information, or by conducting some form of surveillance.

Note also that in State v. Williams, 251 N.J. Super. 617 (Law Div. 1991), the court held that two separate tips coming from two different anonymous sources, when viewed together, *did* provide police with a reasonable articulable suspicion — the close analog to the "reasonable grounds" standard used to justify a search conducted by school officials. In essence, the court in Williams concluded that the whole is greater than the sum of its parts. Each separate tip, viewed independently, might not have been sufficient, but when viewed together provided a reasonable basis to believe that the information provided in the tips was accurate.

5.4. Protecting the Identity of Sources of Information.

Some students will occasionally report information about school infractions or suspected criminal activity. It is critically important for police and school officials to protect the identity of these students. This is necessary not only to protect the safety of these students as against the risk of retaliation, but also to encourage students and other members of the school community to come forward with information that will allow school officials and, where appropriate, law enforcement authorities, to preserve order and discipline and to protect the interests of law-abiding members of the school community.

A state statute, which is part of New Jersey's Rules of Evidence, provides that:

> A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.
> [N.J.S.A. 2A:84A-28 (also codified as Evid. R. 516.).]

Although this statute is commonly referred to as the "informer's privilege," the privilege actually does not belong to the person providing information, but rather belongs to the government "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with the enforcement of the law." See Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). The statute is designed to encourage citizens to perform their civic duty to communicate knowledge of wrongdoing to law enforcement officials without fear of reprisals. See Grodjesk v. Faghani, 104 N.J. 89, 97 (1986). As a general proposition, courts acknowledge the need to preserve the secrecy of an informer's identity, and have created what has been called a "presumption of confidentiality" that can only be overcome by a "substantial showing of a need" for disclosure. See Cashen v. Spann, 77 N.J. 138 (1978).

What is privileged is the identity of the informer, not the information that the informer may have provided. However, if disclosing the contents of the information would likely reveal the identity of the informer, such disclosure is generally precluded. Grodjesk v. Faghani, supra, 104 N.J. at 96.

In State v. Biancamano, 284 N.J. Super. 654 (App. Div. 1995), the court recently applied the same general principles to confidential information that was provided to school officials. In that case, the vice-principal was informed by a confidential informant that a particular student was distributing drugs. The court had no difficulty in concluding that the principal had reasonable grounds to conduct a search of the student based upon the information provided by the confidential informant.

The court further concluded that the vice-principal need not reveal the identity of his confidential informant, as the informant played no part in the discovery of the

drugs. The person providing the information, in other words, was not an "essential witness on a basic issue in the case." Nor was he or she apparently "an active participant in the crime for which defendant is prosecuted." 284 N.J. Super. at 660, citing to State v. Milligan, 71 N.J. 373, 383-384 (1976).

In light of the Court's recent ruling in State v. Biancamano, school officials in New Jersey appear to have the authority not only to rely upon information provided by confidential sources, but also to keep their sources of information confidential. Of course, if the person is an essential witness to or an active participant in the offense or infraction, a court may compel the disclosure of the informant's identity as a matter of due process and to safeguard the right of a defendant in a criminal proceeding to confront the witnesses against him or to compel the appearance of witnesses who may give testimony that is favorable to the defendant. Even in a non-criminal, school-based disciplinary proceeding, it is conceivable that a school official may in some circumstances be required to disclose the identity of a confidential informant if that informant is an essential witness or active participant in the conduct that forms the basis for the disciplinary proceeding. (In that event, a school official could still extinguish any such confrontation right, thus preserving the confidentiality of the informant's information and identity, by dismissing the disciplinary action.)

It is critical to note that the issue in the Biancamano case was whether the prosecutor was required to disclose the identity of the informant to a defendant in a criminal prosecution. The case does *not* stand for the proposition that a school official may refuse to disclose to a prosecutor the source of information concerning suspected criminal activity. Pursuant to state law and regulations promulgated by the State Board of Education, school officials are required to turn over to law enforcement information concerning at least certain forms of suspected criminal activity, including child abuse or neglect, the unlawful possession and/or distribution of controlled dangerous substances, and the unlawful possession and/or use of firearms. (See Chapter 14 for a more complete discussion of the obligation of school officials to report information to law enforcement.) In the absence of some specific federal or state law or regulation establishing confidentiality, a prosecutor or grand jury may compel any person, including a school official, to produce evidence or testimony concerning possible criminal activity. (Compare the "amnesty" feature described in Chapter 14.1C, which authorizes school officials in certain circumstances to withhold the identity of a student who voluntarily turns over controlled substances.)

Finally, it bears noting that the law governing the protection of confidential information is complicated. Courts must carefully balance the need on the one hand for law enforcement officers to encourage citizens to cooperate with authorities and to avoid

reprisals and retaliation, as against the need on the other hand for a defendant in a criminal prosecution to confront the witnesses against him or her and to have access to information that might provide a viable defense to the criminal charges. Federal law and regulations also impose significant restrictions on sharing and divulging information that was learned in the course of providing alcohol or other drug abuse diagnosis or treatment. See 42 C.F.R. Part 2, discussed in Chapter 14.2.

Any questions concerning the confidentiality of sources of information, or any disputes between school officials and law enforcement agencies with regard to these issues, should be addressed to the county prosecutor or to the Director of the Division of Criminal Justice. (See Chapter 14.5 for a more detailed discussion of the procedures for resolving disputes.)

5.5. Handling Confidential Informants.

As noted above, in most cases, students provide information to teachers or school officials on an informal, ad hoc basis. Few students serve in a capacity that can be likened to paid, professional, or "registered" informers who are said to "work" for law enforcement agencies.

As a general proposition, given the potential for reprisals and retaliation, a school official should not recruit a student to serve as an ongoing source of information about school rule infractions or criminal activity. The better practice is not to ask the student to actively obtain more information, *and in no event should a student be recruited to infiltrate a gang or criminal operation or to go "undercover."* Nor should a school official ask a student to undertake a search or to seize or secure an item for the purpose of turning it over to the school official. (See discussion in Chapter 8.8.) Rather, a student should only be asked to report further information if the student happens to learn of it.

Furthermore, it would be appropriate for the school officials to advise the student of the risks inherent in providing further information, and the student should be encouraged not to divulge to *anyone* (other than the student's parents or legal guardians) that he or she has provided information. As a general proposition, the student should be encouraged to discuss the situation with his or her parents or legal guardian unless this would be clearly inappropriate (as where the student is reporting abusive or otherwise unlawful behavior by a parent or member of the household).

Finally, it must be noted that this subchapter deals only with the use of informants by school officials. For information concerning the appropriate procedures that county prosecutors and police agencies must use in handling juvenile informants,

see the recently released *"New Jersey Law Enforcement Officers' Reference Manual: Handling Juvenile Offenders or Juveniles Involved in a Family Crisis"* developed by the Division of Criminal Justice. That Manual includes new Attorney General Guidelines on the Use of Juveniles as Informants and a model Juvenile Informant Agreement, Liability Waiver, and Parent or Guardian's Consent Form. (These materials are reprinted as Appendix 10 to this Manual.)

6. INTERVIEWS AND INTERROGATIONS

All citizens, including students, have specific rights that are guaranteed by the Fifth and Sixth Amendments, including the Fifth Amendment right against self-incrimination. The exact nature and application of these Fifth and Sixth Amendment rights depends to a large extent on who is asking the questions. Just as school officials are given more leeway than police in conducting searches (recall that the standard governing school officials is less stringent that the one that applies to searches conducted by police), so too, the legal standards governing interviews conducted by school officials are significantly different from the rules and procedures that law enforcement officers must follow when they conduct a custodial interrogation.

6.1. Interrogations Conducted by Law Enforcement Officials.

More than thirty years ago, the United States Supreme Court in the landmark case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 684 (1966), held that police officers must first provide a precise set of warnings (the so-called "Miranda rights") to any person who is subject to "custodial interrogation," which is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 86 S.Ct. at 612. "Questioning" moreover, is defined as any words or actions on the part of the police that they should know are reasonably likely to elicit an incriminating response from the person in custody. See Rhode Island v. Innis, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), cert. denied, 456 U.S. 930, 120 S.Ct. 1980, 72 L.Ed.2d 447(1980).

In State in the Interest of R.W., 115 N.J. Super. 286 (App. Div. 1971), aff'd 61 N.J. 118 (1972), the court held that the Miranda rule should not be mechanically applied when dealing with juveniles. The court in that case concluded that the test, ultimately, is whether the juvenile was "treated with the utmost fairness and with every consideration that his age and all surrounding circumstances indicate should be accorded him." Id. at 295. Thus, if a child is not old enough to understand and waive his or her Miranda rights, "questioning may go forward even without the Miranda warning, provided it is conducted with the utmost fairness, without force or other improper influence, mental or physical, and in accordance with the highest standards of due process and fundamental fairness." Id. at 296.

As a general proposition, juveniles are afforded *greater protection* during the course of police questioning than adults precisely because children are inherently more susceptible to psychological pressure exerted by adults, and especially authority figures,

such as police officers. Accordingly, the requirements of Miranda v. Arizona should be fully observed during the custodial interrogation of juveniles by law enforcement officers. See In the Interest of B.T., 145 N.J. Super. 268 (App. Div. 1976) certif. denied 73 N.J. 49 (1977); State in the Interest J.P.B., 143 N.J. Super. 96 (App. Div. 1976).

A juvenile should be informed of his or her Miranda rights immediately after being taken into custody and before any police officer attempts to ask a question that is designed or reasonably likely to elicit an incriminating response. (It is not a violation of Miranda to ask the juvenile to give his or her name or address, or to ask how the juvenile's parents or legal guardians can be reached, since the answers to these kinds of pedigree questions are not "testimonial" in nature and do not pose a risk of self-incrimination. Compare Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990).) Police officers should assume that a student is "in custody" for purposes of Miranda if the questioning occurs in the office of a school official, even if the officer has not formally arrested or taken the juvenile into custody, since courts are likely to conclude that a student in these circumstances is not free to leave.

A police officer must also make all reasonable efforts to ensure that a juvenile understands the Miranda rights. Because children are impressionable, police must take extra precautions to make certain that any statements made by a juvenile in response to police questioning are voluntary. In construing the validity and voluntariness of a waiver of constitutional rights by a juvenile, reviewing courts will consider the juvenile's age, level of education, mental capacity, background, and prior experience that the juvenile has had with the juvenile justice or criminal justice systems.

Importantly, New Jersey courts have ruled that because children are more easily subjected to psychological coercion (and, presumably, psychological "ploys") than adults, police should ordinarily not question a juvenile (or engage in any actions that are designed or reasonably likely to elicit an incriminating response from the juvenile) without a parent or legal guardian present, especially in any inherently coercive environment such as a police station. By their comforting presence, parents are deemed to be able to allay the fear or pressure placed on a juvenile who is being questioned by police in an unfamiliar or inherently intimidating setting. See State in the Interests of J.P.B., supra.

Under New Jersey law, the 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. Law enforcement officers should never refuse to contact a parent or guardian, or refuse to admit them to the interrogation. See

State In the Interest of Carlo, 48 N.J. 224, 240-241 (1966); State In the Interest of J.F., 286 N.J. Super. 89, 98 (App. Div. 1995).

However, the presence of a parent or a guardian is not absolutely required, and statements given by juveniles have been admitted into evidence notwithstanding that the questioning was conducted without a parent or legal guardian being present. In determining whether an interrogation is permissible in the absence of a parent or guardian, courts will consider the efforts by police to locate a parent, the parent's willingness to be present, or the presence of someone else close to the juvenile in lieu of a parent. See State In the Interests 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, 114-115 (1972) (whenever possible and especially in the case of young children, no child should be interviewed by police except in the presence of his or her parents or guardians); State in the Interest of J.F., supra, 286 N.J. Super. at 98. Ordinarily, however, a school official — especially one who has a 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 has a competing if not conflicting interest in protecting the school environmental by having the student admit to the offense, especially if the offense occurred on school property.

In the event that it is not possible to secure the presence of a parent or guardian at the time of questioning, law enforcement authorities should keep a careful record of the attempts that were made to locate a parent or guardian, and police should document the responses of the parents or guardians once located. Police should also make a careful record if the juvenile refuses to reveal the names, addresses, or location(s) of a parent or guardian. Even where a juvenile refuses to divulge such information, however, reasonable efforts should be made to locate a parent or guardian by, for example, attempting to secure the necessary information from appropriate school authorities.

Once the presence of a parent or guardian has been secured, the Miranda warnings should be repeated. The juvenile must clearly waive his or her rights before questioning begins. Both the juvenile and parent or guardian present should be asked to sign the written Waiver of Miranda Rights form, and the parent or guardian should remain present throughout the course of the interview.

6.2. Interviews Conducted by School Officials.

In State v. Biancamano, 284 N.J. Super. 654 (App. Div. 1995) certif. denied, 143 N.J. 516 (1996), the court concluded that:

> We have no doubt ... that the T.L.O. standards concerning Fourth Amendment searches are equally applicable to defendant's Fifth Amendment claim. A school official must have leeway to question students regarding activities that constitute either a violation of the law or a violation of school rules. This latitude is necessary to maintain discipline, to determine whether a student should be excluded from the school, and to decide whether further protection is needed for the student being questioned or for others.
> [284 N.J. Super. at 662.]

The Appellate Division thus refused to extend the Miranda rule to interviews conducted by school officials, notwithstanding that the student being questioned may not be free to leave and that the questions posed were designed or reasonably likely to elicit an incriminating response. The court easily distinguished other cases that held that the Miranda rule sometimes applies to interviews conducted by individuals who are not normally thought of as being part of the law enforcement community. Compare State v. Helewa, 223 N.J. Super. 40 (App. Div. 1988), a case where the Appellate Division determined that Miranda warnings should have been provided during the course of an investigation conducted by a Division of Youth and Family Services' (DYFS) caseworker. See also State v. P.Z., 152 N.J. 86 (1997) (Court distinguished State v. Helewa, a case in which the DYFS caseworker interviewed a defendant who had been arrested and was incarcerated during the interview in a county correctional facility. The interview in the P.Z. case, in contrast, was *non*custodial).

The court in State v. Biancamano found no reason, however, to extend the Helewa decision to apply to questioning of students by a school administrator. The court noted that:

> School officials are neither trained nor equipped to conduct police investigations. However, as a matter of necessity, they must regularly conduct inquiries concerning both violations of school rules and violations of law. While the police may eventually be summoned, the need to question students to determine the existence of weapons, drugs, or

> potential violence in the school requires that latitude be given to school officials.
> [284 N.J. Super. at 663.]

The New Jersey court in Biancamano relied heavily on the decision by the Supreme Judicial Court of Massachusetts in Commonwealth v. Snyder, 413 Mass. 521, 597 N.E.2d (1992). According to the Biancamano court, the Massachusetts Supreme Judicial Court "minced no words" when it stated:

> There is no authority requiring a school administrator not acting on behalf of law enforcement officials to furnish Miranda warnings. Even if we were to assume that, during the questioning in the principal's office the environment was coercive because Snyder was in custody (or because his freedom was significantly restricted) and that, therefore, Miranda warnings would have been required if the questioning would have been by the police ... [the principal and assistant principal] were not law enforcement officials or agents of such officials. The Miranda rule does not apply to a private citizen or school administrator who is acting neither as a instrument of the police nor as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile... . The fact that the school administrators had every intention of turning the marihuana over to the police does not make them agents or instrumentalities of the police in questioning Snyder.
> [597 N.E.2d at 1369.]

The court in Biancamano thus agreed with the Massachusetts court and flatly rejected the defendant's claim that he was entitled to receive Miranda warnings before being questioned by the vice-principal. Needless to say, the result would be different if, in fact, a school official were acting as an agent of law enforcement. The problem is similar to the one arising under the Fourth Amendment with respect to the so-called "silver platter" doctrine discussed in Chapter 4.5D4(a).

The Appellate Division in Biancamano noted that this issue was simply not before it, since there was no allegation that the vice-principal had questioned defendant at the behest of the police. The mere fact that school administrators intend or are even duty-bound by law and regulation to turn over drugs, weapons, or information to police does not transform them into police agents who would be required to administer Miranda warnings before questioning a student.

A recent New Jersey Supreme Court decision strongly supports the proposition that the existence of a statute or regulation that requires civilian authorities to turn over information to law enforcement does not mean that the lawfulness of a search or interview conducted by those civilian authorities must be judged according to the stricter standards and rules governing police-initiated searches or interrogations. See State v. P.Z., 152 N.J. 86 (1997). The P.Z. case involved an interview conducted by a Division of Youth & Family Services' (DYFS) worker. The Court noted that in child abuse cases, DYFS, the civil authority, must provide information about suspected abuse and neglect to the county prosecutor, the criminal authority. See N.J.S.A. 9:6-8.30a. See also N.J.A.C. 10:129-1.1a, which requires that DYFS officials "refer to county prosecutors all cases that involve suspected criminal activity on the part of a child's parent, caretaker, or any other person." (Note that this statutory and regulatory requirement for DYFS officials to turn over information to appropriate law enforcement authorities is roughly analogous to the regulatory duty that school officials have pursuant to N.J.A.C. 6:29-10.5 to report to law enforcement authorities information concerning firearms and controlled dangerous substances.) The New Jersey Supreme Court in P.Z. rejected the defendant's argument that where "parallel" civil and criminal systems are both operating, the defendant must receive Miranda warnings before being interviewed in a noncustodial setting by the DYFS employee. While the Court was "sensitive to the potential for manipulation," it did not find any such manipulation in the exchange of information between DYFS and the county prosecutor in that case.

If, however, police were to request or even suggest that school officials pose certain questions, then the result would almost certainly be different. In State in the Interest of J.P.B., 143 N.J. Super. 96 (App. Div. 1976), the court made clear that the obligation to administer Miranda warnings extends to *anyone* who is acting in an official capacity as an agent of the police. In that case, a supervisor at a state-maintained custodial institution informed a probation officer and a state trooper of incriminatory information learned from a juvenile resident. At the trooper's request, the supervisor posed further questions to the juvenile. In these circumstances, the supervisor was deemed to be acting as a police agent and was thus required to provide Miranda warnings before posing these additional questions.

It bears repeating that the New Jersey Supreme Court in State v. P.Z., supra, cautioned that courts must be "sensitive to the potential for the state's deliberately manipulating" a noncriminal procedure in order to obtain evidence against a criminal defendant. The Court in P.Z. cited to the Law Division opinion in State v. Flower, 224 N.J. Super. 208 (Law Div. 1987), aff'd, 224 N.J. Super. 90 (App. Div. 1988). In that case, the trial court had found that the only purpose motivating a DYFS investigator when she interrogated the defendant was to assist in the defendant's prosecution. The

New Jersey Supreme Court in P.Z. observed that the court in Flower had "properly held that Miranda warnings were required." 152 N.J. at 116, n. 7.

The New Jersey Supreme Court in P.Z. ultimately held that the DYFS employee was not required to provide Miranda warnings during a noncustodial interview because: "[t]here was no indication that the DYFS caseworker interviewed the defendant with the purpose of aiding in his criminal prosecution or, as Justice Pollock suggests in his dissent, that the caseworker had a 'hidden agenda' to obtain an 'incriminating statement' from P.Z." 152 N.J. at 120. The record of that case, according to the majority, contained no reference to regular interaction between the civil and criminal authorities, let alone "manipulation" of DYFS by the county prosecutor so as to obtain information specifically to help the criminal authorities. Id.

The New Jersey Supreme Court in P.Z. nonetheless issued a strong warning: "If there was evidence that a DYFS worker met with defendant simply as a subterfuge to achieve law enforcement purposes, we might well reach a different result." 152 N.J. at 20.

Justices Pollock and Coleman, working with the same factual record, reached a decidedly different conclusion, finding ultimately that the DYFS caseworker had been acting for *both* DYFS and the county prosecutor. According to Justice Pollock, even if she was acting primarily to protect the best interests of the injured child, it remains that she was also acting on behalf of the county prosecutor. "In sum," Justice Pollock concluded, the DYFS caseworker was a "dual agent." The "proof of the pudding," according to Justice Pollock, was that the county prosecutor had expressly *authorized* the DYFS caseworker to take a statement. 152 N.J. at 128-129 (Pollock, J., dissenting) (emphasis added).

In light of the majority decision in P.Z., and especially in view of the concerns raised by the dissent, although county prosecutors are authorized by Attorney General Directive 1988-1 to provide legal advice to school officials with regard to the legality of a search (see Chapter 14.5), prosecutors should never "authorize" much less request or direct school officials to undertake an interview in circumstances where the interviewed student is likely to make an incriminating statement. Nor should the prosecutor or police "suggest" specific questions to be asked by school officials.

Furthermore, Attorney General Directive 1988-1 provides in no uncertain terms that:

> No law enforcement officer shall direct, solicit, encourage, attend, or otherwise participate in the questioning of any juvenile by school officials unless such questioning could be lawfully conducted by the law enforcement officer acting on his or her own authority in accordance with the rules and procedures governing law enforcement interrogations and interviews.
> [Attorney General Directive 1988-1, Part V (k)(1).]

In light of this Attorney General Directive, the mere presence by a police officer during questioning of a juvenile would seem to trigger the requirement to provide Miranda warnings and to seek the attendance of the juvenile's parent or legal guardian, notwithstanding that the interrogation took place in a principal's office and notwithstanding that the questions were actually being posed to the student by a school official.

Finally, it would appear that, unlike police officers, school officials acting independently may routinely question students about suspected school rule infractions or even criminal law violations without first having to reach out to parents or legal guardians, provided that police officers do not attend or otherwise participate in the questioning.

6.3. Interview Principles That Apply to Both School and Law Enforcement Officials: The Requirement of Voluntariness.

It is well-settled that a person invoking the privilege against self-incrimination may do so "in *any* ... proceeding, civil or criminal, formal *or informal*, where the answers might tend to incriminate him in future criminal proceedings." Minnesota v. Murphy, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141, 79 L.Ed.2d 409, 418 (1984) (emphasis added). However, as a general proposition, this privilege is not self-executing under either federal or state law. Rather, it is the duty and responsibility of the person claiming the privilege to invoke it. Murphy, supra, 465 U.S. at 428-429, 104 S.Ct. at 1142-1143, 79 L.Ed.2d at 419-420. Accord, State v. Reed, 133 N.J. 237, 251 (1993). Thus, when the privilege against self-incrimination is not asserted and the person being questioned chooses to answer, the choice to respond is considered voluntary.

As is well-known, an exception to this general rule was created by the United States Supreme Court more than thirty years ago in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Court in Miranda determined that a

custodial interrogation by law enforcement officers is inherently coercive, thus automatically triggering the Fifth Amendment privilege against self-incrimination. As the New Jersey Supreme Court recently noted, "Miranda warnings" are now household words in the United States. "Today, even schoolchildren know that when a person in police custody is questioned by law enforcement, he must be told that he has the right to remain silent, that any statement he makes may be used against him, he has the right to an attorney, and that if he cannot afford an attorney, one will be provided for him." State v. P.Z., 152 N.J. 86, 102 .

The New Jersey Supreme Court in P.Z. cautioned that custodial interrogations by law enforcement officers are not the only special circumstances in which the Fifth Amendment privilege against self-incrimination is "self-executing." Id. at 106. The United States Supreme Court and New Jersey courts have consistently held that the government may not force an individual to choose between his or her Fifth Amendment privilege and another important interest, because such choices are deemed to be inherently coercive. These cases are based on the principle that the Fifth Amendment is violated "when a state compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered." Id. at 106-107 (citations omitted).

Long before Miranda v. Arizona was decided, the United States Supreme Court held that certain interrogation techniques are so offensive to a civilized system of justice that they must be condemned under the due process clause. See Miller v. Fenton, 474 U.S. 109, 106 S.Ct. 445, 449, 88 L.Ed.2d 405, 410 (1985). The Miranda decision, according to the New Jersey Supreme Court, established a per se rule to counteract the inherently coercive nature of custodial interrogations by law enforcement; it did *not* eliminate the due process requirement that all statements given during an interrogation must be voluntary. State v. P.Z., 152 N.J. at 112-113.

To determine whether a statement is made voluntarily, the courts will consider whether the statement was "the product of an essentially free and unconstrained choice by its maker," or whether instead the person's "will has been overborne and his capacity for self-determination critically impaired." See Schneckloth v. Bustamonte, 412 U.S. 218, 225-226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854, 862 (1973); State v. Galloway, 133 N.J. 631, 654 (1993). This issue, in turn, can be resolved only after an assessment of the "totality of the circumstances" surrounding the statement. Galloway, supra, 133 N.J. at 654 (observing also that, in New Jersey, the state must prove voluntariness beyond a reasonable doubt) .

Reviewing courts will look at the characteristics of the person being questioned as well as the details of the interrogation itself. Schneckloth v. Bustamonte, supra, 412

U.S. at 226, 935 S.Ct. at 2047, L.Ed.2d at 862. Relevant factors include the age, education, and intelligence of the person being questioned; whether and in what manner the person was advised of his or her constitutional rights; the length of detention; whether the questioning was repeated and prolonged in nature; and whether physical punishment or mental exhaustion was involved. See State v. Miller, 76 N.J. 392, 402 (1978).

In light of these cases, it bears noting that even though school officials, acting independently and on their own authority, are not required to administer Miranda warnings or to postpone questioning until a parent or legal guardian is present, the admissibility of a juvenile's statement will depend on whether the statement was voluntary. If school officials use coercive, intimidating, or overbearing tactics, it is likely that any resulting statements will be deemed to be inadmissible, and if such statements provide the factual basis for conducting a search (whether by school officials or by police), the ensuing search may be deemed to be the "fruit" of the improper interrogation, and physical evidence found as a result of the search may thus be subject to the exclusionary rule.

7. SEARCHES CONDUCTED PRIOR TO OR DURING SCHOOL FIELD TRIPS AND SCHOOL-SPONSORED EVENTS

During school field trips and other school-sponsored events, students remain subject to close supervision by school officials. School officials, in other words, continue to be responsible for the welfare and supervision of students at all school-sponsored functions that occur off-campus, without regard to whether those functions or activities take place during regular school operating hours. Accordingly, the same search and seizure rules apply whether the search is conducted on or off school grounds.

Thus, for example, a school official or agent of the school, such as a parent chaperon, must comply with the rules established in New Jersey v. T.L.O. before conducting a search based on reasonable grounds to believe that the search would reveal evidence of a crime or a violation of school rules. (Note, however, that if a parent chaperon at an off-site school function conducts a search of the parent's *own* child, there is no governmental intrusion and the Fourth Amendment does not apply, even if the parent chooses to turn over any contraband or information to school officials for use in a school disciplinary proceeding or a criminal prosecution. Minors enjoy no Fourth Amendment protections with respect to searches conducted by their own parents unless the search was done at the specific request of a police officer or school official.)

Similarly, all of the rules governing "suspicionless" searches apply prior to and during field trips. In Desilets v. Clearview Reg'l Bd. of Educ. 265 N.J. Super. 370, 379 (App. Div. 1993), the court considered whether the Fourth Amendment was violated by a school policy of searching students' hand luggage prior to a field trip. The school policy at issue was designed to discourage students from bringing alcohol, weapons, or drugs on a field trip. The search policy was limited to hand luggage, and school officials did not search students' persons or pockets.

The field trip in that case was voluntary and recreational, and transportation by bus was provided by the school board. Teachers accompanied the students and functioned as chaperons. The court in Desilets upheld the school search policy, concluding that the deterrent effect advanced the legitimate interests of the school in preventing students from taking contraband on field trips. The court was persuaded that the search was justified at its inception by the unique burdens placed on school personnel in the field trip context and that the search limited to hand luggage was reasonably related to the school's duty to provide discipline, supervision, and control.

In reaching this conclusion, the court was mindful of the "rich opportunity for mischief which the field trips provides to some students." Id. at 380. The need for close

supervision in the schoolhouse is intensified, the court held, on field trips where opportunities abound to allude the watchful eyes of chaperons. Administrators and teachers not only have the duty to protect students from the misbehavior of other students, the court noted, but in the context of a field trip, also have a duty to protect the general population from student mischief.

The court further recognized that a teacher confronted with a serious problem of misbehavior on school grounds is able to draw upon substantial resources to deal with the problem, such as other teachers and administrators or a school nurse. Teachers in schoolhouses also have quick access to police and ambulance services, if necessary. Chaperons on a field trip, in contrast, are relatively isolated.

The court was also persuaded by the fact that pursuant to the school policy, students were not subject to abusive exercise of discretion, since all students participating in the field trip were required to submit to the search of their hand luggage. Consequently, there was no stigma attached to the search because no individual student or group of students was being singled-out. Id. at 382. Finally, because the trip was off school premises, school administrators required parental permission, and the permission slip contained a statement noting that hand luggage would be searched. By providing advance notice, students had ample opportunity to eliminate from the hand luggage items that, though not contraband, might have been embarrassing if revealed.

Since school officials are permitted in these circumstances to open and visually inspect the contents of luggage that is to be brought on class trips, they would also be permitted to use scent dogs to sniff the luggage for drugs. Indeed, it is generally accepted that a canine sniff of the exterior surface or air surrounding a closed, opaque container represents far less of an intrusion on legitimate privacy rights than occurs when a closed container is actually opened and its contents are exposed to visual scrutiny or rummaging. (See generally Chapter 4.5 for a more detailed discussion of the use of drug-detection canines.)

Finally, it should be noted that, especially in view of the Desilets opinion, school officials would also be authorized to inspect students' belongings before admitting students to on- or off-campus after-hours events such a dances, proms, concerts, sporting events, or other extracurricular functions. Such inspections — a form of point-of-entry search — are especially appropriate to discourage teens from bringing drugs or alcohol to these events. (See also Chapter 4.7 for a discussion of point-of-entry inspections.) Although the "implied consent" doctrine is usually of little help in resolving Fourth Amendment issues (see Chapter 2.4), in this particular context, students seeking admission to these kinds of extracurricular events would be especially hard pressed to

complain about such inspections, provided that advance notice is given and further provided that the inspections follow a neutral plan and are not used to harass, intimidate, or discourage the attendance of particular students or groups of students.

THIS PAGE LEFT INTENTIONALLY BLANK

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.

9. SURVEILLANCE AND PATROLLING SCHOOLS

9.1. Human Surveillance.

It goes without saying that school officials are permitted, indeed are expected, to closely supervise and monitor the activities of schoolchildren at all times while students are on school grounds or are otherwise subject to the care and supervision of the school district. With very few exceptions, school officials are authorized to enter any room or area within the school building or on school grounds to observe or "surveil" students. Obviously, however, for the reasons discussed in more detail below, a school official should not enter a locker room or shower area used by students who are not of the same gender, and a school official should not open the door of an occupied toilet or shower stall unless there are reasonable grounds to believe that the stall is *not* being used not for its intended purpose, but rather is being used to conceal illegal activities, or unless there is reason to believe that a student is in distress and in need of immediate medical attention.

The act of observing students, or using other senses such as smell or hearing to monitor student activities, generally does not constitute a "search" within the meaning of the Fourth Amendment. This would be true even in the case where the presence of the observing official is not immediately apparent, or is even purposely concealed, provided that students do not have a reasonable expectation of privacy in the place and at the time they are being watched. Surveillance and monitoring, in other words, need not be limited to roving patrols of corridors, classrooms, and places where students congregate. It is also permissible in most instances to make observations from concealed, stationary locations, such as from behind two-way mirrors.

Thus, for example, a school official could look out a window (and even use binoculars or other vision-enhancing devices) to observe students who are congregating in places outside the school building to smoke or consume drugs or alcohol. Similarly, school officials can sit in parked vehicles to observe student activities. By the same token, school officials walking in the school parking lot are free to look though car windows to observe students sitting in parked vehicles who are smoking or are consuming drugs or alcohol, without in any way running afoul of the Fourth Amendment, provided officials do not enter these parked vehicles. (The act of opening a window or door would constitute a "search" under the Fourth Amendment.)

In State v. Saez, 139 N.J. 279 (1995), the New Jersey Supreme Court held that it was unreasonable and thus impermissible for police officers to peer through the crack in a basement wall to observe the criminal activities taking place in the adjoining house,

notwithstanding that the police had been invited to use the basement to make these observations. This recent case is sometimes cited for the proposition that police may not set up a "duck blind" to conduct surveillance of activities occurring inside a home, since the drug traffickers in that case were said to enjoy a reasonable expectation of privacy while they were in their own basement.

That case reflects the importance that courts place on protecting the sanctity of a home. The same protections and expectations of privacy simply do not exist in the context of the school house. In Stern v. New Haven Comm. Sch., 529 F.Supp. 31 (E.D. Mich. 1981), the court held that a public high school student was not subjected to an unconstitutional search when a school official observed him through a two-way mirror in the boys' restroom. The student was observed buying marijuana from another student, and the incident was ultimately reported to the police. The student sued the school district for civil damages under 42 U.S.C. § 1983. The court dismissed the student's civil rights claim, ruling that Fourth Amendment rights must yield to the extent that they interfere with the school administration's fundamental duty to operate the school as an educational institution. The court in that case ultimately concluded that when the student's privacy interests are weighed against the school's duty to maintain order and discipline, the use of a two-way mirror in a boys' restroom did not violate the Fourth Amendment.

Even so, school officials in New Jersey should be cautious before conducting a surveillance of students in restrooms or locker rooms, since it is by no means clear that New Jersey courts would conclude that students have no expectation of privacy as against surveillance in these areas, and especially in a toilet, urinal, or shower area.

Recently, a New Jersey court for the first time addressed the issue of what degree of privacy is due an individual in a public restroom. In State v. Boynton, 297 N.J. Super. 382 (App. Div. 1997), the police were searching for a fugitive in a bar that they knew he frequented. After failing to locate the fugitive in the main part of the bar, an officer opened an unlocked single-occupancy public restroom and interrupted the sought-after fugitive in the middle of a drug sale involving another person.

The court in Boynton ultimately ruled that the entry into the unlocked public restroom was lawful, so that the officer was rightfully present when he observed controlled dangerous substances in "plain view." "The officer," the court reasoned, "did not have to avert his eyes in the presence of the illegal activity that was taking place in front of him." 297 N.J. Super. at 394.

In reaching its conclusion, the court undertook a careful review of privacy law in other jurisdictions. While acknowledging that it is axiomatic that individuals are due some degree of privacy in a public restroom, the court held that any such right of privacy is not absolute. 297 N.J. Super. at 388. In deciding whether an individual possesses a reasonable expectation of privacy sufficient to trigger constitutional protection under the Fourth Amendment, courts must take into account factual considerations, such as the layout of the restroom, the area in the restroom where the activity takes places, and, to some degree, the method of surveillance employed by the police.

The court noted, for example, that a distinction must be drawn between restroom stalls and restroom "common areas" (i.e., sinks). Individuals performing illegal activities in the common area of a public restroom, the court found, cannot possess a reasonable expectation of privacy. 297 N.J. Super. at 389.

While the use of a stall in a public restroom (or, presumably, the use of a shower curtain) affords a greater degree of privacy, again, this right of privacy is not absolute. The court noted that the general rule in other jurisdictions seems to be that when a stall is equipped with a door, individuals in the stall are accorded a reasonable expectation of privacy "unless they are engaged in illegal activity that is apparent to the casual observer who is rightfully in a common area of the restroom." Id. The court cited as an example an Illinois case where a police officer heard two voices coming from a single stall. In those circumstances, it was not unlawful for the officer to look into the stall through the gap between the door and the door frame. See People v. Morgan, 200 Ill. App.3d 956, 146 Ill. Dec. 561, 558 N.E.2d 524, appeal den., 133 Ill.2d 567, 149 Ill. Dec. 331, 561 N.E.2d 701 (1990). The court in Boynton also cited to cases which held that bathroom stalls that are not equipped with doors do not provide the same reasonable expectation of privacy. 297 N.J. Super. at 389.

Notably, the Boynton court carefully analyzed a Washington state decision, State v. Berber, 48 Wash. App. 583, 740 P.2d 863 (1987). In doing so, the court emphasized the relevance of whether the method of surveillance used by authorities, if unchecked by constitutional considerations, would diminish the amount of privacy and freedom afforded citizens to an extent that is inconsistent with a free and open society. The court thus drew a clear distinction between the act of entering a public restroom, on the one hand, and the act of conducting *clandestine* surveillance on the other hand. 297 N.J. Super. at 391. Although the facts in Boynton did not involve any such clandestine surveillance, the court implied, if only in dicta, that such activity by police might easily intrude upon a citizen's reasonable expectation of privacy.

School officials should also consider that the New Jersey Legislature recently enacted a statute that flatly prohibits schools from conducting strip searches of students. P.L. 1997, c. 242 (N.J.S.A. 18A:37-61.) The new statute, which took effect on September 5, 1997, seems to reflect a legislative judgment, one likely to be heeded by the courts, that school officials have no business watching students disrobe. It is interesting to note, however, that the United States Supreme Court recently concluded in Vernonia Sch. Dist. 47J v. Acton, 115 S.Ct. 2386 (1995), that student athletes enjoy a reduced expectation of privacy. "School sports," the Court reasoned, "are not for the bashful," and "public school locker rooms ... are not notable for the privacy they afford." 115 S.Ct. at 2392, 2393.

In any event, before establishing a concealed surveillance site in any portion of a restroom or locker room, school officials should be prepared to document why that procedure is absolutely necessary, pointing, for example, to recent incidents where those very locations were used to commit drug violations or to commit assaults against other students. In addition, the surveillance should be done in a way that minimizes privacy intrusions to the greatest extent possible consistent with the reason for resorting to surveillance in the first place.

It bears repeating, finally, that school officials would be free to enter and "patrol" those locations, provided that this form of monitoring and supervision was conducted by school employees of the appropriate gender for a bona fide purpose.

9.2. Cameras and Electronic Monitoring.

As a general proposition, school officials are permitted under the Fourth Amendment to deploy security cameras to observe any place or activity that could be monitored or patrolled by a person. Once security monitors are deployed, however, the better practice is to provide notice by placing signs clearly warning all persons that the area is subject to surveillance by video camera. The principal purpose in deploying these cameras, after all, is to deter unlawful activity and disruptive behavior, not to catch students in the act so that they can be suspended, expelled, or prosecuted.

Cameras generally should not be deployed in lavatories or locker rooms, or at least in portions thereof where they would be likely to record students who are undressed or who are performing normal excretory functions. (See discussion in the preceding subsection concerning State v. Boynton, 297 N.J. Super. 382 (App. Div. 1997), and the possible impact of the new law that prohibits strip searches.) If cameras are to be deployed in such locations, school authorities should be prepared to document the reasons that necessitate this significant privacy intrusion (i.e., a recent spate of drug

offenses or assaults committed at these locations). But see the above-quoted portions of Vernonia Sch. Dist. 47J v. Acton, wherein the United States Supreme Court noted, at least in dicta, that locker rooms are not notable for the privacy they afford, and that "there is an element of communal undress inherent in athletic participation." 115 S.Ct. at 2392, 2393 (citation to authority and quotation marks omitted). In addition, precautions must be taken to ensure that students in these circumstances are observed only by designated security personnel or school officials of the same gender.

It should be noted that N.J.S.A. 2A:4A-61b generally prohibits juveniles under the age of fourteen from being photographed for criminal investigation purposes, unless the juvenile or parent/guardian consents, or unless permission is granted by a court. This statute applies only to photographs taken for criminal identification purposes (i.e., "mug shots" to be used in a photo array or "line up"). This statute does not prevent schools from deploying cameras or from keeping a photograph or videotape record of students who were observed by a security camera.

Finally, it is important to note that under New Jersey's electronic surveillance laws, N.J.S.A. 2A:156A-1, et seq., it is generally unlawful to use electronic or mechanical devices to record, monitor or amplify private conversations, that is, conversations or any "oral communication" that the participants would reasonably expect to be private. See N.J.S.A. 2A:156A-2b. Accordingly, security monitoring devices should be limited to conducting a *visual* surveillance, rather than an aural one. If sound monitors are for any reason to be deployed for security purposes in hallways or classrooms, warning notices must be clearly and conspicuously posted so that all persons in these areas know that these devices are present and operational. Under no circumstances should school officials use listening devices or sound-enhancing devices to surreptitiously listen in on conversations of students who are suspected of engaging in unlawful activity. In fact, it is a crime to do so, N.J.S.A. 2A:156A-3, and persons who violate the Wiretap Act are also subject to punitive damages in a civil lawsuit. N.J.S.A. 2A:156A-24b.

THIS PAGE LEFT INTENTIONALLY BLANK

10. SEARCHES OF PERSONS AND "STRIP" SEARCHES

10.1. General Considerations — Following a Step-by-Step Plan of Action to Minimize the Risks and Degree of Intrusion.

The New Jersey Supreme Court in New Jersey v. T.L.O. aptly observed that even a limited search of a person (as opposed to places or containers) is a substantial invasion of privacy. In Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir.) cert. denied, 463 U.S. 1207, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (5th Cir.) (1982), the court went even further, noting that, "society recognizes the interests in the integrity of one's person, and the Fourth Amendment applies with its fullest vigor against any indecent or indelicate intrusion on the human body." 677 F.2d at 480. For this reason, school officials, and police officers as well, should be especially cautious before undertaking a search of a student's person.

As with any search, a school official preparing to search a student's person should follow a logical plan of action that is designed to minimize the intrusiveness of the search to the greatest extent possible. See Chapter 3.2B(1) for a more detailed explanation of how to devise a reasonable search plan. Thus, for example, a school official who has reasonable grounds to believe that a student is carrying contraband or evidence of an offense or infraction on his or her person should ordinarily follow these steps in sequence:

1. Bring the student to the principal's office or other location away from other students.

2. Make certain that at least one other school official is present to serve as a witness and to assist in the search if necessary. (Note that any physical touching of the student should generally be done by a staff member of the same sex as the student.)

3. Clearly identify your authority and purpose, indicating the specific kind of object that you are searching for (e.g., a weapon, drugs, etc.).

4. Give the student an opportunity to surrender the sought-after object(s). (Note, turning over illicit drugs at the request of a school official does *not* constitute a "voluntary" act within the meaning of the amnesty provisions of the Memorandum of Agreement Between Education and Law Enforcement Officials (1992) and N.J.A.C. 6:29-10.5(a)(1), and any suspected controlled dangerous substances surrendered during a search must be

provided to police along with the name of the student who was in possession of the substance. See Chapter 14.1C.)

5. Require the student to put down any handbag or backpack and/or to remove outer garments so that these objects can be searched without physically touching the student's person.

6. Require the student to empty his or her pockets unless the sought-after item is a weapon and there is reason to believe that the student might use the weapon to commit an assault. School officials in making this determination should consider the totality of the known circumstances, including the student's present state of mind and reaction to the encounter (e.g., belligerent, cooperative, etc.) and his or her reputation for violence or for resisting authority.

7. Begin any touching of the student's actual person in the place most likely to conceal the sought-after object.

8. Conduct a "frisk" or "patdown" before actually reaching into a pocket to determine whether there is anything present that might be the sought-after object. If this limited tactile search of the outer clothing does not reveal the presence of an object that could be the subject of the search, the school official should not conduct any more invasive search of that location unless the nature of the evidence sought or of the clothing is such that a limited patdown would not in any event have revealed the presence of the sought-after evidence.

9. While conducting a "frisk" or "patdown" of the student's clothing, school officials should not slide or otherwise manipulate an object in a pocket unless the object reasonably could be the item being sought, or unless it is immediately apparent after the initial touching that the item is a weapon or other contraband that you did not expect to find. (See discussion of the "plain feel" doctrine in Chapter 11.)

10. Immediately stop searching when the object of the search is found and secured unless there are reasonable grounds at that moment to believe that the student is carrying yet additional evidence of a serious offense or infraction that would independently justify a search of the person.

10.2. Search of Person and the "Wingspan."

When a police officer lawfully takes a juvenile "into custody" (i.e., arrests the juvenile based upon probable cause to believe that a juvenile has committed an act which, if committed by an adult, would be an offense), the officer is authorized to conduct a contemporaneous search of the juvenile's person, clothing, or any items carried by the juvenile or otherwise within the juvenile's "wingspan," which is defined as the immediate vicinity of the arrest where the juvenile would be able to reach for a weapon or to conceal or destroy evidence. This form of search is known as a "search incident to an arrest," and represents one of the recognized and commonly used exceptions to the warrant requirement. Note that a police officer does not need probable cause to believe that the search will reveal evidence of a crime. Rather, a contemporaneous search of the arrestee is automatically authorized, provided that the arrest is lawful.

While school officials have no authority to "arrest" students for suspected criminal law violations, they are permitted to conduct a search of a student's person — if the search is conducted in a reasonable manner — where there are reasonable grounds to believe that evidence of the infraction or criminal law violation will be found in the course of the search. That, after all, is the essence of the court's ruling in New Jersey v. T.L.O.. Note that with respect to searches conducted by school officials, there is no automatic search "incident to the arrest." If, for example, school officials have reasonable grounds to believe that a student recently committed an assault, they could *not* conduct a search of that student unless they also had reasonable grounds to believe that the search would reveal evidence of that crime (i.e., a weapon that had been used to commit the assault). (See Chapter 3.2A for a more detailed discussion of the "four step" analysis school officials should perform before initiating a search of a particular student.)

As with any search, school officials should use the least intrusive means available to accomplish the legitimate objective of the search. A state statute expressly authorizes both public and private school employees 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 strongly urged *not* to use force in conducting a search. Where force is necessary and thus authorized, the better practice would be to call the police for assistance.

Where it is at all feasible, moreover, school officials should request the student to produce the sought-after object or to empty his or her pockets, rather than to proceed immediately to physically touch the student. Conducting a physical search of a

student's person, in other words, should only be used as a means of last resort. If the student refuses to comply or resists any physical touching, school officials are strongly encouraged to discontinue the search and notify the police. (See also Chapter 3.2B(8) for a more detailed discussion of the appropriate use of force or threat of force.) It would not be inappropriate in these circumstances for the school official to advise the student that the police will be called and that they will be provided with the information that suggests that the student has committed an offense and is carrying evidence of that offense. In some cases, students when confronted with this warning will agree to empty their pockets or to remove and turn over the sought-after evidence. (Note that this would *not* be a valid consent search, see Chapter 8, but would nonetheless be lawful provided that the school official had reasonable grounds to believe that the student was in possession of contraband or other evidence.)

As a general proposition, when police arrive at the scene, they should assume responsibility for conducting the search, see N.J.A.C. 6:29-10.3(b)(4)(iv), and the lawfulness of the ensuing search would in that event be determined by using the stricter standards governing law enforcement searches (i.e., the probable cause standard and the need for a warrant or recognized exception to the warrant requirement such "search incident to an arrest"). (See Chapter 2.5.) Moreover, when police in any way participate in a search that is actually conducted by school officials, that participation will usually transform the search into a law enforcement activity that will then be subject to the more rigorous standard of judicial review. (See discussion of the so-called "silver platter" doctrine in Chapter 4.5D(4)(a).) One possible exception to this rule might conceivably apply where police are summoned not to conduct the search, but rather only to stand by and guard against the possibility that a student would assault a school staff member while that staff member conducts the search under the more flexible reasonable grounds standard of proof. It is conceivable if not likely, however, given the present state of the law, that courts in this state would consider the mere presence of police officers in these circumstances sufficient "participation" to convert the ensuing search into a law enforcement activity.

When police are not at all involved, the search by school officials need only be justified by the reasonable suspicion standard described in more detail in Chapter 3. School officials should nonetheless understand that precisely because the standard is said to be more "flexible" than the probable cause test used by police, the precise quanta of proof required to satisfy the reasonable grounds standard will vary according to the degree of the privacy intrusion of the contemplated search. Since a physical search of a student's person constitutes the most invasive form of search that a school official may lawfully undertake, it follows that the reasonable grounds standard would be set at its highest level in these circumstances.

In at least one case cited in a footnote in New Jersey v. T.L.O., a court expressly held that a higher standard of justification (approaching full probable cause) applies where the search is "highly intrusive." See M.M. v. Anker, 607 F.2d 588, 589 (2nd Cir. 1979). In other words, as the intrusiveness of a search intensifies, the standard of Fourth Amendment reasonableness approaches probable cause even though the search is conducted by school officials. Compare Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). The Anker case involved a "strip search" of a female student for some unidentified stolen object. (As noted in the next subchapter, pursuant to a recently-enacted statute, school officials in New Jersey are now prohibited in any event from conducting a strip search.) Thus, although the general rule is that school officials are permitted to conduct a search based upon reasonable grounds — a less stringent standard of proof than probable cause — school officials should be mindful that courts will more closely scrutinize the facts justifying a search where the search is particularly intrusive, such as one that involves a physical touching of a student's person.

Furthermore, the United States Supreme Court in New Jersey v. T.L.O. expressly warned that the scope of the search must not be "excessively intrusive in light of ... the nature of the suspected infraction." 105 S.Ct. at 735 (emphasis added). This suggests that students should ordinarily not be subjected to a physical touching to find evidence of comparatively minor infractions of school rules, such as chewing gum, candy, or snack foods. Although the Court in T.L.O. made clear that school officials are authorized to enforce *all* school rules, and to conduct reasonable searches to secure evidence of any infraction, school officials must always use common sense and should carefully consider the seriousness of the suspected infraction before conducting a physical search of the student's person or before using force or threat of force to effectuate any such search. In sum, courts are likely to afford school officials more latitude in conducting a search for a suspected gun or switchblade than a search for cigarettes.

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.]

School officials must be especially cautious in touching a student's crotch area (or female breasts), since such contact constitutes a particularly intrusive form of search. Regrettably, in some jurisdictions, notably Los Angeles, weapons and drugs are routinely concealed by students in the crotch area precisely because students know that school officials will be reluctant to conduct a thorough search that would entail touching the clothing that covers these private parts of the human anatomy. To some extent, baggy, oversized trousers have become popular with gang members precisely because such clothing makes it easier to conceal drugs and weapons.

In any case where the search will involve any physical touching of a student by a school official, the better practice would be to have another school employee present as a witness to reduce the chance that a student would falsely accuse the official of misconduct and also to reduce the likelihood that the student would forcibly resist the search. It is strongly advised that any physical touching be done by a school official of the same gender as the student. Recall also that all searches, *and especially searches of the person*, should be conducted in private and away from other students. See Chapter 3.2B(1).

10.3. "Strip" Searches.

There are few subjects within the field of search and seizure law that are more sensitive and more controversial than the question as to when and under what circumstances governmental officials may conduct a "strip search." Although such conduct by certain governmental officials (i.e., police or corrections officers) may, in certain limited circumstances, be appropriate and even necessary to protect the public, strip searches, without question, constitute a gross invasion of privacy, especially when the subject of a strip search is a child.

Without question, strip searches are among the most intrusive of searches. In MaryBeth G. v. City of Chicago, 723, F.2d 1263, 1272 (7th Cir. 1983), the court referred to strip searches as "demeaning," dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." Moreover, "the perceived invasiveness and physical intimidation intrinsic to strip searches may be exacerbated for children." Jenkins by Hall v. Talladega City Bd. of Educ., 95 F.3d 1036, 1039 (11th Cir. 1996); see also Justice v. City of Peachtree City, 961 F.2d 188, 192 (11th Cir. 1992) ("[c]hildren are especially susceptible to possible

traumas from strip searches." (internal quotation marks omitted)). A strip search performed by someone of a different gender from the person searched would be considered significantly more intrusive than a same-sex search. See Jenkins by Hall v. Talladega City Bd. of Educ., supra, 95 F.3d at 1044, n. 15 (11th Cir. 1996).

In In the Interest of T.L.O., the New Jersey Supreme Court minced no words when it observed that:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law."
> [94 N.J. 331, 344 n.6 (1983), quoting from Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980), cert. denied, 451 U.S. 1022, 101 S.Ct. 3015 (1981).]

In response to the New Jersey and Unites States Supreme Court decisions in T.L.O., the Attorney General in 1985 issued School Search Guidelines that concluded that:

> One need not be a constitutional scholar to recognize that students should never be subjected to any conduct even approaching the intensity of a strip search, except in the most urgent, extraordinary and life-threatening situations, such as to seize an observed dangerous weapon or to secure the implements of an imminent suicide attempt.

On September 5, 1997, Governor Whitman signed into law P.L. 1997, c. 242, (N.J.S.A. 18A:37-6.1), which provides in its entirety that, "Any teaching staff member, principal or other educational personnel shall be prohibited from conducting any strip search or body cavity search of a pupil under any circumstances." This legislation was introduced in response to an outrageous situation where third-graders were told to drop their pants so that a school official could search for $23 that was missing.

The new statutory prohibition against strip searches "under any circumstances" applies even where a school official has reasonable grounds to believe that a pupil may have committed an act which if committed by an adult would constitute a criminal offense. It should be noted in this regard that although the original bill specifically

included language to that effect, that clause was deleted from the bill by committee amendment. Even so, the legislative declaration prohibiting teaching staff members, principals, or other educational personnel from conducting *any* strip search or body cavity search of a pupil *under any circumstances* could not be more absolute.

It is not clear, however, whether the new prohibition applies only to public school employees, or whether it also extends to persons employed by nonpublic schools. Certainly the Legislature is free to impose limits on the actions taken by employees of private, parochial, and independent schools in order to afford protections to their students. Thus, for example, the law prohibiting corporal punishment of pupils expressly applies to persons "employed or engaged in a school or education institution, whether public or private ..." N.J.S.A. 18A:6-1 (emphasis added).

The new strip search law, in contrast, includes no such express reference to private schools. The bill as originally introduced included a section that would have imposed a duty to report criminal offenses to a local law enforcement agency on "any teaching staff member, principal, or other educational personnel of any public school in this State." The Assembly Judiciary Committee on May 20, 1996 amended the bill to delete the entire first section, thus removing from the legislation any reference to public schools. The remaining language of the bill that was eventually adopted by the Legislature and signed by the Governor refers only to "any teaching staff member, principal, or other educational personnel." But even if the literal provisions of the new law were to be construed by courts to apply only to public school employees, employees of nonpublic schools should, as a matter of common sense, proceed with great caution before engaging in conduct that would constitute a strip search, since the new law presumably reflects a legislative judgment that such conduct is highly invasive of privacy rights and violates a standard of care that may be owed to *all* schoolchildren under generally accepted principles of tort law.

The new legislation governing searches undertaken by school employees also does not include definitions of the terms "strip search" and "body cavity search." Those terms are nonetheless defined in another law, N.J.S.A. 2A:161A-3 et seq., that imposes significant limitations (but not a total ban) on the authority of police officers to conduct strip or body cavity searches. Specifically, for the purposes of that act, a strip search is defined to mean:

> The removal or rearrangement of clothing for the purpose of visual inspection of the person's undergarments, buttocks, anus, genitals or breasts. The term does not include any removal or rearrangement of clothing reasonably required to render medical treatment or assistance or

the removal of articles of outer-clothing, such as coats, ties, belts or shoelaces.
[N.J.S.A. 2A:161A-3a.]

The term "body cavity search" is defined to mean, "the visual inspection or manual search of a person's anal or vaginal cavity." N.J.S.A. 2A:161A-3b.

Absent any legislative history or indication to the contrary, it must be assumed that the Legislature by adopting N.J.S.A. 18A:37-6.1 intended to use the same definitions with respect to searches conducted by school officials. Note that the statutory definition of a strip search is substantially broader than a "nude" search. Accordingly, school officials are prohibited from ordering students to remove clothing that would expose *either* undergarments or a nude body. However, school officials would not be prohibited from removing, or ordering students to remove, articles of outer clothing, as defined in the above-quoted statute.

Furthermore, the statutory term "outer clothing" should be construed in light of the recent fashion trend, also inspired by California-based gangs, to wear multiple layers of baggy clothing. A sweater or sweatshirt worn under another sweatshirt, jacket, or vest should not be deemed to be an undergarment unless it is, in fact, in direct contact with the student's skin.

Applying a reasonable interpretation of the new statutory prohibition, a school official should also not be deemed to have conducted a "strip search" if he or she removes a weapon or other contraband from a student's waistband, even if the act of retrieving the object briefly exposes the student's skin or undergarments in the area of the waistband. In other words, the removal of a weapon or other contraband in these circumstances should not automatically or reflexively be construed to constitute the "rearrangement" of the student's clothing, especially when the purpose of such conduct is *not* to conduct a visual or tactile inspection of the person's undergarments, buttocks, anus, genitals, or breasts, but rather to remove and secure (i.e., "seize") an item that had already been observed, admitted to, or detected during a "patdown." (As noted in Chapter 2.2, a "seizure" is deemed to be a lesser form of intrusion than a true "search.") Obviously, the school official in these circumstances should minimize the degree of intrusion so that the exposure or re-arrangement of underclothing is clearly incidental to the official's true purpose, that is, to secure an object the existence and location of which was already known, and school officials are reminded that especially when a weapon is involved, the better practice may be to call the police and permit responding police officers to assume responsibility for conducting the search and seizure. See N.J.A.C. 6:29-10.3b4(ii).

School officials would not be precluded from rearranging or even removing clothing, including undergarments, if that is necessary to render medical assistance, provided that the true purpose is not to search for evidence of a crime.

It goes without saying, moreover, that even in the absence of the new statute, school officials would be precluded from conducting a "body cavity" search. It is simply not possible to conceive of a situation where a less invasive and thus preferable option would not be available to respond to even the most urgent circumstances. Thus, even if school officials had highly-reliable information to suggest that a student was concealing drugs in his or her body cavity and intended to destroy those drugs, or even intended to consume them in an apparent suicide attempt, the correct response would be to restrain the child and call the police or other appropriate emergency response or medical personnel, *not* to reach into the anal or vaginal cavity to retrieve the drugs or to conduct a visual inspection of the orifice to confirm the presence of the drugs.

The term "body cavity" as used in the new statute does not include a student's oral cavity. See N.J.S.A. 2A:161A-3b, which refers specifically to a person's anal or vaginal cavity. Even so, because an oral inspection involves a significantly invasive search, a school official should not order a student to open his or her mouth for visual inspection unless there are strong reasonable grounds to believe that the student is trying to conceal or swallow evidence of a serious infraction or violation of law. Needless to say, a school official may nonetheless order a student to "spit out" something that is obviously in the student's mouth, such as chewing gum, without running afoul of the Federal or State Constitutions. Where the school official reasonably believes that the student has ingested a controlled dangerous substance or any other object or substance that might pose a threat to the student's health, the school official should report the matter immediately and seek appropriate medical assistance. See also Chapter 13.2 specifying the procedures school officials must follow where there is a reason to believe that a student is under the influence of an intoxicating substance.

It is important to note that the new strip search statute prohibits school officials from engaging in less intrusive conduct that, in some circumstances, might not have been unconstitutional. The Legislature, of course, is free to afford students and other citizens greater rights and protections than are minimally guaranteed by the State and Federal Constitutions.

Consider that in Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993), public high school officials conducted a search of a male high school student who was suspected of carrying drugs in his crotch area, based on an observed unusual bulge. Two male school officials accompanied the student to the boys' locker room to conduct the search. The school officials made certain that no one else was present in the locker room and then locked the door to ensure that the search would be conducted in private. The school officials stood at a distance of 10 to 12 feet from the student when they ordered him to remove his street clothes and put on a gym uniform. The school officials visually inspected the student's naked body and physically inspected his clothes. They found no evidence of drugs or any other contraband.

The student filed a civil rights action under 42 U.S.C. § 1983. The Court of Appeals for the Seventh Circuit affirmed the trial court's order granting summary judgment in favor of the school officials. The court in summarily dismissing the lawsuit noted that no one could seriously dispute that a nude search of a child is traumatic. The court nonetheless found that school officials had reasonable grounds to believe that the student was hiding drugs in his crotch area (recall that a search is not unconstitutional merely because no evidence was found), and that the suspicion justified the search in the careful manner in which it was conducted.

In light of the new statute, however, it is clear that this type of conduct is now prohibited in New Jersey if undertaken by school officials. Accordingly, where a school official believes that suspected evidence of a crime could only be revealed by the removal or rearrangement of clothing that would reveal the student's undergarments, buttocks, anus, genitals, or breasts, the correct response is to call the police, who are authorized to conduct a strip search in appropriate circumstances. It is important to note in this regard that the prohibition against strip searching of students contained in the new law applies only to searches undertaken by school officials. Police officers, in contrast, will continue to be bound by the law codified at N.J.S.A. 2A:161A-3 et seq. and guidelines issued by the Attorney General pursuant to that law. (Those guidelines are attached as Appendix 11.)

Although school officials are clearly prohibited from conducting a strip search under the new statute, and thus would be precluded from ordering a student to disrobe or to engage in conduct that would expose the student's undergarments or nude body, school officials are not precluded from directing a student to produce contraband or evidence that happens to be concealed in the student's undergarments. Although the act of ordering a student to produce an object concealed on his or her person clearly constitutes a "search" within the meaning of the Fourth Amendment, such conduct, if actually undertaken by the student himself or herself, would *not* constitute a "strip

search" within the meaning of the new statute, since there would be no touching of the student nor exposure to view of the student's undergarments or nude body.

If the student refuses to produce evidence believed to be concealed in undergarments in response to a request or demand made by a school official who has reasonable grounds to believe that such evidence is present, school officials at that point would be well-advised to call the police. Note, moreover, that school officials would be free to warn the student that if he or she refuses to reveal the object suspected to be present, the police will be summoned to the scene. (Note in this regard that school officials in these circumstances would not be asking for "consent" to search, but rather would be conducting a search pursuant to New Jersey v. T.L.O. based upon reasonable grounds to believe that the student is concealing evidence of a crime.)

Finally, the new statute would not prohibit a school official from conducting a limited patdown of outer clothing (or requiring a student to remove outer clothing). Any such patdown would be similar to a police "frisk" for weapons, but need not be limited to a search for weapons. Thus, a school official who has reasonable grounds to conduct a search could patdown a student's outer clothing to reveal or examine an unexplained bulge that could be any form of contraband or evidence of crime. Because this limited tactile search would not involve rearranging clothing to the point of exposing undergarments or the student's buttocks, anus, genitals, or female breasts, it would not be a strip search within the meaning of the new statute. As noted in Chapter 10.1, school officials nonetheless must proceed with great caution and restraint in conducting any form of a search that involves physically touching a student's person.

11. PLAIN VIEW

During the course of their duties, school authorities may come across an item that they immediately recognize to be evidence of a school rule infraction or of a crime. This may occur during the course of a suspicionless inspection (see Chapter 4), a suspicion-based search (see Chapter 3), or during the course of routine interactions with students or while patrolling the hallways or conducting a surveillance. (see Chapter 9). School officials are permitted under the Fourth Amendment to seize these items, which are said to be in "plain view," provided that (1) at the moment the items come into view, the school officials are legitimately present and have not already violated a student's Fourth Amendment rights, and (2) it is immediately apparent to the school officials that they are, in fact, observing evidence of a crime or infraction.

Note that with respect to the first criterion, if school officials have already violated a student's Fourth Amendment rights, the plain view doctrine does not apply, and any evidence observed or seized following the Fourth Amendment violation will be said to be a "fruit" of the unlawful search or seizure and thus subject to the exclusionary rule. Note further that if the object was observed only after school officials had peeked, poked, or pried (i.e., had to open a closed container or rearrange clothing), then the items subsequently observed can only be lawfully seized if school officials had acted appropriately in conducting the peeking, poking, or prying. In other words, school officials must have reasonable grounds to believe that evidence of a school rule infraction or crime will be found *before* they engage in searching conduct that reveals the object.

Thus, for example, if a school official directs a student to empty his pockets without first having reasonable grounds to believe that the student is carrying evidence of an infraction or offense, any items dutifully revealed by the student would *not* be said to be in "plain view." Rather, those objects would be said to be a "fruit" of a search that, in this example, would have been unlawfully conducted.

On the other hand, if the student voluntarily and on his or her own initiative chooses to empty his pockets, or unwittingly reveals an object that was concealed in a closed container, that object would be said to be in "plain view," and it could be seized lawfully provided that it is immediately apparent to school officials that the object is contraband or is evidence of a school rule infraction or violation of the criminal law.

With respect to the "immediately apparent" criterion, the police officer or school official must be able to recognize the incriminating character of the evidence without conducting any further peeking, poking, or prying (unless, of course, the officer or official is already permitted to conduct a further peeking, poking, or prying under a

separate legal theory). This usually means, in the context of a law enforcement operation, that the police officer has *probable cause* to believe that the items in plain view are evidence or contraband. See Arizona v. Hicks, 480 U.S. 321, 326-328, 107 S.Ct. 1149, 1153-1154, 94 L.Ed.2d 347 (1987). In the context of a discovery by a school officials, it would seem that the school employee need only have *reasonable grounds* to believe that the items in plain view are contraband or evidence of a crime or school rule infraction. (Recall that the United States Supreme Court in T.L.O. held that school officials need not be concerned with the probable cause standard that applies to searches conducted by police.)

Under the plain view doctrine, ordinarily, the seized evidence would have been discovered "inadvertently." It is not uncommon for school officials to initiate a search looking for a particular type of object or item and, during the course of the search, discover evidence of a completely different and previously unsuspected violation. Thus, for example, school officials may conduct a search of a student's purse looking for cigarettes based upon reasonable grounds to believe that the student had been smoking, and subsequently discover evidence of drug-abuse violations, such as drug paraphernalia or illicit substances. In that event, school officials may lawfully seize the drugs and drug paraphernalia. In fact, that is exactly what happened in New Jersey v. T.L.O..

In Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), the United States Supreme Court noted that "inadvertence" is characteristic of most plain view seizures, although the Court said that inadvertence is not a necessary element or condition. As a general rule, if police officers know in advance that they are going to find a particular item during the course of a search, they are expected to apply for a search warrant that specifically identifies all of the items to be seized. Under federal law, a seizure of an item would nonetheless be lawful under the plain view doctrine even if police could have, but chose not to, describe the object in their warrant application, so long as the police do not expand the scope of their search beyond that authorized by the warrant.

In State v. Damplias, 282 N.J. Super. 471 (App. Div. 1995), a New Jersey court declined to decide whether "inadvertence" is required in New Jersey under the plain view doctrine. In any event, this is not likely to become a significant issue in the context of searches conducted by school officials, since they are not, in any event, required to stop and apply for a search warrant where they have reasonable grounds to believe that a given search would reveal evidence of a school rule infraction or violation of the criminal law.

In a closely-related vein, police officers are not allowed to expand the scope of their search upon the discovery of evidence in plain view, unless the expanded search is authorized by a warrant or some other (i.e., besides "plain view") recognized exception to the warrant requirement. So too, government officials conducting a so-called "administrative search" cannot rely on evidence discovered in plain view during the administrative inspection as the basis upon which to expand the scope of the search "without first making a successful showing of probable cause to an independent judicial officer." Michigan v. Clifford, 464 U.S. 287, 294, 104 S.Ct. 641, 647 (1984). Thus, fire officials who are conducting an administrative inspection into the cause and origin of a fire who discover evidence of arson may seize that evidence, but are not permitted to conduct a more intrusive search (one that goes beyond a cause and origin inspection) without first obtaining a warrant.

Once again, this principle would not seem to apply in the context of searches conducted solely by school officials. Although the New Jersey Supreme Court in T.L.O. referred to these as "administrative" searches (as distinct from traditional criminal searches), the fact remains that school officials are allowed to conduct complete and thorough searches without having to apply for warrants and on the basis of a more flexible and less stringent standard of proof than probable cause. Thus, when a school official lawfully observes an object in plain view that is immediately recognized to be contraband or evidence of a crime or school rule infraction, the school official may not only seize that item, but may also proceed immediately to conduct a further search for additional like evidence, provided that the initial discovery, considered in conjunction with all other known facts, provides reasonable grounds to believe that additional evidence will be found in a particular place or in a particular container that is on school grounds or that is otherwise subject to school supervision.

It is important to note that the "plain view" doctrine applies to any of the human senses, including smell. In State v. Judge, 275 N.J. Super. 194 (App. Div. 1994), Judge (now Justice) Coleman ruled that the smell of burning marijuana coming from a passenger compartment of a lawfully-stopped vehicle constitutes probable cause. So too, in State v. Vanderveer, 285 N.J. Super. 475 (App. Div. 1995), the court held that the smell of burning marijuana on a small porch constituted probable cause to believe that an offense was being committed. (The fact that drugs were *not* found during the course of the search did not mean that the search was unlawful.) Since the recognizable smell of marijuana (or, presumably, burning tobacco products) constitutes probable cause, it is doubtless that school officials who smell burning marijuana (or burning tobacco products) would have "reasonable grounds" to conduct a search, since it is well-settled that the reasonable grounds standard governing school searches requires less proof than

the probable cause standard that applies to searches conducted by police.

The plain view doctrine also applies to the sense of touch. In Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), the United States Supreme Court held that police officers may lawfully seize an object discovered during the course of conducting a lawful "frisk" or "patdown" for weapons if it is "*immediately apparent*" to the officers during the course of the protective frisk that the object that they are touching is evidence of a crime. This case has thus established the so-called "plain touch" or "plain feel" doctrine. The Court made clear, however, that it must be immediately apparent to police that they are feeling evidence of a crime *without* squeezing, sliding, or otherwise manipulating the contents of the suspect's pocket. The act by a police officer of squeezing, sliding, or manipulating the suspect's clothing constitutes a full-blown search, which goes well beyond the conduct that is permitted during a limited "patdown" for weapons.

In the context of school search law, however, this limitation on what police can do during the course of a protective frisk for weapons should not pose a particular problem. A school official, after all, would only be permitted to conduct a physical "patdown" of a student if he or she has reasonable grounds to believe that the student is carrying a weapon or other evidence of a school rule infraction or crime. In the event that school officials have such reasonable grounds, they (unlike police officers) would be authorized to conduct a *full-blown search*, subject, of course, to the limitations described in Chapter 10 concerning searches of persons and "strip searches". (Recall that police cannot conduct a full search of a person's clothing unless they have probable cause to arrest — a significantly higher standard of proof than the reasonable suspicion that authorizes police to conduct a limited patdown for weapons, or that authorizes school officials to conduct a full search.) Accordingly, where school officials have reasonable grounds to conduct any search at all, whether or not for weapons, they would be *permitted* to squeeze, slide, or otherwise manipulate the contents of a pocket. (But again, see Chapter 10 for a detailed discussion of the law governing strip searches and searches of the person.)

As noted in Chapter 3, because every search conducted by school officials must be limited to its legitimate objective, a search should ordinarily cease when the particular item being sought has been found and removed, provided that there is no basis for continuing to search for other suspected items. If a search conducted by school officials is based on reasonable grounds to believe that drugs will be found, school officials need not, of course, automatically stop upon the discovery of the first marijuana cigarette or packet of white powdery substance. Rather, the school officials conducting the 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. (Of course, school officials at this point may also elect to discontinue the search and call the police, who can be asked to assume responsibility for conducting any further searches. (See Chapter 14.1.) If school officials choose that option, they must take steps to ensure that the student, or anyone who may be working in concert with the student, does not conceal or destroy evidence before the police can arrive on the scene.)

Note also that the items revealed during the course of a lawful search may provide a factual basis to conduct an entirely new search based on a new suspicion of wrongdoing. Consider the following example: A student is observed carrying a small knife. The student could be brought to the principal's office and could be ordered to empty his pockets. Although the search in that case would be justified by reasonable grounds to believe that the student is carrying a weapon on his person, if the search of the student's pockets were to reveal drugs or drug paraphernalia, school officials could not only lawfully seize that contraband, they could also conduct a separate new search of the student's locker based on a suspicion that additional drugs or drug paraphernalia might be concealed at that location. (Note that a reasonably-grounded suspicion that the student was carrying a knife in his pocket would probably ***not*** justify a search of the student's locker unless there was some articulable reason to believe that the student kept additional weapons in the locker. See Chapter 3.2A for a discussion of the "four step" analysis that school officials should perform before initiating a search, or in this context, before expanding the search.)

THIS PAGE LEFT INTENTIONALLY BLANK

12. EXIGENT CIRCUMSTANCES

12.1. General Considerations.

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

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

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

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

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

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

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

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

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

12.2. Protection of Evidence.

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

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

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

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

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

12.3. Explosives and Bomb Threats.

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

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

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

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

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

THIS PAGE LEFT INTENTIONALLY BLANK

13. URINALYSIS DRUG TESTING

13.1. General Considerations.

The United States Supreme Court has definitively ruled that urine testing is an intrusion on privacy, both during collection of the sample and when the sample is tested. Thus, state-compelled collection and testing of urine constitutes a "search" subject to the demands of the Fourth Amendment. Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 617, 626-627, 109 S.Ct. 1402, 1413, 1418-1419, 103 L.Ed.2d 639, 665-666 (1989).

For purposes of Fourth Amendment analysis, there are essentially two distinct types of compulsory urinalysis: (1) drug testing of a specific student based on an individualized suspicion that that student has recently abused or is under the influence of drugs or alcohol, and (2) suspicionless or "random" drug testing. The legal requirements concerning the former type of drug testing are discussed in Chapter 13.2 The legal requirements governing the latter type of drug testing are discussed in Chapter 13.3.

It is critical to note that in the case of *both* suspicion-based drug tests and random drug tests, positive test results may only be used by school officials for bona fide educational purposes, must be kept strictly confidential, and may not be provided to law enforcement agencies. It is not clear as a matter of law, however, whether a positive drug test may be used, either alone or in conjunction with other facts, in determining whether there are reasonable grounds that would justify school officials in conducting a search of a student's locker or belongings for physical evidence of illicit drugs or alcoholic beverages.

This question may be academic in the context of a suspicion-based drug test, since the facts or circumstances that would establish reasonable grounds to compel a student to submit to drug testing would seem also to provide reasonable grounds to conduct a search of that student's locker or possessions for controlled substances or alcohol. In other words, since the legal standard governing suspicion-based drug testing is identical to the standard that applies to more traditional searches for physical evidence undertaken by school officials, it would not be necessary for a school official to wait to learn the results of a drug test and to use that information to justify a search for controlled dangerous substances or alcohol. In fact, the better practice in those circumstances would be to conduct the search for physical evidence at or about the same time that the student is ordered to submit to urinalysis so as to make certain that any illicit drugs or alcohol that may be stored in the student's locker are not retrieved by

other students, (note that pursuant to State Board of Education regulations, the student believed to be under the influence of drugs or alcohol must be removed from the school), and also to provide medical practitioners with information that would assist them in providing appropriate diagnosis and treatment to the student who is suspected of being under the influence of some unknown intoxicating substance.

The issue is far more complex where a *random* drug test produces a positive result indicating that the student had recently used (and thus may still be in possession of) alcohol or a controlled dangerous substance. Note that school officials cannot search a locker, desk, or student property unless they have reasonable grounds to believe that drugs or alcohol are currently concealed in the place to be searched. Given the normal delays in receiving drug test results, a positive test result may in any event be too "stale" to justify the search of a locker or other place commonly used to conceal a cache of drugs or alcohol, at least in the absence of some other source of information. (See Chapter 3.2B(8) for a more detailed discussion of "staleness" in the context of suspicion-based searches.)

As noted in Chapter 13.3, the constitutionality of a random drug testing policy will depend on whether it is found to serve a "prophylactic and distinctly *non*punitive" purpose, which distinguishes a random drug test from an "evidentiary" search. While positive random drug test results can, under the Fourth Amendment, lawfully be used as the basis for excluding a student from participating in interscholastic athletic programs, and perhaps from participating in other extracurricular programs as well, it is by no means clear that the drug test results can be used as the predicate for an investigation leading potentially to more serious disciplinary actions, such as suspension, expulsion, or even eventual criminal prosecution for possession of illicit drugs found in a search conducted by school officials that would not have been conducted but for the positive drug test result.

There can certainly be no question that positive urinalysis results can never be provided to or used by a law enforcement agency. The issue, rather, is whether school officials in the course of enforcing school disciplinary rules, and police and prosecutors in the course of enforcing criminal laws, may rely upon physical evidence that was discovered as a result of a physical search predicated upon a well-grounded suspicion that in turn was engendered or bolstered by the results of a random drug test. It would seem that a search of a locker or other container in these circumstances would be deemed to be a "fruit" of the random drug test, unless school officials were already aware of other facts that provided an independent and sufficient basis to conduct the search for physical evidence.

From a policy perspective, the better rule would be that school officials should never be required to close their eyes to reliable facts that suggest that contraband has been brought on to school grounds and is likely to be secreted in a particular location. Given the legal controversies and uncertainties surrounding random drug testing, however, it is by no means certain or even likely that a majority of the members of the United States Supreme Court, much less the New Jersey Supreme Court, would permit school officials to use random drug test results in any way to initiate or support an investigation into violations of school rules or the criminal law.

13.2. Drug/Alcohol Testing Based on Suspicion of Intoxication.

The act of ordering a student to submit to urinalysis to detect the presence of alcohol, controlled dangerous substances, or their metabolites constitutes a "search" for Fourth Amendment purposes. Accordingly, an individual student may not be compelled by school officials to submit to urinalysis unless the school official meets the "reasonable grounds" test established in New Jersey v. T.L.O. and discussed in detail in Chapter 3 of this Manual.

State law and regulations clearly prescribe the responsibilities and procedures for school officials to follow where a student is believed to be under the influence of drugs or alcohol. See N.J.S.A. 18A:40A-12. The statutory procedures are restated and amplified in rules and regulations promulgated by the State Board of Education at N.J.A.C. 6:29-6.5. Specifically, N.J.A.C. 6:29-6.5a provides that:

> In instances involving alcoholic beverages, controlled dangerous substances or any chemical or chemical compound as identified in N.J.A.C. 6:29-6.3(a), the following shall apply:
>
> 1. Any professional staff member to whom it appears that a pupil may be under the influence of alcoholic beverages or other drugs on school property or at a school function shall report the matter as soon as possible to the school nurse or medial inspector and the principal.
>
> i. In the absence of the principal, his or her designee shall be notified; and,
>
> ii. In instances where the school nurse, medical inspector or the principal are not in attendance, the staff member responsible for the school function shall be immediately notified.

2. The principal or his or her designee shall immediately notify the parent or guardian and the chief school administrator and arrange for an immediate examination of the pupil. The examination may be performed by a physician selected by the parent or guardian or by the medical inspector. If the chosen physician is not immediately available, the examination shall be conducted by the medical inspector or, if the medical inspector is not available, the pupil shall be accompanied by a member of the school staff, designated by the principal, to the emergency room of the nearest hospital for examination. If available, a parent or guardian should also accompany the pupil.

3. If, at the request of the parent or legal guardian, the medical examination is conducted by a physician other than the medical inspector, such examination shall not be at the expense of the district board of education.

4. Provisions shall be made for the appropriate care of the pupil while awaiting the results of the medical examination.

5. A written report of the medical examination shall be furnished to the parent or guardian of the pupil, the principal and the chief school administrator by the examining physician within 24 hours.

6. If the written report of the medical examination is not submitted to the parent or guardian, principal and chief school administrator within 24 hours, the pupil shall be allowed to return to school until such time as a positive diagnosis of alcohol or other drug use is received.

7. If there is a positive diagnosis from the medical examination, indicating that the pupil is under the influence of alcoholic beverages or other drugs, the pupil shall be returned to the care of a parent or guardian as soon as possible. Attendance at school shall not resume until a written report has been submitted to the parent or guardian of the pupil, the principal and chief school administrator from a physician who has examined the pupil to diagnose alcohol or other drug use. The report shall certify that substance abuse no longer interferes with the pupil's physical and mental ability to perform in school. In addition, the staff member shall complete the Violence, Vandalism and Substance Abuse Incident Report.

8. Refusal or failure by a parent to comply with the provisions of N.J.S.A. 18A:40A-12 shall be deemed a violation of the compulsory education

(N.J.S.A. 18A:38-25 and 18A:38-31) and/or child neglect (N.J.S.A. 9:6-1 et seq.) laws.

9. While the pupil is at home because of the medical examination or after his or her return to school, the school may require additional evaluation for the purpose of determining the extent of the pupil's alcohol or other drug use and its effect on his or her school performance.

Rules and regulations promulgated by the State Board of Education establish nearly identical procedures with respect to cases involving the suspected use of anabolic steroids, see N.J.A.C. 6:29-6.5b, although anabolic steroids have since been classified Schedule III controlled dangerous substances. N.J.A.C. 8:65-10.3(b)(4); 24 N.J.R. 2256b (effective June 15, 1992). It would thus seem that the provisions of N.J.A.C. 6:29-6.5b have been rendered moot, and that school officials must comply with the provisions of N.J.A.C. 6:29-6.5a in cases involving anabolic steroids.

School officials must also scrupulously comply with state and federal laws and regulations concerning the confidentiality of substance abuse, diagnosis and treatment information. See e.g. 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2. These confidentiality laws and regulations are discussed in greater detail in Chapter 14.2.

13.3. Suspicionless or Random Drug Testing.

A. Introduction. There is probably no subject within the field of search and seizure law that is more controversial than the question whether and under what circumstances school officials may compel large numbers of students to submit to suspicionless or random urinalysis. As of the time this Manual is being prepared for publication, there are a number of pending cases in New Jersey courts challenging the constitutionality of school drug testing programs. It is impossible to predict with certainty how these cases will be resolved by the trial courts, and eventually, by the Appellate Division and the State Supreme Court. In the circumstances, this Chapter will not attempt to address every conceivable legal issue that might arise, and school officials who desire to implement a drug testing policy should consult with the school board attorney.

Nothing in this Manual should be construed as either endorsing or disapproving random drug testing programs. This discussion, rather, is intended only to provide a whirlwind tour of the legal issues that might arise were a school to adopt such a policy.

Because information learned during the course of a drug testing program may never be shared with law enforcement authorities, and because this is a specialized field of search and seizure law that extends beyond the expertise of county prosecutors as the chief law enforcement officers within their jurisdictions, school officials should not rely upon county prosecutors to give advice concerning random urinalysis programs, and prosecutors would be well-advised not to offer advice on this topic. (See the discussion in Chapter 14.5 concerning Attorney General Directive 1988-1, which authorizes county prosecutors to answer questions posed by school officials concerning search and seizure issues.)

As a practical matter, those school districts that have developed random drug testing programs will also employ a range of other policies and programs that are designed to discourage students from using alcohol and other drugs and from bringing drugs, alcohol, and other contraband on to school grounds. This is not to suggest that as a matter of constitutional law, school districts can only implement a random drug testing policy as a "last resort," where other tactics have failed or would likely prove to be unavailing in addressing a school's particular substance abuse problem. Compare N.J.S.A. 2A:156A-9 (electronic surveillance law that provides that a wiretap application can only be approved by a court upon a finding that "normal investigative procedures ... have been tried and have failed or reasonably appear to be unlikely to succeed if tried... .") In fact, the United States Supreme Court has repeatedly refused to declare that only the "least intrusive" search practical can be reasonable under the Fourth Amendment. See discussion in Chapter 2.8. Even so, as is true with respect to the use of drug-detection canines discussed in Chapter 4.5, the better policy and practice would be to use random drug testing, if at all, to supplement, not to supplant, other methods and procedures available to school officials to discourage students from abusing drugs and alcohol and from bringing and keeping drugs and alcohol on school grounds.

B. Fourth Amendment Issues. Recently, the United States Supreme Court decided a landmark case that explains when and under what circumstances school officials would be permitted under the Fourth Amendment to adopt a policy that requires certain students to submit to random, suspicionless drug testing. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). In that case, the school district in the town of Vernonia, Oregon, adopted a policy that authorized random urinalysis drug testing of students who participate in school athletics programs. The policy applied to all students participating in interscholastic athletics. Students wishing to play sports were required to sign a form consenting to the testing and were also required to obtain the written consent of their parents. (For the reasons discussed in Chapter 8, such compelled "consent" would not be a valid "waiver" of constitutional rights under New Jersey law.) Student athletes were tested at the

beginning of the season for their sport; in addition, once each week of the season, the names of the athletes were placed in a "pool" from which a student, under the supervision of two adults, would blindly draw the names of 10% of the athletes for random testing. Those randomly selected would be notified and tested that same day, if possible.

The students selected to be tested would complete a "specimen control form" bearing an assigned number. Students taking prescription medications were required to identify the specific medication by providing a copy of the prescription or a doctor's authorization. The student would then enter an empty locker room accompanied by an adult monitor of the same sex. Each boy selected would produce a sample at a urinal, remaining fully clothed with his back to the monitor, who would stand approximately 12 to 15 feet behind the student. Monitors were permitted to watch the student while he produces the sample, and they would listen for normal sounds of urination. Female athletes would produce samples in an enclosed bathroom stall, so that they could be heard but not observed. After the sample is produced, it would be given to the monitor, who would check it for temperature and tampering and then transfer it to a vial. The samples would then be sent to an independent laboratory, which would routinely test them for amphetamines, cocaine, and marijuana. Other drugs, such as LSD, might be screened at the request of the school district.

The United States Supreme Court accepted the finding that the laboratory's procedures are 99.94% accurate. The school district followed strict procedures regarding the "chain of custody" of the urine samples and access to test results. The laboratory, for example, would not know the identity of the students whose samples it tests. The laboratory was authorized to mail written test results only to the superintendent and to provide test results to school district personnel by telephone only after the requesting official recites a code confirming his or her authority. Only the superintendent, principals, vice-principals, and athletic directors had access to test results, and the results were not kept for more than one year.

If a sample tested positive, a second test would be administered as soon as possible to confirm the result. If the second test was negative, no further action would be taken. If the second test was positive, the athlete's parents would be notified, and the school principal would convene a meeting with the student and his or her parents, at which time the student would be given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next athletic season. The student would then be retested prior to the start of the next athletic season for which he or she is eligible. The policy also provided that a second offense would result in

automatic imposition of option #2; a third offense would result in suspension of the remainder of the current season and the next two athletic seasons.

In upholding the constitutionality of this policy by a 6-3 margin, the United States Supreme Court began its analysis by observing that the ultimate measure of the constitutionality of a governmental search is "reasonableness." The question whether a particular search meets the reasonableness standard, in turn, "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." 115 S.Ct. at 2390. The Court recognized that searches unsupported by probable cause can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impractical." Id. at 2391. The Court in Vernonia recognized that it had previously determined that such "special needs" exist in the public schools, citing to New Jersey v. T.L.O..

The Supreme Court then considered the nature of the privacy interests upon which the search intrudes, recognizing that the Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as legitimate. "Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." Id. at 2391. The Court further explained that particularly with regard to medical examinations and procedures, "students within the school environment have a lesser expectation of privacy than members of the population generally." Id. at 2392. Legitimate privacy expectations, the Court reasoned, are even less with regard to student athletes. "School sports," the Court found, "are not for the bashful," and "public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford." Id. at 2392-2393.

The Court also found that school athletes enjoy reduced expectations of privacy since, "[b]y choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally," since the school district had long maintained a policy that athletes must submit to a pre-season physical exam. Id. at 2393. For all of these reasons, the Court concluded that the privacy interests compromised by the process of obtaining the urine sample are "negligible." Id.

The Court then considered the other aspect of privacy invasion associated with urinalysis, that is, the disclosure of information concerning the state of the subject's body and the materials that he or she has ingested. The Court found it significant that the tests at issue looked only for drugs, and not for whether the student is, for example,

epileptic, pregnant, or diabetic. Id. at 2393. Moreover, the drugs for which the samples were screened are standard and did not vary according to the identity of the student.

Finally, and of great importance, the Court noted that the results of the tests are disclosed only to a limited class of school personnel who have a need to know, and are not turned over to law enforcement authorities or used for any internal disciplinary function. Id. at 2393. This led the Court to conclude that these searches are undertaken for prophylactic and distinctly *non*punative purposes, thus clearly distinguishing these searches from so-called "evidentiary" searches. Id. at 2393, n.2. See also discussion in Chapter 4.5D4(c) (discussing the importance of the underlying "purpose" of a generalized or suspicionless search).

The Supreme Court concluded its Fourth Amendment analysis by turning to a discussion of the nature and immediacy of the governmental concern at issue and the efficacy of the means chosen by the school district to meet it. The Court concluded that it "can hardly be doubted" that the nature of the concern, deterring drug use by our nation's schoolchildren, "is important — perhaps compelling ... ." Id. at 2395. The Court found that:

> School years are the time when the physical, psychological, and addictive effects of drugs are most severe ... and of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.
> [Id. at 2395.]

The Court also emphasized that the urinalysis program at issue in that case was directed narrowly to drug use by school athletes, "where the risk of immediate physical harm to the drug user and those with whom he is playing his sport is particularly high." Id.

As to the effectiveness of this means for addressing the problem, the Court stated that, "it seems to us self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs." Id. at 2396. The majority of the Court at this point expressly rejected the respondent's argument that a "less intrusive" means to the same end was available, namely, "drug testing on suspicion of drug use." Id. at

2396. In fact, the Court concluded that, "[i]n many respects we think, testing based on 'suspicion' of drug use would not be better, but worse." Id.

Taking into account all of these factors — the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search — the United States Supreme Court concluded that the school district's policy was reasonable and hence constitutional. The Court nonetheless took pains to:

> caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.
> [Id. at 2396.]

C. State Constitutional Analysis. As noted throughout this Manual, the New Jersey Supreme Court has on several occasions interpreted Article I, Paragraph 7 of the New Jersey Constitution, the counterpart to the Fourth Amendment, to provide citizens with greater protections against unreasonable searches and seizures than are provided by the United States Constitution as interpreted by the United States Supreme Court and other federal courts. The question thus arises whether the random drug urinalysis scheme held to be constitutional by the United States Supreme Court in Vernonia would survive constitutional scrutiny by our state courts. In resolving this difficult question, New Jersey courts will look not only to the text of the constitutional provisional issue (in this instance, the text of Article I, Paragraph 7 of the New Jersey Constitution is virtually identical to the text of the Fourth Amendment to the United States Constitution), but also to pre-existing state law, distinctive state traditions, and public attitudes compelling a different state constitutional interpretation. See State v. Hunt, 91 N.J. 338, 364-367 (1982) (Handler, J., concurring).

With respect to pre-existing state law, there seems to be only one published state court decision dealing with a school policy requiring certain students to submit urine samples for drug testing, and that case, Odenheim v. Carlstadt-East Rutherford Reg. Sch., 211 N.J. Super. 54 (Ch. Div. 1985), was decided by a trial level judge, rather than by an appellate court or the New Jersey Supreme Court. The judge in that case ruled that the school search policy at issue was unconstitutional, although for the reasons discussed below, the precedental value of that trial court ruling is questionable if not negligible in light of Vernonia and more recent New Jersey Supreme Court decisions.

In Odenheim, a student challenged a school policy that required enrolled students to submit to a comprehensive medical examination that, in addition to other more traditional medical tests, included drug screening designed to detect the presence of controlled dangerous substances. The urine samples were taken for a number of traditional medical tests as well as the drug screen, and the policy provided that no civil or criminal sanctions would be imposed in the event of a positive test.

Even so, the trial court in Odenheim found that the policy violated the reasonable privacy expectations of schoolchildren. 211 N.J. Super. at 61. The court determined that the policy was:

> not reasonably related in scope to the circumstances which initially justified the interference. School policy already provides for exclusion and/or suspension of students who are involved with drug activity. The raw numbers and percentages of students referred to a student assistance counseling as compared with the total student body is not reasonably related in scope to the circumstances which justify the interference, urinalysis, in the first place.
> [211 N.J. Super. at 61.]

Although the decision notes that the plaintiff's challenge was based not only on the Fourth Amendment but also on Article I, Paragraph 7 of the New Jersey Constitution, the court's entire analysis was under the Fourth Amendment and the judge relied entirely on federal precedent. Indeed, the trial court cited to no published state court decision at all.

We now know, of course, in light of the recent Vernonia decision, that the Odenheim court's reliance upon federal precedent turns out to have been misguided. It is interesting that in Vernonia, the United States Supreme Court at the very end of its opinion commented that the 9th Circuit Court of Appeals, a federal court, had earlier held that Vernonia's policy not only violated the Fourth Amendment, but also, by reason of that violation, contravened Article I, Paragraph 9 of the Oregon Constitution. The United States Supreme Court observed, "[o]ur conclusion that the former holding was in error means that the latter holding rested on a flawed premise." 115 S.Ct. at 2397. Thus, by the same token, to the extent that the Odenheim court's ruling rested on Fourth Amendment principles, that holding too is based on a flawed premise.

In a slightly different context, an appellate-level court in 1987 ruled that the random drug testing of police officers violates Article I, Paragraph 7 of the New Jersey Constitution, even if such testing does not violate the Fourth Amendment of the United

States Constitution. See Fraternal Order of Police, Newark Lodge No. 12 v. The City of Newark, 216 N.J. Super. 461(App. Div. 1987). While the F.O.P. case might until very recently have been cited for the proposition that the New Jersey Constitution bans all forms of random drug testing, the fact remains that that case no longer carries any precedental weight in view of a recent New Jersey Supreme Court case that ruled that random drug testing of New Jersey Transit police officers does *not* violate the State Constitution. In New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 151 N.J. 531 (1997), the New Jersey Supreme Court, in a unanimous opinion authored by Chief Justice Poritz, chose to follow the lead of the United States Supreme Court, rather than to interpret the State Constitution to provide additional protections against random drug testing.

The PBA argued that the "special needs" test developed by the United States Supreme Court in its series of random drug testing cases is not compatible with Article I, Paragraph 7 of the New Jersey Constitution. The New Jersey Supreme Court, while acknowledging that it has on occasion found that Article I, Paragraph 7 affords greater protections against unreasonable searches and seizures than does the Federal Constitution, nonetheless found that the "special needs" test provides "a useful analytical framework for considering the protections afforded by Article I, Paragraph 7 of the New Jersey Constitution," and the Court thus adopted that method of analysis. Id. at 556. The Court in unanimously rejecting the PBA's argument added that, "[t]his [federal analytical] approach enables a court to take into account the complex factors relevant in each case and to balance those factors in such manner as to ensure that the right against unreasonable searches and seizures is adequately protected." Id. It is also interesting to note that the New Jersey Supreme Court cited to and to some extent relied on Vernonia in reaching its conclusion. Id. at 553.

After conducting a "context-specific inquiry," the Court, considering the police officers' decreased expectation of privacy, the adequate limitations on the intrusiveness of the testing, and the compelling state interests in promoting safe conduct by armed officers, held that random drug testing of the New Jersey Transit police force is constitutional. Id. at 564-565.

In light of the New Jersey Supreme Court's recent and unanimous opinion in New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., there would seem to be no precedent to support the argument that the rule established by the United States Supreme Court in Vernonia would violate Article I, Paragraph 7 of the New Jersey Constitution. This is especially true in the context of students' privacy rights, since the New Jersey Supreme Court in T.L.O. had developed essentially the same legal standard for determining the reasonableness of school searches that was eventually accepted by

the United States Supreme Court in T.L.O.. (See Chapter 1.4, noting that while the United States and New Jersey Supreme Courts used the same "reasonable grounds" test, the Courts disagreed in applying the facts of that case to the legal standard of review.) This point was emphasized by the Appellate Division in Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370, 379 (App. Div. 1993), a case discussed in Chapter 7 in which the court sustained the constitutionality of the school's policy of searching students' hand luggage prior to field trips. The court in Desilets, in rejecting the plaintiff's contention that the search policy violated Article I, Paragraph 7 of the New Jersey Constitution, explained:

> We note that in its T.L.O. opinion the New Jersey Supreme Court analyzed the search and seizure issue under the Fourth Amendment to the United States Constitution, and did not suggest that New Jersey's organic law imposed more stringent standards.
> [264 N.J. Super. at 382.]

D. Factual Basis Justifying a Random Drug Testing Program. A court reviewing the constitutionality of a school policy that requires certain students to submit to random drug testing must undertake a "context-specific" inquiry, examining closely the competing private and public interests advanced by the parties. See New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., supra, 151 N.J. at 559. Given the inherent vagaries of this case-by-case balancing test, it is reasonable to expect that litigation will focus not on whether the State Constitution should be interpreted differently from the Fourth Amendment, but rather on how to apply the unique facts and circumstances of each particular case to the Vernonia legal standard. It is simply not clear exactly what facts must be presented to convince a court that random drug testing is a reasonable response to a school's drug problem.

In Vernonia, the United States Supreme Court briefly recounted the facts that were found at trial, beginning with an observation that in that Oregon school district, "as elsewhere in small town America, school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community." 115 S.Ct. at 2388.

According to the Court, teachers and administrators in the mid-to-late 1980's observed a sharp increase in drug use. Students in the Vernonia school district began to speak out about their attraction to the drug culture and to boast that there was nothing that the school could do about it. Along with more drugs came more disciplinary problems. The Court observed that between 1988-1989, the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported

in the early 1980s, and several students were suspended. The trial court had also found that students during this period became increasingly rude during class, and outbursts of profane language became common. Id.

Initially, the school district responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use, and the school district even resorted to the use of a drug-detection canine. Id. According to the findings of the trial court:

> The administration was at its wit's end and ... a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary problems had reached "epidemic proportions." The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misconceptions about the drug culture.
> [115 S.Ct. at 2389.]

At that point, school district officials held a parent "input" night to discuss a proposed student athlete drug policy, and the parents in attendance gave their unanimous approval. Id.

It is by no means certain, indeed doubtful, that a random drug testing policy could only survive constitutional scrutiny based upon a finding that a large segment of the student population is in a "state of rebellion." In other contexts where courts have sustained the constitutionality of suspicionless searches, courts have recognized that the goal of providing safe, drug-free schools is often impeded by the behavior of only a few students. See e.g., Commonwealth v. Cass, 709 A.2d 350, 364 (Pa. 1998). See also Desilets v. Clearview Reg'l Bd. of Educ. 265 N.J. Super. 370, 379 (App. Div. 1993) (court rejected the argument that the rare incidence of detection of contraband as a result of the school's policy of searching all hand luggage brought on class trips indicated that there was no problem at that particular middle school serious enough to justify these suspicionless searches).

Furthermore, the United States Supreme Court has repeatedly used the "special needs" test to sustain random drug testing policies involving highly-regulated professional and safety-sensitive jobs where there was no evidence that actual drug use by, for example, Customs Service agents or railway workers had reached significant much

less epidemic levels. See e.g., Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 109 S.Ct. 1384, 104 L.Ed.2d 685 (1989). In fact, the government in Von Raab did not even claim that the testing program was a response to a demonstrated drug problem within the Customs Service.

So too, the New Jersey Supreme Court in New Jersey Transit PBA Local No. 304 v. New Jersey Transit Corp., 115 N.J. 531 (1997), paid little attention to the problem of actual drug usage by New Jersey Transit police officers, noting only that the "concerns about illegal drug use by police officers are not simply hypothetical," and accepting the representation made at oral argument that pre-employment and random testing of trainees at the State Police Academy shows a statewide positive rate of about 4%. 115 N.J. at 563.

As noted in Chapter 2.9, as a general position, there is no minimum number of acts of violence, vandalism, disorder, or substance abuse that must occur before a school can lawfully adopt a particular search policy. Indeed, the United States Supreme Court in the Vernonia opinion itself emphasized that:

> It is a mistake ... to think that the phrase "compelling state interest" in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concerns ... . Rather, the phrase describes an interest which appears *important enough* to justify that particular search at hand, in light of other factors which show the search to be relatively intrusive upon genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met. [515 U.S. at ___, 115 S.Ct. at 2394, 2395 (italics in original).]

Clearly, no region, town, school district, or school building in America is immune from the influence of drug trafficking and substance abuse. While the precise nature and extent of the problem varies geographically and over time, it is hard to imagine that the drug problem among adolescents in Vernonia, Oregon in 1989 is disproportionately greater than the problem that exists today in school districts throughout New Jersey, especially in view of national and statewide surveys that show that the problem of teenage substance abuse has worsened in recent years. (See Chapter 1.2.)

A reviewing court, therefore, should not declare a drug testing policy unconstitutional merely because school officials choose not to describe the problem with imprecise hyperbolism, such as by characterizing the student body as being "in a state of rebellion," or by describing the drug and disciplinary problem as one of "epidemic proportions." The inquiry, rather, should focus on measurable (if not quantifiable) facts.

How prevalent is substance abuse, and how has that changed over time? To what extent has the increased use and availability of controlled dangerous substances affected student behavior, student performance (academic and otherwise), and student safety (including an assessment of *students'* perceptions of the dangers they face while in school)? Has there been an increase in the incidence of violence, vandalism, classroom disruptions, suspensions, and expulsions, and is there reason to believe that any such increase in disciplinary problems is related to the abuse and/or sale of illicit drugs and alcohol?

The real question may turn out to be who is in the best position to decide whether drug-related disciplinary problems have reached the point where random drug testing is a reasonable response. Phrased somewhat differently, the outcome of these cases may well depend on the extent to which reviewing courts will defer to the judgment of school officials in determining whether the school's substance abuse problem is such as to justify the decision to resort to random drug testing. Obviously, courts will not and must not abdicate their responsibility to conduct their own balancing test, or what is described in the caselaw as a thorough "context-specific inquiry." It nonetheless bears noting that the Supreme Court in Vernonia seemed to be especially impressed by the fact that the school officials in that case implemented the drug testing policy only after soliciting input from parents. The Court re-emphasized at the end of its discourse that:

> We may note that the primary guardians of Vernonia's schoolchildren appear to agree [that the drug testing policy is reasonable]. The record shows no objection to this districtwide program by any parents other than the couple before us here — even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its local school board and the District Court, as to what was reasonably in the interest of these children under the circumstances.
> [115 S.Ct. at 2397.]

In any event, school officials seeking to adopt a random drug testing policy must be prepared to develop a complete factual record to support their policy decision. (See Chapter 2.9.) Furthermore, school officials should be careful to document the nature and scope of the substance abuse and disciplinary problem in each specific school, grade level, or subpopulation of students that would be affected by the proposed drug testing policy. In her dissenting opinion in Vernonia, Justice O'Connor, who was joined by Justices Stevens and Souter, expressed concern in this regard that there was virtually no evidence in the record of a drug problem at the "grade school" at which the petitioner

attended when the litigation began. Rather, the witnesses who testified at trial to drug-related incidents were mostly teachers or coaches at the high school. 115 S.Ct. at 2406 (O'Connor, J., dissenting). As Justice O'Connor noted, "[p]erhaps there is a problem at the grade school, but one would not know it from this record." Id.

The United States Supreme Court in Vernonia specifically referred to certain kinds of facts and circumstances that would be relevant, including a marked increase in disciplinary problems and classroom disturbances, more common outbursts of profane language and rude behavior in classes, student athletes in a state of near rebellion, and direct school staff observations of students using and "glamorizing" drug and alcohol use. Other court decisions involving other types of suspicionless search programs may also provide guidance in identifying the kinds of facts and observations that should be made part of the record. In Commonwealth v. Cass, 709 A.2d 350, 357 (Pa. 1998), for example, the Supreme Court of Pennsylvania recently listed several reasons that supported school officials' "heightened concern" as to drug activity in the school that justified the use of drug-detection canines. These factors include:

- information received from unnamed students;
- observations from teachers of suspicious activity by the students, such as passing small packages amongst themselves in the hallways;
- increased use of the student assistance program for counselling students with drug problems (see Chapter 14.2 concerning the confidentiality of information that could reveal the identity of specific students participating in drug or alcohol counselling programs);
- calls from concerned parents;
- observation of a growing number of students carrying pagers;
- students in possession of large amount of money; and,
- increased use of pay phones by students.

School officials interested in pursuing the option of implementing a random drug testing program might also want to commission a confidential survey of students to gauge with some measure of empirical precision the prevalence of student drug use and the nature of students' attitudes concerning the use of alcohol and other drugs. These school-specific studies could be patterned after the high school survey administered every three years by the Division of Criminal Justice and the middle school survey recently developed by the Department of Health. (See Chapter 1.2.) (Both of these surveys are administered in conjunction with the Department of Education.)

Finally, although law enforcement agencies may play no part in a school's decision to adopt a drug testing program, and in any event would not be permitted to receive the

results of positive drug tests, police and prosecutors can nonetheless support local school officials in documenting the scope of the school's drug problem by providing information concerning the criminal activities of students. As noted in Chapter 14.3, the New Jersey Code of Juvenile Justice was amended in 1994 to make it easier for law enforcement agencies to share information with schools. Specifically, N.J.S.A. 2A:4A-60 now permits law enforcement or prosecuting agencies to provide school officials with information regarding a juvenile who is under investigation for an offense when, in the judgment of law enforcement authorities, the information may be useful to school officials in maintaining order.

The law also contains a provision that allows school principals to request information regarding any juvenile delinquency charges that were filed against enrolled students, and these requests may be made either by the principal on a case-by-case basis or in accordance with procedures that could be agreed to in advance as part of the Memorandum of Agreement Between Education and Law Enforcement Officials (1992). In this way, a school district and local police department might agree automatically to share information regarding all students enrolled in the district who are formally charged with any act of delinquency, including simple possessory drug charges and alcohol-related offenses. Furthermore, the recently-amended law *requires* that law enforcement or prosecuting agencies advise the school principal if an enrolled student is charged with delinquency where the offense occurred on school property or a school bus, occurred at a school-sponsored function, constitutes a first or second-degree crime, or involved the unlawful manufacture, distribution, or possession with intent to distribute a controlled dangerous substance.

E. Scope of the Student Population Subject to Drug Testing. The school drug testing policy at issue in Vernonia applied only to students participating in interscholastic athletics. It is thus not yet clear whether a school would be permitted to adopt a more wide-ranging program that would, for example, require students engaged in non-athletic extracurricular activities, or even the entire student body, to submit to random urinalysis. The Court in Vernonia cautioned "against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts," 115 S.Ct. at 2396, although it would appear that this warning was addressed mostly to those who might broadly interpret the case to permit random drug testing outside of the school context. Indeed, the Court observed in the very next sentence that, "[t]he most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities under a public school system, as guardian and tutor of children entrusted to its care." Id. at 2396.

One of the members of the Court who joined in the majority decision, Justice Ginsburg, wrote separately to explain that:

> I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school. [115 S.Ct. at 2397 (Ginsburg, J., concurring).]

Although Justice Ginsburg's concurring opinion technically means only that the court has reserved decision on the constitutionality of any more wide-ranging school urinalysis policy, the strong implication is that she would not join a majority to uphold a broader program, or at least one that applies to the entire student body.

Furthermore, a close reading of the majority decision indicates, as noted by Justice Ginsburg in her concurring opinion, that the constitutionality of the Vernonia school district's drug testing policy depended at least to some extent on the Court's findings that (1) there is a reduced privacy expectation and closer school regulation of student athletes, 115 S.Ct. at 2389, 2392-2393, and (2) that drug use by athletes risks immediate physical harm to users and those with whom they play. Id. at 2394-2395. The Court also noted that given the limited population that was subject to drug testing, the most severe sanction allowed under the school policy was suspension from extracurricular athletic programs. Id. at 2390. This led the Court to characterize the policy not only as being "nonpunitive," but also as not one that is not being used "for an internal disciplinary function." Id. at 2393.

At least one federal appellate court has sustained the constitutionality of a somewhat more expansive school drug testing program that applied to students engaged in nonathletic extracurricular activities. The United States Court of Appeals for the 7th Circuit ruled in Todd v. Rush County School, which was decided on January 12, 1998, that the reasoning set forth in Vernonia also applies to testing of students involved in any extracurricular activity. The court noted that, "certainly successful extracurricular activities require healthy students." The court also agreed with the finding of the district court judge that extracurricular activities, like athletics, "are a privilege at the high school," and added that students engaged in extracurricular activities, "like athletes, can take leadership roles in the school community and serve as an example to others."

In affirming the constitutionality of the Rushville, Indiana drug testing policy, the court concluded that the policy was undertaken in furtherance of the school district's

responsibilities as a guardian and tutor of children entrusted to its care and that the "lynchpin of [the] program" is to protect the health of the student's involved. The court thus concluded that the Rush County School's drug testing program, while broader than the one upheld in Vernonia, is "sufficiently similar to the programs in Vernonia ... to pass muster under the Fourth and Fourteenth Amendments."

It is far less likely that a school would be permitted to compel drug testing of *all* students, and, in fact, to this point, it appears that no court has permitted such a widespread policy. It is true that the Court in Vernonia, citing to New Jersey v. T.L.O., recognized that all students within the school environment, not just athletes, have a lesser expectation of privacy than members of the population generally, "particularly with regard to medical examinations and procedures ... ." 115 S.Ct. at 2392.

So too, the Court clearly stated that the "most significant element in this case": is that the drug testing policy was undertaken in furtherance of the government's responsibilities as guardian and tutor of children entrusted to its case, id. at 2396, and that, "[c]entral, in our view, to the present case is that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." Id. at 2391. The Court's emphasis on this point suggests that the school's responsibilities, and thus the scope of its authority, extends to all pupils, and not just to athletes and students who participate in extracurricular activities.

Even so, there would seem to be insuperable practical as well as legal difficulties in implementing a schoolwide drug testing policy, including, most notably, the problem of fashioning an appropriate response or remedy in the event of a confirmed positive drug test. It is one thing to exclude a substance-abusing student from a sports team, orchestra, band, or club. It is another thing entirely to exclude the student from attending regular classes. See discussion in Chapter 13.2 describing the procedures that must be followed when a student is found to be under the influence of an intoxicating substance. A suspension from regular classes would thus seem to cross the line into the realm of an "internal disciplinary function," 115 S.Ct. at 2393, although it is at least conceivable (though by no means certain) that a court would tolerate such a program if it were used solely to place students who test positive in an appropriate treatment or counselling program.

F. Special Rules and Procedures Governing Random Drug Testing Programs. Because the use of random drug testing represents an aggressive, dramatic, and controversial tactic, school officials considering this technique must take special precautions to ensure that drug testing policies are developed and implemented in accordance with the principles and safeguards outlined in Vernonia. Many of these

procedures and special precautions are discussed in the preceding sections of this Chapter. It is appropriate, however, to restate some of these principles succinctly:

(1) Soliciting Parental Input. School officials are strongly encouraged to solicit input from parents, teachers, and other members of the school community before conducting a canine operation. See Vernonia, supra, 115 S.Ct. at 2395, 2397. Even if not constitutionally required, it is a good idea to meet with parents and afford them meaningful input in the decision to resort to the use of drug testing, since this provides education officials with an excellent opportunity to discuss with parents and other members of the school community the scope and nature of the school's drug problem and the need for a comprehensive response that goes far beyond relying on random urinalysis. Convening a parent "input" night not only provides school officials with an opportunity to solicit the opinions of the "primary guardians" of the district's schoolchildren, id. at 2397, but also affords an opportunity to engage in a fact-finding inquiry and to learn firsthand from parents their views concerning the scope and nature of the school's substance abuse problem.

(2) Findings. As noted throughout this Chapter, school officials should carefully document their findings to demonstrate why it is necessary and appropriate to implement a drug testing policy. These findings should spell out the nature and scope of the problem that exists in the school and why the proposed policy will help to alleviate the problem. (See Chapter 13.3D for a more detailed discussion of the kinds of facts and sources of information that would be relevant and that might support the implementation of drug testing policy.) It is also critical that the findings relate specifically to the particular school and population of students who will be subject to random drug testing.

(3) Limited Purpose. A school drug testing policy must be designed to deter substance abuse and not to catch and punish users. The policy must be undertaken for prophylactic and distinctly *non*punative purposes (i.e., protecting student athletes from injury and deterring drug use in the student population). The policy must make clear that positive test results will not be disclosed to law enforcement agencies. School officials should carefully consider whether there are less restrictive or intrusive alternatives to accomplish their legitimate objective, which is to discourage students from using alcohol or other drugs.

(4) Minimize the Invasiveness of the Intrusion. A random drug testing policy must specify the procedures for collecting and handling urine samples, so as to minimize to the greatest extent possible the invasion of student privacy. (See § 13.3B for a detailed discussion of the sample collection and monitoring procedures that were deemed

to be constitutional in the Vernonia case.) The conditions under which samples are taken must be "nearly identical to those typically encountered in public restrooms." Vernonia, supra, 115 S.Ct. at 2393.

In addition, the policy must establish a neutral plan that clearly prescribes the random selection method that will ensure that students selected to submit to urinalysis are not singled out on the basis of an individualized suspicion, or on the basis of some impermissible criteria, such as race, ethnicity, socioeconomic status, or membership in a "gang." (Note that where school officials have reason to believe that a particular student or group of students may be using or under the influence of an intoxicating substance, they must comply with the "reasonable grounds" test established in New Jersey v. T.L.O. and explained in Chapters 13.2 and 13.3.) The random drug testing program must *never* be used as a ruse or subterfuge to compel a student to submit to drug testing where a school official suspects that particular student may have used or is under the influence of an intoxicating substance.

G. *Preserving the Chain of Custody and Ensuring the Accuracy of Drug Test Results.* The policy must specify the procedures to preserve the so-called "chain of custody" of all samples that are taken, and must also include procedures, such as those described in the Vernonia case, to ensure reliable drug test results.

H. *Preserving Confidentiality.* It is critically important that the policy include provisions to make certain that the identity of students who test positive for drugs are kept confidential. See Chapter 14.2 for a more detailed discussion of federal law and regulations that protect the confidentiality of persons, including schoolchildren, who receive substance abuse diagnosis or treatment.

I. *Prescription Medication.* The student in the Vernonia case argued that the school district's drug testing policy was unduly intrusive because it required that students, if they were to avoid sanctions for a falsely positive test, identify *in advance* any prescription medications that they were taking. The Supreme Court agreed that this "raises some cause for concern," 115 S.Ct. at 2394. In an earlier case involving the random drug testing of Federal Customs Service employees, the Court "flagged as one of the salutary features of [that] program the fact that employees were not required to disclose medical information unless they tested positive, and even then, the information was supplied to a licensed physician rather than to the government employer." 115 S.Ct. at 2394, referring to Treasury Employees v. Von Raab, 489 U.S. 656, 672-673, n.2, 109 S.Ct. 1384, 1394-1395, n.2., 103 L.Ed.2d 685 (1989). It was not clear from the record in Vernonia whether the school district would have permitted students to

provide the requested information concerning prescription medication in a confidential manner, and the Court refused to "assume the worst." 115 S.Ct. at 2394.

In the circumstances, a school drug testing policy should include clear procedures to ensure the confidentiality of information provided by students concerning their lawful use of prescription substances, and schools would be well-advised to adopt a policy similar to the one described in Von Raab, whereby (1) students would not be required to disclose medical information unless they test positive, and (2) such information would be supplied only to a licensed medical professional rather than to school officials.

THIS PAGE LEFT INTENTIONALLY BLANK

14. COOPERATION BETWEEN EDUCATION AND LAW ENFORCEMENT OFFICIALS

For many years, education and law enforcement professionals throughout New Jersey have enjoyed a close and excellent working relationship. As an expression of the commitment to work together to protect students and the educational environment, a number of "memoranda of agreement" have been signed by local education and law enforcement officials. These agreements were developed by the Attorney General's Education and Law Enforcement Working Group, and have been endorsed by the Department of Education and State Board of Education, and have even been expressly referenced in rules and regulations promulgated by the State Board. See e.g., N.J.A.C. 6:29-10.3(b)(12) (requiring all districts to "adopt and implement policies and procedures that must include an agreement or memorandum of understanding with appropriate law enforcement authorities, which agreement must be consistent with the policies established in the state Memorandum of Agreement developed by the Attorney General's Education and Law Enforcement Working Group").

These agreements focus on a number of specific areas of mutual concern, such as the need to respond to illicit drugs, firearms, and other dangerous weapons in and around schools. In addition, a memorandum of agreement concerning hate crimes — crimes that are motivated by prejudice — has also been endorsed by the Attorney General and Commissioner of Education and has been distributed as a statewide model.

All of these documents spell out in some detail what teachers, principals, and police officers are to do in the event that drugs, drug paraphernalia, or firearms or other weapons are discovered on school grounds, or other crimes are committed on school property or involve school-aged children. These agreements were developed because both education and law enforcement professionals recognized that it would be inappropriate to wait for a crisis to happen to first decide how to respond. Rather, it is far better to develop precise policies and procedures that anticipate problems and that clarify everyone's duties and responsibilities.

Despite all of the enlightened rhetoric, these agreements would not be worth the paper that they are printed on unless school districts get the word out to all school staff members. To help to accomplish that important objective, a number of county prosecutors have developed "quick reference guides" to summarize the rights and responsibilities that are set forth in these memoranda.

14.1. Referrals to Law Enforcement Agencies.

A. Firearms. There is nothing more frightening to parents, teachers, and children than the thought that loaded guns might be brought on to school property. Although most jurisdictions in New Jersey have been spared the level of violence experienced in some urban communities, such as Los Angeles and nearby New York City, the fact remains that the problem of firearms on school property is real, the threat far from imaginary. No community or campus is immune, and there have been a number of recent incidents involving the presence of firearms on school property in suburban and rural as well as urban communities throughout New Jersey. It is therefore the responsibility of all education and law enforcement officials to be prepared to act swiftly, calmly, and deliberately in response to a firearms incident.

School staff members should keep in mind that more often than not, when a firearm is brought on to school property, it is not used to terrorize others or to engage in gang-related violence. Rather, in most cases, the weapon has been brought on to school property to impress others, that is, to "show off" to friends and classmates. That fact, however, by no means minimizes the seriousness of the situation or the need for a prompt and decisive response.

Rules and regulations promulgated by the State Board of Education make clear that whenever any school employee develops reason to believe (1) that a firearm has been unlawfully brought on to school property, or (2) that any student or other person is in unlawful possession of a firearm, whether on or off school property, or (3) that any student or other person has committed an offense with or while in possession of a firearm, whether or not such offense was committed on school property or during school operating hours, then the school employee must report the incident or information as soon as possible to the principal or, in the absence of the principal, to the staff member responsible at the time of the alleged violation. See N.J.A.C. 6:29-10.4b.

At that point, either the principal or the responsible staff member is required by regulation to notify the chief school administrator who, in turn, is required to notify, as soon as possible, the county prosecutor or other law enforcement official designated by the county prosecutor to receive this information. The chief school administrator or designee must provide to the county prosecutor or designated law enforcement agency all known information concerning the matter, including the identity of the pupil or staff member involved.

Note that this reporting requirement applies with respect to *information* concerning the unlawful possession or use of a firearm. Thus, school officials have a responsibility to report information to law enforcement even in cases where school officials did not directly observe, much less seize and secure, a firearm.

In a closely-related vein, rules and regulations promulgated by the State Board of Education provide that whenever a school employee seizes or comes upon any firearm, that employee must *immediately* advise the county prosecutor or other appropriate law enforcement official, and must secure the firearm or weapon pending the response by law enforcement to retrieve and take custody of the firearm. See N.J.A.C. 6:29-10.5b. School employees having custody of a firearm are required to take reasonable precautions, in accordance with local board of education procedures, to prevent its theft, destruction, or unlawful use by any person.

It is critical to note that teachers and other school employees are *not* required to take a gun away from a student. If a teacher or other school official learns that a student is carrying a firearm, the correct response is to immediately notify the principal or superintendent, who must then immediately call the police.

If a school official discovers a firearm in a desk, locker, or other location, he or she should not pick up or handle the weapon. Under no circumstances should the school official try to determine whether the gun is loaded. Rather, the correct response is to notify the principal or superintendent and to watch over the weapon to make certain that no one else takes or uses it until the police arrive on the scene.

Finally, it should be noted that the recently adopted "Zero Tolerance for Guns Act," P.L. 1995, c. 127 and 128, (N.J.S.A. 18A:37-7, et seq.), imposes additional administrative responsibilities upon school officials when a student is found to have brought a firearm on to school property, at a school-sponsored function or on a school bus. Those responsibilities and required procedures are generally beyond the scope of this Manual, and are discussed in a memorandum to chief school administrators from the Education Commissioner (attached as Appendix 7).

B. Knives and Other Deadly Weapons. Regrettably, it is not too uncommon that school officials will come upon students who are armed with weapons other than firearms, such as knives and clubs. Some weapons are especially dangerous and simply have no lawful purpose. Switchblades, gravity knives (which are similar to switchblades, but use centrifugal force rather than a spring to open), ballistic knives (which literally shoot out the blade as a projectile), stun guns, and metal knuckles would fall into this category.

Pursuant to rules and regulations adopted by the State Board of Education, whenever a school employee seize or comes upon any dangerous weapon other than a firearm, the school official should immediately advise the county prosecutor or appropriate law enforcement official, and secure the weapon pending the response by law enforcement to retrieve and take custody of the dangerous weapon. As with firearms, a school employee who has taken a dangerous weapon into custody is required to take reasonable precautions, in accordance with local board of education procedures, to prevent its theft, destruction, or unlawful use by any person. See N.J.A.C. 6:29-10.5b.

Note that the agreed-upon procedures spelled out in the Memorandum of Agreement concerning a knife or other deadly weapon are somewhat different from the rules concerning firearms. Whereas school officials are absolutely required in all cases to call police when a firearm is discovered, school officials are encouraged, but not required, to call police upon discovery of certain other types of weapons. In deciding how best to exercise discretion, school officials should use common sense. Generally, it would not be necessary to call police upon the discovery of a small pocket or Swiss Army-type knife, whereas police should always be called if a school official sees or learns about a switchblade, metal knuckles, or a stun-gun.

In deciding whether to call police, school officials should carefully consider the nature and dangerousness of the weapon and any legitimate uses which it may have. Utility or razor knives, sometimes also called "box cutters," for example, have many useful and legitimate functions, but are nonetheless also used by some adolescents as easily concealed weapons, and generally do not belong in schools except, perhaps, in arts and crafts classrooms. Note in this regard that school rules may also prohibit students from carrying pocket knives, and, in that event, school officials may also confiscate such items (and may conduct a lawful search for such items under the authority of New Jersey v. T.L.O.) even if the decision is ultimately made not to call the police when a small knife is discovered.

As a general rule, if the principal or superintendent is not sure whether to call the police, the safer course is to err on the side of seeking police advice and assistance, and *the police should always be called if the weapon was actually used or threatened to be used against a person*.

It is also very important to understand that school employees are *not* required or expected to use physical force to take a weapon from a student. School officials, in other words, should never try to wrest a weapon away from a student. Rather, the correct response is to notify the principal or local superintendent and immediately call the

police, who are equipped and specially trained to respond to these kinds of potentially violent situations.

It should also be noted that state law imposes certain disciplinary requirements if a pupil commits an assault upon a teacher, administrator, other school employee, or another student with any kind of weapon. Specifically, these assaultive pupils must be immediately suspended. N.J.S.A. 18A:37-2.2.

C. Illicit Drugs. Pursuant to rules and regulations promulgated by the State Board of Education, and subject only to certain federal confidentiality rules discussed in Chapter 14.2, any school official who has reason to believe that a pupil or staff member has unlawfully possessed or has been in any way involved in the distribution of a controlled dangerous substance (including anabolic steroids) or drug paraphernalia while on or near school property is required to report the matter as soon as possible to the principal, or, in the absence or the principal, to the staff member responsible at the time of the alleged violation. See N.J.A.C. 6:29-10.4(a). Either the principal or responsible staff member is then required by regulation to notify the chief school administrator, who, in turn, is required to notify as soon as possible the appropriate county prosecutor or other law enforcement official designated by the county prosecutor to receive this information.

Note that this reporting requirement applies with respect to any *information* concerning the suspected possession or distribution of illicit drugs. Thus, school officials have a responsibility to report information to law enforcement even in cases where school officials did not actually observe or seize illicit drugs or paraphernalia.

Where a school employee does seize or discover any substance or item suspected to be a controlled dangerous substance (including anabolic steroids) or drug paraphernalia, he or she is required by regulation to *immediately* notify and turn over the substance or item to the principal or designee. The school principal or designee is then required immediately to notify the chief school administrator or designee who, in turn, must notify the appropriate county prosecutor or other law enforcement official designated by the county prosecutor to receive this information. See N.J.A.C. 6:29-10.5(a). (Besides the duty established by the State Board of Education regulation, it is an offense in New Jersey for any person to dispose of a suspected controlled dangerous substance by any means other than by turning the substance over to a law enforcement officer. See N.J.S.A. 2C:35-10c.)

The school employee, principal, or designee is required by regulation to safeguard the substance or paraphernalia against further use or destruction and to secure the

substance or paraphernalia until such time as it can be turned over to the county prosecutor or other appropriate law enforcement officer. N.J.A.C. 6:29-10.5(a).

When the police arrive to take custody of the substance or paraphernalia, school officials are required by regulation to provide police with *all* known information concerning the matter, including the identity of the pupil(s) or staff member(s) involved (subject only to the federal confidentiality regulations discussed in Chapter 14.2). This information would include the exact location where the substance or paraphernalia was first discovered, the identity of all persons who had custody of the substance or paraphernalia following its discovery or seizure, and the identity of any pupil or staff member believed to have been in actual or constructive possession of the substance or paraphernalia (i.e, e.g., the name of the student assigned to the locker where the drugs or paraphernalia was found). (This information is sometimes referred to in the law as the "chain of custody.") See N.J.A.C. 6:29-10.5(a)(1).

It is critical to note that the Attorney General and the State Board of Education have adopted an "amnesty" feature that allows school officials to withhold the identity of any student who was in unlawful possession of a controlled dangerous substances in certain limited circumstances. Specifically, school officials need not tell the police the name of a student from whom drugs were obtained, provided that: (1) the student voluntarily and on his or her own initiative turned the drugs over to a teacher or counsellor; *and* (2) the student has agreed to accept help from the school's substance abuse program, *and* (3) there is no indication that the student was involved in drug distribution or "dealing" activities. See N.J.A.C. 6:29-10.5(a)(1).

For the purposes of this amnesty feature, an admission by a pupil made in response to questioning initiated by a school official, or following the discovery of a controlled dangerous substance or paraphernalia by a school official, does *not* constitute a voluntary, self-initiated request for counselling and treatment. By the same token, the amnesty feature would not apply in any case where the student was ordered to surrender the drugs, or where the student turned over drugs because he or she expected that the drugs would be imminently discovered in an ongoing sweep search or suspicion-based search.

This amnesty provision is designed to provide a strong incentive for students with a substance abuse problem to overcome denial and to seek out help. This reflects a conscious policy decision that the need to encourage substance abusing students to reach out for help outweighs the need to prosecute students for comparatively minor possessory drug offenses. Note that even where the amnesty provision applies, school officials are still required to turn the drugs over to police. See N.J.S.A. 2C:35-10c

(making it a criminal offense to dispose of controlled dangerous substances by any means other than turning them over to a law enforcement officer). Note also that the amnesty feature does not apply to firearms or other deadly weapons, but rather is limited to controlled dangerous substances or paraphernalia, since the purpose of this feature is not to secure evidence or even to remove dangerous items from the school, but rather to provide an incentive for students with a substance abuse problem to seek and accept help for their problem.

D. Child Abuse and Neglect. Under state law, school officials are required to keep a watchful eye for the telltale behavioral traits or physical signs of child abuse or neglect. The law establishes a legal duty for school officials, indeed for all citizens, immediately to report any suspected abuse to law enforcement authorities and/or to the Division of Youth and Family Services. See N.J.S.A. 9:6-8.10 and N.J.A.C. 6:29-9.1 et seq. Specifically, N.J.S.A. 9:6-8.10 provides that:

> Any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report the same immediately to the Division of Youth and Family Services by telephone or otherwise. Such reports, where possible, shall contain the names and addresses of the child and his parent, guardian, or other person having custody and control of the child and, if known, the child's age, the nature and possible extent of the child's injuries, abuse or maltreatment, including any evidence of previous injuries, abuse or maltreatment, and any other information that the person believes may be helpful with respect to the child abuse and the identity of the perpetrator.

The statute further provides that any person who knowingly fails to report an act of child abuse having reasonable cause to believe that an act of child abuse has been committed may be criminally prosecuted as a disorderly person. N.J.S.A. 9:6-8.14.

Although teachers, school nurses, and other child-care professionals are especially likely to be in a position to detect evidence of child abuse, the court in State v. Hill, 232 N.J. Super. 353 (Law Div. 1989) made clear that the statutory duty to report suspected child abuse applies to *every* citizen. Recognizing the especially important role that school staff members must play in protecting children, the Legislature has further directed that:

> All school districts shall be required to establish policies designed to provide for the early detection of missing and abused children. These policies shall include provisions for the notification of the appropriate law

enforcement and child welfare authorities when a potential missing or abused child situation is detected.
[N.J.S.A. 18A:36-25.]

The statutory duty to report suspected child abuse applies even if the suspicion of child abuse is based upon information that is learned from a pupil who is participating in a school-based drug or alcohol abuse counselling program. See P.L. 1997, c. 362 (N.J.S.A. 18A:40A-7.1 et seq.) discussed in Chapter 14.2, infra. The new state law specifically addresses the problem that arises when a student's parent or guardian or other person residing in the pupil's household is dependent upon or illegally using a controlled dangerous substance. In such cases, there is a distinct possibility if not probability of child abuse or neglect, especially if there are young siblings residing in the household who are dependent upon a drug-using or selling parent or guardian for supervision and care.

In a similar vein, federal confidentiality law, which generally prohibits the disclosure of information concerning patients who are participating in substance abuse education, prevention, treatment, or rehabilitation programs, simply does *"not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities."* 42 U.S.C. § 290dd-2(e) (emphasis added). Thus, the federal law and regulations governing the confidentiality of drug and alcohol treatment programs cannot be relied upon to relieve the duty established under N.J.S.A. 9:6-8.10 to immediately report suspected child abuse. (Consult Chapter 14.2 for a more detailed discussion of federal confidentiality laws and regulations concerning information learned during the course of alcohol or other drug diagnosis or treatment.)

Note that state law provides unequivocally that a person who acts in good faith in reporting suspected abuse or neglect is immune from civil liability, and all doubts should be resolved in favor of reporting the suspicion to appropriate authorities. See N.J.S.A. 9:6-8.13.

E. Hate Crimes. Hate crimes — crimes that are motivated by racial, ethnic, religious, or sexual prejudice — inflame tensions and can work quickly to disrupt an entire community. There are many things that our children must learn while in school, but learning how to hate, or how to be hated, must never become part of the educational curriculum.

Regrettably, a large percentage of the hate crimes that occur in this state are committed by or directed against children. This is especially disturbing because school-aged children are particularly vulnerable to this type of crime and, acting out of

frustration, hate crime victims may be inclined to respond by engaging in further violence. It is important for school officials to understand that hate crimes that are committed away from school property can lead directly to retaliation and escalating violence in the school building.

The New Jersey Attorney General and the county prosecutors have adopted a policy that hate crimes will simply not be tolerated and will be investigated and prosecuted to the full extent of the law. Specially trained bias investigation officers are available to respond twenty-four hours a day to any suspected or confirmed hate crime incident.

A number of jurisdictions have adopted a model hate crimes agreement, patterned after the agreement between education and law enforcement officials concerning drugs and weapons. The hate crimes memorandum of understanding, sometimes referred to as the "Elizabeth Agreement," provides that if a school official in the course of his or her professional responsibilities learns of a crime committed on or off school grounds that seems to be motivated, in whole or in part, by racial, ethnic, religious, or sexual prejudice, the school official must immediately notify the principal or local superintendent, who then must immediately call the county prosecutor's office or the local police.

If a school official learns of an act that, while not criminal, nonetheless appears to be motivated by prejudice (such as the distribution of a hate pamphlet), the school official is strongly encouraged (but not necessarily required) to immediately notify the principal or superintendent who, in turn, is encouraged to call the prosecutor's office or local police as soon as possible.

It is important to remember that some acts that may not be subject to criminal prosecution, and that may even be considered to be a protected form of speech under the First Amendment, can nonetheless provoke hate, frustration, and violent relation. That is why it is so important that law enforcement officials be kept apprised of any incidents involving bias or prejudice.

For the purposes of this Manual, school officials would be authorized to conduct a search is they have reasonable grounds to believe that the search would reveal evidence of a bias crime. The search would not be unreasonable merely because the evidence subsequently uncovered could not be used as the basis for a criminal prosecution because the underlying conduct turned out to be a protected form of speech. (Recall that pursuant to New Jersey v. T.L.O., school officials are authorized to conduct searches for violations of school rules that do not amount to criminal offenses.) It must be noted in this regard that students do not shed their First Amendment rights when they enter the

schoolhouse. See Tinker v. Des Moines Comm. Sch. Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). These First Amendment issues are often complex and are generally beyond the purview of this Manual.

If a school official, including a custodian, comes upon graffiti that seems to express racial, ethnic, religious, or sexual hatred (e.g., a swastika, racial epithets, etc.), or that suggests possible gang or hate group activities, the school official must, pursuant to the terms of the Hate Crimes Agreement, immediately notify the principal or local superintendent, who in turn must immediately notify the prosecutor's office or local police. As noted above, graffiti is often an indication of gang activities and is used by gang members to mark turf or as a form of newspaper to make announcements to other members, or especially to rival gangs. Because such graffiti is potential evidence of a crime, it is important that graffiti not be destroyed or damaged until the police have had an opportunity to come to the scene so that the evidence can be interpreted and photographed. Pending the arrival of police, school officials might want to conceal the graffiti in a manner that causes no permanent damage so as to minimize students' exposure to the hateful message or gang announcement. Once police have had an opportunity to make a photographic record of the evidence, school officials can arrange to permanently paint over or sandblast the graffiti without unnecessary delay.

F. Gambling. Gambling is a form of compulsive behavior that can be as dangerous and as addictive as drugs or alcohol. Although a gambling episode may start innocently enough, some children quickly run up gambling debts that amount to hundreds or even thousands of dollars. These children are often forced to steal from their parents or others to pay off these enormous debts. Most frightening of all, gambling operations, even those run by juveniles, routinely use force, intimidation, and strong-arm tactics to enforce gambling debts.

Illicit gambling operations for profit are a form of organized crime that cannot be tolerated in or around schools. In many cases, school officials may not even be aware of the type of evidence (such as gambling slips and records) that are associated with this form of criminal behavior. A number of prosecutor's offices have prepared materials that help to explain the nature of the problem, and these brochures are available for distribution to students, teachers, and parents. Law enforcement officials are also available to speak to student assemblies and to meet with school officials to discuss the telltale signs of a gambling enterprise.

It is important that school officials be able to recognize these activities, given the overriding need to protect student safety. Any threat to a student or school official

relating to the enforcement of a gambling debt should be taken seriously and should be reported immediately to the prosecutor's office or local police.

G. Other Crimes. Rules and regulations promulgated by the State Board of Education and the various memoranda of agreement spell out the procedures that school officials are either required or encouraged to follow in reporting certain specific types of crimes, such as drug possession or distribution, the possession or use of firearms, child abuse and neglect, and so-called "hate" crimes. These are especially serious forms of criminal behavior that school officials should report to law enforcement authorities promptly whenever there is a reasonable suspicion to believe that the offense occurred or is about to be committed. There are many other types of crimes and offenses that can and do occur on school property or that involve students, either as perpetrators or as victims. These include vandalism, theft, assaults, and gambling.

When a school official develops reason to believe that an offense has been committed on school property or by or against a student, he or she should report the incident to his or her appropriate superior (e.g., the building principal or local superintendent), who, in turn, must decide whether to call the police. The better practice is for school officials ordinarily to report all suspected crimes to the police or to the county prosecutor's office.

In deciding whether to call the police in cases that do not involve guns, other deadly weapons, drugs or drug paraphernalia, child abuse or neglect, or hate crimes, school officials should use common sense and should consider the seriousness of the offense and especially whether the victim or intended victim was a child. (School officials should be mindful that child victims are not only especially vulnerable, and may be in need of victim counselling services, but are also more likely than adult victims to retaliate or resort to vigilantism.)

As a general rule, *all* violent crimes should be reported to police, although, of course, school officials should exercise discretion in the case, for example, of a schoolyard fistfight that did not involve weapons or bodily injury to the combatants. It is important for school officials to understand that law enforcement authorities may be aware of other facts and circumstances that would shed light on the incident and put it in its proper context. A school-based offense that may not on its face seem too serious may actually be part of a larger pattern of crimes committed off of school property. (By way of example, a fistfight occurring in the schoolyard on a Friday afternoon may escalate into a more serious confrontation off of school property over the weekend.) Again, when in doubt, school officials should generally err on the side of reporting all suspected crimes to police for appropriate handling.

School officials should also be aware that it is a criminal offense in this state to conceal or destroy evidence of a crime committed by another. See N.J.S.A. 2C:28-6 and 2C:29-3a(3). When school officials seize or otherwise come into possession of any item or object that is contraband per se, or is suspected to be the fruit or instrumentality of a crime, they should contact the police as soon as possible to arrange for the police to take custody of the evidentiary object.

It also bears noting, finally, that not all crimes committed on school property are directed against students. Sometimes, teachers and other staff members become the victims of theft, vandalism, or assaults. While teachers and other school employees have many duties and responsibilities, they also have rights. The right to a safe school environment, one that is free of drugs, guns, and violence and that is conducive to education, is a right to be enjoyed by *all* members of the school community, including not only students, but also teachers, administrators, and all other school employees. For this reason, state law requires the immediate suspension of a pupil who commits an assault upon a teacher, administrator, or other school employee, even if a weapon was not used in the assault. See N.J.S.A. 18A:37-2.1.

14.2. Confidentiality of Substance Abuse, Diagnosis, and Treatment Information.

Pursuant to federal regulations, all information concerning a student's participation in a school intervention or treatment program for his or her own substance abuse must be kept strictly confidential. 42 C.F.R. Part 2. See also N.J.A.C. 6:29-10.6. Accordingly, nothing in other rules and regulations promulgated by the State Board of Education, or otherwise described in this Manual, should be construed in any way to authorize or require the transmittal to a law enforcement agency of any protected information or records that are in the possession of a substance abuse counselling or treatment program.

Specifically, federal law codified at 42 U.S.C. § 290dd-2 provides in pertinent part that:

> Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

Regulations promulgated by the Federal Department of Health & Human Services pursuant to this statute make clear that, "no State law may either authorize or compel any disclosure prohibited by these regulations." 42 C.F.R. § 2.20.

In sum, school officials are not permitted to disclose to law enforcement authorities, or to any person other than a member of the local district substance abuse program, that a student has received or is receiving alcohol or other drug evaluation or treatment services. Nor are school officials permitted to disclose any information, including a student's identity or information about specific, illegal drug activity, where that information was learned in the course of or as a direct result of drug or alcohol abuse evaluation or treatment services provided by the local district substance abuse program. This prohibition, however, does not apply to information about illegal activity that was learned by a school employee *outside* of the local district substance abuse program, and any such information must be reported to police in accordance with N.J.A.C. 6:3-6.4 and 10.5. Nor would this law preclude school officials from documenting the number of students who are receiving substance abuse counselling for the purpose of justifying a school search policy, see Chapter 2.9, provided that school officials do not reveal any information that might identify any individual students.

Furthermore, the federal confidentiality statute expressly provides that, "[t]he prohibitions [on disclosure of information] of this section do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities." 42 U.S.C. § 290dd-2(e). Consequently, this federal law in no way relieves the duty imposed on all citizens by N.J.S.A. 9:6-8.10 to immediately report suspected child abuse to the Division of Youth and Family Services, and the federal law and regulations would provide no defense to a disorderly persons prosecution under N.J.S.A. 9:6-8.14 for knowingly failing to report an act of child abuse. See Chapter 14.1D.

In addition to the federal statute and regulations concerning confidentiality of substance abuse diagnosis and treatment information, the New Jersey Legislature on January 12, 1998 adopted P.L. 1997, c. 362 in accordance with Governor Whitman's recommendations. The new law, codified at N.J.S.A. 18A:40A-7.1 et seq., provides in pertinent part that:

> Except as provided by Section 3 of P.L. 1971, c. 437 (C 9:6-8.10), if a public or private secondary school pupil who is participating in a school-based drug and alcohol abuse counseling program provides information during the course of a counseling session in that program which indicates that the pupil's parent or guardian or other person residing in the pupil's

> household is dependent upon or illegally using a [controlled dangerous substance], that information shall be kept confidential and may be disclosed only under the circumstances expressly authorized under subsection b. of this section.

The new statute is broader than the federal confidentiality statute and regulations in that it applies to any student who is participating in a school-based alcohol or drug abuse counselling program, even if the student is not personally abusing substances, but rather is seeking counselling to deal with the problems related to the substance abuse of another. The federal law, in contrast, only provides confidentiality protections to persons who are "patients," that is, persons who are receiving counselling for their *own* substance abuse problem. See 42 C.F.R. § 2.11(b) (defining the term "patient" to mean any individual who has applied for or has been given diagnosis for treatment for alcohol or drug abuse).

This represents an important extension of confidentiality protections and is designed to encourage students to seek help for the problems that arise from the substance abuse of parents or siblings. As early as 1987, the New Jersey Legislature found that:

> Research indicates that particular groups of youngsters, such as the children of alcoholic parents, may in fact face an increased risk of developing alcohol and other substance abuse problems and that early intervention services can be critical in their prevention, detection and treatment; and, school based initiatives have proven particularly effective in identifying and assisting students at a high risk of developing alcohol and other drug disturbances and in reducing absenteeism, decreasing the consumption of alcohol and other drugs, and in lessening the problems associated with such addictions.
> [N.J.S.A. 18A:40A-8 (b) and (c).]

It is nonetheless critical to note that the new state confidentiality law features an important exception to the general rule of preserving confidentiality. Specifically, the law does *not* prevent school officials or counsellors from disclosing information to the Division of Youth and Family Services (DYFS) or to a law enforcement agency "if the information would cause a person to reasonably suspect that the secondary school pupil or another child may be an abused or neglected child." In light of this express exception, and the express reference in the above-quoted text to N.J.S.A. 9:6-8.10, the new confidentiality statute in no way relieves the duty imposed by the State Legislature on all citizens, including school administrators, teachers, counsellors, school nurses, and

substance awareness coordinators, to inform DYFS immediately where there is reasonable cause to believe that a child has been subjected to child abuse or acts of neglect. (As noted in Chapter 14.1D, a person who knowingly fails to report an act of child abuse having reasonable cause to believe that an act of child abuse has been committed is guilty of a disorderly persons offense. N.J.S.A. 9:6-8.14.)

It is also important to note that school officials have a number of specific statutory and regulatory responsibilities that arise when they develop reason to believe that a student may be under the influence of alcoholic beverages or other drugs while on school property or at a school function. Specifically, school employees are required to report the matter as soon as possible to the school nurse, medical inspector, or the principal. See N.J.A.C. 6:29-6.5. Those reporting provisions, and the procedures that require that the student be removed and examined by appropriate medical personnel are more fully described in Chapter 13.2 and in rules and regulations promulgated by the State Board of Education that are attached as Appendix 5.

It should be noted, finally, that school employees who in good faith report suspected substance abuse of a pupil to the principal or school nurse are afforded express immunity from civil liability. See N.J.S.A. 18A:40A-14.

14.3. Reciprocal Sharing of Information.

In 1994, Governor Whitman signed legislation that amended New Jersey's Code of Juvenile Justice to make it easier for law enforcement agencies to share information with schools. Specifically, the act provides for three categories of disclosure of information to schools. These are: (1) permissive disclosure during an investigation; (2) disclosure following a charge at the principal's request; and (3) required disclosure following a charge.

A. Permissive Disclosure During an Investigation. The new law permits law enforcement or prosecuting agencies to provide school officials with information regarding a juvenile who is under investigation for an offense when, in the judgment of law enforcement authorities, the information may be useful to school officials in maintaining order. This information may also be shared by the principal with appropriate school staff, but where no charges have been filed, the statute prohibits this information from being "maintained" as part of a pupil's records. Since the statute prohibits school officials from maintaining a record of this information, it should be provided orally by law enforcement officials. Providing this information orally, rather than in writing, will help to avoid inadvertent retention or disclosure of such information.

B. Disclosure Following Charge at Principal's Request. The law contains provisions that allow principals to request information regarding juvenile delinquency charges that were filed against an enrolled student. These requests may either be made by the principal on a case-by-case basis or according to procedures that could be agreed to in advance as part of the Memorandum of Agreement Between Education and Law Enforcement Officials (1992). For example, a school district and local police department might agree to automatically share this information regarding all students enrolled in the district who are formally charged with delinquency.

C. Required Disclosure Following Charge. The new law *requires* that law enforcement or prosecuting agencies advise the principal of the school where the student is enrolled if the student is charged with delinquency and:

(1) the offense occurred on school property or a school bus, occurred at a school-sponsored function, or was committed against an employee or official of the school; or,

(2) the juvenile was taken into custody (i.e., arrested) as a result of information or evidence provided by school officials; or

(3) the offense resulted in death or serious bodily injury, or involved an attempt or conspiracy to cause death or serious bodily injury; the unlawful use or possession of a firearm or other weapon; the unlawful manufacture, distribution, or possession with intent to distribute a controlled dangerous substance; or the intimidation of an individual or group of individuals because of race, color, sexual orientation, or ethnicity; or,

(4) the offense if committed by an adult would be classified as a crime of the first or second degree.

The specific provisions for sharing juvenile delinquency information to schools are more fully described in a memorandum from the Attorney General and the Commissioner of Education dated July 28, 1995, which is attached as Appendix 8.

D. Specificity of Shared Information. Pursuant to N.J.S.A. 2A:4A-60 as recently revised, where law enforcement agencies are authorized to provide information concerning a juvenile to school officials, they may do more than merely advise the principal as to the name of the charge and the citation to the applicable statute, whether the juvenile was acquitted or adjudicated delinquent, and what disposition (i.e.,

sentence) was imposed. Rather, law enforcement officials are permitted to share any information about the juvenile (subject to other confidentiality laws such as those governing information learned by means of electronic surveillance) that could reasonably pertain to maintaining order, safety, and discipline in the school.

Thus, for example, police could provide the principal with information concerning: the specific type of drug found (as determined by field tests and laboratory analysis); the amount, purity, and value of the drug; how the drug was packaged; whether cash was found or whether there are other indications that the drug was intended to be sold or distributed; where precisely the drug or other contraband was found; what type of weapon was found; whether a suspected firearm was operable and/or loaded; and whether the suspected offense involved or was directed at another enrolled student. (It is especially important promptly to share information concerning the identity of a victim who is enrolled at the same school so that school officials can take steps to protect the victim from further attack and to prevent retaliation or an escalation of violence.)

In addition, the revised juvenile confidentiality law permits a law enforcement officer to testify in a due process suspension or expulsion hearing as to any such facts concerning the offense, provided that the hearing is closed to the general public, and further provided that the prosecutor's office is satisfied that providing such testimony at a hearing before a school board would not jeopardize a law enforcement operation, investigation, or juvenile or adult prosecution.

14.4. Using Information Provided by Law Enforcement Agencies.

Contrary to population misconception, school officials are permitted to conduct their own investigations and to initiate appropriate disciplinary proceedings based upon information provided by law enforcement, even where a formal juvenile prosecution is still pending. (As noted in Chapter 14.3D, police officers may even provide testimony in support of a school disciplinary proceeding.) In other words, it in no way constitutes "double jeopardy" to conduct parallel investigations and disciplinary/prosecution proceedings. Furthermore, school authorities may discipline a student for violating school rules without having to wait for a finding of guilty by a Family Court Judge, and may even impose discipline for a violation of school rules where the student has been found *not guilty* of the same conduct in a formal juvenile prosecution, since the standard of proof used in the juvenile justice system, proof beyond a reasonable doubt, is far greater than the standard used by schools in expulsion, suspension, or other disciplinary proceedings.

School officials should be cautious, however, not to inadvertently undermine an ongoing law enforcement investigation or juvenile prosecution. Accordingly, when school officials are apprised that police are interested in a matter, or that a juvenile prosecution is pending, school officials should take no further action, and certainly should conduct no further investigation (such as by conducting a search or questioning the suspected student or any other witness) without first consulting with the county prosecutor.

As noted throughout this Manual, if school officials should decide to undertake an investigation or to conduct a search based upon information that was provided by law enforcement, significant issues arise whether the resulting search was conducted independently by school officials under the authority of New Jersey v. T.L.O., or whether instead the search will be subject to the stricter search and seizure rules governing the law enforcement community. (For a more detailed discussion of these issues, see Chapter 4.5D4(a).)

14.5. Resolving Controversies and Disputes.

Pursuant to rules and regulations adopted by the State Board of Education, school officials are expressly authorized to request that a law enforcement agency assume responsibility for conducting any search or seizure. See N.J.A.C. 6:29-10.3b4(ii). (In that event, of course, the resulting search conducted by police must be done in accordance with the rules governing law enforcement searches.) By the same token, school officials are required by regulation to permit law enforcement authorities upon their arrival to assume responsibility for conducting any search or seizure. See N.J.A.C. 6:29-10.3(b)(4)(iv).

School officials are expressly prohibited by regulation to "impede any law enforcement officer engaged in a lawful search, seizure, or arrest, whether pursuant to a warrant or otherwise." N.J.A.C. 6:29-10.3b4(iii). In other words, school officials are required to defer to police officers with respect to the execution of an arrest or a search. While school officials in many contexts are said to serve "in loco parentis" (that is, in the place of parents), it is important to note that even parents are not allowed to interfere with police officers who are acting within the scope of their duty. In fact, it is a criminal offense to do so. See N.J.S.A. 2C:29-1 (obstruction of administration of law or other governmental functions). Where any individual believes that a search that is being conducted by a law enforcement officer is unlawful, the appropriate recourse is ***not*** to resist, but rather to submit to the search and, thereafter, to challenge the matter in court.

However, and consistent with the spirit of cooperation between education and law enforcement officials expressed in the Memorandum of Agreement Between Education and Law Enforcement Officials (1992), school officials are authorized to direct any dispute or objection to any proposed or ongoing law enforcement operation or activity to the chief executive officer of the law enforcement agency involved. See Attorney General Directive 1988-1, Part 8, ¶ 3. Where the chief executive officer of the agency is for any reason unable to satisfactorily resolve the dispute or objection, the matter should be referred to the county prosecutor, who is expressly authorized by the Attorney General to work in conjunction with the county superintendent of schools and, where appropriate, the Division of Criminal Justice, to take appropriate steps to resolve the dispute. The county prosecutor bears responsibility for the exercise of sound discretion in such matters consistent with the policies announced in the Attorney General Directive that requires cooperation between law enforcement and education officials. Any dispute that cannot be resolved at the county level must be resolved by the Attorney General, whose decision is binding.

14.6. The Role of Prosecutors in Answering Search and Seizure Questions.

Prosecutors are expressly authorized by the Attorney General to answer questions posed by school officials concerning the law of arrest, search and seizure. It must be noted in this regard that a prosecutor in responding to these questions must not encourage or authorize, much less direct, a school official to undertake a given search, since to do so might make that search subject to the stricter rules governing the law enforcement community. As noted in Chapters 4.5D4 and 6.2, the New Jersey Supreme Court in State v. P.Z. 152 N.J. 86 (1997), recently warned that courts must be sensitive to the potential to the state's deliberately manipulating a civil or noncriminal procedure in order to obtain evidence against a criminal defendant. The Court in that case held that a Division of Youth and Family Services (DYFS) caseworker was not required to provide Miranda warnings before conducting a noncustodial interview because the caseworker in that case was acting within the scope of her duties to investigate and establish a placement plan for the defendant's daughter, and because there was no indication that she had interviewed the defendant with the purpose of aiding in the criminal prosecution or otherwise had a "hidden agenda" to obtain an incriminating statement. In a dissenting opinion, Justice Pollock, who was joined by Justice Coleman, came to a different conclusion, finding ultimately that while the DYFS caseworker may well have been acting primarily to protect the best interests of the injured child, she was also acting on behalf of the county prosecutor, in effect as a "dual agent." The "proof of the pudding," according to Justice Pollock, was that the county prosecutor had expressly authorized the DYFS caseworker to take a statement of the defendant. 152 N.J. at 128-129 (Pollock, J., dissenting).

In the circumstances, it is important that when giving legal advice to school officials with respect to search and seizure issues, county prosecutors should not direct, request, recommend, or even "authorize" school officials to conduct a search or to interview a potential criminal defendant. Rather, the prosecutor should only explain the applicable principles of law and advise the school officials whether the contemplated search or seizure is likely to be judged to be lawful or unlawful based upon an objective assessment of the facts and the law.

Accordingly, Attorney General Directive 1988-1 makes clear that nothing in that Directive shall be construed to require any school official to actively participate in any search or seizure conducted or supervised by a law enforcement officer. Nor should any provision of that Executive Directive, or this Manual, be construed to direct, solicit, or encourage any school official to conduct any search or seizure on behalf of law enforcement, or for the sole purpose of ultimately turning evidence of a crime over to a law enforcement agency. Rather, it must be understood that any search or seizure conducted by a school official must be done in furtherance of the school official's independent responsibility to maintain order, discipline, and safety, based on the school official's independent authority to conduct reasonable investigations as provided in New Jersey v. T.L.O.. See Attorney General Directive 1988-1, Part IV J7.

With these important caveats in mind, prosecutors are nonetheless authorized to provide legal advice to school officials, with the understanding that school officials are free to reject that advice, and are encouraged in any event also to seek legal advice from the school district's attorney.

Finally, prosecutors should *not* give advice to school officials concerning random drug testing programs, since this is a highly-specialized field of search and seizure law that allows for no law enforcement involvement and that is generally beyond the ken and expertise of law enforcement officials. (As noted in Chapter 13.3D, prosecutors may, however, assist local school officials in documenting the nature and scope of a school's drug problem by sharing information concerning the unlawful activities of enrolled students in accordance with N.J.S.A. 2A:4A-60c.)

TABLE OF AUTHORITIES

Cases

Interest of F.B., 658 A.2d 1278 (Pa. Super. 1995), allocatur granted 666 A.2d 1056 (1995) (143, 145, 146)
Interest of S.S., 680 A.2d 1172 (Pa. Super. 1996) (143)
Jenkins by Hall v. Talladega City Bd. of Educ., 95 F.3d 1036, 1039 (11th Cir. 1996) (6, 57, 204, 205)
Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980) (28, 31, 90, 94, 95, 124, 131)
Justice v. City of Peachtree City, 961 F.2d 188, 192 (11th Cir. 1992) (204, 205)
K-9 Drug Detection Service of Florida, Inc., Denial of Application for Registration, 56 FR 5238 (1991) (32)
M.M. v. Anker, 477 F.Supp. 837 (1989), aff'd 607 F.2d 588 (2nd Cir. 1979) (50, 203)
Marshall v. Barlow's, Inc. 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (39)
MaryBeth G. v. City of Chicago, 723, F.2d 1263, 1272 (7th Cir. 1983) (204)
Matter of Gregory M., 82 N.Y.2d 588, 627 N.E.2d 500, 606 N.Y. S.2d 579 (58)
Michigan Dep't. of State Police v. Sitz, 496 U.S. 444 (1990), 110 S.Ct. 2481, 110 L.Ed.2d 412. (81, 128)
Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641, 78 L.Ed.2d 477 (1987) (39, 118, 122, 213)
Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993) (58, 60, 214)
Minnesota v. Murphy, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141, 79 L.Ed.2d 409, 418 (1984) (172)
Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (165, 172, 184)
Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1395, 103 L.Ed.2d 685 (1985) (37, 73, 75)
New Jersey Div. of Youth & Family Serv. v. Wunnenberg, 167 N.J. Super. 578 (App. Div. 1979) (73)
New Jersey Transit PBA Local 304 v. New Jersey Transit, 151 N.J. 531, 556 (1997) (74, 234, 235, 237)
New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (2, 4, 5, 8, 12, 15, 21, 23, 28, 37, 41, 45, 48, 63, 69, 81, 107, 182, 203)
New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (39, 40)
Odenheim v. Carlstadt-East Rutherford Reg. Sch., 211 N.J. Super. 54 (Ch. Div. 1985) (232, 233)
Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) (166)
People v. Morgan, 200 Ill. App.3d 956, 146 Ill. Dec. 561, 558 N.E.2d 524, appeal den., 133 Ill.2d 567, 149 Ill. Dec. 331, 561 N.E.2d 701 (1990) (195)
People v. Dukes, 151 Misc.2d 295, 580 N.Y.S. 2d 850 (N.Y. Crim. Ct. 1992) (142, 146, 148, 151)
Rasmus v. Arizona, 939 F.Supp. 709 (D. Ariz. 1996) (15)
Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980) (54, 55)
Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297, cert. denied, 456 U.S. 930, 102 S.Ct. 1980, 72 L.Ed.2d 447 (1980) (110, 165)
Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) (161)
Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (26, 173, 174, 181, 183)
Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (219)
Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) (6)
Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (73, 112, 223)
State in the Interest of A.B.M., 125 N.J. Super. 162 (App. Div. 1973) aff'd 63 N.J. 531 (1973) (167, 186)
State in the Interest of Carlo, 48 N.J. 224 (1966) (167)
State in the Interest of J.B., 284 N.J. Super. 513 (App. Div. 1995) (49)
State in the Interest of J.F., 286 N.J. Super. 89 (App. Div. 1995) (167, 186)
State in the Interest of J.P.B., 143 N.J. Super. 96 (App. Div. 1976) (166, 170)
State in the Interest of R.W., 115 N.J. Super. 286 (App. Div. 1971), aff'd 61 N.J. 118 (1972) (165)
State in the Interest of S.H., 61 N.J. 108 (1972) (167, 186)

Statutory Provisions

Regulatory Provisions

Rules

Executive Directives

Miscellaneous

TABLE OF APPENDICES

APPENDIX 1

Original "Attorney General Guidelines Regarding School Searches"
(1985)

IRWIN I. KIMMELMAN
ATTORNEY GENERAL

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

TO: ALL NEW JERSEY
PUBLIC SCHOOL TEACHERS
AND ADMINISTRATORS

Re: Attorney General's Guidelines
Regarding School Searches

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

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

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

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

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

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

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

B. School Searches Entail a Balancing of Competing Interests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Having established the grounds upon which a search may be initiated, it is next necessary to discuss the scope of the actual search, that is, the degree to which the teacher or school administrator may peer into a student's private belongings. A search will be permissible in its scope when it is reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the suspected infraction. Once again, the permissible scope of any search is bounded by the dictates of common sense.

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

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

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

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

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

D. Summary

1. A "search" entails conduct by a public school official which involves peeking, poking or prying into a private area or closed, opaque container, such as a purse, knapsack, briefcase or clothing.

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

3. Any teacher or school official who seeks to conduct a search of a student and his or her personal possessions must first satisfy the requirements of reasonableness and common sense.

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

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

b) A search will be reasonable in its scope and intensity where it is reasonably related to the objective of the search and is not excessively intrusive in light of the age and sex of the student and the nature of the suspected infraction.

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

IRWIN I. KIMMELMAN
Attorney General

APPENDIX 2

Attorney General Executive Directive 1988-1
Concerning Law Enforcement Operations
on or Near School Property
(1988)

DRUG FREE SCHOOL ZONE

Attorney General's Executive Directive Concerning Law Enforcement Operations On Or Near School Property

Issued August 1988

Executive Directive No. 1988-1

Whereas, drug abuse is one of the most serious and pervasive problems facing the citizens of this State; and

Whereas, school age children are especially vulnerable to and influenced by the activities of predatory drug offenders; and

Whereas, the Governor has called for a broad based and multi-disciplinary attack on both the "supply" and "demand" facets of the substance abuse problem; and

Whereas, our long term efforts to address this national problem will depend in large measure on the eventual success of programs and initiatives designed ultimately to reduce the demand for illicit substances; and

Whereas, elementary and secondary schools will serve as the principal medium for educating young people about the perils of substance abuse; and

Whereas, young citizens of this State have an undeniable and fundamental right to the advantages of a school environment which is conducive to educational goals and prerogatives and which is totally free of drug abuse and trafficking activities; and

Whereas, the Legislature by enactment of the Comprehensive Drug Reform Act of 1987 and the Drug-Free School Zone Act has provided for enhanced punishment for drug offenders who distribute to or who use children, or who operate on or near school property; and

Whereas, the Attorney General by promulgation of the Statewide Narcotics Action Plan (SNAP) has directed that the enforcement of New Jersey's drug laws shall be the number one priority of the law enforcement community, and that special emphasis shall be placed on the patrol and protection of schools and areas within drug-free school zones; and

Whereas, there is a demonstrated need for the continuation, institutionalization and enhancement of the spirit of cooperation which exists between law enforcement officials and professional educators with respect to the substance abuse problem; and

Whereas, pursuant to the provisions of Chapter 5 of the Statewide Narcotics Action Plan, law enforcement officials are directed at all times to respect and appreciate the needs, concerns and rights of students and professional educators; and

Whereas, the Attorney General has established a School Zone Narcotics Enforcement Working Group, which is comprised of representatives from every level within the professional educational and law enforcement communities, and which has developed and recommended specific guidelines concerning law enforcement activities conducted on school property, including but not limited to undercover school operations, and also concerning the legal and professional responsibilities of school employees to report to appropriate law enforcement officials suspected incidents of drug use and trafficking; and

Whereas, the State Board of Education will adopt rules and regulations, and the Commissioner of Education will promulgate rules, regulations, guidelines and model agreements which will compliment and help to implement the provisions of this Executive Directive,

Now, therefore, I Cary Edwards, Attorney General of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby DIRECT that all law enforcement agencies and officers in this State shall comply with the directives, policies and procedures which are attached hereto and incorporated herein.

This Executive Directive shall take effect immediately.

Given, under my hand and seal, this 4th day of August, 1988 in the Year of Our Lord, one thousand nine hundred and eighty-eight, and of the Independence of the United States, the two hundred and twelfth.

Cary Edwards
Attorney General

Part I - Purpose

This Executive Directive is intended to ensure the uniform and aggressive enforçement of every provision of the Comprehensive Drug Reform Act, while also ensuring strict compliance with the underlying principles embodied in Directive 5.10 of the Statewide Action Plan for Narcotics Enforcement (SNAP), which provides that:

> It shall be the policy of this State that no law enforcement activity or operation shall interfere with school substance abuse counselling and education initiatives. Accordingly, all undercover, surveillance and "clean sweep" narcotics operations taking place on school property shall be coordinated and approved by either the county prosecutor or the Attorney General. In the absence of compelling or exigent circumstances, no such operation shall be conducted in or on school property unless the appropriate school authorities have first been consulted. Such operations should not be undertaken without giving due consideration to their impact on the educational environment, existing substance abuse counselling programs and the relationships between school authorities, the law enforcement community and the student population.

The provisions of this Executive Directive are intended to direct law enforcement as to the manner in which all operations and activities directly affecting schools are to be conducted. The provisions of this Executive Directive are not intended to serve as an operational manual covering every aspect of law enforcement operations and procedures affecting schools. Rather, it is the purpose of this Executive Directive to set forth and reaffirm overriding State policies, and to establish an organizational framework and decision-making and consultation process by which to ensure that law enforcement officers at all times demonstrate a proper respect and appreciation for the rights and interests of students and professional educators.

It should be noted, finally, that the provisions of this Executive Directive were developed as a direct result of the specific recommendations of the School Zone Narcotics Enforcement Working Group established pursuant to SNAP Directive 5.14. The policies and procedures established in this Executive Directive are therefore the product of a frank and thoughtful dialogue between representatives at every level of the New Jersey law enforcement and professional education communities.

Part II - Statement of Policies, Findings and Objectives

1. Schools are a principal medium by which to provide young people with the personal skills and information which they will need to help them to resist the temptation to experiment with illicit substances. New Jersey's elementary and secondary schools thus emerge as a vital and perhaps the single most important component of this State's

comprehensive, long term prevention program designed ultimately to alter tolerant attitudes and behavior concerning substance abuse. Accordingly, it shall be the policy of the New Jersey law enforcement community to promote and safeguard an environment which is conducive to education. No law enforcement operation, program or activity, therefore, shall be permitted to interfere with educational goals and prerogatives, which must always take precedence over traditional law enforcement objectives.

2. Law enforcement officers are required by law to use all reasonable diligence in apprehending and prosecuting offenders against the law. However, law enforcement officers must recognize that school officials and administrators share a similar but independent responsibility to provide for the safety and proper discipline of children in their charge.

3. It is essential to the success of the deterrent scheme established by the Comprehensive Drug Reform Act of 1987 that all citizens know and understand the legal consequences associated with the illicit use and distribution of controlled dangerous substances, and the efforts by law enforcement, as embodied in the Statewide Narcotics Action Plan, which are designed to increase the likelihood that all drug offenders will be identified, apprehended and subject to prosecution.

4. The Legislature, by enactment of the Comprehensive Drug Reform Act, rejected the notion that any drug offense, including simple possessory offenses, can properly be characterized as a minor or "victimless" crime. Accordingly, the Legislature established stern, realistically enforceable penalties directed against users and purchasers, without whom major traffickers would have no market or profit opportunities. The Legislature further provided for the imposition of especially stern punishment upon offenders who operate on or near schools. It shall therefore be the law enforcement policy of this State to ensure that schools and schoolyards do not become sanctuaries or safe havens for adult or juvenile drug offenders. The very presence of drug use and trafficking activities on school property results in a direct and immediate injury to the rights and interests of all law abiding members of the school community.

5. It shall be the law enforcement policy of this State, consistent with the provisions of the Comprehensive Drug Reform Act and the Code of Juvenile Justice, to aggressively enforce this State's penal statutes against all drug offenders. By arresting all drug offenders, including juveniles suspected of use and simple possession, law enforcement will serve a vital intervention function, and will thereby initiate the juvenile justice process so that the courts and appropriate substance abuse professionals can provide necessary evaluation, treatment and counselling services for drug using and drug dependent juveniles.

6. Attention has been focused on the placement of undercover law enforcement officers in schools. Such operations can serve as a vital tool in helping to identify and remove from school environments those persons who distribute illicit drugs. Such operations are also consistent with the policy objective of deterring young people from violating drug laws, and further serves to emphasize to all members of society that all persons who violate drug laws, including juveniles, are subject to arrest, prosecution and the imposition of punishment. However, an undercover school operation should not be undertaken in isolation; rather it should be part of a more comprehensive law enforcement program designed to deal with the substance abuse problem and drug trafficking activities on or near school property.

7. Law enforcement agencies contemplating an undercover school operation must recognize the risks associated with such operations, which by their nature have the potential to disrupt the educational environment and to interfere with the formation and continuation of trust relationships between members of the school community. Accordingly, it is necessary to establish uniform, minimum standards by which to ensure that all undercover school operations are planned and conducted so as to maximize their legitimate deterrent benefits, while minimizing to the greatest extent possible the risk of disruption and injury to educational goals and prerogatives.

Part III - Applicability and Effective Date

1. The provisions of this Executive Directive shall take effect immediately and shall henceforth govern the conduct of all law enforcement operations and activities occurring on school property which are undertaken by any state, county or local law enforcement agency. The effective date of this Executive Directive shall not depend upon the promulgation or final adoption of complimentary rules and regulations by the Commissioner of Education.

2. The provisions of this Executive Directive are designed to establish a framework for cooperation and consultation between the law enforcement and education professional communities, and to provide express authorization for law enforcement agencies to enter into agreements or memoranda of understanding with appropriate school officials which define the mutual rights, interests and responsibilities of the members of both professional communities with respect to law enforcement operations undertaken on school property.

3. The provisions of this Executive Directive, and the underlying policies announced herein, shall apply with respect to all elementary and secondary (junior high and high) schools located in the State without regard to whether a school is public, private or parochial. With respect to non-public schools, all references in this Executive Directive to building principals, local superintendents or other public school officials or

employees shall be deemed to mean and refer to the appropriate private or parochial school counterpart or counterparts.

4. It shall be the responsibility of every law enforcement agency to review and where necessary modify its rules, regulations and standard operating procedures so as to reflect and enforce the provisions of this Executive Directive. It shall also be the responsibility of every law enforcement agency to ensure that all officers are familiar and comply with such rules, regulations and standard operating procedures as amended.

5. All operations conducted pursuant to this Executive Directive by any state law enforcement agency shall be subject to the approval of the Attorney General or his designee.

6. All operations conducted pursuant to this Executive Directive by any county or local law enforcement agency shall be subject to the approval of the county prosecutor.

Part IV - Liaisons

Each county prosecutor and each law enforcement agency having patrol jurisdiction shall designate a person or persons to serve as a liaison between that law enforcement agency and local and county school officials. Where appropriate, each law enforcement agency should designate as school liaison the agency's juvenile bureau supervisor, juvenile officer or officer assigned to handle juvenile matters. For this arrangement to work, the local superintendents of each school should similarly designate a person to serve as a liaison to the respective law enforcement agencies. The roles and functions of these liaisons are to:

- Facilitate communication and cooperation;
- Identify issues or problems that arise in the implementation of this Executive Directive and facilitate the resolution of any such problems;
- Act as the primary contact person between the schools and the affected law enforcement agencies;
- Act together in developing joint training and other cooperative efforts, including information exchanges and joint speaking engagements.
- Coordinate intervention and prevention efforts.

Part V - Law Enforcement Operations

A. Definitions

As used in this Executive Directive:

Controlled Dangerous Substance shall mean a drug, substance or immediate precursor as defined at N.J.S.A. 2C:35-2, and shall include controlled substance analogs.

Undercover School Operation shall mean a planned operation undertaken by a law enforcement agency wherein a law enforcement officer(s) is placed in a school community and poses as a member of the school community for the purpose of identifying and eventually apprehending persons engaged in the illegal distribution of controlled dangerous substances.

Planned Narcotics Surveillance shall mean a planned operation wherein a law enforcement officer(s) enters onto school property or buildings in plainclothes during operating school hours for the purpose of observing or participating in activities associated with the use, possession or distribution of any controlled dangerous substance. This term shall not include observations made by a law enforcement officer, whether in uniform or in plainclothes, from any place or property not owned by a school or school board.

Routine Patrol shall mean activities undertaken by a law enforcement officer, whether in uniform or in plainclothes and whether on foot or in a marked or unmarked vehicle, to patrol areas within a drug-free school zone (see N.J.S.A. 2C:35-7) for the purpose of observing or deterring any criminal violation or civil disturbance.

Planned Arrest shall mean an arrest or taking into custody based upon probable cause which was known to a law enforcement officer sufficiently in advance of the time of the actual arrest, whether as a result of an undercover school operation, planned narcotics surveillance, or - otherwise, so that there was sufficient opportunity for the arresting officer or any other law enforcement officer to apply for and obtain an arrest warrant, even though an arrest warrant may not have been sought or issued. The term shall also include arrests made pursuant to a "clean sweep" (i.e., e.g. multiple arrest) operation as prescribed by SNAP Guideline 5.4.

Spontaneous Arrest, in distinction to a planned arrest, shall mean an arrest or taking into custody based upon probable cause to believe that an offense is being committed in the arresting officer's presence under circumstances where the officer could not have foreseen with certainty that the specific offense would occur and thus

where the arresting officer had no reasonable opportunity to apply for an arrest warrant. The term shall also include any arrest or taking into custody in response to a request by a school official pursuant to subsection G(l) of this Part.

Operating School Hours shall include the time in which a school is in session or when students are engaged in school-related activities under the supervision of professional school staff.

B. Undercover School Operations

1. Requests to Conduct Operations

a. All requests by school officials to undertake an undercover school operation in a particular school or school district should be directed to the local chief of police or, where appropriate, to the Superintendent of State Police. However, the ultimate approval of all undercover school operations shall be granted by the county prosecutor or, where appropriate, the Attorney General or his designee.

b. Any request to undertake an undercover school operation shall not be made public by either the requesting school official or the law enforcement agency receiving the request.

c. The county prosecutor or the Attorney General or his designee shall make a good faith effort to comply with all reasonable requests to initiate an undercover operation, considering the scope and nature of the substance abuse problem in a particular school or district and the availability of law enforcement resources.

d. Where the county prosecutor or the Statewide Narcotics Task Force is for any reason unable to comply with a request to undertake an undercover school operation, the county prosecutor or the Attorney General or his designee shall promptly notify the requesting school officials.

e. It is understood and agreed that the decision to decline a request to undertake an undercover school operation shall not be made public by either the requesting school official(s) or the law enforcement agency receiving the request.

f. Nothing in this subsection shall be construed to preclude law enforcement officials from initiating a request to conduct an undercover school operation pursuant to Section 2 of this Part.

2. Consultation and Cooperation

a. As a practical matter, a successful undercover school operation cannot take place without the assent and continuing cooperation of the building principal and local school superintendent, and, except as may be expressly provided herein, none shall be attempted without such assent and continuing cooperation. Accordingly, prior to the placement of any undercover officer in a school, the school building principal and the local superintendent shall be consulted unless there are compelling reasons not to consult with either of these officials. The Attorney General alone shall have the authority to determine the existence of compelling reasons not to consult with either of these officials. Where the Attorney General determines that compelling reasons exist, an alternative school official or officials shall be designated who shall be consulted in lieu of the building principal or local superintendent prior to the placement of an undercover officer in a school and throughout the course of the operation.

b. In any case where the undercover school operation has not been requested by an appropriate school official pursuant to subsection 1 of this Part, the law enforcement agency proposing the operation shall advise the building principal and local superintendent of the nature of the proposed operation and shall, to the extent possible, explain the reasons why the operation is necessary and appropriate. This explanation should include a description of the extent and nature of the suspected drug trafficking activities occurring within the school environment which would justify the operation. Law enforcement officials shall not be required or permitted by the provisions of this subsection to divulge any information received in confidence, whether from an informant or otherwise, or which would violate the laws or court rules governing the disclosure of juvenile offender information, grand jury information or information derived from electronic surveillance.

c. Undercover school operations should not necessarily be limited to schools falling within any particular region or demographic setting (i.e., e.g. rural, suburban, urban center, etc.,) or any particular district factoring group (i.e., a composite measure of socioeconomic status within a geographic area). Rather, subject to the availability of resources, undercover school operations should be proposed and conducted in accordance with the provisions of this Executive Directive in any and all schools where the designated law enforcement and school officials determine that such operations would be beneficial.

d. Information provided by law enforcement to the building principal or local superintendent pursuant to subsection B(2)(b) of this Part shall be kept strictly confidential and shall not be divulged by the building principal or local superintendent to any other person without the expressed approval of the county prosecutor or, where appropriate, the Attorney General or his designee.

e. No law enforcement officer shall disclose the fact that an undercover school operation has been proposed, requested or is being or has been considered with respect to any particular school or school district.

f. The building principal and the local superintendent shall be afforded the opportunity to offer specific concerns regarding the conduct of any proposed undercover school operation, and shall be given the opportunity to make general or specific recommendations as to how to minimize the impact of the proposed operation on the educational environment, existing substance abuse counselling programs and the relationship between school authorities, the law enforcement community and the student population. In developing an undercover school operation plan, as required by subsection B(2)(h), infra, and throughout the course of the operation, the law enforcement agency conducting the operation shall give due consideration to the concerns and recommendations offered by the building principal and local superintendent.

g. All undercover school operations must be approved in writing by the Attorney General or his designee or a county prosecutor. To ensure the integrity of the decision-making process, the law enforcement agency or department proposing the undercover school operation shall submit to the county prosecutor or to the Attorney General or his designee a written confidential plan which sets forth the procedures to be taken to provide for the security and safety of the undercover officer and to ensure compliance with all applicable provisions of this Executive Directive. Such plans shall also document all of the general and specific recommendations of the building principal and/or local superintendent, and shall indicate those steps which will be taken to implement and comply with those recommendations.

h. It shall not be necessary or required for the law enforcement agency proposing the undercover school operation to provide a copy of the confidential plan to the building principal or local superintendent, except that these school officials shall be advised whenever the law enforcement agency conducting the undercover school operation is for any reason unable or unwilling to follow any recommendation proposed by the building principal or superintendent.

i. Each plan shall specify the chain of command and identify those superior officers who will directly supervise the activities of the undercover officer. Each plan shall also designate the contact person(s) who will be available on a 24-hour basis to respond to any problems which might arise.

j. The county prosecutor authorizing the operation, or the Attorney General or his designee in the case of operations conducted by any state law enforcement agency, shall remain ultimately responsible for all aspects of the operation and shall be kept abreast of all undercover activities. The law enforcement agency responsible for

conducting the undercover operation shall maintain control of the logistics of any operation once begun.

k. For statistical and recordkeeping purposes and to facilitate the development of model plans, a copy of each approved undercover school operation plan shall be transmitted to and maintained by the Statewide Narcotics Task Force.

l. A law enforcement agency conducting the undercover school operation shall provide to the building principal and local superintendent a detailed briefing concerning the logistical and recordkeeping requirements associated with successfully placing an officer undercover. The building principal and local superintendent shall be provided with the names and telephone numbers of the designated person(s) who shall be available on a 24-hour basis to respond to any problems or inquiries.

m. The Statewide Narcotics Task Force shall, by September 1, 1988, prepare and continually update a confidential manual describing in detail the required logistical forms, recordkeeping requirements and procedures designed to ensure the integrity and security of the undercover operation. This manual shall also discuss past undercover operation experiences and problems, and shall recommend procedures to avoid or minimize these problems. This manual shall be provided to all county prosecutors and may be provided on a confidential basis to any building principal or local superintendent as part of the briefing required by subsection B(2)(1) of this Part.

3. Security; Limited Disclosure Agreements; Early Termination

a. The building principal and local superintendent shall be informed as to the identity of any person assigned to an undercover investigation unless there are compelling reasons, as determined by the Attorney General pursuant to subsection B(2)(a) of this Part, not to inform either of these officials. The building principal and local superintendent, and any other school officials or employees who may be informed as to the identity of the undercover officer, will safeguard the identity of that officer and will not disclose the existence of a contemplated or ongoing undercover school operation to any person.

b. In the event that the building principal, local superintendent or any other school official or employee who may have been informed as to the existence of the operation subsequently learns of any information which suggests that the true identity of the undercover officer has been revealed, or that any person has questioned the identity or status of the undercover officer as a bona fide member of the school community, or that the integrity of the operation has been in any other way compromised, such information should be *immediately* communicated to the law enforcement officer requesting the operation.

c. The school principal and local superintendent shall be advised whenever an undercover school operation has been suspended or terminated or whenever the undercover officer is permanently removed from the school environment.

4. Operation Targets; Persons Subject to Arrest

a. The purpose of an undercover school operation is to identify and apprehend persons engaged in the distribution of controlled dangerous substances on school property or to juveniles. It is recognized, however, and in accordance with SNAP Directives 5.7 and 6.10, that any person who violates the Comprehensive Drug Reform Act, including a person who commits a simple possessory, use or being under the influence offense, is subject to eventual arrest and prosecution. Nothing in this Executive Directive shall be construed to preclude the prosecutor from electing in his discretion to forego formal prosecution in favor of pursuing school disciplinary proceedings or other appropriate criminal justice alternatives, subject to the requirements of law. See Part II(5).

5. Use of Undercover Officers As School Employees

No undercover school operation shall be conducted which entails the placement of an undercover officer as a certified member of the school community without prior written approval of the Attorney General with notice given to the Commissioner of Education, or in the case of non-public schools, the chief school officer. The Attorney General shall base his approval upon a finding that 1) other law enforcement methods would not be effective, and 2) there is a reasonable articulable suspicion that adult school employees or other non-student member(s) of the school community are engaged in drug trafficking activities. In such event, and upon such findings, the underlying purpose of the operation shall not be to identify or to apprehend student offenders, but rather to identify and to apprehend suspected adult or non-student offenders. Furthermore, the confidential plan required to be prepared pursuant to Section B(2)(g) of this Part shall outline steps developed in consultation with the building principal and local superintendent which will be taken to minimize the undercover officer's contact with and impact upon the student population. No undercover officer shall be permitted to teach a formal class of instruction without the approval of the Attorney General and local superintendent, and in no event shall an undercover officer posing as a non-student member of the school community be permitted to establish or to simulate any confidential, trust or counsellor relationship with any student.

6. Arrest Procedures

No arrest or taking into custody during the course of, or as a result of, an undercover school operation shall be executed except in strict compliance with the arrest protocols prescribed by Section G of this Part.

7. Limitations on Undercover Officer Conduct

a. Entrapment. Every undercover officer shall be thoroughly briefed on the law concerning entrapment. See N.J.S.A. 2C:2-12. No undercover officer shall encourage or counsel any student to purchase or use alcohol or any controlled dangerous substance.

b. Confidentiality of Treatment Records. Every undercover officer shall be briefed on federal regulations and state policies concerning the confidentiality of treatment and substance abuse counselling program records and information. It is the policy of these regulations to strictly safeguard such records and information from disclosure, and no law enforcement activity shall be permitted in any way to interfere with, intrude upon or in any way compromise the integrity of any substance abuse counselling or treatment program.

c. Treatment. No undercover officer shall discourage any student from seeking drug or alcohol abuse treatment or counselling, or from reporting his or her own alcohol or substance abuse problem or dependency.

d. Non-Participation in Treatment. No undercover officer shall in any way participate in or attend any drug or alcohol abuse treatment or counselling program. In the event that an undercover officer is referred to or recommended to participate in a counselling or treatment program by a teacher or school staff member, the undercover officer shall report the circumstances of that referral or recommendation to his superiors and shall decline such referral or recommendation.

e. Preservation of Teacher Trust Relationships. No undercover officer shall engage in any activity or conversation which would require any teacher or school official to violate or compromise a trust relationship with any student.

f. Use and Distribution Prohibition. No undercover officer shall ingest or inhale (other than passive inhalation) any controlled dangerous substance; nor shall any undercover officer be permitted to distribute or dispense any controlled dangerous substance without the expressed approval of the county prosecutor or, where appropriate, the Attorney General or his designee.

g. Disciplinary Infractions. It is recognized that in order to remain credible and so as to gain access to and to interact socially with persons engaged in illicit drug trafficking activities, an undercover officer cannot be expected to pose as a model student. Nonetheless, no undercover officer shall engage in any activities which unduly disrupt the educational environment, or which amount to disciplinary infractions of such a nature and magnitude so as to prevent other students from enjoying the full benefits of that educational environment. Every undercover officer shall be expected at all times to respect the rights of teachers and other students, and each undercover officer shall be briefed on the rules of conduct promulgated by the school.

h. Romantic Involvement. No undercover officer shall encourage or participate in any romantic relationship with any student during the course of an undercover operation.

i. Firearms Policy. It is understood that undercover work concerning drug trafficking activities is inherently dangerous, and, as evidenced by recent events in other states, subjects the undercover officer to the risk of bodily injury or death. Accordingly, law enforcement should take all measures which are necessary and appropriate to protect the undercover officer, as well as to protect all students with whom the undercover officer may come into contact, and to avoid potentially violent confrontations wherever possible. In general, an undercover officer should not carry a firearm or otherwise bring onto or maintain a firearm on school property. However, there may be instances where an undercover officer may be required to leave school property for the purpose of participating in an off-campus drug transaction under circumstances where the carrying of a concealed weapon is necessary and prudent, and where there would be no meaningful opportunity for the undercover officer to retrieve a weapon while en route to participate in the off-campus drug transaction. Accordingly, an exemption from the general rule prohibiting the carrying or bringing onto school property of a firearm may only be granted with the expressed approval of the officer's immediate superior unless otherwise specified in the plan approval process by good cause shown. Any firearm brought onto school property pursuant to this subsection will ordinarily be contained in a closed and fastened case locked in the trunk of an automobile operated by the undercover officer. It is assumed, moreover, that any exemption from the general weapons carrying policy established in this subsection shall only be rarely sought, and approval to carry a firearm onto school property shall only be granted where alternative means of providing adequate security or support are not feasible.

8. Post-Operation Report

Following the termination of every undercover school operation, the county prosecutor or the Assistant Attorney General in charge of the Statewide Narcotics Task Force shall prepare a post-operation report which shall be transmitted to the Attorney

General. The report shall discuss the results and impact of the operation and any logistical or policy problems which were encountered. The report shall also include recommendations for improved procedures in dealing with potentially recurring problems. The county prosecutor or the Assistant Attorney General in charge of the Statewide Narcotics Task Force shall solicit the comments and recommendations of the building principal and local superintendent, and these comments and recommendations shall be included in the post-operation report. The contents of a post-operation report shall be publicly disclosed, and a copy shall be provided to the building principal, local and county superintendents and the Commissioner of Education.

9. Post-Operation Seminars

To maximize the deterrent impact of an undercover school operation, the law enforcement agency conducting the operation shall make available officers to participate in seminars which, upon the invitation of appropriate school officials, may be held in the school in which the operation was conducted. The purpose of these seminars shall be to discuss with teachers, parents and/or students the nature of the completed operation, the procedures employed pursuant to this Executive Directive to minimize the intrusion into the educational environment, and to discuss the substance abuse problem from a law enforcement perspective. See SNAP Guideline 5.10. It shall be the policy of the State's law enforcement community to promote the frank and open discussion of issues concerning the need for such operations, and to solicit opinions and recommendations from teachers, parents, students and members of the community-at-large. No such seminar or lecture shall be held, however, except with the approval of the building principal or local superintendent of the school in which the operation was conducted.

10. Operational Models and Technical Assistance

a. The Statewide Narcotics Task Force shall compile information concerning the best way in which to plan and conduct undercover school operations, and shall from time to time make this information and associated recommendations available to all county prosecutors. The Statewide Narcotics Task Force shall be available at all times to provide technical assistance and advice concerning any aspect of an undercover school operation. See also SNAP Directive 5.11 (State Police will, subject to the availability of resources, make available undercover teams to support undercover school operations).

b. The Statewide Narcotics Task Force, working in conjunction with the county prosecutors, shall develop a program in which officers who had previously served in an undercover school capacity can meet with officers who have been selected to participate in an undercover school operation for the purpose of discussing in detail

the logistical, security and policy aspects of the operation, and to discuss the emotional and psychological stresses associated with participating in such operations.

C. Planned Narcotics Surveillance

1. Notice and Consultation. In the absence of compelling or exigent circumstances, as shall be determined by the county prosecutor or the Attorney General or his designee, no planned narcotics surveillance operation as defined in this Executive Directive shall be conducted during operating school hours without first providing notice to and consulting with the building principal or local superintendent of the school involved.

2. Limitations; Targeted Subjects. Nothing in this Executive Directive shall be construed to prevent any law enforcement officer from making any observations from any place or property not owned by a school or school board, except that a planned narcotics surveillance or any other form of observation should, wherever possible, be limited to observing 1) those specific individuals or groups of individuals who are believed to be involved in drug trafficking activities, or 2) those specific areas or places on school property where drug use or trafficking activity is believed to occur frequently.

D. Routine Patrols

1. Aggressive Enforcement Plans. SNAP Directive 5.9 establishes that it is the responsibility of every local law enforcement agency to maintain, at appropriate times, a visible police presence within all drug-free school zones, and to file and periodically update a confidential report with the county prosecutor detailing how these zones are to be patrolled.

2. Notice to School Officials. Where a patrol plan developed pursuant to SNAP Directive 5.9 requires an officer to periodically enter onto school property or buildings, the chief operating officer of the department with patrol jurisdiction should advise the appropriate school building principal and local superintendent. It is understood and agreed that any portion of a patrol plan disclosed to school officials in accordance with this subsection shall be kept strictly confidential.

3. On-Site Reporting. Except when responding to an emergency, or where compliance with this subsection would otherwise not be feasible, no on duty police officer shall enter any school building without first complying with the procedures established by the school for the reporting of visitors. It is understood that the agreements or memoranda of understanding developed pursuant to this Executive Directive and rules and regulations to be promulgated and adopted by the Commissioner of Education may prescribe the specific on-site reporting procedures. It

shall be the responsibility of each police department or agency with patrol responsibilities to make certain that all officers are familiar and comply with the reporting policies established by each school within the law enforcement agency's jurisdiction.

4. Arrest Procedures. No law enforcement officer, whether in uniform or otherwise, shall enter school property or buildings for the purpose of making an arrest or taking a juvenile into custody except in accordance with the arrest protocols established in Section G of this Part.

E. Police Presence at Extra-curricular Events

1. SNAP Guideline 5.3 provides that each local law enforcement agency, working in conjunction with the appropriate school officials, should provide for the presence of uniformed police officer(s) at all major school sporting events. It is understood that the procedures for complying with this SNAP Guideline are properly the subject of local agreements or memorandums of understanding entered into between the law enforcement agency and school officials. In the absence of compelling reasons as may be determined by the county prosecutor or chief executive officer of the law enforcement agency having patrol jurisdiction, uniformed police officers should not be assigned to school functions, and especially those functions occurring within school buildings, except with the approval of the building principal or local superintendent.

2. The purpose for requesting uniformed police presence on school property is not limited merely to the goal of deterring illegal drug use and trafficking activities; rather, police assistance is often requested for the purpose of maintaining order, crowd and traffic control, and other bona fide public safety reasons. All requests by school officials for law enforcement agencies to provide for a uniformed presence at any school event should be directed to the local police liaison or local chief executive officer of the law enforcement department or agency having patrol jurisdiction.

F. Referrals and Evidence Pick-up

1. Procedures Concerning Required Referrals. Pursuant to guidelines to be issued by the Commissioner of Education, school officials will promptly notify designated law enforcement officials whenever any school employee develops reason to believe a violation of the Comprehensive Drug Reform Act has occurred, (hereinafter referred to as a "referral"), except that school officials shall not be required or expected to refer a matter to law enforcement where a student has voluntarily sought treatment or counseling on his or her own initiative in accordance with the policies and procedures set forth in the guidelines issued by the Department of Education. For the purposes of this Executive Directive, an admission by a student of a violation of the Comprehensive Drug Reform Act which is in response to questioning initiated by a law enforcement

officer or school employee shall not constitute a voluntary, self-initiated request for counseling and treatment.

2. Nonapplicability to Treatment Program Records and Information. Nothing in this Section shall be construed in any way to authorize or require a referral or transmittal of any information or records in the possession of a substance abuse counselling or treatment program, and such information or records shall be strictly safeguarded in accordance with applicable federal regulations and state policies.

3. Securing Physical Evidence Pending Referral and Pick-Up. Pursuant to guidelines to be issued by the Commissioner of Education, wherever a school employee seizes or comes upon any substance believed to be a controlled dangerous substance, or item believed to be drug paraphernalia, school officials shall immediately advise the local law enforcement agency having patrol jurisdiction and shall secure the substance or item pending the response by that law enforcement agency to retrieve and take custody of the substance or item. School employees having custody of the substance or item must take reasonable precautions, as per local board of education procedures, to prevent its theft, destruction or use by any person. Under no circumstances shall any person destroy or otherwise dispose of any controlled dangerous substance or drug paraphernalia except by turning over such substance to the responding law enforcement officer.

4. Prompt Response to Referrals and Request for Pick-Up; Preserving Chain of Custody. It shall be the responsibility of the law enforcement agency summoned pursuant to subsection 3 of this section to promptly dispatch an officer to take custody and secure the controlled dangerous substance or drug paraphernalia. School officials should, in accordance with the policies and procedures set forth in the guidelines issued by the Department of Education, provide to the responding law enforcement officer information necessary to establish the chain of custody and the circumstances of the seizure, including the identity of any person from whom the substance or item was obtained, except that the summoned law enforcement officer shall not request information concerning the identity of the person from whom the controlled dangerous substance or item was obtained, where the substance or item was turned over to a substance abuse counsellor in the course of or as a result of diagnosis or treatment, or where: 1) the person voluntarily and on his or her own initiative turned over the substance to a school employee *and* 2) the person was not involved in distribution activities, *and* 3) the student agrees to participate in an appropriate treatment program. Nothing in this Section shall be construed in any way to authorize or require a referral or transmittal of any information or records in the possession of a substance abuse counseling or treatment program, and such information or records shall be strictly safeguarded in accordance with applicable federal regulations and state policies.

G. Arrest Protocols

For the purpose of this Executive Directive, the term "arrest" shall include the taking into custody of a juvenile for an offense which if committed by an adult would constitute a crime or disorderly persons offense.

1. Requests by School Officials

a. All requests by any school official to summon a law enforcement officer for the purpose of making an arrest on school property, whether for a suspected violation of the Comprehensive Drug Reform Act or for a suspected violation of any other criminal statute, should be directed to the designated police liaison or to the chief of the department having patrol jurisdiction.

b. It is understood that agreements or memoranda of understanding shall be entered into between school officials and local law enforcement agencies, and that these agreements or memoranda of understanding should prescribe the preferred procedures for entering school premises for the purpose of effecting arrests.

c. It shall be the general policy of every law enforcement agency effecting an arrest on school grounds to minimize the disruption of the school environment to the greatest extent possible consistent with the requirements of public safety. Accordingly, substantial weight should be given by the law enforcement officer assigned to make the arrest to the specific recommendations of the building principal or local superintendent as to the place and manner for effecting the arrest.

d. So as to minimize any disruption of the educational environment, every reasonable effort should be made to effect the arrest in the building principal's office, or in some other designated area away from the general student population.

e. Where feasible, the responding law enforcement officer(s) should be in plainclothes, use unmarked police vehicle(s) and refrain from using a siren or flashing overhead lights. In addition, the number of responding officers should be kept to a minimum consistent with the requirements of public safety.

2. Other Spontaneous Arrests

a. In those cases in which a law enforcement agency responds during operating school hours to a suspected offense reported by someone other than the building principal or local superintendent, or where a law enforcement officer observes the occurrence of an offense on school property during operating school hours which would justify a warrantless arrest, or where a person subject to arrest retreats onto school property during operating school hours, the arresting law enforcement officer

shall notify the building principal as soon as it is practical to do so. Where the arrest involves a student enrolled in the school, the building principal shall, wherever feasible, be notified before the student is taken from school grounds.

b. When effecting any spontaneous arrest on school property during operating school hours, every reasonable precaution should be taken to minimize the disruption of the school environment to the greatest extent possible consistent with the requirements of public safety. Accordingly, the policies and procedures set forth in subsection 1 of this section shall be complied with wherever it is feasible to do so.

3. Planned Arrests

a. Whenever a planned arrest is to occur on school property, the building principal or local superintendent shall be advised and consulted before the arrest occurs, and the arresting officer(s) shall comply with the policies and procedures set forth in subsection 3 of this section which are designed to minimize any disruption of the educational environment.

H. Notice of Arrests

1. Arrests of Students on School Grounds. As required by subsection 2 of this Part, whenever a student has been arrested on school property, the law enforcement officer or agency involved shall, as soon as practicable, notify the building principal. Wherever possible, such notice shall be given before the student has been taken off of school property. Where the student is a juvenile, all information concerning the circumstances of the arrest shall be provided to the building principal on a confidential basis. See N.J.S.A. 2A:4A-60c.

2. Arrests of Non-Students on School Grounds. Where a person other than an enrolled student is arrested on school property, the building principal shall be advised as to the circumstances of the offense and the identity of the offender, provided that where the person arrested is a juvenile, the law enforcement agency or officer involved shall not divulge any information which would violate the laws governing the disclosure of juvenile information.

3. Arrests of Students off School Grounds During Operating School Hours. Where a student is arrested off of school property during operating school hours, or under circumstances which would lead the arresting officer to believe that a school official was responsible for the care and custody of the student at the time of the arrest, or where the arresting officer reasonably believes that the student was in transit between school and his home at the time of arrest, the arresting officer shall as soon as is practicable notify the building principal of the school in which the student is enrolled.

All information concerning the basis and circumstances of the arrest shall be provided to the building principal on a confidential basis. See N.J.S.A. 2A:4A-60c.

I. Investigations and Grand Juries

1. Compliance with Confidentiality Regulations. SNAP Directive 5.10 establishes the policy of this State that no law enforcement activity or operation shall be permitted to interfere with any school substance abuse counselling or treatment program. Accordingly, and to ensure strict compliance with federal regulations designed to safeguard substance abuse counselling and treatment program records and information, the prosecutor's manual and grand jury manual shall be supplemented to include a detailed discussion of the applicable federal regulations. (42 *C.F.R.* Part 2).

2. Exemptions Subject To Attorney General Approval. No state, county or local law enforcement agency shall cause a subpoena to be issued, or apply for a search warrant, concerning records and information maintained by a bona fide substance abuse counselling or treatment program, nor shall any exemption to the federal regulations be sought in accordance with the procedures established in those regulations without the prior written approval of the Attorney General.

J. School Searches

1. It is understood that while the Fourth Amendment applies to all searches of students conducted by public officials, different legal standards are used to justify searches conducted by school officials as compared to searches conducted by law enforcement officers. See *New Jersey v. T.L.O.*, 469 *U.S.* 325 (1985). Specifically, searches conducted by law enforcement officers must be based upon probable cause to believe that a crime has been or is being committed, and must further be authorized by a search warrant issued by a neutral and detached judicial officer unless the search falls into one of the recognized and narrow exceptions to the warrant requirement.

2. The United States Supreme Court in *New Jersey v. T.L.O.* recognized that school officials have a legitimate interest in maintaining discipline, and thus have the inherent, independent authority to conduct an investigation of suspected rule infractions and to subject students and student property to reasonable searches and seizures.

3. No law enforcement officer shall direct, solicit, encourage or otherwise actively participate in any specific search conducted by a school official unless such search could be lawfully conducted by the law enforcement officer acting on his or her own authority in accordance with the rules and procedures governing law enforcement searches. Nothing in this section shall be construed to preclude a law enforcement officer from taking custody of any item or substance seized by any school employee.

4. It is understood and agreed that pursuant to law and guidelines to be issued by the Commissioner of Education, school officials shall immediately notify law enforcement officers whenever a school employee comes into possession, whether as a result of a search or otherwise, of any substance believed to be a controlled dangerous substance. See e.g., N.J.S.A. 2C:35-10c. (See also Section F(3) of this Part concerning procedures for turning over substances to appropriate law enforcement officials).

5. School officials shall permit law enforcement officers upon their arrival to the scene to assume responsibility for conducting any joint and cooperative search, in which event the standards governing searches conducted by law enforcement officers shall prospectively apply.

6. It is illegal for any person to impede any law enforcement officer(s) engaged in a lawful arrest, search or seizure, whether pursuant to a warrant or otherwise. See e.g., N.J.S.A. 2C:29-1. Any questions by school officials concerning the legality of any contemplated or ongoing arrest, search or seizure conducted by a law enforcement officer on school property should be directed to the appropriate county prosecutor, or in the case of an arrest, search or seizure undertaken by a member of the Statewide Narcotics Task Force, to the Assistant Attorney General in charge.

7. Nothing in this subsection or in any other provision of this Executive Directive shall be construed to require any school official to actively participate in any search or seizure conducted or supervised by a law enforcement officer; nor shall any provision of this Executive Directive or the Attorney General's School Search Guidelines be construed to direct, solicit or encourage any school official to conduct any search or seizure on behalf of law enforcement, or for the sole purpose of ultimately turning evidence of a crime over to a law enforcement agency. Rather, it is understood that any search or seizure conducted by school officials shall be based on the school officials' independent authority to conduct reasonable investigations as provided in *New Jersey v. T.L.O.*

8. Any question by a school official concerning the law governing searches conducted by school officials should be addressed to the appropriate county prosecutor.

K. Interrogations and Interviews

1. No law enforcement officer shall direct, solicit, encourage, attend or otherwise participate in the questioning of any juvenile by school officials unless such questioning could be lawfully conducted by the law enforcement officer acting on his or her own authority in accordance with the rules and procedures governing law enforcement interrogations and interviews. Pursuant to guidelines to be issued by the

Commissioner of Education, and subject to the provisions of Section F of this Part, all information obtained by school employees concerning the commission of an offense, whether obtained as a result of the questioning of a student or otherwise, shall be referred to the appropriate law enforcement agency, provided however, that nothing in this subsection or any other provision of this Executive Directive shall be construed to authorize or require a school employee to divulge information or records subject to the confidentiality requirements of 42 *C.F.R.* Part 2, or any other applicable regulation, law or rule of evidence concerning confidential and privileged communications.

2. All law enforcement officers shall comply with procedures and requirements established by law concerning interrogations and interviews of juveniles.

L. "Tiplines" and Student Watch Groups

1. "Tiplines" established pursuant to SNAP Guideline 5.8 shall be staffed by law enforcement officers, and the role of school officials with respect to the operation of such tiplines shall be limited to publicizing to members of the school community the existence and purpose of these tiplines.

2. The Narcotics Crime Prevention and Public Awareness Working Group is hereby directed to prepare in conjunction with the School Zone Narcotics Enforcement Working Group a model student watch program. Each county prosecutor and local law enforcement agency shall be responsible for assisting school officials in developing and implementing watch groups or similar student oriented crime prevention and awareness programs. Nothing in this subsection, however, shall be construed to require any school or school district to develop or implement a student watch program.

Part VI - Joint Training

A. Each county prosecutor shall be responsible for ensuring that every law enforcement officer within his jurisdiction is familiar with and complies with all of the provisions and policies set forth in this Executive Directive.

B. So as to foster and institutionalize the spirit of communication and cooperation enjoyed by the members of the School Zone Narcotics Enforcement Working Group, the Division of Criminal Justice, working in conjunction with the Department of Education and county prosecutor, shall develop and implement a joint training program to provide for the simultaneous instruction of members of the law enforcement and educational communities throughout the State. Such joint instructional programs shall at a minimum include a discussion of:

1. The provisions of this Executive Directive;

2. The complimentary guidelines issued by the Commissioner of Education;

3. The nature and content of agreements or memoranda of understanding entered into between county and local school officials and law enforcement agencies;

4. The Comprehensive Drug Reform Act, focusing especially on those provisions affecting juveniles or which are designed to protect children and to displace drug trafficking activities from areas adjacent to schools;

5. The Attorney General's Statewide Narcotics Action Plan, and

6. The United States Supreme Court decision in *New Jersey v. T.L.O.* and the Attorney General's School Search Guidelines.

7. The federal guidelines on confidentiality for counseling and treatment.

Part VII - Revisions and Periodic Conferences

The School Zone Narcotics Enforcement Working Group established pursuant to SNAP Directive 5.14 shall continue to meet on a periodic basis to discuss the implementation of and compliance with the provisions of this Executive Directive, and to recommend necessary and appropriate revisions.

Each county prosecutor, working in conjunction with the county superintendent of schools, shall not less than once each calendar year organize and conduct a meeting of representatives from the law enforcement and educational communities to discuss the implementation of and compliance with the provisions of this Executive Directive throughout the county, to discuss any other matters of mutual concern, and to recommend revisions to this Executive Directive. Every chief of police, school building principal and local superintendent shall be invited to attend, along with any other persons or organization representatives who the county prosecutor believes could contribute to or benefit from the proceedings. Each county prosecutor shall thereafter issue a report to the Attorney General as to the results of the meeting, which shall include a discussion of any general or specific recommendations concerning the need for revisions to this Executive Directive.

Part VIII - Principles of Construction: Dispute Resolution Procedures

1. The provisions of this Executive Directive and any discretionary powers conferred by the provisions of this Executive Directive upon any law enforcement officer

or agency shall be liberally construed to further the general purposes and policies set forth in Parts I and II.

2. Any question by a county prosecutor, the chief executive officer of a law enforcement agency, or a school official concerning the intended meaning or applicability of any provision of this Executive Directive may be addressed to the Office of Narcotics Enforcement Coordination and Planning in the Division of Criminal Justice, which is hereby designated to receive and respond to such inquiries. Where appropriate, that office shall consult with representatives in the Division of Law concerning the interpretation of any civil law or rule or regulation. Copies of all written responses to inquiries concerning any interpretation or construction of any provision of this Executive Directive shall be forwarded to the Commissioner of Education or his designee for their information and dissemination to other interested school officials.

3. Any dispute or objection as to any proposed or ongoing law enforcement operation or activity should be directed by the appropriate school official to the chief executive officer of the law enforcement agency involved. Where the chief executive officer of the agency is for any reason unable to satisfactorily resolve the dispute or objection, the matter should be referred to the appropriate county prosecutor, who is hereby authorized to work in conjunction with the county superintendent of schools and, where appropriate, the Division of Criminal Justice, to take appropriate steps to resolve the matter. The county prosecutor shall bear responsibility for the exercise of sound discretion in such matters consistent with the policies announced in this Executive Directive. Any dispute which cannot be resolved at the county level shall be resolved by the Attorney General whose decision will be binding.

APPENDIX 3

The State Model Agreement Between Education and Law Enforcement Officials (1992)

THE STATE MEMORANDUM OF AGREEMENT BETWEEN EDUCATION AND LAW ENFORCEMENT OFFICIALS

NEW JERSEY DEPARTMENT OF EDUCATION
NEW JERSEY DEPARTMENT OF LAW
AND PUBLIC SAFETY

APRIL 1992

A MODEL FOR AN AGREEMENT BETWEEN EDUCATION AND LAW ENFORCEMENT OFFICIALS*

Law Enforcement Activities Occurring on School Grounds and the Reporting of Suspected Drug and Other Offenses by School Officials to Law Enforcement

PREAMBLE

Statement of Policies, Findings and Objectives

1. Recent History.

In 1988, the Department of Law and Public Safety and the Department of Education issued a Model Agreement for use by local law enforcement and education officials. These agreements were eventually signed in every community across the State and documented the commitment by both professional communities to work together to address the State's drug problem as it relates to school-aged children. Since these agreements were first signed, there have been many new developments with respect to the scope and nature of the State's evolving drug and alcohol problem. Accordingly, the undersigned parties hereby recognize the need to update their memorandum of agreement and to reaffirm their commitment to work together as co-equal partners in addressing these new and evolving problems.

---

*This document is based on the Model Agreement previously approved and used throughout the State. All new material is underlined.

2. Nature of the Problem.

The predecessor memorandum of agreement was designed to ensure cooperation between law enforcement and education officials and ultimately to protect the educational environment. Recent events have made clear that the policies and procedures established in our earlier agreement should not be limited solely to the enforcement of New Jersey's controlled dangerous substance laws. We recognize in this regard that other offenses are occasionally committed on school property, during operating school hours or during school-related functions or activities. These offenses against persons or property may involve violence and the actual or threatened infliction of bodily injury, the unlawful use or possession of firearms or other dangerous weapons, arson or fire-setting activities, vandalism and theft. It is understood and agreed that the commission of serious offenses on school property, whether directed at students, school employees or school property, not only undermines the educational environment, but can directly endanger the safety and well being of members of the school community and thus requires an appropriate and decisive response.

3. Reasons for Special Concern.

The parties to this memorandum of agreement are aware of and are concerned by recent events occurring in New Jersey and nearby New York City involving students who were found to be in unlawful possession of firearms and other deadly weapons and who brought

such weapons onto school property. It is not our intention to cause undue alarm or to overstate the nature or magnitude of the problem. Nor is it our intention in any way to jeopardize the rights of students. To the contrary, we wish to emphasize that our goal is to safeguard the essential right of all students and school employees to enjoy the benefits of a school environment which is conducive to education and which is free of the disruptive influence of crime, violence, intimidation and fear. Accordingly, the parties to this agreement recognize the need to have in place policies and procedures to deal appropriately and decisively with these inherently dangerous and disruptive situations. It is our hope and expectation that by developing and publicizing the existence of clear policies, we can discourage the commission of serious offenses on school property and thereby protect the safety and welfare of all members of the school community. In developing these policies, it is understood that it is a crime for any person to knowingly have in his or her possession any firearm in or upon the buildings or grounds of any school without the written authorization of the governing officer of the institution. See N.J.S.A. 2C:39-5e. It is agreed and understood that this statute is designed to protect children and the educational environment, and that violations of this statute are especially serious matters which warrant a prompt referral to and response by law enforcement authorities. It is further understood that it is a crime in this State for any person to knowingly have in his or her possession any gravity knife,

switchblade knife, dagger, billy, blackjack, metal knuckle, sling shot, cesti or ballistic knife, without having an explainable lawful purpose. See N.J.S.A. 2C:39-3e. Finally, it is understood that it is a crime for any person to dispose of any such weapon, or any firearm unless he or she is licensed or registered to do so. See N.J.S.A. 2C:39-9d.

4. Benefit of Referrals to Law Enforcement Authorities.

It is understood that law enforcement officials have access to confidential information which may show that a juvenile offender has previously committed acts of delinquency outside of school property and about which school officials may therefore be unaware. These confidential law enforcement records may concern prior juvenile arrests, adjudications, dispositions, referrals to juvenile conference committees and stationhouse adjustments. For this reason, the failure by school officials to refer a suspected offense to law enforcement authorities may unwittingly prevent the professional actors within the juvenile justice system, including law enforcement and family court officials, from identifying and dealing appropriately with juvenile offenders, and may thus prevent these actors from taking those steps which are necessary and appropriate to intervene, to address the juvenile's problems in a timely fashion and to protect the public safety. In order to enable school officials to make a more informed decision as to whether to refer a suspected act of delinquency to law enforcement authorities, the parties to this

agreement understand the need for and benefit of establishing procedures by which law enforcement officials can explain the workings of the juvenile justice system and the options, services and resources which are available through that system to respond to juveniles' needs. It is thought that such ongoing dialogue will enable school officials to understand the likely consequences of a referral involving a given offense. It is also hoped that in this way, law enforcement and school officials can work to dispel many of the myths about the juvenile justice system, and to develop a better understanding of the resources available to address the needs of juveniles who enter into this system.

5. Anabolic Steroids.

The parties to this agreement understand that in 1991, the New Jersey Commissioner of Health promulgated rules and regulations which classify anabolic steroids as Schedule III controlled dangerous substances. The parties to this agreement understand and recognize that the problem of the unlawful use of anabolic steroids is a particularly serious one with respect to school-aged children and that this problem is not limited to student athletes, but also involves students who use these especially dangerous substances to enhance their physical appearance. The parties to this agreement recognize that these substances often have profound, long term adverse side effects and that their unlawful use by children cannot be tolerated.

6. Alcohol Consumption.

The parties to this agreement recognize that public attention has been focused on the problem of alcohol consumption on school property. The most recent survey of New Jersey's high school students confirms that alcohol continues to be by far the most commonly used substance by school-aged children. The parties to this agreement recognize and reaffirm that alcohol remains an illicit substance for underaged persons, and that alcohol offenses, especially those occurring on school property or during school-related activities, are serious matters which warrant a decisive and predictable response.

7. Law Enforcement Participation in Substance Abuse Prevention Programs.

In recent years, a number of educational programs, such as D.A.R.E., D.A.D., McGruff ("Take a Bite Out of Crime") and similar programs have demonstrated that specially trained police officers can provide substance awareness, drug abuse resistance and crime prevention instruction which is effective and beneficial to students. The parties to this agreement recognize, however, that in providing and promoting such innovative instructional programs, education officials remain ultimately responsible for approving and monitoring all educational curricula. Local education officials also remain responsible for making certain that children receive the approved K-12 chemical awareness curricula in accordance with State law and rules,

regulations and policies adopted by the State Board of Education and the Commissioner of Education.

Article I
Liaisons

We, _____ (county prosecutor) and _____ (each law enforcement agency having patrol jurisdiction) will each designate a person or persons to serve as a liaison to appropriate local and county school officials.

(The county superintendent _____ the local superintendent of each school) will similarly designate a person to serve as a liaison to the county prosecutor's office and to the respective local law enforcement agency. The roles and functions of these liaisons are to:

- Facilitate communication and cooperation;
- Identify issues or problems that arise in the implementation of this Agreement and facilitate the resolution of any such problems;
- Act as the primary contact person between the schools and the affected law enforcement agencies;
- Act together in developing joint training and other cooperative efforts, including information exchanges and joint speaking engagements, and
- Coordinate drug and alcohol abuse intervention and prevention efforts.

Article 2
Law Enforcement Operations

A. Definitions

As used in this Agreement:

"Controlled Dangerous Substance" shall mean a drug, substance or immediate precursor as defined at N.J.S.A. 2C:35-2, and shall include controlled substance analogs. Pursuant to regulations adopted by the Department of Health, the term also includes anabolic steroids.

"Undercover School Operation" shall mean a planned operation undertaken by a law enforcement agency wherein a law enforcement officer(s) is placed in a school community and poses as a member of the school community for the purpose of identifying and eventually apprehending persons engaged in the illegal distribution of controlled dangerous substances or the unlawful use, possession or distribution of firearms or dangerous weapons.

"Planned Surveillance" shall mean a planned operation wherein a law enforcement officer(s) enters onto school property or buildings in plainclothes during operating school hours for the purpose of observing or participating in activities associated with the use, possession or distribution of any controlled dangerous substance or firearms or dangerous weapons. This term shall not include observations made by a law enforcement officer, whether in uniform or in plainclothes, from any place or property not owned by a school or school board.

"Routine Patrol" shall mean activities undertaken by a law enforcement officer whether in uniform or in plainclothes and whether on foot or in a marked or unmarked vehicle, to patrol areas within a drug-free school zone (see N.J.S.A. 2C:35-7) for the purposes of observing or deterring any criminal violation or civil disturbance.

"Planned Arrest" shall mean an arrest or taking into custody based upon probable cause which was known to a law enforcement officer sufficiently in advance of the time of the actual arrest, whether as a result of an undercover school operation, planned surveillance, or otherwise, so that there was sufficient opportunity for the arresting officer or any other law enforcement officer to apply for and obtain an arrest warrant, even though an arrest warrant may not have been sought or issued. The term shall also include arrests made pursuant to a "clean sweep" (i.e., e.g. multiple arrest) operation as prescribed by Guideline 5.4 of the Attorney General's Statewide Narcotics Action Plan (SNAP).

"Spontaneous Arrest," in distinction to a planned arrest, shall mean an arrest or taking into custody based upon probable cause to believe that an offense is being committed in the arresting officer's presence under circumstances where the officer could not have foreseen with certainty that the specific offense would occur and thus where the arresting officer had no

reasonable opportunity to apply for an arrest warrant. The term shall also include any arrest or taking into custody in response to a request by a school official pursuant to subsection G(1) of this Article.

"Operating School Hours" shall include the time in which a school is in session or when students are engaged in school-related activities under the supervision of professional school staff.

"Firearm" means any firearm within the meaning of N.J.S.A. 2C:39-1f, and includes any handgun, rifle, shotgun, machine gun or automatic or semi-automatic rifle regardless of whether such firearm is operable or loaded with ammunition.

"Deadly weapon" means any weapon within the meaning of N.J.S.A. 2C:39-1r, and includes any device readily capable of lethal use or of inflicting serious bodily injury, including but not limited to gravity knives, switchblade knives, daggers, dirks, stilettos, or other dangerous knives, blackjacks, bludgeons, metal knuckles, cesti or similar leather bands studded with metal filings or razor blades embedded in wood and any weapon or other device which projects, releases or emits tear gas or any other substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispensed in the air.

B. Undercover School Operations

1. Requests to Conduct Operations

a. All requests by school officials to undertake an undercover school operation in a particular school or school district will be directed to the local chief of police or, where appropriate, to the Superintendent of State Police. However, it is understood that the ultimate approval of all undercover school operations can only be granted by _____ or, (the county prosecutor) where appropriate the Attorney General or his designee.

b. A request to undertake an undercover school operation will not be made public by either the requesting school official or the law enforcement agency receiving the request.

c. The county prosecutor or the Attorney General or his designee will make a good faith effort to comply with all reasonable requests to initiate an undercover operation, considering the scope and nature of the substance abuse or weapons-related problem in the school or district and the availability of law enforcement resources.

d. Where the county prosecutor or the Statewide Narcotics Task Force is for any reason unable to comply with a request to undertake an undercover school operation, the county prosecutor or the Attorney General or his designee will promptly notify the requesting school officials.

e. The decision to decline a request to undertake an undercover school operation shall not be made public by either the requesting school official(s) or the law enforcement agency receiving the request.

f. Nothing in this agreement shall be construed to preclude law enforcement officials from initiating a request to conduct an undercover school operation pursuant to Section 2 of this Article.

2. Consultation and Cooperation

a. As a practical matter, a successful undercover school operation cannot take place without the assent and continuing cooperation of the building principal and local school superintendent, and, except as may be expressly provided herein, none shall be attempted without such assent and continuing cooperation. Accordingly, prior to the placement of any undercover officer in a school, the school building principal and the local superintendent will be consulted unless there are compelling reasons not to consult with either of these officials. Where the Attorney General determines that compelling reasons, exist, an alternative school official or officials will be designated who will be consulted in lieu of the building principal or local superintendent prior to the placement of an undercover officer in a school and throughout the course of the operation.

b. In any case where the undercover school operation has not been requested by an appropriate school official, the law enforcement agency proposing the operation will advise the building principal and local superintendent of the nature of the proposed operation and will to the extent possible explain the reasons why the operation is necessary and appropriate. This explanation should include a description of the extent and nature of the suspected drug trafficking or weapons-related activities occurring within the school environment which would justify the operation. It is understood and agreed that law enforcement officials will not be required or permitted to divulge any information received in confidence, whether from an informant or otherwise, or which would violate the laws or court rules governing the disclosure of juvenile offender information, grand jury information or information derived from electronic surveillance.

c. It is understood and agreed that undercover school operations should not be necessarily limited to schools falling within any particular region or demographic setting i.e., e.g. rural, suburban, urban center, etc. or any particular district factoring group (i.e., a composite measure of socioeconomic status within a geographic area). Rather, subject to the availability of resources, undercover school operations should be proposed and conducted where the designated law enforcement and school officials determine that such operations would be beneficial.

d. Information provided by law enforcement to the building principal or local superintendent will be kept strictly confidential and will not be divulged by the building principal or local superintendent to any other person without the express approval of the county prosecutor or, where appropriate, the Attorney General or his designee.

e. No law enforcement officer will disclose the fact that an undercover school operation has been proposed, requested or is being or has been considered with respect to any particular school or school district.

f. The building principal and the local superintendent will be afforded the opportunity to offer specific concerns regarding the conduct of any proposed undercover school operation, and will also be given the opportunity to make general or specific recommendations as to how to minimize the impact of the proposed operation on the educational environment, existing substance abuse counseling programs and the relationship between school authorities, the law enforcement community and the student population. In developing an undercover school operation plan and throughout the course of the operation, the law enforcement agency conducting the operation will give due consideration to the concerns and recommendations offered by the building principal and local superintendent. Furthermore, these school officials will be advised whenever the law enforcement agency conducting the undercover school operation is for any reason unable or unwilling to follow any proposed recommendation.

However, it is understood that the law enforcement agency responsible for conducting the undercover operation shall maintain control of the logistics of any operation once begun.

g. The law enforcement agency conducting the undercover school operation will provide to the building principal and local superintendent a detailed briefing concerning the logistical and recordkeeping requirements associated with successfully placing an officer undercover. The building principal and local superintendent may contact the designated liaison who will be available on a 24 hour basis to respond to any problems or inquiries.

3. Security; Limited Disclosure Agreements; Early Termination

a. The building principal and local superintendent will be informed as to the identity of any person assigned to an undercover investigation unless there are compelling reasons, as shall be determined by the Attorney General, not to inform either of these officials. The building principal and local superintendent, and any other school officials or employees who may be informed as to the identity of the undercover officer, will safeguard the identity of that officer and will not disclose the existence of a contemplated or ongoing undercover school operation to any person.

b. In the event that the building principal, local superintendent or any other school official or employee who may have been informed as to the existence of the operation subsequently learns of any information which suggests that the true identity of the undercover officer has been revealed, or that any person has questioned the identity or status of the undercover officer as a bona fide member of the school community, or that the integrity of the operation has been in any other way compromised, such information will be immediately communicated to the law enforcement agency conducting the operation or to the county prosecutor.

c. The school principal and local superintendent will be advised whenever an undercover school operation has been suspended or terminated or whenever the undercover officer is permanently removed from the school environment.

4. Use of Undercover Officers as School Employees.

It is understood that no undercover school operation may be conducted which entails the placement of an undercover officer as a certified member of the school community without prior written approval of the Attorney General with notice given to the Commissioner of Education, or in the case of non-public schools, the chief school officer. It is understood that the Attorney General will base his approval upon a finding that 1) other law enforcement methods would not be effective, and 2) there is a reasonable articulable suspicion that adult school employee(s) or

other non-student member(s) of the school community are engaged in drug trafficking or unlawful weapons-related activities. In that event, and upon such findings, the underlying purpose of the operation would not be to identify or to apprehend student offenders, but rather to identify and to apprehend suspected adult or non-student offenders. Furthermore, the law enforcement agency involved will develop in consultation with the building principal and local superintendent those steps which will be taken to minimize the undercover officer's contact with and impact upon the student population. It is understood that no undercover officer will be permitted to teach a formal class of instruction without the approval of the Attorney General and local superintendent, and that in no event will an undercover officer posing as a non-student member of the school community be permitted to establish or to simulate any confidential, trust or counsellor relationship with any student.

5. Limitations on Undercover Officer Conduct

a. Entrapment. No undercover officer will encourage or counsel any student to purchase or use alcohol or any controlled dangerous substance.

b. Confidentiality of Treatment Records. Federal regulations and State policies concerning the confidentiality of treatment and substance abuse counseling program records and information will be strictly safeguarded. No law enforcement

activity will be permitted in any way to interfere with, intrude upon or in any way compromise the integrity of any substance abuse counseling or treatment program.

c. Treatment. No undercover officer will discourage any student from seeking drug or alcohol abuse treatment or counseling, or from reporting his or her own alcohol or substance abuse problem or dependency.

d. Non-Participation in Treatment. No undercover officer will in any way participate in or attend any drug or alcohol abuse treatment or counseling program. In the event that an undercover officer is referred to or recommended to participate in a counseling or treatment program by a teacher or school staff member, the undercover officer will report the circumstances of that referral or recommendation to his superiors and will decline such referral or recommendation.

e. Preservation of Teacher Trust Relationships. No undercover officer will engage in any activity or conversation which would require any teacher or school official to violate or compromise a trust relationship with any student.

f. Use and Distribution Prohibition. No undercover officer will ingest or inhale (other than passive inhalation) any controlled dangerous substance; nor will any undercover officer be permitted to distribute or dispense any controlled dangerous substance without the express approval of the county prosecutor or, where appropriate, the Attorney General or his designee. Under no circumstances will an undercover officer sell or

transfer a firearm on school property or to a student without the express prior approval of the county prosecutor, or, where appropriate, the Attorney General or his designee.

g. Disciplinary Infractions. It is understood that an undercover officer cannot be expected to pose as a model student. Nonetheless, no undercover officer will engage in any activities which unduly disrupt the educational environment, or which amount to disciplinary infractions of such a nature and magnitude so as to prevent other students from enjoying the full benefits of that educational environment. An undercover officer will at all times respect the rights of teachers and other students.

h. Romantic Involvement. No undercover officer will encourage or participate in any romantic relationship with any student during the course of an undercover operation.

i. Firearms Policy. It is understood that undercover work concerning drug trafficking activities is inherently dangerous. Accordingly, it is understood and agreed that law enforcement will take all measures which are necessary and appropriate to protect the undercover officer, as well as to protect all students with whom the undercover officer may come into contact, and to avoid potentially violent confrontations whenever possible. In general, an undercover officer will not carry a firearm or otherwise bring onto or maintain a firearm on school property. An exemption from the general rule prohibiting the carrying or bringing onto school property of a firearm will

only be granted with the express approval of the officer's immediate superior, unless otherwise specified in the plan approval process for good cause shown. Any firearm brought onto school property will ordinarily be contained in a closed and fastened case locked in the trunk of an automobile operated by the undercover officer. It is assumed, moreover, that any exemption from the general weapons carrying policy agreed to herein will only be rarely sought, and approval to carry a firearm onto school property will only be granted where alternative means of providing adequate security or support are not feasible.

6. Post-Operation Report

It is understood that following the termination of every undercover school operation, the county prosecutor or the Assistant Attorney General in charge of the Statewide Narcotics Task Force will prepare a post-operation report which will be transmitted to the Attorney General. The report will discuss the results and impact of the operation and any logistical or policy problems which were encountered. The report will also include recommendations for improved procedures in dealing with potentially recurring problems. The county prosecutor or the Assistant Attorney General in charge of the Statewide Narcotics Task Force will solicit the comments and recommendations of the building principal and local superintendent, and these comments and recommendations will be included in the post-operation

report. The contents of a post operation report will be publicly disclosed, and a copy will be provided to the building principal, local and county superintendents and the Commissioner of Education.

7. Post-Operation Seminars

To maximize the deterrent impact of an undercover school operation, the law enforcement agency conducting the operation will make available officers to participate in seminars which, upon the invitation of appropriate school officials, may be held in the school in which the operation was conducted. The purpose of these seminars will be to discuss with teachers, parents and/or students the nature of the completed operation, the steps taken to minimize the intrusion into the educational environment, and to discuss the substance abuse or weapons-related problem from a law enforcement perspective. It is our agreed upon policy to promote the frank and open discussion of issues concerning the need for such operations, and to solicit opinions and recommendations from teachers, parents, students and members of the community-at-large.

C. Planned Surveillance

1. Notice and Consultation. In the absence of compelling or exigent circumstances, as shall be determined by the county prosecutor or the Attorney General or his designee, no planned narcotics surveillance operation as defined in this Agreement

will be conducted during operating school hours without first consulting with the building principal or local superintendent of the school involved.

2. Limitations; Targeted Subjects. Nothing in this Agreement shall be construed to prevent any law enforcement officer from making any observations from any place or property not owned by a school or school board, except that a planned narcotics surveillance or any other form of observation should, wherever possible, be limited to observing 1) those specific individuals or groups of individuals who are believed to be involved in drug trafficking or weapons-related activities, or 2) those specific areas or places on school property where drug use or trafficking or weapons-related activity is believed to occur frequently.

D. Routine Patrols

1. Aggressive Enforcement Plans. The _____ (Police Department) will maintain at appropriate times a visible police presence within all drug-free school zones, and will file and periodically update a confidential report with the _____ (Prosecutor) detailing how these zones are to be patrolled.

2. Notice to School Officials. Where a patrol plan requires an officer periodically to enter onto school property or buildings, the _____ (Police Department) will advise the appropriate school building principal and local superintendent. It is

understood and agreed that any portion of a patrol plan disclosed to school officials in accordance with this subsection will be kept strictly confidential.

3. On-Site Reporting. Except when responding to an emergency, no on-duty police officer will enter any school building without first complying with the procedures established by the school for the reporting of visitors. It shall be the responsibility of _____ (each police department or agency with patrol responsibilities) to make certain that all officers are familiar and comply with the reporting policies established by each school within the law enforcement agency's jurisdiction.

E. Police Presence at Extra-curricular Events

1. It is our agreed upon policy that _____ (police department with patrol responsibilities), working in conjunction with the appropriate school officials, should, whenever possible, provide for the presence of uniformed police officer(s) at all major school sporting events. In the absence of compelling reasons as may be determined by _____ (the county prosecutor or chief executive officer of the law enforcement agency having patrol jurisdiction), it is understood and agreed that uniformed police officers will not be assigned to school functions, and especially those functions occurring within school buildings, except with

the approval of the building principal or local superintendent.

2. It is understood that the purpose for requesting uniformed police presence on school property is not limited merely to the goal of deterring illegal drug use or trafficking activities; rather, police assistance is often requested for the purpose of maintaining order, crowd and traffic control, and other bona fide public safety reasons. All requests by school officials for law enforcement agencies to provide for a uniformed presence at any school event should be directed to _____ (local police liaison) or _____ (local chief executive officer of the law enforcement department or agency having patrol jurisdiction).

F. Referrals and Evidence Pick-Up

1. Procedures Concerning Required Referrals Involving Controlled Substances. Subject to the provisions of subsection 2 of this section, school officials will promptly notify _____ (designated law enforcement officials) whenever any school employee develops reason to believe a violation of the Comprehensive Drug Reform Act has occurred, except that school officials are not required to refer a matter to law enforcement where a student has voluntarily and on his or her own initiative sought treatment or counseling for a substance abuse problem, provided the student was not involved in drug distribution activities and further provided the student agrees to participate in an appropriate treatment or counseling program. For the

purposes of this Agreement, an admission by a student of a violation of the Comprehensive Drug Reform Act which is in response to questioning initiated by a law enforcement officer or school employee shall not constitute a voluntary, self-initiated request for counseling and treatment.

2. Non-Applicability to Treatment Program Records and Information. Nothing in this Agreement shall be construed in any way to authorize or require a referral or transmittal of any information or records in the possession of a substance abuse counseling or treatment program, and such information or records will be strictly safeguarded in accordance with applicable federal regulations and state policies.

3. Securing Controlled Substances and Paraphernalia Pending Referral and Pick-Up. Wherever a school employee seizes or comes upon any substance believed to be a controlled dangerous substance or drug paraphernalia, school officials will immediately advise _____ (the local law enforcement agency having patrol jurisdiction) and will secure the substance or item pending the response by _____ (law enforcement agency) to retrieve and take custody of the substance or paraphernalia. School employees having custody of the substance or item will take reasonable precautions as per local board of education procedures to prevent its theft, destruction or use by any person. In accordance with the requirements of law, see N.J.S.A. 2C:35-10c., it is understood that under no circumstances may any person

destroy or otherwise dispose of any controlled dangerous substance or drug paraphernalia except by turning over such substance or item to the responding law enforcement officer.

4. Prompt Response to Controlled Substance Referrals and Request for Pick-Up; Preserving Chain of Custody. _____ (The law enforcement agency) _____ will dispatch an officer as promptly as possible to take custody and secure the controlled dangerous substance or drug paraphernalia. School officials will provide to the responding law enforcement officer information necessary to establish the chain of custody and the circumstances of the seizure, including the identity of any person from whom the substance or item was obtained, except that school officials need not provide information concerning the identity of a student from whom the controlled dangerous substance or item was obtained where the substance or item was turned over by a student to a substance abuse counselor in the course of or as a result of diagnosis or treatment, or where: 1) the student voluntarily and on his or her own initiative turned over the substance to a school employee; and 2) there is no reason to believe that the student was involved in distribution activities; and 3) the student agrees to participate in an appropriate treatment or counseling program. Nothing in this section shall be construed in any way to authorize or require a referral or transmittal of any information or records in the possession of a substance abuse counseling or treatment program, and such information or records

will be strictly safeguarded in accordance with applicable federal regulations and state policies.

5. Procedures Concerning Permissive Referrals.

Subject to the provisions of subsections 2 and 6 of this section, it is agreed that _____ should
(designated school official)
notify _____ whenever any school
(designated law enforcement official)
employee develops reason to believe that a criminal offense has been committed on or against school property, during operating hours or during school-related functions or activities. In deciding whether to refer the matter to the designated law enforcement agency, the principal of the school or his or her designee should consider the nature and seriousness of the offense and the risk that the offense posed to the health or safety of other students, school employees or the general public. Nothing in this subsection shall be construed in any way to relieve the duty to report a violation of the Comprehensive Drug Reform Act as required by subsection 1 of this section and regulations promulgated by the State Board of Education. See N.J.A.C. 6:3-6.1 et seq. Nor shall this subsection be construed in any way to relieve the duty to notify appropriate law enforcement and child welfare authorities when a potential missing or abused child situation is detected, as required by N.J.S.A. 18A:36-25.

6. Required Referrals Involving Firearms. Subject only to the provisions of subsection 2 of this section, it is agreed that _____ will immediately notify _____ (designated school official) (designated law enforcement official) whenever any school employee in the course of his or her employment develops reason to believe that a firearm has unlawfully been brought onto school property, or that any student or other person is in unlawful possession of a firearm, whether on or off school property, or that any student or other person has committed an offense with or while in possession of a firearm, whether or not such offense was committed on school property or during operating school hours.

7. Securing Firearms and Dangerous Weapons Pending Referral and Pickup. Whenever a school employee seizes or comes upon any firearm or dangerous weapon, school officials should in the case of a dangerous weapon other than a firearm, and shall in the case of a firearm, immediately advise _____ (designated law enforcement official) and secure the firearm or weapon pending the response by the _____ to retrieve and take custody (~~law~~ enforcement agency) of the firearm or dangerous weapon. School employees having custody of a firearm or dangerous weapon will take reasonable precautions as per local board of education procedures to prevent its theft, destruction or unlawful use by any person. It is understood and agreed that under no circumstances will any person

destroy or otherwise dispose of any seized or discovered firearm except by turning over such firearm to the responding police officer.

8. Law Enforcement Response to Permissive Referrals. (The law enforcement agency) receiving information about the commission of an offense pursuant to subsection 5 of this section will respond promptly and, when there is probable cause to believe that an offense has been committed, will handle the matter in accordance with the provisions of the Attorney General's Executive Directive Concerning the Handling of Juvenile Matters by Police and Prosecutors. Except as may be specifically provided in subsection 2 of this section, school officials should in the absence of compelling reasons provide the responding law enforcement officer information necessary to establish the chain of custody and the circumstances of the seizure or discovery of any dangerous weapon or item, other than a firearm dealt with in subsection 9 of this section or a controlled dangerous substance or drug paraphernalia dealt with in subsection 3 of this section, which was or may have been unlawfully possessed or used in connection with or derived from criminal activity. Nothing in this subsection shall be construed in any way to authorize or require a referral or transmittal of any information or records in the possession of a substance abuse counselling or treatment program and obtained in the course of providing diagnosis or treatment where such referral or transmittal would constitute a

violation of federal confidentiality regulations, and such information or records will be strictly safeguarded in accordance with such applicable federal regulations and state policies.

9. Prompt Law Enforcement Response to Required Referrals. _____ receiving information about the (law enforcement agency) the existence of an unlawful firearm on school property pursuant to subsection 6 of this section will immediately dispatch an officer to take custody and secure the firearm. Except as may be specifically provided in subsection 2 of this section, school officials will provide to the responding law enforcement officer information necessary to establish the chain of custody and the circumstances of the seizure or discovery of the firearm, including the identity of any person from whom the firearm was obtained. Nothing in this subsection shall be construed in any way to authorize or require a referral or transmittal of any information or records in the possession of a substance abuse counseling or treatment program and obtained in the course of providing diagnosis or treatment where such referral or transmittal would constitute a violation of federal confidentiality regulations, and such information or records will be strictly safeguarded in accordance with such applicable federal regulations and state policies.

10. Interdiction of Weapons. It is understood and agreed that the _____ will make every reasonable (law enforcement agency) effort to effect the arrest of any student believed to be in the

unlawful possession of a firearm or other dangerous weapon while the student is not on school property, so as to prevent whenever possible the bringing of such firearm or weapon onto school property. When this is not feasible, the _____ (law enforcement agency) shall scrupulously comply with the notification requirements for planned arrests as set forth in Article 2, G(3) of this Agreement.

11. Arrest Protocols Following Permissive Referrals. It is understood and agreed that the arrest protocols set forth in Article 2, section G of this Agreement, which are designed to minimize the disruption of the school environment, will be followed whenever a student is to be arrested on school property for any offense, including offenses which do not involve controlled dangerous substances or drug paraphernalia. Similarly, it is understood and agreed that the notification procedures set forth in Article 2, section H of this Agreement will be followed whenever a student or non-student is arrested on school property, or whenever a student is arrested off of school property during operating school hours, for a violation of any criminal statute, including an offense which does not involve controlled dangerous substances or drug paraphernalia. It is also understood and agreed that the _____ (police department) will at all times comply with the patrol notification and on-site reporting procedures set forth in Article 2, section D(2) and (3) of this Agreement, whether the purpose of the law enforcement

entry onto school property or buildings is to enforce the Comprehensive Drug Reform Act or any other criminal statute.

12. Notification to School Officials. Where a formal complaint is filed against a student for any offense which if committed by an adult would be an indictable crime, the law enforcement agency or the county prosecutor will, in accordance with the provisions of N.J.S.A. 2A:4A-60c, provide information on a confidential basis to the building principal of the school at which the student is enrolled concerning the offense charged and any resulting adjudication or disposition.

13. Advice as to Juvenile Justice System Practices and Procedures. The _____ and the
(designated law enforcement official)
county prosecutor shall be available on an ongoing basis to explain to school officials the practices and procedures of the juvenile justice system with respect to the handling of juveniles suspected of or formally charged with acts of delinquency. The _____ and the county prosecutor
(designated law enforcement official)
shall also provide on an ongoing basis information concerning the services and resources available through the juvenile justice system to deal with delinquent or at-risk youth and families in crisis, including stationhouse adjustments, referrals to Juvenile Conference Committees and other pre-adjudication diversion programs, and post-adjudication disposition options which are available in the county.

14. Advice as to weapons. It is understood that new weapons have evolved and proliferated which are readily concealable and easily disguised. By way of example, small, single shot firearms have been produced so as to resemble a remote paging device or "beeper." Similarly, dangerous knives can be disguised as belt buckles and other seemingly innocuous items. Accordingly, the _____ and (designated law enforcement agency) the county prosecutor will be available on an ongoing basis to provide school officials with information and advice about such weapons and their prevalence in the district or in the county so that they may be readily identified by school officials.

15. Possession of Consumption of Alcoholic Beverages by Minors. It is understood that it is unlawful for a person under the age of 21 to purchase or knowingly consume an alcoholic beverage on school property or during school sponsored activities. See e.g., N.J.S.A. 2C:33-15 and N.J.A.C. 6:29-6.3(a). So too, it is an offense for an adult to bring or possess an alcoholic beverage on school property without the express written permission of the school board or building principal. See N.J.S.A. 2C:35-16. It is agreed and understood that these statutes are designed to protect children and the educational environment, and that violations of these statutes should be deemed to be serious matters which would ordinarily warrant a referral to and prompt response by law enforcement authorities in accordance with the provisions of subsections 5 and 8 of this section. Where appropriate, the law enforcement

agency or the county prosecutor may elect to forego formal charging or prosecution in favor of pursuing school disciplinary proceedings or other appropriate juvenile justice alternatives, including but not limited to a "stationhouse adjustment," subject to the requirements of law and the Attorney General's Executive Directive Concerning the Handling of Juvenile Matters by Police and Prosecutors.

G. Arrest Protocols

For the purpose of this Agreement, the term "arrest" shall include the taking into custody of a juvenile for any offense which if committed by an adult would constitute a crime or disorderly persons offense.

1. Requests by School Officials

All requests by any school official to summon a law enforcement officer for the purpose of making an arrest on school property, whether for a suspected violation of the Comprehensive Drug Reform Act or for a suspected violation of any other criminal statute, should be directed to _____ (the designated police liaison or to the chief of the department having patrol jurisdiction).

2. It shall be the general policy of _____ (law enforcement agency) when effecting any arrest on school grounds, to minimize the disruption of the school environment to the greatest

extent possible consistent with the requirements of public safety. Accordingly, substantial weight will be given by the law enforcement officer assigned to make the arrest to the specific recommendations of the building principal or local superintendent as to the place and manner for effecting the arrest.

a. So as to minimize any disruption of the educational environment, every reasonable effort should be made to effect the arrest in the building principal's office, or in some other designated area away from the general student population.

b. Where feasible, the responding law enforcement officer(s) should be in plainclothes, use unmarked police vehicle(s) and refrain from using a siren or flashing overhead lights. In addition, the number of responding officers should be kept to a minimum consistent with the requirements of public safety.

2. Other Spontaneous Arrests

a. In those cases in which a law enforcement agency responds during operating school hours to a suspected offense reported by someone other than the building principal or local superintendent, or where a law enforcement officers observes the occurrence of an offense on school property during operating school hours which would justify a warrantless arrest, or where a person subject to arrest retreats onto school property during operating school hours, the arresting law enforcement officer will notify the building principal as soon as it is practical to

do so. Where the arrest involves a student enrolled in the school, the building principal will wherever feasible be notified before the student is taken from school grounds.

b. When effecting any spontaneous arrest on school property during operating school hours, every reasonable precaution will be taken to minimize the disruption of the school environment to the greatest extent possible consistent with the requirements of public safety.

3. Planned Arrests

a. Whenever a planned arrest is to occur on school property, the building principal or local superintendent will be advised and consulted before the arrest occurs.

H. Notice of Arrests

1. Arrests of Students on School Grounds. Whenever a student has been arrested on school property, the law enforcement officer or agency involved will, as soon as practicable, notify the building principal. Whenever possible, such notice will be given before the student has been taken off of school property. Where the student is a juvenile, all information concerning the circumstances of the arrest will be provided to the building principal on a confidential basis and in accordance with the provisions of N.J.S.A. 2A:4A-60c.

2. Arrests of Non-Students on School Grounds. Where a person other than an enrolled student is arrested on school property, the building principal will be advised as to the

circumstances of the offense and the identity of the offender, provided that where the person arrested is a juvenile, it is understood that the law enforcement agency or officer involved is not permitted to divulge any information which would violate the laws governing the disclosure of juvenile information.

3. Arrests of Students off School Grounds During Operating School Hours. Where a student is arrested off of school property during operating school hours, or under circumstances which would lead the arresting officer to believe that a school official was responsible for the care and custody of the student at the time of the arrest, or where the arresting officer reasonably believes that the student was in transit between school and his home at the time of arrest, the arresting officer will as soon as is practicable notify the building principal of the school in which the student is enrolled. All information concerning the basis and circumstances of the arrest will be provided to the building principal on a confidential basis and in accordance with the provisions of N.J.S.A. 2A:4A-60c.

I. School Searches

1. No law enforcement officer will direct, solicit, encourage or otherwise actively participate in any specific search conducted by a school official unless such search could be lawfully conducted by the law enforcement officer acting on his or her own authority in accordance with the rules and procedures governing law enforcement searches. Nothing in this Agreement

shall be construed to preclude a law enforcement officer from taking custody of any item or substance seized by any school employee.

2. School officials will immediately notify law enforcement officers whenever a school employee comes into possession, whether as a result of a search or otherwise, of any substance or item believed to be a controlled dangerous substance, drug paraphernalia or firearm.

3. School officials will permit law enforcement officers upon their arrival to the scene to assume responsibility for conducting any search, in which event the standards governing searches conducted by law enforcement officers will prospectively apply.

4. Any questions by school officials concerning the legality of any contemplated or ongoing arrest, search or seizure conducted by a law enforcement officer on school property should be directed to the _____, or in the
(appropriate county prosecutor)
case of an arrest, search or seizure undertaken by a member of the Statewide Narcotics Task Force, to the Assistant Attorney General in charge.

5. Nothing in this Agreement shall be construed in any way to require any school official to actively participate in any search or seizure conducted or supervised by a law enforcement officer; nor shall this agreement be construed to direct, solicit or encourage any school official to conduct any search or seizure on behalf of law enforcement, or for the sole purpose of

ultimately turning evidence of a crime over to a law enforcement agency. Rather, it is understood that any search or seizure conducted by school officials shall be based on the school officials' independent authority to conduct reasonable investigations as provided in New Jersey v. T.L.O.

6. Any question by a school official concerning the law governing searches conducted by school officials should be addressed to _____ (the county prosecutor or his designee).

J. Interrogations and Interviews

1. No law enforcement officer will direct, solicit, encourage, attend or otherwise participate in the questioning of any juvenile by school officials unless such questioning could be lawfully conducted by the law enforcement officer acting on his or her own authority in accordance with the rules and procedures governing law enforcement interrogations and interviews. All information obtained by school employees concerning the commission of an offense, whether obtained as a result of the questioning of a student or otherwise, will be referred to the appropriate law enforcement agency, provided however, that nothing in this Agreement shall be construed to authorize or require a school employee to divulge information or records subject to the confidentiality requirements of 42 C.F.R. Part 2, or any other applicable regulation, law or rule of evidence concerning confidential and privileged communications.

K. "Tiplines" and Student Watch Groups

1. Any "tiplines" which may be established for the reporting of suspicious activity occurring on school property or buses or within Drug-Free School zones will be staffed by law enforcement officers, and it is understood that the role of school officials with respect to the operation of such tiplines is limited to publicizing to members of the school community the existence and purpose of these tiplines.

2. It is understood that the Narcotics Crime Prevention and Public Awareness Working Group, which was created by the Attorney General, has prepared in conjunction with the School Zone Narcotics Enforcement Working Group a model student watch program. _____ (The county prosecutor and local law enforcement _____ will assist school officials who wish to develop and agency) implement such watch groups or similar student-oriented crime prevention and awareness programs.

Article 3
Joint Training

A. So as to foster and institutionalize the spirit of communication and cooperation underlying this Agreement, _____ agree to (appropriate school and law enforcement personnel) participate in a joint training program which will be developed in conjunction with the Division of Criminal Justice, the Department of Education and county prosecutor. It is understood

that this program will include a discussion of:

1. The provisions of this Agreement;

2. Attorney General Executive Directive 1988-1;

3. The complementary guidelines issued by the Commissioner of Education;

4. The Comprehensive Drug Reform Act, focusing especially on those provisions affecting juveniles or which are designed to protect children and to displace drug trafficking activities from areas adjacent to schools;

5. The Attorney General's Statewide Narcotics Action Plan;

6. The United States Supreme Court decision in New Jersey v. T.L.O. and the Attorney General's School Search Guidelines; and

7. The federal regulations on confidentiality for counseling and treatment; and

8. The scope and nature of the problem concerning firearms and other dangerous weapons on school property.

Article 3.1
Law Enforcement Participation in Educational Programs

A. Law Enforcement's Contribution to Substance Abuse Education and Demand Reduction.

The parties to this agreement understand and accept that the only viable, long-term solution to the nation's drug epidemic is to reduce the public's demand for illicit substances, and that education emerges as one of the most promising means available by which to provide a generation of students with information, skills and incentives to resist the temptation to experiment with and use chemical substances. However, the parties further understand that the contributions of the law enforcement community to the goal of a drug-free New Jersey need not and

should not be limited merely to disrupting the supply of illicit drugs; rather, the law enforcement community can help to reduce the demand for drugs, not only by holding drug users accountable for their unlawful conduct, but also by actively participating in public awareness and prevention programs and educational initiatives. To this end, a number of innovative and highly successful programs have been developed by numerous organizations in which specially trained police officers participate directly in school-based educational programs. These programs are designed to teach students about the nature and dangers of substance abuse, methods to enhance students' self-esteem and proven techniques and skills for resisting peer pressure to experiment with drugs or engage in other dangerous activities. These initiatives include, but are not limited to, the D.A.R.E. program (Drug Abuse Resistance Education), D.A.D. (Defenders Against Drugs), and the McGruff program sponsored by the Crime Prevention Officers Association.

B. Approval and Supervision of Educational Curricula.

It is understood and agreed that education officials are at all times ultimately responsible for approving, supervising, monitoring, evaluating and otherwise ensuring the consistent high quality of all educational curricula and instructional programs provided to students, whether the instruction is provided by certified school employees or by specially trained law enforcement officers invited into the schools pursuant to section C. of this Article. It is also understood and agreed that local

school officials remain ultimately responsible for making certain that all substance awareness instructional programs are developed and provided in a manner which is consistent with the requirements of N.J.S.A. 18A:40A-1 et seq., the New Jersey Department of Education's Chemical Health Education Guide (N.J.A.C. 6:29-6.6), and any and all applicable rules, regulations and policies adopted by the State Board of Education or the Commissioner of Education concerning the development, review, monitoring, approval and implementation of K-12 chemical awareness curricula and related courses of instruction.

C. Procedures for Inviting, Soliciting or Promoting Police Participation in Educational Programs.

It is understood and agreed that no law enforcement officer shall be permitted to provide a course of instruction to students unless the officer has been invited or requested to provide such course of instruction by the appropriate school official, or the course of instruction has otherwise been approved by the appropriate school official. In order to enhance cooperation between law enforcement and education authorities, it is agreed that all requests by school officials for information concerning the nature and availability of law enforcement instructional programs such as D.A.R.E., D.A.D., McGruff, etc. should be directed to _____, with notice of
(Designated Law Enforcement Liaison)
the request provided to the county prosecutor. All requests by a law enforcement agency seeking an invitation to provide any such law enforcement instructional program, or seeking to demonstrate

the desirability of providing such an instructional program, should be directed to _____, with notice
(Designated School Official)
given to the county prosecutor. The county prosecutor, working in cooperation with the county superintendent of schools, shall be responsible for coordinating all such invitations or requests for invitations to participate in law enforcement instructional programs. The county prosecutor further agrees to serve on an ongoing basis as an information clearinghouse to provide school officials with information concerning the availability and benefits of such law enforcement instructional programs.

Article 4
Revisions and Periodic Conferences

It is understood that _____, working in
(county prosecutor)
conjunction with the _____ will not less than
(county superintendent)
once each calendar year organize and conduct a meeting of representatives from the law enforcement and educational communities to discuss the implementation of and compliance with the provisions of Attorney General Executive Directive 1988-1 throughout the county, to discuss any other matters of mutual concern, and to recommend revisions to the Attorney General Executive Directive and to this Agreement. It is understood that every chief of police, school building principal and local superintendent will be invited to attend, along with any other persons or organization representatives who could contribute to

or benefit from the proceedings. Following each conference, _____ will thereafter issue a report to the (county prosecutor) Attorney General as to the results of the meeting, which will include a discussion of any general or specific recommendations concerning the need for revisions to the Attorney General Executive Directive and to this Agreement.

Article 5
Dispute Resolution Procedures

It is understood and agreed that any dispute or objection as to any proposed or ongoing law enforcement operation or activity on school property will be directed by the appropriate school official to the chief executive officer of the law enforcement agency involved. Where the chief executive officer of the agency is for any reason unable to satisfactorily resolve the dispute or objection, the matter will be referred to _____ (the county prosecutor) who is hereby authorized to work in conjunction with _____ (the county superintendent of schools) and, where appropriate, Division of Criminal Justice, to take appropriate steps to resolve the matter. Any dispute which cannot be resolved at the county level shall be resolved by the Attorney General whose decision will be binding.

Article 6
Maintenance of the Agreement

This agreement shall remain in full force and effect until such time as it may be modified. Modification of this Agreement will be effected only with the mutual agreement of the _____ school district, the _____ County Superintendent of Schools, the _____ Police Department and the _____ County Prosecutor. Modifications required by a change in state or federal law, rules or regulations or applicable guidelines or executive directives shall be made on the effective date of such revisions of law, regulations, guidelines or directives. All parties to this Agreement will notify the other parties immediately regarding any such legal or regulatory changes.

The parties to this Agreement recognize the value of cooperation and communication with respect to the drug and weapons problem as it relates to students and school grounds, and believe that entering into this Agreement will help them to be more effective in dealing with these problems and in making certain that schools are safe havens for law abiding children, and not convenient marketplaces or resorts for drug dealers and users.

As an expression of our mutual concern and commitment to students, and to the level of cooperation and understanding described in this Agreement, and undersigned parties do hereby

affirm and agree to abide by the standards, procedures, principles and policies set forth in this document.

On this _____ day of _____,

Nineteen Hundred and Ninety-two.

_____ _____

School District Superintendent Chief, Police Department

_____

President, District Board of Education

Approved by:

_____ _____

County Superintendent of Schools County Prosecutor

APPENDIX 4

New Jersey Administrative Code 6:29-10.1 et seq.
(Safe and Drug-Free Schools)

SUBCHAPTER 10. SAFE AND DRUG FREE SCHOOLS

6:29–10.1 Purpose

The purpose of this subchapter is to establish uniform Statewide policies and procedures for cooperating with law enforcement operations and activities on or near school grounds to ensure a safe school environment, and to identify the circumstances under which school officials shall refer violations to the police for handling, as authorized by the Attorney General's Executive Directive 1988–1. Such policies and procedures shall be consistent with and complementary to the State Memorandum of Agreement approved by the Department of Law and Public Safety and the Department of Education.

6:29–10.2 Adoption of policies and procedures

(a) District boards of education shall adopt and implement policies and procedures to ensure cooperation between school staff and law enforcement authorities in all matters relating to:

1. The unlawful possession, distribution and disposition of the following:

i. Controlled dangerous substances, including anabolic steroids;

ii. Drug paraphernalia;

iii. Alcohol;

iv. Firearms, as defined in N.J.S.A. 2C:39–1f; and

v. Other deadly weapons, as defined in N.J.S.A. 2C:39–1r; and

2. The planning and conduct of law enforcement activities and operations occurring on school property, including arrest procedures and undercover school operations.

6:29–10.3 General requirements

(a) District policies and procedures developed pursuant to this section shall:

1. Be developed, implemented, and revised, as necessary, through consultation with the county prosecutor and such other law enforcement officials as may be designated by the county prosecutor;

2. Be reviewed and approved by the county superintendent;

3. Be made available annually to all school staff, pupils, and parents or guardians; and

4. Be consistent with reporting, notification and examination procedures of students suspected of being under the influence of alcohol and other substances in accordance with N.J.A.C. 6:29–6.

(b) District policies and procedures shall include, but not be limited to, the following components:

1. The designation of liaisons to law enforcement agencies and the prescription of their roles and responsibilities by the district chief school administrator;

2. Specific procedures for and responsibilities of staff in summoning appropriate law enforcement authorities onto school property for the purpose of conducting law enforcement investigations, searches, seizures, and arrests;

3. Specific procedures for and responsibilities of staff in cooperating with arrests made by law enforcement authorities on school property;

4. Specific procedures for and responsibilities of staff in initiating or conducting searches and seizures of pupils, their property, and personal effects. All searches and seizures conducted by school staff shall comply with the standards prescribed by the United States Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), as set forth in the "Attorney General's Guidelines Regarding School Searches," issued in 1985;

i. Any question concerning searches conducted by school officials shall be directed to the appropriate county prosecutor.

ii. School officials may request that law enforcement authorities assume responsibility for conducting any search or seizure.

iii. No school staff member shall impede any law enforcement officer engaged in a lawful search, seizure, or arrest whether pursuant to a warrant or otherwise.

iv. School staff shall permit law enforcement authorities upon their arrival to assume responsibility for conducting any search or seizure.

v. Any questions concerning the legality of any contemplated or ongoing search, seizure, or arrest conducted by a law enforcement officer on school property shall be directed to the county prosecutor or, in the case of a search, seizure or arrest undertaken by the Division of Criminal Justice in the Department of Law and Public Safety, to the Assistant Attorney General in charge;

5. The procedures for and responsibilities of staff, with regard to interviews of pupils suspected of possessing, or distributing a controlled dangerous substance, drug paraphernalia, or a firearm or other deadly weapon;

6. Procedures for planning, approving, and conducting undercover school operations;

i. The chief school administrator and school principal shall cooperate with law enforcement authorities in the planning and conduct of undercover school operations. The chief school administrator shall approve such undercover operations without prior notification to the district board of education.

ii. All information concerning requests to undertake any undercover school operation, information supplied by law enforcement authorities to justify or explain the need for and of a proposed undercover school operation, and all other information concerning an ongoing undercover school operation, including the identity of any undercover officer placed in a school, shall be kept strictly confidential by the chief school administrator and school principal. The chief school administrator and principal shall not divulge information concerning any undercover school operation to any person without the prior express approval of the county prosecutor or designee. In the event that the chief school administrator, principal or any other school staff or district board member who may have been informed as to the existence of the undercover school operation subsequently learns of any information which suggests that the true identity of the undercover officer has been revealed, or that any person has questioned the identity or status of the undercover officer as a bona fide member of the school community, or that the integrity of the undercover school operation has been in any other way compromised, such information shall be immediately communicated to the county prosecutor or designee;

7. The procedures for and responsibilities of staff concerning the safe and proper handling of any seized controlled dangerous substance, drug paraphernalia, or a firearm or other deadly weapon, and the prompt delivery of such items to appropriate law enforcement authorities in accordance with the provisions of this subchapter;

8. The procedures for and responsibilities of staff in notifying authorities of any suspected violation of any laws prohibiting the possession, sale or other distribution of any controlled dangerous substance, drug paraphernalia, or a firearm or other deadly weapon;

9. Provisions for requesting uniformed police attendance at extracurricular school events;

10. Provisions for notifying parents or guardians as soon as possible whenever a pupil is arrested for violating any laws prohibiting the possession, sale or other distribution of any controlled dangerous substance, drug paraphernalia, or a firearm or other deadly weapon;

11. Provisions for the inservice training of school staff concerning policies and procedures established in this subchapter, and the exchange of information regarding the practices of the education and law enforcement agencies; and

12. An agreement or memorandum of understanding with appropriate law enforcement authorities. Such agreements or memoranda of understanding shall be consistent with the policies established in this subchapter and in the State Memorandum of Agreement. These agreements or memoranda of understanding shall define the reciprocal rights and obligations of pupils, parents or guardians, school staff, and law enforcement officials with respect to the possession, distribution and disposition of controlled dangerous substances, drug paraphernalia, and firearms and other deadly weapons; with respect to the planning and conduct of law enforcement activities and operations, occurring on school property, including arrests and undercover school operations; and with respect to law enforcement's participation in substance abuse prevention programs;

i. Copies of all agreements or memoranda of understanding entered into with law enforcement authorities shall be approved by the district board of education and shall be submitted to and approved by the county prosecutor and county superintendent of schools;

13. Provisions for resolving disputes concerning law enforcement activities occurring on school property; and

14. An annual process for the local chief school administrator and appropriate law enforcement officials to discuss the implementation and need for revising the agreement or memorandum of understanding, and to review the effectiveness of policies and procedures implemented pursuant to the provisions of this subchapter. This annual review shall include input from the county superintendent, community and meeting(s) with the county prosecutor and such other law enforcement officials designated by the county prosecutor.

6:29–10.4 Reporting pupils or staff members to law enforcement authorities

(a) Subject to the provisions of N.J.A.C. 6:29–10.6 below, any teaching staff member having reason to believe that a pupil or staff member has unlawfully possessed or in any way been involved in the distribution of a controlled dangerous substance, including anabolic steroids, or drug paraphernalia, on or near school property, shall report the matter as soon as possible to the principal or, in the absence of the principal, to the staff member responsible at the time of the alleged violation. Either the principal or the responsible staff member shall notify the chief school administrator, who in turn shall notify as soon as possible the appropriate county prosecutor or other law enforcement official designated by the county prosecutor to receive such information.

1. The chief school administrator or designee shall provide to the county prosecutor or designee all known information concerning the matter, including the identity of the pupil or staff member involved. The chief school administrator or designee shall not disclose, however, the identity of any pupil or staff member who has voluntarily sought treatment or counseling for a substance abuse problem provided the pupil or staff member is not currently involved or implicated in drug distribution activities.

i. For the purpose of this section, an admission by a pupil or staff member in response to questioning initiated by the principal or teaching staff member, or following the discovery of a controlled dangerous substance, including anabolic steroids, or drug paraphernalia by the principal or teaching staff member, shall not constitute a voluntary, self-initiated request for counseling and treatment.

(b) Whenever any school employee develops reason to believe that a firearm or other deadly weapon has unlawfully been brought onto school property, or that any student or other person is in unlawful possession of a firearm or other deadly weapon, whether on or off school property, or that any student or other person has committed an offense with or while in possession of a firearm, whether or not such offense was committed on school property or during school operating hours, the matter shall be reported as soon as possible to the principal, or in the absence of the principal, to the staff member responsible at the time of the alleged violation. Either the principal or the responsible staff member shall notify the chief school administrator, who in turn shall notify, as soon as possible, the county prosecutor or other law enforcement official designated by the county prosecutor to receive such information. The chief school administrator or designee shall provide to the county prosecutor or designee all known information concerning the matter, including the identity of the pupil or staff member involved.

6:29–10.5 Handling of substances, firearms and other items

(a) Any school employee who seizes or discovers any substance or item believed to be a controlled dangerous substance, including anabolic steroids, or drug paraphernalia, shall immediately notify and turn over the substance or item to the principal or designee. Either the principal or designee shall then immediately notify the chief school administrator or designee who in turn shall notify the appropriate county prosecutor or other law enforcement official designated by the county prosecutor to receive such information. The school employee, principal or designee, shall safeguard the substance or paraphernalia against further use or destruction and shall secure the substance or paraphernalia until such time as the substance or paraphernalia can be turned over to the county prosecutor or designee.

1. The principal or designee shall provide to the county prosecutor or designee all information concerning the manner in which the substance or paraphernalia was discovered or seized, the identity of all persons who had custody of the substance or paraphernalia following its discovery or seizure, and the identity of any pupil or staff member believed to have been in possession of the substance or paraphernalia. However, the principal or designee shall not disclose the identity of any pupil or staff member who voluntarily and on his or her own initiative turned over the substance or paraphernalia to a school employee, provided that there is reason to believe that the pupil or staff member was involved with the substance or paraphernalia for the purpose of personal use, not distribution activities, and further provided that the pupil or staff member agrees to participate in an appropriate treatment or counseling program.

i. For the purposes of this section, an admission by a pupil or staff member in response to questioning initiated by the principal or teaching staff member, or following the discovery of a controlled dangerous substance, including anabolic steroids, or drug paraphernalia by the principal or teaching staff member shall not constitute a voluntary self-initiated request for counseling and treatment.

(b) Whenever a school employee seizes or comes upon any firearm or dangerous weapon, school officials should in the case of a dangerous weapon other than a firearm, and shall in the case of a firearm, immediately advise the county prosecutor or appropriate law enforcement official, and secure the firearm or weapon pending the response by law enforcement to retrieve and take custody of the firearm or dangerous weapon. School employees having custody of a firearm or dangerous weapon will take reasonable precautions, as per local board of education procedures, to prevent its theft, destruction or unlawful use by any person.

6:29–10.6 Confidentiality of pupil or staff member involvement in substance abuse intervention and treatment programs

(a) All information concerning a pupil's or staff member's involvement in a school intervention or treatment program for substance abuse shall be kept strictly confidential in accordance with applicable Federal regulations (42 C.F.R. Part 2).

(b) Nothing in this subchapter shall be construed in any way to authorize or require the transmittal of any information or records which are in the possession of a substance abuse counseling or treatment program.

(c) The principal or designee shall not disclose to law enforcement officials or to any person other than a member of the local district's substance abuse program that a pupil or staff member has received or is receiving evaluation or treatment services from the local district's substance abuse program; nor shall the principal or designee disclose any

information, including the pupil's or staff member's identity or information about illegal activity, where such information was learned in the course of or as a result of evaluation or treatment services provided by the local district's substance abuse program.

(d) Nothing in the section shall be construed to preclude the disclosure of information about illegal activity which was learned by any school employee outside of the local district's substance abuse program, and any such information about illegal activity shall be reported in accordance with N.J.A.C. 6:3–6.4 and 10.5.

APPENDIX 5

New Jersey Administrative Code 6:29-6.1 et seq.
(Substance Abuse)

SUBCHAPTER 6. SUBSTANCE ABUSE

6:29–6.1 Purpose

These rules are designed to provide standards for district boards of education in their development of policies and procedures to evaluate and treat pupils who have alcohol and other drug-related problems in the school setting.

Amended by R.1989 d.480, effective September 5, 1989.
See: 21 N.J.R. 1603(a), 21 N.J.R. 2784(b).
Changed words "guidance to" to "standards for" and added reference to ... alcohol and "other" drug-related....
Recodified by R.1990 d.154, effective March 5, 1990.
See: 21 N.J.R. 3815(a), 22 N.J.R. 793(a).
Rule on physical education personnel recodified to N.J.A.C. 6:29–3.1.
Rule on the purpose of the subchapter on substance abuse recodified from N.J.A.C. 6:29–9.1.

6:29–6.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise:

"Evaluation" means those procedures used to determine a pupil's need for an educational program or treatment which extends beyond the regular school program by virtue of the use of alcohol or other drugs by the pupil or the pupil's family.

"Intervention and referral to treatment" means those programs and services offered to help a pupil because of the use of alcohol or other drugs by the pupil or the pupil's family.

Amended by R.1989 d.480, effective September 5, 1989.
See: 21 N.J.R. 1603(a), 21 N.J.R. 2784(b).
Amended definition for "evaluation" and for "treatment" by deleting 1.–4. under each definition and recodified those procedures to N.J.A.C. 6:29–9.3.
Recodified by R.1990 d.154, effective March 5, 1990.
See: 21 N.J.R. 3815(a), 22 N.J.R. 793(a).
Rule on physical education exemption procedures recodified to N.J.A.C. 6:29–3.2.
Definitions regarding substance abuse recodified from N.J.A.C. 6:29–9.2.

Case Notes

Temporary excuse from physical education class. J.L. v. Bd. of Ed., West Orange, Essex Cty., 1974 S.L.D. 842.

6:29–6.3 Adoption of policies and procedures

(a) District boards of education shall adopt and implement policies and procedures for the evaluation, intervention and referral to treatment of pupils whose use of alcohol and other drugs has affected their school performance or who possess, consume or who on reasonable grounds are suspected of being under the influence of the following substances in school or at school functions:

1. Alcoholic beverages;

2. Any controlled dangerous substance, as identified in N.J.S.A. 24:21–2; and/or

3. Any chemical or chemical compound which releases vapor or fumes causing a condition of intoxication, inebriation, excitement, stupefaction, or dulling of the brain or nervous system including but not limited to glue containing a solvent having the property of releasing toxic vapors or fumes, as defined in N.J.S.A. 2A:170–25.9.

(b) In adopting and implementing policies and procedures for the evaluation, intervention and referral to treatment of alcohol or other drug-affected pupils, district boards of education shall:

1. Consult with local agencies approved by the State Department of Health; and

2. Provide for compliance with the confidentiality requirements established in Federal regulations found at 42 CFR Part II.

(c) Alcohol and other drug policies of district boards of education shall include, but not be limited to, the following components:

1. The roles of appropriate school staff when handling a variety of possible alcohol or other drug-related situations involving pupils on school property or at school functions;

2. Specific procedures, sanctions and due process provisions for violations of the alcohol and other drug policy requiring disciplinary action by the district board of education. The sanctions should be graded according to the severity of the offense;

3. Specific procedures to govern instances where emergency room services are required in treating alcohol or other drug-affected pupils;

4. The provision of evaluation services for pupils who are affected by alcohol or other drug use. These services shall include any of the following:

i. Examination by a physician for the purpose of diagnosing whether the pupil is under the influence of alcohol and/or other drugs;

ii. Evaluation by the child study team to determine a pupil's eligibility for special education and/or related services when the pupil has been identified as potentially educationally handicapped;

iii. Assessment by individuals who are certified by the New Jersey State Board of Examiners as substance awareness coordinators or by individuals who are appropriately certified by the New Jersey State Board of Examiners and trained in alcohol and other drug abuse prevention; and/or

iv. Referral to a community agency approved by the County Local Advisory Council on Alcoholism and Drug Abuse or the State Department of Health;

5. The provision of intervention and treatment-referral services for pupils who are affected by alcohol or other drug use. Intervention and treatment-referral shall be provided by individuals who are certified by the New Jersey State Board of Examiners as substance awareness coordinators or by individuals who are appropriately certified by the New Jersey State Board of Examiners and trained in alcohol and other drug abuse prevention. These programs and services shall include any of the following:

i. Provisions for a program of instruction, counseling and related services provided by the district board of education while a pupil is receiving medical or therapeutic care for a diagnosed alcohol or other drug dependency problem;

ii. Referral to a community agency approved by the County Local Advisory Council on Alcoholism and Drug Abuse or the State Department of Health;

iii. Providing support services for pupils who are in care or returning from care for alcohol and other drug dependency; and/or

iv. A special class or course designed to meet the needs of pupils with alcohol or other drug use problems;

6. Procedures for cooperating with law enforcement drug operations and activities on or near school property in accordance with the provisions established in N.J.A.C. 6:3–6; and

7. Provisions for the establishment of parent/guardian substance abuse educational programs offered at times and places convenient to the parents of the district on school premises or other facilities.

(d) The policies and procedures for the evaluation, intervention and referral to treatment of alcohol and other drug-affected pupils developed under this section shall be reviewed and approved by the Department of Education.

Amended by R.1989 d.480, effective September 5, 1989.
See: 21 N.J.R. 1603(a), 21 N.J.R. 2784(b).
At (b)2. added provision for compliance with Federal confidentiality requirements; at new (c)4i-iv, delineated evaluation services; at (c)5i-iv delineated treatment services and added new (c)6 and 7.
Recodified by R.1990 d.154, effective March 5, 1990.
See: 21 N.J.R. 3815(a), 22 N.J.R. 793(a).
Rule on physical education exemption procedures recodified to N.J.A.C. 6:29–3.3.
Rule on adoption of policies and procedures recodified from N.J.A.C. 6:29–9.3.

Case Notes

Substance abuse guidance counselor's notes of interviews regarding incident in which high school students were charged with aggravated sexual assault were privileged. State in Interest of L.P., 250 N.J.Super. 103, 593 A.2d 393 (Ch.1991).

Proper manner for determining worker's compensation rate for injured employee holding multiple positions was to aggregate salaries from all three positions. Stack v. Boonton Bd. of Ed., 199 N.J.Super. 121, 488 A.2d 1032 (App.Div.1985).

Alcohol consumption; students prohibited from participation in graduation ceremonies. R.F. Et Al. v. Board of Education of Park Ridge, 93 N.J.A.R.2d (EDU) 79.

6:29–6.4 Review and availability of policies and procedures

(a) Each district board of education shall establish an annual process to review the effectiveness of its alcohol and other drug policies and procedures. The district board of education shall solicit community input as well as consult with local agencies approved by the State Department of Health in the review process.

(b) Alcohol and other drug policies and procedures for discipline, evaluation, intervention and referral to treatment of pupils shall be made available annually to all school staff, pupils, and parents or guardians.

Amended by R.1989 d.480, effective September 5, 1989.
See: 21 N.J.R. 1603(a), 21 N.J.R. 2784(b).
Added phrase ... alcohol and "other" drug....
Recodified by R.1990 d.154, effective March 5, 1990.
See: 21 N.J.R. 3815(a), 22 N.J.R. 793(a).
Rule on athletics procedures recodified to N.J.A.C. 6:29–3.4. Rule on review and availability of policies and procedures recodified from N.J.A.C. 6:29–9.4.

6:29–6.5 Reporting, notification and examination procedures

(a) In instances involving alcoholic beverages, controlled dangerous substances or any chemical or chemical compound as identified in N.J.A.C. 6:29–6.3(a), the following shall apply:

1. Any professional staff member to whom it appears that a pupil may be under the influence of alcoholic beverages or other drugs on school property or at a school function shall report the matter as soon as possible to the school nurse or medical inspector and the principal.

i. In the absence of the principal, his or her designee shall be notified; and

ii. In instances where the school nurse, medical inspector or the principal are not in attendance, the staff member responsible for the school function shall be immediately notified.

2. The principal or his or her designee shall immediately notify the parent or guardian and the chief school administrator and arrange for an immediate examination of the pupil. The examination may be performed by a physician selected by the parent or guardian or by the medical inspector. If the chosen physician is not immediately available, the examination shall be conducted by the medical inspector or, if the medical inspector is not available, the pupil shall be accompanied by a member of the school staff, designated by the principal, to the emergency room of the nearest hospital for examination. If available, a parent or guardian should also accompany the pupil.

3. If, at the request of the parent or legal guardian, the medical examination is conducted by a physician other than the medical inspector, such examination shall not be at the expense of the district board of education.

4. Provisions shall be made for the appropriate care of the pupil while awaiting the results of the medical examination.

5. A written report of the medical examination shall be furnished to the parent or guardian of the pupil, the principal and the chief school administrator by the examining physician within 24 hours.

6. If the written report of the medical examination is not submitted to the parent or guardian, principal and chief school administrator within 24 hours, the pupil shall be allowed to return to school until such time as a positive diagnosis of alcohol or other drug use is received.

7. If there is a positive diagnosis from the medical examination, indicating that the pupil is under the influence of alcoholic beverages or other drugs, the pupil shall be returned to the care of a parent or guardian as soon as possible. Attendance at school shall not resume until a written report has been submitted to the parent or guardian of the pupil, the principal and chief school administrator from a physician who has examined the pupil to diagnose alcohol or other drug use. The report shall certify that substance abuse no longer interferes with the pupil's physical and mental ability to perform in school. In addition, the staff member shall complete the Violence, Vandalism and Substance Abuse Incident Report.

8. Refusal or failure by a parent to comply with the provisions of N.J.S.A. 18A:40A–12 shall be deemed a violation of the compulsory education (N.J.S.A. 18A:38–25 and 18A:38–31) and/or child neglect (N.J.S.A. 9:6–1 et seq.) laws.

9. While the pupil is at home because of the medical examination or after his or her return to school, the school may require additional evaluation for the purpose of determining the extent of the pupil's alcohol or other drug use and its effect on his or her school performance.

(b) In instances involving anabolic steroids, the following shall apply after July 1, 1990:

1. Whenever any teaching staff member, school nurse or other educational personnel of any public school shall have reason to believe that a pupil has used or may be using anabolic steroids, that teaching staff member, school nurse or other educational personnel shall report the matter as soon as possible to the school nurse or medical inspector, as the case may be, or to a substance awareness coordinator, and to the principal or, in his or her absence, to his or her designee.

2. The principal or his or her designee, shall immediately notify the parent or guardian and the superintendent of schools, if there be one, or the administrative principal and shall arrange for an examination of the pupil by a doctor selected by the parent or guardian or by the medical inspector. The pupil shall be examined as soon as possible for the purpose of diagnosing whether or not the pupil has been using anabolic steroids.

3. A written report of that examination shall be furnished by the examining physician to the parent or guardian of the pupil and to the superintendent of schools or administrative principal.

4. If it is determined that the pupil has been using anabolic steroids, the pupil shall be interviewed by a substance awareness coordinator or another appropriately

trained teaching staff member for the purpose of determining the extent of the pupil's involvement with these substances and possible need for treatment. In order to make this determination, the coordinator or other teaching staff member may conduct a reasonable investigation which may include interviews with the pupil's teachers and parents. The coordinator or other teaching staff member may also consult with such experts in the field of substance abuse as may be necessary and appropriate.

5. If it is determined that the pupil's involvement with and use of these substances represents a danger to the pupil's health and well-being, the coordinator or other teaching staff member shall refer the pupil to an appropriate treatment program which has been approved by the Commissioner of Health.

(c) Any staff member who reports a pupil to the principal or his or her designee in compliance with the provisions of this subsection shall not be liable in civil damages as a result of making such a report as specified in N.J.S.A. 18A:40A–13 and N.J.S.A. 18A:40A–14.

Amended by R.1989 d.480, effective September 5, 1989.
See: 21 N.J.R. 1603(a), 21 N.J.R. 2784(b).
Deleted (a)1–8 and recodified (b) to new (a) incorporating alcohol and other drug policy as one uniform policy, added new 6 regarding written medical report and new 8 regarding parents' refusal to comply with N.J.S.A. 18A:40A–12.
Recodified by R.1990 d.154, effective March 5, 1990.
See: 21 N.J.R. 3815(a), 22 N.J.R. 793(a).
Recodified from N.J.A.C. 6:29–9.5.

6:29–6.6 Curriculum and instruction

(a) Each school district having kindergarten through sixth grades shall incorporate into its curriculum at each grade level alcohol and other drug education, including tobacco and anabolic steroids, appropriate for the pupil's age and maturity, in accordance with Department of Education Chemical Health Guidelines pursuant to N.J.S.A. 18A:40A–1. These guidelines are available through the New Jersey State Department of Education, 225 West State Street, PO Box 500, Trenton, New Jersey 08625–0500.

(b) Each school district having seventh through twelfth grades shall incorporate into its curriculum at each seventh through twelfth grade level a minimum of 10 clock hours per school year of alcohol and other drug education, including tobacco and anabolic steroids, in accordance with Department of Education Chemical Health Guidelines, pursuant to N.J.S.A. 18A:40A–1.

(c) Instructional programs on the nature of anabolic steroids shall be incorporated into the curriculum after July 1, 1990.

Amended by R.1989 d.480, effective September 5, 1989.
See: 21 N.J.R. 1603(a), 21 N.J.R. 2784(b).
Deleted (a) and recodified (b) to (a); added new (b) establishing need for 10 hours minimum instruction per school year in grades seventh through twelfth.
Recodified by R.1990 d.154, effective March 5, 1990.
See: 21 N.J.R. 3815(a), 22 N.J.R. 793(a).
Text on curriculum and instruction recodified from N.J.A.C. 6:29–9.6; requirements for programs regarding tobacco and anabolic steroids added; (c) added.

APPENDIX 6

New Jersey Administrative Code 6:29-9.1 et seq.
(The Reporting of Allegations of Child Abuse and Neglect)

SUBCHAPTER 9. THE REPORTING OF ALLEGATIONS OF CHILD ABUSE AND NEGLECT

6:29–9.1 Purpose

The purpose of this subchapter is to establish uniform Statewide policies and procedures for public school personnel to report allegations of child abuse and neglect to the Division of Youth and Family Services (DYFS) and to cooperate with the investigation of such allegations.

Amended by R.1994 d.237, effective May 16, 1994.
See: 26 N.J.R. 537(a), 26 N.J.R. 2019(a).

6:29–9.2 Adoption of policies and procedures

(a) District boards of education shall adopt and implement policies and procedures for the reporting and the cooperation with the Division of Youth and Family Services (DYFS) in investigations of child abuse and neglect. District policies and procedures developed pursuant to this subchapter shall be reviewed and approved by the county superintendent. These policies and procedures shall not be limited to the following, but shall:

1. Include provisions requiring school personnel, compensated and uncompensated (volunteer), to immediately report to the DYFS incidents of child abuse and neglect. The person reporting the alleged child abuse and neglect shall inform the school principal or his or her designee of the report after the DYFS referral has been made. However, notice to the principal or his or her designee need not be given when the person believes that such notice would be likely to endanger the referrer or child(ren) involved or when the person believes that such disclosure would be likely to result in retaliation against the child or in discrimination against the referrer with respect to his or her employment.

i. School personnel having reasonable cause to believe that a child has been subjected to child abuse or neglect or acts of child abuse or neglect as defined under N.J.S.A. 9:6–8.9 shall immediately report to the DYFS (see N.J.S.A. 9:6–8.10). When referring cases to the DYFS, the school referrer shall provide, when possible, the following information:

(1) The name of the child;

(2) The age and grade of the child;

(3) The name and address of the child's parent or guardian or other person having custody and control (for example, foster parent);

(4) A description of the child's condition, including any available information concerning current or previous injuries, abuse, or maltreatment and including any evidence of previous injuries;

(5) The nature and possible extent of the child's injuries, abuse, or maltreatment; and

(6) Any other pertinent information that the referrer believes may be relevant with respect to the child abuse and/or to the identity of the alleged perpetrator;

2. Include a statement indicating the importance of early identification of child abuse or neglect;

3. Provide assurances that no school personnel will be discharged from employment or in any manner discriminated against with respect to compensation, hire, tenure or terms, conditions or privileges of employment as a result of making in good faith a report or causing to be reported an allegation of child abuse (N.J.S.A. 9:6–8.13);

4. Require procedures for the following:

i. District cooperation with the DYFS in investigations of child abuse or neglect that has occurred at any time outside or within the confines of the school or during a school-related function;

ii. District action as defined in N.J.S.A. 9:6–3.1 in response to the findings at each stage of the investigation process as it affects the child(ren) and the school personnel;

iii. Release of the child(ren) from the school; and

iv. Transfer of the child(ren) between schools;

5. Provide for the establishment of a liaison to the DYFS from the district board of education.

i. The function of the liaison is to:

(1) Facilitate communication and cooperation between the district and the DYFS; and

(2) Act as the primary contact person between the schools and the DYFS with regard to general information sharing and the development of mutual training and other cooperative efforts;

6. Include provisions for the annual delivery of information and in-service training programs to school personnel concerning child abuse or neglect, instructional methods and techniques relative to issues of child abuse or neglect in the local curriculum, and personnel responsibilities pursuant to N.J.S.A. 9:6–8.10 et seq.;

i. All new school district employees, both paid and voluntary, shall receive the required information and training as part of their orientation; and

7. Detail the responsibilities of the district board of education as follows:

i. Permit the DYFS investigator to interview the child(ren) in the presence of the school principal or his or her designee. If the child(ren) is intimidated by the presence of that school representative, the child(ren) shall name a staff member, whom he or she feels will be supportive, who will be allowed to accompany the child during the interview. The purpose of including a school representative is to provide comfort and support to the child, not to participate in the investigation;

ii. Cooperate with the DYFS in scheduling interviews with any school personnel who may have information relevant to the investigation;

iii. Release, in accordance with N.J.S.A. 18A:36–19 and N.J.A.C. 6:3–6, all pupil records of the child(ren) under investigation that are deemed to be relevant to the assessment or treatment of child abuse (see N.J.S.A. 9:6–8.40);

iv. Maintain, secure, and release all confidential information about child abuse or neglect cases in accordance with N.J.S.A. 18A:36–19, N.J.S.A. 9:6–8.10a, and N.J.A.C. 6:3–6;

(1) Information regarding allegations of child abuse or neglect reported to, investigated and reported upon by DYFS about a school employee shall be considered confidential and may be disclosed only as required in order to cooperate with DYFS investigations pursuant to N.J.A.C. 6:29–9.2(a)4 or by virtue of a court order. Records pertaining to such information shall be maintained in a secure location separate from other employee personnel records and accessible only to the district chief school administrator or his or her designee.

v. Permit the DYFS to physically remove pupils from school during the course of a school day when it is necessary to protect the child or take the child to a service provider. Such removal shall take place once the principal or his or her designee has been provided, either in advance or at the time removal is sought, with appropriate authorization as specified in N.J.S.A. 9:6–8.27 through 8.30;

vi. Cooperate with the DYFS when it is necessary to remove the child(ren) from his or her home for proper care and protection and when such removal results in the transfer of the child to a school other than the one in which he or she is enrolled;

vii. Provide due process rights to school personnel who have been reassigned or suspended in accordance with N.J.S.A. 18A:6–10 et seq., 18A:25–1, 18A:25–6, and N.J.S.A. 9:6–3.1. Temporary reassignment or suspension of school personnel alleged to have committed an act of child abuse shall occur if there is reasonable cause to believe that the life or health of the alleged victim or other children is in imminent danger due to continued contact between the school personnel and a child (see N.J.S.A. 18A:6–10 et seq. and N.J.S.A. 9:6–3.1); and

viii. Remove from the employee's personnel records all references to a report to the DYFS and/or the official notice from the DYFS of child abuse or neglect regarding a school district employee, immediately following the receipt of an official notice from the DYFS that the allegation was unfounded. Such DYFS report regarding a school employee shall not be used against the employee for any purpose relating to employment, including but not limited to, discipline, salary, promotion, transfer, demotion, retention or continuance of employment, termination of employment or any right or privilege related thereto.

Amended by R.1994 d.237, effective May 16, 1994.
See: 26 N.J.R. 538(a), 26 N.J.R. 2019(b).

APPENDIX 7

Commissioner of Education Memorandum
to Chief School Administrators
Regarding "Zero Tolerance for Guns Act"
(1995)

State of New Jersey

DEPARTMENT OF EDUCATION
CN 500
TRENTON NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

LEO KLAGI
Commissio

August 4, 1995

TO: Chief School Administrators

FROM: Leo Klagholz, Commissioner
Department of Education

SUBJECT: Chapters 127 and 128 of 1995, The Zero Tolerance for Guns Act

Two assembly bills, A-2348 and A-2349, were recently signed into law by Governor Whitman. The approved copies of the bills, which are attached, include the amendments which were adopted by the legislature to concur with recommendations made in the Governor's conditional veto message. The new statutes place New Jersey in compliance with the provisions of the federal Gun-Free School Act of 1994, which requires states to enact such provisions.

These two laws are supportive of proposals in the Safe Schools Initiative to remove students from the regular education program who possess firearms or who commit violent acts with weapons other than firearms, and are effective with the 1995-96 school year. Information is attached to assist you in implementing the provisions of Chapter 127 and 128. If you have questions regarding the new statutes, please contact Robin Bryant, director, Office of Safe and Drug-Free Schools at (609) 292-0321.

LK/BA/tkch
Attachments
c: Richard A. DiPatri
Barbara Anderson
Peter B. Contini
Robin Bryant
County Superintendents

POLICY INFORMATION AND PROCEDURES

Safe Schools Initiative

I. Introduction

The following information is intended to assist district boards of education in implementing the Safe Schools Initiative, based on recent legislation that has become law. Chapter 127 of 1995 requires that pupils who are convicted or adjudicated delinquent for possession of a firearm or who are found to be in possession of a firearm on school property must be immediately removed from the regular education program and provided with an alternative program, pending a hearing before the board of education. Chapter 128 of 1995 requires that pupils who commit assaults upon members of the school community with a weapon other than a firearm shall be immediately removed from the school's regular education program and provided with an alternative program, pending a hearing before the board of education. These new laws, in addition to the other statutes referenced below, represent a significant milestone in our efforts to insure that schools are environments safe from violence and conducive to learning.

The new laws also bring New Jersey in compliance with provisions of federal law, P.L. 103-382, the Improving America's Schools Act of 1994 (IASA). This law mandates that states have in effect a statute requiring local educational agencies to "expel" from school for a period of not less than one year, a pupil who is determined to have brought a weapon to a school, as a condition of receiving federal funds. The federal law does not define the term "expulsion," and the Department of Education has been advised that the provisions in Chapter 127 of 1995 which require "removal" of a pupil for the same violation, comply with the intent of the federal law.

The IASA further provides that each local educational agency requesting assistance from the State under the provisions of the act must:

- Provide to the State an assurance that it is in compliance with the State law (Chapter 127 of 1995); and

- Provide a description of the circumstances surrounding any exclusion of pupils imposed under the State law.

Information regarding compliance with these provisions of the IASA have been provided to school districts as part of the application package for the Safe and Drug-Free Schools and Communities Act entitlement grant program disseminated in July 1995. District responsibility for providing information regarding exclusion of pupils will be met through utilization of the revised Vandalism, Violence, and Substance Abuse Report Form which will be distributed in September 1995.

Existing regulations, N.J.A.C. 6:29-10.2, already require district boards of education to adopt policies and procedures on the unlawful possession, distribution, and disposition of firearms and

other deadly weapons. The following suggestions should be used to assist school districts in revising their policies and procedures in accordance with the new statutory framework.

I. Administrative Procedures for Removal of Pupils for Weapons Offenses (Implementing Chapters 127 and 128 of 1995)

Definitions:

Removal: The exclusion of a pupil from the regular education program in the school to which the pupil was assigned for the purpose of being offered a thorough and efficient, free public education and assignment of the pupil to an alternative education school/program for at least one calendar year, following a proper hearing conducted by the district board of education.

Expulsion: A permanent exclusion from school which denies a pupil the right to a free, thorough and efficient public education provided by the school district in which the pupil resides, based on specific conditions and following due process procedures, including a hearing conducted by the district board of education.

Suspension: A temporary exclusion from school, following due process procedures.

Procedures

Removal of Pupils From Regular Education

- Any pupil who is convicted or found to be delinquent for the following offenses shall be immediately removed from the school's regular education program for a period of not less than one calendar year and placed in an alternative education school or program pending a hearing before the district board of education to remove the pupil:
  - Possessing a firearm on any school property, on a school bus, or at a school -sponsored function; or
  - Committing a crime while possessing a firearm.

  (Reference: N.J.S.A. 2C:1f and 18 U.S.C. 921)

- Any pupil who assaults a pupil, teacher, administrator, board member, or other school district employee with a weapon other than a firearm on school property, on a school bus, or at a school-sponsored function must be immediately removed from the school's regular education program and placed in an alternative education school or program, pending a hearing before the district board of education.

(Reference: N.J.S.A. 2C.12-1a(1) and N.J.S.A. 2C:39-1(r)

- The principal is responsible for the removal of any pupil for a weapons offense and must immediately report the removal to the chief school administrator. The principal must also notify the appropriate law enforcement agency of the possible violation of the code of criminal justice.

- If placement in an approved alternative education school or program is not available, the pupil must be provided home instruction or instruction in other suitable facilities or programs until the alternative education placement is available.

- In addition to placement in an approved alternative school or home instruction, the district board of education may consider other appropriate alternative education programs, such as individualized program plans developed in accordance with the graduation requirement standards set forth in N.J.A.C. 6:8-7.1(d)ii.

- Any pupil removed for a weapons offense is entitled to a hearing before the board of education to determine if the pupil is guilty of committing the offense.

    1. The hearing shall take place no longer than 90 calendar days following the day the pupil is removed from the regular education program. The hearing is not subject to the provisions of the "Open Public Meetings Act," P.L. 1975, c.231 (C. 10:4-6 et seq.).

    2. The decision of the board must be made within five days after the close of the hearing. Any appeal of the board's decision must be made to the Commissioner of Education within 90 calendar days of the board's decision.

    3. If it is found that the pupil is not guilty of these offenses, the pupil must be immediately returned to the regular education program.

    4. The chief school administrator may modify the decision to remove a pupil on a case-by-case basis.

Return of Pupils to Regular Education

- The chief school administrator determines whether the pupil is prepared to return to the regular education program or whether the pupil remains in the alternative education program or other educational placement. The chief school administrator's decision must be made in accordance with district procedures established pursuant to N.J.A.C. 6:26 et seq., Intervention and Referral Services for General Education Pupils, in consultation with the principal or director of the alternative education school/program or other educational placement, and in accordance with the conditions resulting from the district board of education hearing on the pupil's offense. If the pupil is educationally disabled, the pupil's placement is determined by the child study team and the pupil's parent(s) in accordance with N.J.A.C. 6:28 et seq., Special Education.

It should be noted that none of the above procedures prohibit the district board of education from expelling a pupil. Additionally, pupils may seek written authorization from the chief school administrator to possess, handle, or use firearms, or other weapons as part of their participation in

school-sponsored functions, military classes, or for recreational activities such as hunting clubs or rifle clubs. The chief school administrator must not provide such authorization to any pupil who has been convicted or found delinquent for possession of a firearm or for a crime involving the use of a firearm.

III. Alternative Settings

The following alternatives are among those that should be considered if a pupil is removed from the regular education program and a placement in an approved alternative education program is not available, or if the chief school administrator determines that it is in the best interest of the pupil and the school to modify the conditions for the removal and placement of the pupil:

A. Home Instruction

Home instruction should be provided in accordance with the provisions of N.J.A.C. 6:28-4.5. If instruction cannot reasonably be provided at the pupil's place of confinement, a suitable alternative location such as a municipal, county or state government facility, or a community-based facility should be considered.

B. Program Completion Option

An Individualized Program Plan (IPP) may be developed for the pupil in accordance with the graduation requirement standards set forth in N.J.A.C. 6:8-7.1(d)ii. The IPP provides the pupil, parent, and teacher with an educational plan to facilitate implementation of alternative educational activities for pupils not placed in an approved alternative school or program. The IPP may be used in conjunction with home instruction, or as the basis for organizing the provision of other tutorial and supervised learning experiences.

C. Distance Learning

It is expected that the technology that will make distance learning an option for delivering individual and small group instruction will become increasingly available during the next two years. Bergen, Burlington, Hudson, and Morris Counties already have a fiber optic infrastructure in use for interactive instruction. Video/audio bridges providing local access to school-based or home sites are used to deliver instruction in combination with computers equipped with fax/modems and other communication devices.

D. Home Schooling

Parents of pupils removed from the regular educational program have the right to educate a child at home. They must demonstrate to the local school district that the instruction provided is academically equivalent to that provided in public school for a child of similar grade and attainment (State v. Massa, 94 N.J. Super. 382, (1967). If parents elect to educate a child at home, they must annually submit a written curriculum as evidence to the local board of education, and they are responsible for development, implementation, and assessment of their child. The local school district has the responsibility to review the proposed curriculum

and accept it or show that the curriculum is not academically equivalent to that provided in the public schools (State v. Vaughn, 44 N.J. Super. 142 (1965).

If a child who has been schooled at home is subsequently enrolled in the local public school, the school evaluates the child and determines appropriate placement and the acceptability of credits.

IV. Special Education

The Individuals with Disabilities Education Act (IDEA), was enacted to ensure that a free, appropriate public education is made available to pupils with disabilities. The rights of pupils with disabilities to a free appropriate public education are compatible with the goal of school safety.

Pupils with disabilities who exhibit dangerous or violent behavior, may be removed immediately from the school setting. The principal may take swift action and may suspend the pupil for up to ten school days without involvement of the child study team.

When the school believes that a pupil with disabilities should be removed from school for more than ten school days the following steps are taken:

- The child study team must conduct a reevaluation to determine whether the pupil's misconduct was primarily caused by his or her disability;

- If the misconduct is determined not to be primarily caused by the pupil's disability, the pupil may be removed, expelled, or suspended from school for more than ten school days, following applicable due process procedures. However, the district may not cease educational services;

- If the misconduct is determined to be primarily caused by the pupil's disability, the pupil may not be expelled or suspended from school for more than ten days. However, the school district may change the pupil's placement if it believes that maintaining the pupil in the current educational placement is inappropriate.

If the district believes that the pupil with disabilities is a danger to self or others, or the pupil's presence in school will substantially disrupt the educational process, the district may seek emergency relief through the Office of Administrative Law to remove the pupil beyond ten school days.

According to provisions of the Jefford amendment to the IDEA made by the IASA, schools are permitted to make immediate interim changes of placement for pupils with disabilities who bring firearms to school. The principal may immediately suspend the pupil for up to ten school days. Subsequently, the pupil may be placed in an interim alternative educational placement for 45 calendar days. The individuals who participate in the development of the IEP are responsible for determining the interim alternative educational setting. During the 45 day interim alternative placement, the child study team will conduct a reevaluation to determine whether the pupil's misconduct was primarily caused by the pupil's disability and review the pupil's placement.

If it is determined that the pupil's behavior was not primarily caused by the disability, then the pupil may be removed for one year to the interim alternative placement. If it is determined that the behavior was primarily caused by the disability, the pupil may not be automatically removed for the one year; however, the district may propose a change in the pupil's placement. In either case, if the pupil's parents request a due process hearing, the pupil must remain in the interim placement until the completion of all proceedings, unless the parents and the school district can agree on another placement.

A resource document from the U.S. Department of Education with questions and answers regarding the disciplining of pupils with disabilities has been mailed to districts to provide additional guidance on this topic.

V. Other State Statutes

Two other existing statutes provide direction regarding behaviors by pupils which are disruptive, violent, or may lead to violence.

A. Assaults on Board of Education Members or Employees

Any pupil who commits an assault not involving a firearm, or other weapon upon a teacher, administrator, board member or other employee of a district board of education must be immediately suspended from school consistent with procedural due process, pending suspension or expulsion proceedings before the district board of education. The proceedings must take place no later than 90 calendar days following the day on which the pupil is suspended.

(Reference: N.J.S.A. 18A:37-21)

B. Remotely Activated Paging Devices

Without the expressed written permission of the school board, the chief school administrator, or the school principal, pupils are prohibited to bring or possess any remotely activated paging device on any property used for school purposes, at any time and regardless of whether school is in session or other persons are present.

(Reference: N.J.S.A. 2C:33-19)

VI. Memoranda of Understanding Between Education and Law Enforcement Authorities

N.J.A.C. 6:29-10.3(a) requires that district boards of education adopt policies and procedures which include an agreement or memorandum of understanding with appropriate law enforcement authorities consistent with the policies established through the State Memorandum of Agreement authorized by the Attorney General's Executive Directive 1988-1. The regulations also require that the chief school administrator and local law enforcement officials annually review the effectiveness of the implementation of the agreement and discuss the need for revising it. Appropriate modifications of the memorandum of agreement should be considered by chief school administrators and local law enforcement officials in order to effectively implement the provisions of the federal and state laws summarized above.

APPENDIX 8

Attorney General/Commissioner of Education
Joint Memorandum to County Superintendents of Schools
and County Prosecutors
Concerning "Sharing Juvenile Delinquency Information
with Schools"
(1995)

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
OFFICE OF THE ATTORNEY GENERAL

DEBORAH T. P(
ATTORNEY GE

MEMORANDUM

To: County Superintendents of Schools
County Prosecutors

From: Deborah T. Poritz, Attorney General
Leo Klagholz, Commissioner, Department of Education

Subject: Sharing Juvenile Delinquency Information with Schools

Date: July 28, 1995

Introduction

Purpose of this Memorandum

This memorandum explains the provisions of New Jersey's revised juvenile delinquency confidentiality law (*P.L.* 1994, *Ch.* 56) that govern sharing delinquency information with schools. It also provides a suggested format and instructions for sharing delinquency information. It is expected that prosecutors will develop local procedures appropriate for their counties and may use other formats for notification, such as computer generated notices, if they are better suited to local needs.

Revision of Juvenile Code Confidentiality Provisions

On June 29, 1994, New Jersey's juvenile delinquency confidentiality law was amended (*P.L.* 1994, *Ch.* 56, copy attached). Among other changes, the law facilitates the sharing of law enforcement information with schools.

Regulations

Although the law (*P.L.* 1994, *Ch.* 56) requires that education rules and regulations be promulgated regarding this information, a review of regulations governing pupil records has indicated that the maintenance of this information is covered by existing regulations. This section will be reviewed further as part of the comprehensive code review process being undertaken by the Department of Education.

Sharing Law Enforcement Information with Schools

Information Disclosed

The act provides for three categories of disclosure to schools. The categories are:

1. Permissive Disclosure During Investigation (N.J.S.A. *2A:4A-60(e));*
2. Disclosure Following Charge at Principal's Request (N.J.S.A. 2A:4A-60(c)(3));
3. Required Disclosure Following Charge (N.J.S.A. *2A:4A-60(d)).*

These categories are described below.

Permissive Disclosure During Investigation (*N.J.S.A.* 2A:4A-60(e))

The law permits law enforcement or prosecuting agencies to share information regarding juveniles under investigation, when, in their judgment, the information may be useful in maintaining order. This information may also be shared by the principal with appropriate staff, but since it relates to investigations only and no charges have been filed, the statute prohibits this information from being maintained. Since the statute prohibits school officials from maintaining a record of this information, it should be provided orally by law enforcement officials. Providing this information orally, rather than in writing, will help avoid inadvertent retention or disclosure of such information.

Disclosure Following Charge at Principal's Request (N.J.S.A. 2A:4A-60(c)(3))

The law contains provisions allowing principals to request information regarding juvenile delinquency charges filed against a student enrolled in their school. These requests may either be done on a case by case basis, or according to procedures that could be agreed to as part of the *Statewide Memorandum of Agreement between Education and Law Enforcement.* For example, a school district and local police might agree to automatically share this information regarding all students enrolled in the district.

Required Disclosure Following Charge (*N.J.S.A.* 2A:4A-60(d))

The law also ***requires*** that law enforcement or prosecuting agencies advise the principal of the school where the student is enrolled when:

- The offense occurred on school property or a school bus, occurred at a school-sponsored function or was committed against an employee or official of the school;

- The juvenile was taken into custody as a result of information or evidence provided by school officials; or

- The offense resulted in:
    - death or serious bodily injury or involved an attempt or conspiracy to cause death or serious bodily injury;
    - the unlawful use or possession of a firearm or other weapon;
    - the unlawful manufacture, distribution or possession with intent to distribute a controlled dangerous substance or controlled substance analog;
    - the intimidation of an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity;
    - a crime of the first or second degree.

Sharing Information Within Schools; Records

Sharing Delinquency Information within a School

The act provides for sharing information within a school once the school has received delinquency information regarding a pupil. The requirements of the act for the three categories of disclosure are discussed below. The last two categories are discussed together since the provisions regarding sharing of this information within a school are the same.

Permissive Disclosure During Investigation (N.J.S.A. 2A:4A-60(e))

Information regarding investigations may also be shared by the principal with appropriate staff, but since it relates to investigations only and no charges have been filed, the statute prohibits this information from being maintained. Since the statute prohibits school officials from maintaining a record of this information, it should be provided to staff orally by the principal. Providing this information orally, rather than in writing, will help avoid inadvertent retention or disclosure of such information. If information regarding an investigation is received in writing by a school, the written notice may not be included in the pupil's record and must be destroyed.

Permissive Or Required Disclosure Following Charge (N.J.S.A. 2A:4A-60(c)(3) or N.J.S.A. 2A:4A-60(d))

For both permissive and required disclosures following a charge of delinquency, the law allows principals to share such information with members of the staff and faculty they deem appropriate for maintaining order or for planning appropriate programs for a specific student. It is important to note that when this information is shared, it becomes part of the pupil's record and is subject to the maintenance and access provisions of N.J.A.C. 6:3-6.1. When the information is not shared, it may be maintained solely as a memory aid by the principal. It is not subject to the provisions of N.J.A.C. 6:3-6.1 since it does not meet the definition of a pupil record under these circumstances.

Additional Information

Suggested Format for Notification

Attached is a suggested format for notification that may be used by law enforcement for providing delinquency information to schools. The suggested format may be used to provide the information, or to confirm a verbal exchange with school personnel. Instructions for the use of the form are also included. To ensure that educators and police are aware of these changes, prosecutors and county superintendents are asked to share this information with local superintendents, principals, chiefs of police and other appropriate law enforcement officials.

Progress Report

It is anticipated that prosecutors will develop local notification procedures to fit the needs of their counties. In order for the Attorney General's Education and Law Enforcement Working Group to assess the implementation of the law, it is requested that prosecutors and county superintendents submit a joint report to Terrence Farley, Director, Division of Criminal Justice, regarding the distribution and discussion of this information and any local procedures that have been developed. The report should be submitted by November 1, 1995. Please send a copy of that report to the Department of Education, attention of Dr. Peter Contini, Assistant Commissioner, Division of Field Services.

"Megan's Law" Guidelines

Nothing in this memorandum supersedes the more specific "Megan's Law" guidelines that govern notification procedures regarding juvenile sex offenders.

Questions Regarding this Memorandum

We appreciate your attention to this issue. If you have any questions, please contact either:

Deputy Attorney General Thomas Fisken
Juvenile Justice Bureau,
Division of Criminal Justice
Department of Law and Public Safety
CN-085
Trenton, N.J. 08625
(609) 984-2091

or,

Jennifer Seeland, Director
Office of Interagency Initiatives
Division of Student Services
Department of Education
CN-500
Trenton, N.J. 08625
(609) 292-5935

/ww
Attachments

Instructions for the Suggested Format For Juvenile Delinquency Law Enforcement/School Exchange Of Information

This suggested format is designed for transmitting information regarding juvenile delinquency charges, adjudications, or dispositions to principals of schools in which the juveniles is enrolled. **This form should not be used to transmit information regarding juveniles under investigation against whom no charges have yet been filed.** Since the statute prohibits school officials from maintaining a record of this information regarding investigations, it should be provided verbally by law enforcement officials. Providing this information verbally, rather than in writing, will help avoid inadvertent retention or disclosure of such information by school officials.

The following guidelines should be followed when completing this form.

1. The form should be mailed or faxed with an indication that this information is confidential for the principal. While the principal may decide to share this information with appropriate staff pursuant to the law, sharing of this information is not automatic. Mail or faxes not sent with a confidential cover sheet may be inadvertently disclosed.
2. At least one box should be checked under either Section A or Section B to indicate the authority for this disclosure.
3. One box should be checked in Section C to indicate the current stage of the juvenile proceedings.
4. Section D should be filled out with brief narrative descriptions. Criminal code charge numbers, although they may be included, are not sufficient by themselves to inform school personnel of the nature of the offenses. If an adjudication has taken place the outcome should be included. Special care should be taken to clearly indicate that a juvenile has not been found delinquent if there has been either an adjudication at which the juvenile was found not delinquent, or if the charges were dismissed. If a disposition has been entered the disposition should be described briefly. Diversion to programs such as Juvenile Conference Committees should be considered a disposition for the purposes of this form. Please note that when juvenile cases are diverted, the charges are usually dismissed upon successful completion of the diversion. The school should be notified that charges will be dismissed if the diversion is completed successfully.

Suggested Format For Juvenile Delinquency Law Enforcement/School Exchange Of Information

To: _____ Date: _____

From: _____ Telephone #: _____

Full Name of Juvenile: _____

A. Permissive Disclosure Following Charge (N.J.S.A. *2A:4A-60(c)(3)*)

☐ Check this box if this is a requested disclosure. If requested by the principal, you may confidentially disclose a juvenile's identity to the principal of the school where the juvenile is enrolled as well as to any staff members designated by the principal. Permissive disclosure can apply to any offense if the information is requested.

B. Required Disclosure Following Charge (N.J.S.A. *2A:4A-60(d)*)

☐ Check this box if this is a required disclosure. Disclosure of a juvenile's identity to the principal of a school whe the juvenile is enrolled is required under any of the following circumstances. Check all categories that apply.

- ☐ The offense occurred on school property.
- ☐ The offense occurred on a school bus.
- ☐ The offense was committed against a school employee or official.
- ☐ The juvenile was taken into custody as a result of information or evidence provided by school officials.
- ☐ The offense resulted in death or serious bodily injury.
- ☐ The offense involved an attempt or conspiracy to cause death or serious bodily injury.
- ☐ The offense involved unlawful use or possession of a firearm or other weapon.
- ☐ The offense involved unlawful manufacture, distribution or possession with intent to distribute a controlled dangerous substance or analog.
- ☐ The offense was committed by a juvenile who intended to intimidate an individual or group because of rac color, religion, sexual orientation or ethnicity.
- ☐ The offense, if committed by an adult, would constitute a crime of the first or second degree.

C. Please indicate at which stage of the juvenile proceedings the information is being exchanged.

☐ Charge(s) ☐ Adjudication ☐ Disposition

D. Describe below the charges pending against this juvenile, and if this information is being provided at the time of adjudication or disposition, describe the result of the adjudication and/or disposition.

_____

charges

_____

_____

_____

_____

adjudication

_____

disposition

_____

j0001

LAWS OF: 1994
CHAPTER: 56
APPROVED: 6/29/94

[SECOND REPRINT]
SENATE, No. 893

STATE OF NEW JERSEY

INTRODUCED MARCH 21, 1994

By Senators BENNETT, GORMLEY, Cafiero, McGreevey and Assemblyman Catania

AN ACT concerning access to information related to juvenile justice proceedings, amending P.L.1982, c.79, R.S.53:1-15 and P.L.1985, c.69 and supplementing Title 18A of the Revised Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 1 of P.L.1982, c.79 (C.2A:4A-60) is amended to read as follows:

1. Disclosure of juvenile information; penalties for disclosure.

a. Social, medical, psychological, legal and other records of the court and probation department, and records of law enforcement agencies, pertaining to juveniles charged as a delinquent or found to be part of a juvenile-family crisis, shall be strictly safeguarded from public inspection. Such records shall be made available only to:

(1) Any court or probation department;

(2) The Attorney General or county prosecutor;

(3) The parents or guardian and to the attorney of the juvenile;

(4) The Division of Youth and Family Services, if providing care or custody of the juvenile;

(5) Any institution to which the juvenile is currently committed; and

(6) Any person or agency interested in a case or in the work of the agency keeping the records, by order of the court for good cause shown.

b. Records of law enforcement agencies may be disclosed for law enforcement purposes to any law enforcement agency of this State, another state or the United States, and the identity of a juvenile under warrant for arrest for commission of an act that would constitute a crime if committed by an adult may be disclosed to the public when necessary to execution of the warrant.

c. [Information] At the time of charge, adjudication or disposition, information as to the identity of a juvenile charged with an offense, the offense charged, the adjudication and disposition shall, upon request, be disclosed to:

(1) The victim or a member of the victim's immediate family;

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

1 Senate SJU committee amendments adopted May 5, 1994.

2 Assembly floor amendments adopted June 20, 1994.

(2) Any law enforcement agency which investigated the offense, the person or agency which filed the complaint, and any law enforcement agency in the municipality where the juvenile resides; and

(3) On a confidential basis, the principal of the school where the juvenile is enrolled for use by the principal [or his designee in] and such members of the staff and faculty of the school as the principal deems appropriate for maintaining order, safety or discipline in the school or to planning programs relevant to the juvenile's educational and social development, [which information shall not become part of the juvenile's permanent school records] provided that no record of such information shall be maintained except as authorized by regulation of the Department of Education; or

(4) A party in a subsequent legal proceeding involving the juvenile, [but only] upon approval by the court [and for the sole purpose of impeaching the juvenile as a witness].

d. A law enforcement or prosecuting agency shall, at the time of a charge, adjudication or disposition, advise the principal of the school where the juvenile is enrolled of the identity of the juvenile charged, the offense charged, the adjudication and the disposition if:

(1) The offense occurred on school property or a school bus, occurred at a school-sponsored function or was committed against an employee or official of the school; or

(2) The juvenile was taken into custody as a result of information or evidence provided by school officials; or

(3) The offense, if committed by an adult, would constitute a crime, and the offense:

(a) resulted in death or serious bodily injury or involved an attempt or conspiracy to cause death or serious bodily injury; or

(b) involved the unlawful use or possession of a firearm or other weapon; or

(c) involved the unlawful manufacture, distribution or possession with intent to distribute a controlled dangerous substance or controlled substance analog; or

(d) was committed by a juvenile who acted with a purpose to intimidate an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity; or

(e) would be a crime of the first or second degree.

Information provided to the principal pursuant to this subsection shall be treated as confidential but may be made available to such members of the staff and faculty of the school as the principal deems appropriate for maintaining order, safety or discipline in the school or for planning programs relevant to a juvenile's educational and social development, and no record of such information shall be maintained except as authorized by regulation of the Department of Education.

e. Nothing in this section prohibits a law enforcement or prosecuting agency from providing the principal of a school with information identifying one or more juveniles who are under investigation or have been taken into custody for commission of any act that would constitute an offense if committed by an adult when the law enforcement or prosecuting agency determines that the information may be useful to the principal in maintaining order, safety or discipline in the school or in planning programs relevant to the juvenile's educational and social development. Information provided to the principal pursuant to this subsection shall be treated as confidential but may be made available to such members of the staff and faculty of the school as the principal deems appropriate for maintaining order, safety or discipline in

the school or for planning programs relevant to the juvenile's educational and social development. No information provided pursuant to this section shall be maintained.

[d. There shall be a presumption that information] f. Information as to the identity of a juvenile adjudicated delinquent, the offense, the adjudication and the disposition shall be disclosed to the public where the offense for which the juvenile has been adjudicated delinquent if committed by an adult, would constitute a crime of the first, second or third degree, or aggravated assault, destruction or damage to property to an extent of more than $500.00 [or the manufacture or distribution of a narcotic drug], unless upon application at the time of disposition the juvenile [can demonstrate] demonstrates a substantial likelihood that specific 1and extraordinary1 harm would result from such disclosure in the specific case. Where the court finds that disclosure would be harmful to the juvenile, the reasons therefor shall be stated on the record.

[e.] g. Nothing in this section shall prohibit the establishment and maintaining of a central registry of the records of law enforcement agencies relating to juveniles for the purpose of exchange between State or local law enforcement agencies of this State, another state, or the United States.

[f.] h. Whoever, except as provided by law, knowingly discloses, publishes, receives, or makes use of or knowingly permits the unauthorized use of information concerning a particular juvenile derived from records listed in subsection a. or acquired in the course of court proceedings, probation, or police duties, shall, upon conviction thereof, be guilty of a disorderly persons offense.

[g.] i. The court may, upon application by the juvenile or his parent or guardian, the prosecutor or any other interested party, including the victim or complainant or members of the news media, permit public attendance during any court proceeding at a delinquency case, where it determines that a substantial likelihood that specific harm to the juvenile would not result, and 2[, upon application,]2 the court shall permit a victim, or a family member of a victim 2[, who has filed a statement pursuant to subsection c. of section 23 of P.L.1982, c.77 (C.2A:4A-42)]2 to make a statement prior to ordering a disposition in any delinquency proceeding involving an offense that would constitute a crime if committed by an adult. The court shall have the authority to limit and control the attendance in any manner and to the extent it deems appropriate.

j. The Department of Education, in consultation with the Attorney General, shall adopt, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), rules and regulations concerning the creation, maintenance and disclosure of pupil records including information acquired pursuant to this section. (cf: P.L.1982, c.79, s.1)

2. Section 2 of P.L.1982, c.79 (C.2A:4A-61) is amended to read as follows:

2. Fingerprint records; photographs of juveniles.

a. Fingerprints of a juvenile may be taken only in the following circumstances:

(1) Where latent fingerprints are found during the investigation of an offense and a law enforcement officer has reason to believe that they are those of a juvenile, he may, with the consent of the court or juvenile and his parent or guardian fingerprint the juvenile for the purpose of comparison with the latent fingerprints. Fingerprint records taken pursuant to this paragraph may

be retained by the department or agency taking them and shall be destroyed when the purpose for the taking of fingerprints has been fulfilled.

(2) Where a juvenile is detained in or committed to an institution, that institution may fingerprint the juvenile for the purpose of identification. Fingerprint records taken pursuant to this paragraph may be retained by the institution taking them and shall be destroyed when the purpose for taking them has been fulfilled, except that if the juvenile was detained or committed as the result of an adjudication of delinquency, the fingerprint records may be retained by the institution.

(3) Where a juvenile 14 years of age or older is charged with delinquency on the basis of an act which, if committed by an adult, would constitute a crime, fingerprint records taken pursuant to this paragraph may be retained by a law enforcement agency for criminal identification purposes.

b. No juvenile under the age of 14 shall be photographed for criminal identification purposes without the consent of the court or of the juvenile and his parent or guardian.

c. Fingerprints of a juvenile shall be taken if the juvenile [[is 14 years of age or older and]] is adjudicated delinquent on the basis of an act which, if committed by an adult, would constitute a crime.

d. Fingerprints taken pursuant to subsection c. of this section shall be taken according to the fingerprint system of identification established by the Superintendent of State Police on the forms prescribed and shall be forwarded without delay to the State Bureau of Identification together with such information concerning the juvenile and the adjudication as the Superintendent may require. The State Bureau of Identification shall retain records received pursuant to this subsection for the sole purpose of exchange between State or local law enforcement agencies of this State, and law enforcement agencies of another state or the United States.

(cf: P.L.1982, c.79, s.2)

3. Section 3 of P.L.1982, c.79 (C.2A:4A-62) is amended to read as follows:

3. Sealing of records.

a. On motion of a person who has been the subject of a complaint filed under this act or on its own motion, the court may vacate its order and findings and order the nondisclosure of social, medical, psychological, legal and other records of the court and probation services, and records of law enforcement agencies if it finds:

(1) Two years have elapsed since the final discharge of the person from legal custody or supervision, or 2 years have elapsed after the entry of any other court order not involving custody or supervision; and

(2) He has not been convicted of a crime, or a disorderly persons offense or adjudged delinquent, during the 2 years prior to the filing of the motion, and no proceeding or complaint is pending seeking such conviction or adjudication.

b. In any case wherein a juvenile has been adjudicated delinquent and said juvenile enlists in any branch of the Armed Forces of the United States, he may at any time after the date of such adjudication present a duly verified petition to the court where such adjudication was entered, setting forth all the facts in the matter, including proof of enlistment and acceptance in said armed forces, and praying for the relief provided in this section, and subject to the limitations hereinafter provided in this section, an order may be granted to seal all the records concerning such adjudication including

records of the court, probation services and law enforcement agencies. Failure to enter the armed forces shall have the effect of nullifying the sealing order.

c. Reasonable written notice of the motion shall be given to:

(1) The Attorney General and the county prosecutor;

(2) The authority granting the discharge if the final discharge was from an institution, parole, or probation; and

(3) The law enforcement office, department, and central depository having custody of the files and records if such files and records are included in the motion.

d. Upon the entry of the order, the proceedings in the case shall be sealed and all index references shall be marked "not available" or "no record" and law enforcement officers and departments shall reply and the person may reply to any inquiry that there is no record with respect to such person, except that records may be maintained for purposes of prior offender status, identification and law enforcement purposes. [This section shall not apply to reports required under the Controlled Dangerous Substances Registry Act of 1970, P.L.1970, c.227 (C.26:2G-17 et seq.).] Copies of the order shall be sent to each agency or official named therein.

Inspection of the files and records included in the order may thereafter be permitted by the court only upon motion and only to those persons named in the motion; provided, however, the court, in its discretion, may by special order in an individual case permit inspection by or release of information in the records to any clinic, hospital, or agency which has the person under care or treatment or to individuals or agencies engaged in fact-finding or research.

e. Any adjudication of delinquency or conviction of a crime subsequent to sealing shall have the effect of nullifying the sealing order.

f. Expungement of juvenile records shall be governed by the applicable provisions of chapter 52 of Title 2C of the New Jersey Statutes.

(cf: P.L.1982, c.79, s.3)

4. R.S.53:1-15 is amended to read as follows:

53:1-15. The sheriffs, chiefs of police, members of the State Police and any other law enforcement agencies and officers shall, immediately upon the arrest of any person for an indictable offense, or of any person believed to be wanted for an indictable offense, or believed to be an habitual criminal, or within a reasonable time after the filing of a complaint by a law enforcement officer charging any person with an indictable offense, or upon the arrest of any person for shoplifting, pursuant to N.J.S.2C:20-11, or the conviction of any other person charged with a nonindictable offense, where the identity of the person charged is in question, take the fingerprints of such person, according to the fingerprint system of identification established by the Superintendent of State Police and on the forms prescribed, and forward without delay two copies or more of the same, together with photographs and such other descriptions as may be required and with a history of the offense committed, to the State Bureau of Identification.

Such sheriffs, chiefs of police, members of the State Police and any other law enforcement agencies and officers shall also take the fingerprints, descriptions and such other information as may be required of unknown dead persons and as required by section 2 of P.L.1982, c.79 (C.2A:4A-61) of juveniles adjudicated delinquent and shall forward same to the State Bureau of Identification.

Any person charged in a complaint filed by a law enforcement officer with an indictable offense, who has not been arrested, or any person charged in an indictment, who has not been arrested, shall submit himself to the identification procedures provided herein either on the date of any court appearance or upon written request of the appropriate law enforcement agency within a reasonable time after the filing of the complaint. Any person who refuses to submit to such identification procedures shall be a disorderly person.
(cf: P.L.1982, c.219, s.1)

5. Section 1 of P.L.1985, c.69 (C.53:1-20.5) is amended to read as follows:

1. As used in this act:

a. "Processing criminal history record background checks" means the process whereby the State Bureau of Identification compares a set of fingerprints or name search request with those in its files for a determination as to the criminal history of the person identified by the request.

b. "Noncriminal matter" means any matter, other than the arrest of a person for an indictable offense or other criminal justice purpose, which requires the submission of a person's fingerprints or name search request to the State Bureau of Identification for processing. These matters include background investigations for licensing or employment, or both.

c. For purposes of this section, the criminal history record of a person does not include records concerning charges or adjudications of juvenile delinquency. Such records shall be disclosed only as provided in section 1 of P.L.1982, c.79 (C.2A:4A-60).

(cf: P.L.1985, c.69, s.1)

6. (New section) The State Board of Education, in consultation and cooperation with the Attorney General, shall adopt, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.) rules and regulations regarding law enforcement activities on school grounds and the reporting of suspected offenses and acts of delinquency to law enforcement.

7. This act shall take effect immediately.

Increases public access to information related to juvenile justice system.

APPENDIX 9a

Sample of Affidavit in Support of Search Warrant Following Scent Dog Sweep in School Warren County Prosecutor's Office Multijurisdictional Narcotics Task Force

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION - WARREN COUNTY

CRIMINAL

STATE OF NEW JERSEY)

) ss.:

COUNTY OF WARREN)

AFFIDAVIT

TIMOTHY YOUNG, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I make this affidavit in the performance of my duties as a law enforcement officer of the State of New Jersey. I am a detective employed by the Warren County Prosecutor's Office MultiJurisdictional Narcotics Task Force. Previously I was assigned to the Trial Unit of the Prosecutor's Office. I have been employed by the Warren County Prosecutor's Office since June of 1992. I was previously employed by the office of the Public Defender's Office, Toms River, New Jersey, as an Investigator from August 1990 to March 1991. I graduated from Moravian College with a B.A. degree in 1986 and from the Ocean County Police Academy, in Lakewood, New Jersey in December 1991. During my employment with the Office of the Public Defender my duties included, but not limited to, office and

field work in preparing criminal cases for trial, report writing, serving subpoenas and testifying in criminal court.

Since my assignment to the Multi-Jurisdictional Narcotics Task Force I have worked both surface investigations as well as in an undercover capacity, including the development of informants, and gathering of intelligence information regarding the distribution of illegal drugs. I have assisted in the preparation of affidavits and search warrants and assisted in the execution of many search warrants during my career, which resulted in the successful prosecution of persons involved in the illegal trafficking of narcotic violations of the Controlled Dangerous Substance Act of the State of New Jersey.

I have attended the following seminars/schools to enhance my law enforcement training:

New Jersey Narcotic Enforcement Officers Association Seminar, Alcohol Beverage Control Enforcement, Modified Course for Investigators, Raids (High Risk Warrant Service); Street Level Narcotic Enforcement, Snitches: Confidential Informants In Drug Enforcement.

I have probable cause to believe and do believe that in the [redacted] County of Warren, State of New Jersey there exists evidence of the offenses of Possession of CDS, and Possession of CDS with Intent to Distribute in violation of N.J.S.A. 2c:35-10a et. seq. and N.J.S.A. 2c:35-5a(1) et seq.

2. The facts tending to establish the grounds for this

application and probable cause of my beliefs are as follows:

On March 26, 1996 the Warren County Prosecutor's Officer received information from officials at the [redacted] Board of Education of a possible "on going" drug use and distribution problem inside [redacted] involving the sale and possession of marijuana, cocaine and L.S.D.

a. On March 29, 1996 the Warren County Prosecutor's Office received an official request from the Superintendant of the [redacted] Board of Education to enter the school and to conduct an investigation into narcotics activity. This request included the use of specially trained narcotic detection dogs to assist in determining the existence of narcotics in school.

Arrangements were then made after authorization by appropriate school officials to have officers from the Warren County Prosecutor's Office, the [redacted] Police Department, the [redacted] Police Department and New Jersey Department of Corrections conduct an investigation of the Warren Hills Middle on March 29, 1996. This investigation would center around the student locker area, student parking area and several randomly picked classrooms. These areas were to be investigated by specially trained K-9 teams.

c. On March 29, 1996, the investigation was conducted by three K-9 teams.

Patrolman Collins and K-9 Billy

Patrolman Thomas Cicerelle and K-9 Nekko

Officer William Crampton and K-9 Yogi

(See attached qualifications of each K-9 team incorporated herein.)

K-9 Billy gave a positive indication on the below listed items:

Locker #[redacted] located in cafeteria area belonging to [redacted] at 10:08 a.m.,

Locker #[redacted] located in cafeteria area vacant at 11:05 a.m.

Locker #[redacted] located in cafeteria area belonging to [redacted] at 11:05 a.m.

K-9 Nekko gave a positive indication on the below listed items:

Locker #[redacted] located across from gym by room 306 blue belonging to [redacted] at 10:54 a.m.

Locker #[redacted] located between classrooms 206 and 208 belonging to [redacted] at 10:06 a.m.

Locker #[redacted] located across from gym by room 306 blue belonging to [redacted] at 11:10 a.m.

Based on the above, my training and experience in the field of narcotics, as well as the training and experience of the K-9 teams, I have probable cause to believe that the below listed items are being used for the storage of narcotics and associated narcotic paraphernalia including but not limited to narcotic ledgers, scales, bagging materials, ingestion devices and monies to carry on said illegal activities.

The lockers, vehicles and persons to be searched more specifically described above are described as follows:

ITEM	OWNER
Locker #	[redacted]
Locker #	Unassigned
Locker #	[redacted]
Locker #	[redacted]
Locker #	[redacted]
Locker #	[redacted]

WHEREFORE, the undersigned respectfully requests permission to search the aforementioned lockers in order to find evidence of the illegal practices of possession of controlled dangerous substance, possession with intent to distribute as described above.

WHEREFORE, the undersigned respectfully requested that (a) Search Warrant(s) be issued for:

ITEMS AND DESCRIPTION	OWNER
Locker #	[redacted]
Locker #	Unassigned
Locker #	[redacted]
Locker #	[redacted]
Locker #	[redacted]

Locker #[redacted] [redacted]

I am requesting that these search warrants be issued for the hours between 9AM and 5PM within ten days from the issuance thereof.

DET. TIMOTHY YOUNG

Sworn to and subscribed
before me this 29 day
of March, 1996

Judge of the Superior Court
State of New Jersey

PATROLMAN KENDALL COLLINS AND K-9 BILLY

Patrolman Kendall Collins has been a police officer with the [redacted] Police Department for the last seven (7) years. During which time he has been involved in over 200 narcotic investigations. He was assigned to the Warren County Prosecutor's Office Narcotics Task Force where he worked in an undercover capacity, including the development and gathering of intelligence information regarding the distribution of illegal drugs. He has been involved in over 200 investigations involving narcotics. He has attended the following schools: New Jersey State Police Academy, Driving While Intoxicated/Standarized Field Sobriety Testing, New Jersey State Police Breathalyzer, Crime Scene Investigations, Radar Operator Recertification Training, Morris County Canine Academy for Drug Detection and is a Certified Narcotic Canine Handler.

K-9 Billy graduated the Union County Sheriff's Department, K-9 Unit Basic Narcotic Detection Dog Course on July 16, 1993. He also has received training by the Roanoke County, V.A. Police Department Fall Seminar K-9 Tactics/Search and Seizure Course in October 1994 and V.P.W.D.A. Narcotics Dog Certification Obedience/Area Search/Building Search/Vehicle Search in October 1994. K-9 Billy is trained on a bi-weekly basis in the detection of narcotics. He has been involved in

70 narcotic investigations involving the search of articles, vehicle, and residents. It was during these investigations that K-9 Billy located narcotics and U.S. currency with the residual odor of narcotics. He receives in service training on a continual basis with certified instruction from the Union County Sheriff's Department to meet with the Attorney General's Guidelines.

PATROLMAN THOMAS CICERELLE AND K-9 NEKKO

Patrolman Thomas Cicerelle is a police officer with the [redacted] Police Department and has over seven (7) years of police experience. He has been involved in over 25 narcotics investigation. He has attended the following schools: New Jersey State Police Basic Training Academy, Evasive Driving Class, Emergency Response to Hazardous Materials, Drug Interdiction, Radar Operator Recertification, Drug Enforcement, Sexual Assault Investigation, Commercial Vehicle Inspection, Breathalyzer Operation, K-9 Decoy Seminar, Narcotic Training Seminar, Advanced Criminal Investigations, Basic Narcotic Detection Dog Course, Basic Patrol Dog Course, K-9 Tactics/Search and Seizure Seminar, Top Gun (Investigation and Prosecution of Drug Cases).

K-9 Nekko graduated the Union County Sheriff's Department K-9 Unit Basic Narcotic Detection Dog Course in July 1993. He also attended the following training: U.S.P.C.A. Narcotic Detection Dog Certification, Tuckerton Police Department Basic Patrol Dog Course, Roanoke County V.A. Police Department Fall Seminar on K-9 Tactics/Search and Seizure, U.P.W.D.A. Patrol Dog Certification and U.S.P.C.A. Patrol Dog I Certification. K-9 Nekko is trained on a bi-weekly basis in the detection of narcotics. He has been involved in 60 narcotic investigations

involving the search of articles, vehicles and residents. It was during these investigations that K-9 Nekko located narcotics and U.S. currency with the residual odor of narcotics. He receives in service training on a continual basis with certified instruction from Union County Sheriff's Department meet With the Attorney General's Guidelines.

OFFICER WILLIAM CRAMPTON AND K-9 YOGI

William G. Crampton is a Senior Correctional Officer with the New Jersey Department of Corrections. He has been a correctional officer since 1985. He is presently a K-9 handler for the Special Operations Group of the Department of Corrections and handles both a K-9 Patrol Dog and a K-9 Narcotics Dog. He graduated from the following schools: The Corrections Officer Academy, the Atlantic City Police Deparmtent K-9 Academy for a 640 Hour K-9 Patrol School. He was trained in on and off lead obedience, tracking, building searches, field searches, and all phases of criminal apprehension. He has also attended the Atlantic City Police Dept. K-9 Academy, the Union County Sheriff's Department K-9 Academy with K-9 Yogi for a 480 hour K-9 Narcotics Detection course.

K-9 Yogi has attended the Union County Sheriff's Department K-9 Academy for a 480 hour K-9 Narcotics Detection course. In this course, K-9 Yogi was introduced to and trained to detect the following narcotics: marijuana, cocaine, methamphetamine and heroin. He was trained to give an aggressive indication by scratching at the presence of the narcotic odor. Four days a week K-9 Yogi does random narcotic searches in one of the state correctional facilities, totaling approximately 320 searches.

K-9 Yogi has been nationally certified in the detection of narcotics by the US Police Canine Associations standards in 1994 and 1995. He receives in-service training on a continual basis with certified instructors from the New Jersey State Police, Philadelphia Police Department K-9 Unit and the Union County Sheriff's Department to meet the Attorney General's guidelines.

APPENDIX 9b

Sample of Search Warrant
Warren County Prosecutor's Office
Multijurisdictional Narcotics Task Force

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION-WARREN COUNTY

CRIMINAL

STATE OF NEW JERSEY)

) ss.

COUNTY OF WARREN)

SEARCH WARRANT

TO ANY LAW ENFORCEMENT OFFICER:

1. This matter being opened to the Court under oath on application for the issuance of a search warrant for the locker described below, and the Court having reviewed the affidavit under oath of Detective Timothy Young and being satisfied that probable cause exists to believe that located therein are: evidence of the illegal practices of Possession of CDS, and Possession with Intent to Distribute CDS in violation of N.J.S.A. 2c:35-10a(1) et seq. and N.J.S.A. 2c:35-5b(1) et seq. located in the [redacted], New Jersey;

and the Court, being satisfied that grounds for the granting of this application for a Search Warrant exists.

2. You are hereby authorized to search the locker, described below and to serve a copy of this warrant on such person or the person in charge or control of such locker.

3. You are hereby ordered that if you shall find the illegal practices of Possession of Controlled Dangerous Substance, Possession with Intent and Distribution of Controlled Dangerous Substance there being located, or evidence thereof to wit; Controlled Dangerous Substance, narcotic paraphernalia, including but not limited to narcotic ledgers,scales, bagging material, ingestion material and monies used to carry on such illegal activities, take into your possession all such property to the end that the same may be dealt with according to law.

4. You are hereby ordered, in the event that you seize any of the aforementioned evidence, to give a copy of this warrant together with a receipt for the property so seized to the person from whom it was taken or in whose possession it was found, or in the absence of such person to leave a copy of this warrant together with such receipt in or upon the said locker from which the property is taken.

5. All information contained in the affidavit and/or testimony under oath furnished in support of the application for this search warrant is expressly incorporated herein by reference

and the executing officers are directed to familiarize themselves with the contents thereof.

6. You are further authorized to execute this warrant between the hours of 9AM to 5PM within ten (10) days from the issuance hereof, and to make prompt return to me with a written inventory of the property seized.

7. The following is a description of the premises to be searched:

Locker #[redacted] located in cafeteria area belonging to [redacted]

8. Given and issued under my hand at Belvidere, New Jersey at 1:35 o'clock p.m., this 29th day of March, 1996.

JUDGE OF THE SUPERIOR COURT

APPENDIX 10

Attorney General "Law Enforcement Guidelines
on the Use of Juveniles as Informants"
and Appended "Juvenile Informant Agreement,
Liability Waiver Form and Parent or Guardian's Consent"
Excerpt from the
"New Jersey Law Enforcement Officers' Reference Manual:
Handling Juvenile Offenders or Juveniles
Involved in a Family Crisis"
(1997)

3. Law Enforcement Guidelines on the Use of Juveniles as Informants

3.1 Purpose

These guidelines are intended to govern the use of juveniles, by a law enforcement agency, to actively aid in the investigation of an offense.[34] This may be necessary to protect juveniles in a community from the distribution of controlled dangerous substances, the sale of firearms, or gang activity. It may also be necessary to use juvenile informants where it is suspected that adults are directing juveniles to commit offenses such as theft or the distribution of controlled dangerous substances, as part of a criminal conspiracy. Juvenile informants should be used only when there is no practicable alternative that will enable a law enforcement agency to end an illegal activity that is endangering the community.

3.2 Scope of Guidelines

These guidelines are not intended to limit the ability of law enforcement officers to question juveniles regarding offenses that they may have witnessed, or of which they may have knowledge. These guidelines do not apply to the questioning of juveniles who are the target of an investigation. These guidelines do not apply to the use of juveniles to attempt to purchase cigarettes from local retailers.

The general "Policy on the Use of Informants" contained in the Prosecutor's Manual[35] shall also apply to juvenile informants. Law enforcement agencies are not precluded from adopting supplemental and more detailed procedures to control the use of juvenile informants by that agency.

3.3 Requirements for Juvenile Informants

3.3.1 Age of Juvenile Informant

A "juvenile" is an individual under the age of 18 years.[36] In most circumstances, juveniles under the age of 16 should not be used as informants. However, in some circumstances, the use of a younger juvenile may be necessary, such as where illegal activity is occurring regularly among a group of juveniles under the age of 16. Under no circumstances shall a juvenile under the age of 12 be used as a juvenile informant.

---

[34] Unlike other sections of this manual, the guidelines in this section are being issued here for the first time. See Executive Directive No. 1997 - issued by Attorney General Peter Verniero, 1997.

[35] Appendix G.

[36] *N.J.S.A.* 2A:4A-22a.

3.3.2 Involvement in Treatment

Law enforcement officers shall not recruit juvenile informants who are participating in alcohol or substance abuse treatment or counseling programs at the time they are recruited.

3.3.3 Mental Health

Law enforcement officers shall not use juvenile informants who have a history of treatment for mental illness or suicide attempts.

3.3.4 Physical Health; Medication

Law enforcement officers shall not use juvenile informants who have a medical condition or who are taking medication that increases the danger to the juvenile of acting as an informant.

3.4 Background Check

Law Enforcement Officers shall conduct a thorough background check for each juvenile before using the juvenile as an informant. The background check shall include an interview with a parent or legal guardian and shall determine whether the juvenile meets the requirements set forth in Section 3.3, Requirements for Juvenile Informants.

3.5 Consent Required

The written consent of both the juvenile and a parent or legal guardian must be obtained before using a juvenile informant. The model written agreement included in Appendix H of this manual should be used for this purpose. The model agrement includes a juvenile informant agreement, a liability waiver form and a parent or guardian's consent

A parent or legal guardian must be afforded the opportunity to discuss the matter with the juvenile before seeking the juvenile's written consent. No law enforcement agency or law enforcement personnel shall make any promise or offer, regarding prosecutorial considerations for any offense with which a parent or guardian may be charged, to obtain a parent or guardian's consent to the use of a juvenile as an informant.

3.6 Written Authorization

Prior to using a juvenile informant to purchase a controlled dangerous substance, or otherwise actively aid in the investigation of an offense, a law enforcement officer shall obtain written authorization from the county prosecutor, the Attorney General, or their designee. No law enforcement agency shall make any promises, express or implied, with regard to prosecution without first obtaining the express approval of the Prosecutor or his designee.

3.7 Limitations on Use of Juvenile Informants

3.7.1 Entrapment

Juvenile informants shall not encourage or counsel juveniles or adults to purchase or use alcoholic beverages or any controlled dangerous substance.

3.7.2 Confidentiality of Treatment Records

Federal regulations and State policies concerning the confidentiality of treatment and substance abuse counseling program records and information will be respected. No law enforcement activity will be permitted in any way to interfere with, intrude upon or in any way compromise the integrity of any substance abuse counseling or treatment program.

3.7.3 Treatment

Juvenile informants shall not discourage others from seeking drug or alcohol abuse treatment or counseling, or from reporting his or her alcohol or substance abuse problem or dependency.

3.7.4 Preservation of Teacher Trust Relationships

No juvenile informant will engage in any activity or conversation that would require any teacher or school official to violate or compromise a trust relationship with any student.

3.7.5 Use and Distribution Prohibition

No juvenile informant will ingest or inhale (other than passive inhalation) any controlled dangerous substance, nor will any juvenile informant be permitted to distribute or dispense any controlled dangerous substance.

3.7.6 Firearms

No law enforcement officer shall knowingly permit a juvenile informant to possess, purchase, sell or otherwise transfer a firearm.

3.7.7 Potentially Violent Confrontations

It is understood that drug trafficking activities are inherently dangerous. However, no law enforcement officer shall use a juvenile informant to purchase a controlled dangerous substance in circumstances where it is known that the target of the investigation has a history of violence.

3.7.8 Familiarizing Juvenile Informants with other Offenders

While the use of juvenile informants may be necessary in some circumstances, law enforcement officers should be mindful of the welfare of the juvenile informant. Law

enforcement officers should avoid introducing the juvenile to offenders or conduct which might immerse the juvenile more deeply in a criminal or delinquent culture.

3.8 Operations on School Property

If the juvenile informant is to be used to gather information, or purchase contraband, on school property, the school building principal and the local superintendent will be consulted unless there are compelling reasons not to consult with either of these officials. The law enforcement agency proposing the operation will advise the building principal and local superintendent of the nature of the proposed operation and will, to the extent possible, explain the reasons why the operation is necessary and appropriate. This explanation should include a description of the suspected illegal activities occurring within the school environment which justify the operation. However, law enforcement officials will not disclose any information received in confidence, whether from an informant or otherwise, which would violate the laws or court rules governing the disclosure of grand jury information or information derived from electronic surveillance.

All law enforcement operations taking place on school property shall also comply with the requirements of the *State Model Agreement between Education and Law Enforcement Officials.*[37]

[37] Appendix E.

Appendix H:

Juvenile Informant Agreement,

Liability Waiver Form

and Parent or Guardian's Consent

Juvenile Informant Agreement, Liability Waiver Form and Parent or Guardian's Consent

I, _____,

hereby agree to assist the _____
in the investigation of criminal violations.

My birthdate is _____.

1. ____ I understand that, as used in this agreement, "crimes" means any crimes or delinquent offenses.

2. ____ I understand that I am not allowed to investigate crimes on my own without supervision by an officer of this agency.

3. ____ I agree to do what my supervising officer tells me to do, while I am helping in an investigation.

4. ____ I agree not to break any laws or commit any crimes while working as an informant. I understand that if I commit new crimes while working as an informant I can be arrested for those crimes. I will only be involved in criminal activity if an officer asks me to participate in the criminal or delinquent activities of persons under investigation.

5. ____ I will not carry or possess any weapon or firearm while working as an informant.

6. ____ I will not participate in any acts of violence while working as an informant.

7. ____ I will not drive a motor vehicle without a valid driver's license while working as an informant.

8. ____ I will not use or distribute any drugs while working as an informant.

9. ____ I will not handle any drugs unless specifically asked to do so by an officer.

10. ____ I will not try to talk other people out of seeking drug or alcohol abuse treatment or counseling. I will not try to keep anyone from reporting his or her alcohol or drug abuse problem.

11. ____ I will not try to trick any teacher or school official into telling me about another student's drug or alcohol problem.

12. ____ I am not participating in any alcohol or drug abuse treatment or counseling programs at this time.

13. ____ I have never been treated for mental illness.

14. ____ I have never tried to commit suicide.

15. ____ I understand that I am not a police officer. I agree that I will not claim to be a police officer at any time.

16. ____ I will not use my sex or sexual activity to get any person to commit any crime.

17. ____ I will not try to get a person to commit a crime that they would not be ready, willing and able to commit on their own.

18. ____ I will keep in contact with my supervising officer. I will tell him or her where I am and how I can be contacted, until I stop helping in the investigation.

19. ____ I understand that **under normal circumstances** my name will not be used in any investigation reports, and that I will not be required to testify in Court on this matter.

20. ____ I will tell my attorney that I am working as an informant with this agency.

21. ____ I understand that my assistance to the agency in criminal investigations is for consideration for my pending charges.

22. ____ I understand that any reduction in my pending charges by the _____ County Prosecutor's Office is based on the recommendation of my supervising officer and the Assistant Prosecutor who will be handling the case. If this agreement is part of a plea agreement, the plea agreement shall include a range of possible considerations I may receive on my pending charges, depending on the value of my cooperation.

23. ____ I hereby release and hold harmless the _____, their officers and employees from any liability arising from injury which I may suffer or sustain in the future as a result of these investigations. I understand that this means I will not be able to sue for damages in court if I am injured as a result of these investigations.

24. ____ I have entered into this agreement freely and voluntarily and without duress. No one has forced me to sign this agreement.

25. ____ I have discussed this agreement with my parent or guardian.

Informant's signature: _____ Date: _____

Officer's signature: _____ Date: _____

Witnessing Officer's signature: _____ Date: _____

Parent or Guardian's Consent

My name is _____ (parent or guardian). I am _____ (informant's name)'s

_____ (relationship). I consent to _____ (informant's name) acting as an

informant for this agency. I have discussed this with _____ (informant's name). I have given my consent freely and voluntarily and without duress. No law enforcement agency or law enforcement officer has made any promise or offer, regarding prosecutorial considerations for any offense with which I may be charged, to obtain my consent.

Parent or
Guardian's signature: _____ Date: _____

Officer's signature: _____ Date: _____

Witnessing
Officer's signature: _____ Date: _____

APPENDIX 11

Attorney General Strip Search and Body Cavity Search Requirements and Procedures for Police Officers

Attorney General's Strip Search and Body Cavity Search Requirements and Procedures for Police Officers

N.J.S.A. 2A:161A-1 et seq.

	Strip Search	Body Cavity Search
DEFINITIONS	Removal or rearrangement of clothing to permit visual inspection of a person's ▸ undergarments ▸ buttocks ▸ anus ▸ genitals ▸ breasts The following does not constitute a strip search: ○ removal or rearranging of clothing reasonably required to render medical treatment or assistance, or ○ removal of articles of outer clothing, such as coats, ties, belts or shoelaces.	Visual inspection or manual search of a person's ▸ anal cavity ▸ vaginal cavity
SEARCH REQUIREMENTS	**NO ARREST OR ARREST WITHOUT CUSTODIAL CONFINEMENT** 1. NO Exigent circumstances: a. Search warrant or consent, and b. Authorized by officer in charge of the station house. 2. Exigent circumstances: a. Probable cause to believe that the person is concealing a weapon, contraband or evidence of crime, and b. Exigent circumstances prevent obtaining a search warrant or approval of officer in charge.	***Body cavity search is not appropriate without custodial confinement***

	Strip Search	Body Cavity Search
	CUSTODIAL CONFINEMENT	
SEARCH REQUIREMENTS	1. Officer in charge authorizes confinement in municipal detention facility or transfer to adult correctional facility, and 2. Officer in charge authorizes search, and 3. One of the following: a. Search warrant, or b. Consent, or c. Reasonable suspicion to believe that the person is concealing a weapon, contraband or Controlled Dangerous Substances.	1. Officer in charge authorizes confinement in municipal detention facility or transfer to adult correctional facility, and 2. Officer in charge authorizes search, and 3. One of the following: a. Search warrant, or b. Consent
PROCEDURES	1. Conducted by person of same sex, and 2. Conducted in private, and 3. Conducted under sanitary conditions, and 4. Conducted in a professional and dignified manner, and 5. In custodial confinement, conducted in accordance with Department of Corrections regulations	1. Conducted by licensed physician or registered nurse of same sex, and 2. Conducted in private, and 3. Conducted in a medically acceptable manner and environment, and 4. Conducted under sanitary conditions, and 5. Conducted in accordance with Department of Corrections regulations.

	Strip Search	Body Cavity Search
REPORTING REQUIREMENTS	1. Officer who performs strip search or has body cavity search conducted must report the reason for this search on the record of arrest. The report must include: a. A statement of facts indicating reasonable suspicion or probable cause for the search. b. A copy of the search warrant, if appropriate. c. A copy of the consent form, if appropriate. d. The name of the officer in charge who authorized the search. e. The names of the persons conducting the search. f. An inventory of any items found during the search. 2. If exigent circumstances were the basis for the search, the officer who conducted the strip search must file a separate written report stating the reasons for the immediate search.	

REQUIREMENTS AND PROCEDURES
FOR OFFICER IN CHARGE OF STATION HOUSE

1. The arrested person should be processed in accordance with R. 3:4-1, a summary of this court rule is attached, and, if applicable, with standard operating procedure adopted by the county prosecutor.
2. Where appropriate, a person arrested in accordance with R. 3:4-1 shall be released or have bail set without unnecessary delay but in no event later than 12 hours after arrest.
3. Unless authorized by search warrant or consent, a strip search should not be conducted if the arrested person will be released without custodial confinement or will soon be released on bail or own recognizance.
4. The officer in charge shall assure that a consent to a strip search or body cavity search is in writing whenever possible.
5. The officer in charge shall assure that all strip searches and body cavity searches are conducted in private and that these searches cannot be observed by persons not physically conducting the search.
6. When a body cavity search is conducted, the officer in charge shall request a sworn statement from the licensed physician or registered nurse who conducted the search stating that the body cavity search was conducted pursuant to statutory and medical requirements.
7. All reports pertaining to strip searches or body cavity searches are not public records. These reports shall be made available, upon request, only to the person searched, the county prosecutor, the Attorney General or the Commissioner of the Department of Corrections.

PROCEDURE FOR THE PROCESSING OF SUSPECTS ARRESTED WITHOUT A WARRANT

Always consult with county prosecutor for local procedures

A Summary of New Jersey Court Rule 3:4-1

1. A person arrested without a warrant for any offense shall be taken to the police station where a complaint shall be prepared forthwith.

2. A person arrested without a warrant for one of the following criminal offenses: murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault, aggravated arson, arson, burglary, violations of Chapter 35 of Title 2C that constitute first or second degree crimes, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes, shall be taken to a police station. The police officer shall comply with the criteria of Paragraph 5 below.

3. A person arrested without a warrant for an offense not listed in Paragraph 2 above, shall be taken to the police station where the officer in charge shall:
   a. Complete all post-arrest identification procedures required by law;
   b. Prepare a complaint-summons (CDR-1);
   c. Issue the complaint-summons to the person arrested, and
   d. Release the arrested person in lieu of continued detention.

4. The officer in charge has discretion not to prepare a complaint summons if the officer determines that any of the following conditions exist:
   a. The person has previously failed to respond to a summons;
   b. The officer has reason to believe that the person is dangerous to himself, to others or to property;
   c. There is one or more outstanding arrest warrants for the person;
   d. The prosecution of the offense or offenses for which the person is arrested or the prosecution of any other offense of offenses would be jeopardized by the immediate release of the person;
   e. The person cannot be satisfactorily identified; or
   f. The officer has reason to believe the person will not appear in response to a summons.

5. If the officer determines that one of the conditions in Paragraph 2 or 4 above applies, the officer shall:
   a. Immediately prepare a complaint-warrant (CDR-2), and
   b. Take the person arrested without unnecessary delay before the nearest available committing judge to have bail set. Bail shall be set no later than 12 hours after the arrest.
   c. The officer shall present the matter to the appropriate judicial officer authorized to set bail who shall determine whether there is probable cause to believe that the defendant committed the offense.

INDEX

SCHOOL SEARCH CHECKLISTS

A Companion Reference Guide to the New Jersey School Search Policy Manual

1998

TABLE OF CONTENTS

HOW TO USE THESE CHECKLISTS

The following school search checklists were developed to help school officials understand and comply with the Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution. These constitutional provisions impose strict limitations on the authority of public school teachers, principals and other administrators, coaches, and other public school staff members to conduct searches.

These checklists concisely restate some of the most important search and seizure rules, and are designed to help school officials identify and record appropriate facts that would justify a search of a student and his/her locker and possessions. This is done by presenting a series of questions that a school official should be prepared to answer to justify a search or seizure. Note that not all of these questions will be pertinent in any given situation.

Some questions will require more than a simple "yes" or "no" response, and when a more detailed answer is appropriate, the checklist will usually indicate in parentheses that the school official should be prepared to more fully "explain" or "describe" the relevant circumstances and/or why the school official drew the inference or reached the conclusion that he or she did.

These checklists do not by any means list all of the pertinent facts and observations that could conceivably occur during an investigation into suspected criminal activity or violation of school rules. It is simply not possible to anticipate every situation that could arise, and school officials should be prepared to record any additional pieces of information that might be relevant in determining the reasonableness of a search.

School officials should carefully document all of the facts that were known before conducting a search, as well as any information learned during the course of conducting a search. The timing and sequence of events is critical. School officials must be prepared to explain what they knew, and when they knew it. An investigation must be thought of as a step-by-step process where each step in the unfolding sequence of events is justified by the information learned in the preceding steps. Thus, for example, a school official must have "reasonable grounds" to believe an offense or infraction was committed *before* opening a locker or bookbag to search for evidence of the infraction. School officials should carefully document not only all relevant facts and observations, but also the reasonable, common sense inferences that can be drawn from the information at hand based upon the school official's training and experience.

The Fourth Amendment only prohibits searches that are *unreasonable*, balancing the legitimate privacy rights of students against the legitimate need for school officials to maintain order, discipline, and safety. The key to meeting the reasonableness test, simply stated, is to document all of the *reasons* that justify the decision to undertake the search. When school officials think carefully about what they are doing and try consciously to minimize the intrusion upon students' privacy rights, they are far less likely to violate the Fourth Amendment. For school officials as for police officers, most Fourth Amendment violations are thoughtless ones. It is hoped that these checklists will help school officials to organize their thoughts.

The references in brackets **[thus]** are to sections of the *New Jersey School Search Policy Manual (1998)* and are designed to help school officials quickly locate relevant portions of that Manual. Note, however, that these checklists refer to some but not all of the rules and principles that are described in much greater detail in the *New Jersey School Search Policy Manual*.

These checklists are meant only to enhance the knowledge of school officials about the law of search and seizure, and they do not create any rights beyond those established under the Constitutions, statutes, and regulations of the United States and the State of New Jersey.

SEARCH DEFINED

A search entails a "peeking," "poking," or "prying" by a teacher, principal, or other school official into a private area or an enclosed opaque container, such as a locker, desk, purse/handbag, knapsack, backpack, briefcase, folder, book, or article of clothing. The act of opening a locker or container to inspect its contents constitutes a search, as does the act of reading a journal or handwritten notes. Ordering a student to open a locker or container, or to empty his/her pockets, also constitutes a search.

A search may be based on suspicion of either a criminal offense or a violation of school rules. A search can be for *contraband* (e.g., drugs, alcohol, explosives or fireworks, and/or prohibited weapons); an *instrumentality* used to commit an offense or school rule violation (e.g., a weapon used to assault or threaten another or burglar tools); the *fruits or spoils* of an offense or school rule violation (e.g., the cash proceeds of a drug sale, gambling profits, or a stolen item) or *other evidence* of an offense or school rule violation (e.g., gambling slips, hate pamphlets, records of drug or illegal gambling debts, "crib" notes or other evidence of cheating or plagiarism, etc.).

I. SEARCHES OF PARTICULAR STUDENTS OR LOCATIONS BASED ON INDIVIDUALIZED SUSPICION OF WRONGDOING

GENERAL RULE

In order for a search to be reasonable, a school official must satisfy two separate inquiries: First, was the search justified at its inception? Second, was the search conducted in an appropriate manner, that is, was the actual search reasonable in its scope, duration, and intensity? **[3.3]**

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. Reasonable grounds is more than a mere hunch or unsubstantiated rumor. **[3.2]**

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. **[3.2B]**

Note: If the search is conducted in concert with police officers, stricter rules will usually apply, and the school official should defer to the police officer in conducting the search. **[2.5]**

A. Authority to Initiate the Search.

To initiate a lawful search, a school official must have *reasonable grounds* to believe that:

(1) a law or school rule has been or is being broken;

(2) a particular student(s) has committed the violation or infraction;

(3) the suspected violation or infraction is of a kind for which there may be physical evidence (i.e., contraband, instrumentality, fruits or spoils, or other evidence); and,

(5) the sought-after evidence would be found in a particular place associated with the student(s) suspected of committing the violation or infraction. **[3.2]**

"Reasonable grounds" means a suspicion that is based on reasons that can be articulated. It is more than a mere hunch or supposition, but much less than the level of proof that would be required to impose a disciplinary sanction. **[3.2A(9)]**

Indicate the specific offense(s)/school rule infraction(s) suspected:

Indicate the name of the student(s) suspected of committing the offense(s)/infraction(s):

Indicate the exact place(s) or object(s) to be searched/opened:

☐ Did the student deny owning the object to be searched? (Explain.) (If yes, the student has no legitimate expectation of privacy in the object and cannot later complain that the search was improper.) **[8.10]**

☐ Did the student abandon the object to be searched (i.e., dropped it while running from a school official or while fleeing the scene of the suspected offense)? If yes, the student has no legitimate expectation of privacy in that object and cannot later complain that the search was improper. **[3.2A(5)]** (*Note*: An object placed in a trash receptacle is usually *not* considered to be abandoned property under New Jersey law.)

☐ Did the search involve more than one student? If so, were there reasonable grounds to believe that each individual to be searched would be in possession of the item(s) being sought? (*Note:* In some situations, the number of suspects may be so small that the entire group may be searched. Courts will consider (1) the size of the group, (2) the strength of the grounds to believe that one of them is the person who committed the offense, (3) the seriousness of the offense, and (4) whether the sought-after evidence could harm others.) **[3.2A(10)]**

  ☐ What investigative steps were taken before searching a group of students to narrow the field of suspects? (Explain.)

The following factors and circumstances may be used in determining whether reasonable grounds exist to initiate a search. Each factor in the right-hand column is relevant, but is generally not enough, by itself, to justify a search.

Factors Justifying a Search.

- ☐ Observed infraction/offense in progress.
- ☐ Observed item believed to be stolen. (Explain.) **[3.2A(7)]**
- ☐ Observed weapon or portion thereof.
- ☐ Observed contraband.
- ☐ Smell of burning tobacco or marijuana. **[3.2A(6)]**
- ☐ Student appears to be under influence of alcohol/drugs. (Explain.)
- ☐ Student admits violation.
- ☐ Student appears to be lying. (Explain.) **[3.2A(4)]**
- ☐ Student fits description of suspect of recently-reported offense.
- ☐ Student(s) flee from vicinity of recent offense.
- ☐ Student(s) flee upon approach of schod official **[3.2A(5)]**
- ☐ Information provided by others. (See *Information Provided by Others,* below.)
- ☐ Threatening words or behavior. (Explain.)
- ☐ Incriminating evidence was found during a lawful consent search. (See *Obtaining Permission to Search* checklist.)
- ☐ Incriminating evidence was discovered by a teacher/administrator. (If this discovery entailed a "search," *that* search must have been lawful.)
- ☐ Incriminating evidence was turned over by another student. (See *Evidence Turned Over by Another Student,* below.)
- ☐ Other suspicious conduct (Must fully explain.)

Other Relevant Factors.

- ☐ Extent of particular disciplinary problem in school.
- ☐ Reputation of student to be searched.
- ☐ Student to be searched has history of previous similar violations.
  - ☐ Student was previously disciplined for a similar offense/infraction.
  - ☐ Student was already subject of pending investigation for similar offense/infraction.
- ☐ Report of stolen item.
- ☐ Student seen leaving area where infractions are often committed (i.e., location where students congregate to smoke).
- ☐ Student became nervous or excited when you approached. (Explain.) **[3.2A(4)]**
- ☐ Student refused to make eye contact with you. **[3.2A(4)]**
- ☐ Student made a suspicious or "furtive" movement. (Must describe the exact conduct and why it was suspicious.) **[3.2A(4)]**
  - ☐ Did the student try to conceal an object from your view?
  - ☐ Did the student deny making the suspicious movement you observed? (*Note:* Lying is *always* relevant in deciding whether there are reasonable grounds to believe that the student committed an offense/infraction.)
- ☐ Student is part of a group known to have committed similar offenses/infractions. (Explain.) **[3.2A(12)]**

Information Provided by Others.

Note: All source information should be carefully documented, explaining why the source is credible and why the information is reliable. The record should indicate when, during the course of the investigation, each particular piece of information was learned, and from what source. An anonymous "tip" standing alone will usually not justify a search unless the information provided is corroborated by independent investigation or observation, or by some other source of information.

- ☐ Was the information provided by a school staff member?
- ☐ Was the information provided by a student?
- ☐ Was similar or corroborative information provided by multiple sources?
- ☐ Was the information provided by a victim of an offense?
- ☐ How recent or "fresh" is the information? If there was a delay in reporting the information, why? **[3.2A(8)]**
- ☐ Was the information provided by an eyewitness to an offense/infraction? Did the source actually see the offense and offender? (Describe the circumstances and the likelihood that the person could be mistaken, e.g., poor lighting, observation from a substantial distance, obstructed view, etc.). **[3.2A(3); 5.2]**
- ☐ Was the information provided by a person who had *personal knowledge* of the offense/infraction, or instead by someone who only learned of the incident from yet another person? (Explain.) **[3.2A(3); 5.2]**
- ☐ How did the person learn of or know about the offense/infraction and the existence and location of the evidence (e.g., he/she was present when the offense/infraction was committed; he/she saw (or smelled) the evidence and saw where it was being kept, etc.)?
- ☐ Was the information provided by a person who heard the suspect admit to or boast about the offense/infraction? (Explain the circumstances of the overheard admission and the likelihood that the suspect was lying or exaggerating to impress others.)
- ☐ Was the information provided by a person with a reputation for veracity? Did the source of the information have a motive to lie or exaggerate? **[5.1]**

- ☐ Was the information provided anonymously? If so, describe the steps taken to verify/corroborate the information before conducting the search.
  - ☐ Were similar anonymous "tips" obtained from two or more separate sources? **[5.3]**
  - ☐ Was the anonymous tip consistent with information you were already aware of? (Explain.) **[5.3]**
- ☐ Was the information provided by someone known to be involved in unlawful activity? If so, explain why this source of information is credible. **[5.1]**
  - ☐ Has this source provided reliable information in the past?
  - ☐ Did the source make a statement against his or her own interests?
  - ☐ Does the source have a motive to lie or to minimize his/her own culpability by falsely accusing another?
  - ☐ Did the source provide information only in exchange for leniency?

Evidence Turned Over by Another Student.

- ☐ Was the physical evidence turned over anonymously (i.e., left in a teacher's box or on a teacher's desk)?
- ☐ Who found/handled the evidence? (Describe the complete "chain of custody.")
- ☐ Where exactly was the evidence first found?
- ☐ Describe all indications as to who owned/controlled the evidence and/or the place where it was found before it was turned over.
- ☐ If a student first found or turned over the evidence, was that student asked by a staff member to conduct a search or retrieve the object? (If yes, the student was acting as an agent of the school, and the school official who directed the student's conduct must have had reasonable grounds to conduct the search.)

Additional Information Learned Before Conducting the Search.

☐ Did you find and question other persons who may have witnessed the violation/infraction or who may have relevant information. If yes, with what results? If not, why not?

☐ Did the student suspected of the infraction/violation make an admission to other students? **[6.2]**

☐ Did you observe conduct or circumstances that would tend to corroborate the suspicion (e.g., student appeared to have been in recent fight, student appeared to be under influence of drugs, student observed congregating with other persons suspected of committing offense, etc.) (Explain.)

Additional Information Learned By Interviewing the Suspect Student.

☐ Did you confront the student about the violation before conducting the search? If so, describe the student's reaction (e.g., admitted offense, denied offense, became nervous, excited, belligerent, was evasive, etc.). **[3.2A(4); 6.2]**

☐ Describe the student's attitude to your questions (e.g., evasive, hostile, uncooperative, etc.). **[3.2A(4); 6.2]** (*Note:* A student's refusal to consent to a search may *not* be used as evidence that the student is guilty or has something to hide.) **[8.3]**

☐ Did the student provide an implausible explanation for his/her conduct? (If so, explain.) **[3.2A(4); 6.2]**

☐ Did the student make any statement that you knew to be false or misleading? (If so, explain.) **[3.2A(4); 6.2]**

☐ Were there any discrepancies/inconsistencies in the student's story? (If so, explain.) **[3.2A(4); 6.2]**

☐ Was the suspected offense/infraction committed by more than one student? If so, did you question each one separately?

☐ Did two or more suspect students give conflicting stories/explanations?

☐ Did the student(s) make any furtive or unusual movements? (Describe the actions and why they were suspicious.) **[3.2A(4)]**

☐ Did you ask the student to explain these furtive or unusual movements?

☐ Did the student deny making any suspicious movements that you observed?

☐ Did the student refuse to comply with any instructions (e.g., refused to remove hands from pockets, refused to put down package, etc.)? *Note:* Ordering a student to empty his/her pockets constitutes a search that must be justified by school officials.

☐ Did you smell tobacco/alcohol/drugs on the student's person? **[3.2A(6)]**

☐ Did the suspect appear intoxicated (e.g., dilated pupils, red eyes/nose, sluggish, hyperactive, etc.)?

☐ Did the student have difficulty in responding or standing?

☐ Did another school staff member question the student about the incident? If so, did the student give answers different from the ones given to you? (Explain.)

B. Manner in Which Search Was Conducted.

School officials are generally expected to use the least intrusive means available to accomplish the legitimate objectives of the search. The search should be no broader in scope, nor longer in duration than is reasonably necessary to locate the specific object(s) being sought.

A school official conducting a search should therefore follow a logical *plan* designed to minimize the intrusiveness of the search and complete the search as quickly and easily as possible.

For example, the plan might be to: (1) tell the student what you are looking for and give him/her a chance to surrender the item; (2) conduct any search away from other students; (3) have another school official present as a witness; (4) start any search in the place where the sought-after item is most likely to be; (5) look to see if you can visually identify the item(s) you are looking for before touching or rummaging through personal belongings; (6) feel the outside of a soft-bodied container to determine whether the

sought-after object is inside before opening the container and exposing all of its contents; and (7) stop searching when the sought-after item is found unless at that moment there are reasonable grounds to believe that additional evidence would be found if the search were to continue. **[3.2B(1)]**

Describe the object(s) you expected to find before the search was initiated:

- ☐ Was there a logical and reasonable connection between the thing or place to be searched and the item expected to be found there (i.e., why did you think that the evidence of the suspected offense/infraction would be found at this location)? (Explain.) **[3.2B]**

- ☐ Were there reasonable grounds to believe that the sought-after evidence would still be at this location? **[3.2A(8)]**

  - ☐ When was the last time the evidence was seen or reported to be at this location?

  - ☐ Was the suspected offense/infraction of an ongoing nature (i.e., drug possession or distribution), or was it a "one-time" incident? **[3.2A(8)]**

  - ☐ When was the last time that the suspect committed the offense/infraction?

- ☐ Did anyone report actually seeing the sought-after evidence at the location to be searched?

- ☐ Was the container/place to be searched physically capable of concealing the evidence you were looking for?

- ☐ Was the container/place to be searched of a kind commonly used to store or conceal the type of evidence that you were looking for? (Explain.) **[3.2B(3)]**

  - ☐ Have previous searches of such containers/places resulted in the discovery of this kind of evidence?

- ☐ Did you feel or examine the container to determine whether the sought-after object was inside before opening the container and exposing all of its contents to view? **[2.2; 3.2B(1)]**

- ☐ Was the actual search (i.e., the opening of the locker, backpack, etc.) conducted out of the presence of other students? If not, why not? **[2.8; 3.2B(4)]**

- ☐ Was the search conducted in the presence of the student suspected of committing the offense/infraction? If so, was the student given an opportunity to assist in the search (i.e., to open the bookbag and to produce only the sought-after item)? **[2.8; 3.2B(1)]**

  - ☐ Was there reason to believe that the student would resist or interfere in the search, try to conceal or destroy evidence, or reach for and use a concealed weapon? (Explain basis for concern.) (*Note:* If the search was based upon the consent doctrine, then the student granting consent may have the right to be present unless he/she knowingly gives up that right. See *Obtaining Permission to Search* checklist.)

- ☐ Was at least one other school official present to serve as a witness? (Identify the witness.) **[10.1]**

- ☐ How long did the search take to complete?

- ☐ Did the search cause any damage to student property? If so, describe the damage and why this was necessary? **[3.2B(7)]**

- ☐ Did you threaten to use force against a student? (Must explain.) **[3.2B(8)]**

- ☐ Did you use actual force against a student (i.e., physical restraint)? (Must fully explain.) **[3.2B(10)]**

  - ☐ Did the student resist or attempt to interfere with the search or threaten anyone with violence? If so, were the police called?

- ☐ Did the search cease when the particular item(s) being sought was found and taken into custody? **[3.2B(10)]** If not, explain the reasonable grounds to believe that additional evidence of an offense/infraction would be found.

- ☐ Did you find evidence of a school rule infraction or violation of law that you did not initially expect to find? **[11]**

  - ☐ If yes, when you discovered this other item(s), were you looking in a place and in a manner likely to find the item that you were originally looking for? If not, you must explain why you expanded the scope of your initial search. **[11]**

  - ☐ When you discovered this other item(s), was it *immediately apparent* to you that this object was contraband or evidence of an offense/infraction? (Explain.) **[11]**

Special Rules for Searches of Persons.

School officials should be especially cautious before undertaking a search of a student's person. The scope of the search must not be excessively intrusive in light of the age of the student and the *nature of the suspected infraction*. Students therefore should not ordinarily be subjected to a physical touching to find evidence of comparatively minor infractions of school rules. Rather, a physical search of a person is more likely to be sustained where the object of the search poses a direct threat to students, such as weapons (and especially firearms) and illicit drugs. **[10.2]** School officials must be especially cautious in touching a student's crotch area or female breasts.

As with any search, a school official should follow a logical plan that minimizes the degree of intrusion to the greatest extent possible and that reduces the likelihood that a student would resort to violence. **[10.1]**

For example, the plan might be to: (1) bring the student to the principal's office or other location away from other students; (2) make certain that at least one other school official is present to assist and serve as a witness; (3) clearly identify the specific object(s) being sought and provide the student an opportunity to surrender it unless to do so would create an unreasonable risk; (4) separate the student from any handbag that he/she is carrying and require the student to remove an outer garment so that it could be searched without touching the student; (5) make certain that any physical touching of the student is done by a staff member of the same sex as the student; (6) begin any touching of the student in the place where the object(s) is most likely to be; (7) conduct a limited "patdown" of the student's clothing before reaching into a pocket or waistband; (8) require the student to empty his/her pockets when a patdown reveals something that could be the sought-after evidence unless it would be dangerous to do so (i.e., where the item is a weapon that the student might reasonably use to commit an assault); and (9) stop searching immediately upon finding and securing the sought-after item unless there

are reasonable grounds to believe that the student is carrying additional evidence that would justify a further search of the person. **[10.1]**

- ☐ How old is the student to be searched?
- ☐ What is the gender of the student to be searched?
- ☐ Was the student brought to the principal's office or other location away from other students? If not, why not? **[2.8; 3.2B(4); 10.2]**
- ☐ Was another school employee present as a witness? (Recall that *all* searches should be conducted in private and away from other students. It is strongly recommended that another school staff member attend to serve as a witness.) **[10.2]**
- ☐ Did the student at any time resist or threaten to resist the search? If yes, were the police called? If not, why not? (While school officials are authorized by statute to use force in conducting a search, the better practice is to call the police for assistance.) (Explain.) **[3.2B(8)]**
- ☐ Did you tell the student exactly what you were looking for? **[10.2]**
- ☐ Was the student given an opportunity to remove the sought-after item from his/her pocket before being physically touched? **[10.2]** If not, why not? (i.e., the sought-after item was a weapon that the student could have used to commit an assault)
- ☐ Did you separate the student from any handbag or container he/she was carrying? **[10.2]**
- ☐ Did you ask the student to take off any coat or jacket so that it could be searched without touching the student? **[10.2]**
- ☐ Was any touching of the student done by a staff member of the same sex as the student? If not, why not? **[10.2]**
- ☐ Was any touching of the student first done at the location most likely to be concealing the sought-after evidence? **[10.2]**

- ☐ Was the student "frisked" (i.e., a limited patdown of the outer clothing) to feel for the sought-after object before reaching into a pocket or waistband? **[10.3]**

  - ☐ Did the frisk reveal an object that could have been the item being sought?

  - ☐ Did the frisk unexpectedly reveal an object immediately believed to be a weapon or other contraband? **[11]**

- ☐ Did you ask the student to empty a pocket to reveal any object felt during a patdown that could reasonably have been the sought-after item? **[10.3]** If not, why not?

  - ☐ Did the object appear to be a weapon that could have been used to assault you?

- ☐ Did the student comply with this request?

- ☐ Did the search at any time expose the student's undergarments or naked body? (Must fully explain.) **[10.3]**

Note: N.J.S.A. 18A:37-6-1 expressly prohibits any teaching staff member, principal, or other educational personnel from conducting any strip search or body cavity search of a pupil *under any circumstances*. A strip search would include the removal or re-arrangement of clothing for the purpose of visual inspection of the person's undergarments, buttocks, anus, genitals, or breasts. The term does not include any removal or re-arrangement of clothing reasonably required to render medical treatment or assistance, or the removal of articles of outer clothing, such as coats, ties, belts, or shoelaces. A sweater or sweatshirt worn under another sweatshirt, jacket, or vest should not be deemed to be an undergarment unless it is in direct contact with the student's skin. The statutory prohibition would also not preclude a school official from ordering a student to produce an object concealed on his or her person, even if the object is located in the crotch area or in a brassiere, provided that there is no touching by a school official of the student nor significant exposure to view of the student's undergarments or nude body. (Note that ordering a student to produce the sought-after evidence *does* constitute a search, although not necessarily a "strip" search.) **[10.3]**

II. OBTAINING PERMISSION TO SEARCH

A school official may always ask for permission to conduct a search, even if the official does not have reasonable grounds to believe that the search would reveal evidence of an offense/infraction. Note that if you do already have reasonable grounds to believe that evidence of an offense/infraction will be found in a particular place, you need not rely on the consent doctrine and may conduct a search of that location even over a student's objection. **[8.2]**

To be valid, permission to search must be clear and unequivocal and must constitute a *knowing and voluntary* waiver of constitutional rights. The better practice is to obtain consent that is *express and in writing*. **[8.4]** A student's mere acquiescence to your request to search does *not* constitute a valid consent if the student reasonably believed that you would conduct the search whether he/she agreed to the search or not, and you must be certain that the student knew that he/she had the right to decline your request and prevent you from going ahead with the search. *A student's refusal to give permission may not be considered as evidence of guilt*. **[8.3]**

- ☐ Where did the waiver of rights take place (e.g., principal's office, crowded hallway, etc.)?

- ☐ Was a Permission to Search form used? **[8.4]**

  - ☐ Did the student read and sign the form?

- ☐ Did the person giving consent appear to have the authority to consent to search the area or object to be searched? **[8.7]**

  - ☐ Did the person giving consent claim or appear to *own* the property/area?

  - ☐ Did the person giving consent appear to *control* the property/area?

  - ☐ Was the place to be searched a locker assigned to that student? (*Note*: Special care should be taken in obtaining consent to search an area under joint control, such as a locker assigned to two students. In that event, the search must be limited to the belongings of the person giving consent.)

- ☐ Did the student deny ownership of the object to be searched? **[8.10]** (If so, the student has no expectation of privacy and that particular student cannot later complain that you went ahead and searched that object. However, the student would also have no authority to grant permission to search that object/place.)

- ☐ Was the person giving consent mature enough to be able to understand his/her rights? (Explain.) [8.1]

- ☐ Describe the person's state of mind and appearance (e.g., calm, trembling, protesting his/her innocence, anxious, etc.). [8.5]

- ☐ Was the student familiar to you (i.e., did you have any prior interaction with the student that would put him/her at ease)?

- ☐ Was he/she accustomed to being brought to the principal's office?

  - ☐ Had the student ever before been asked to give consent to search? (Describe the prior incident.)

- ☐ Were any threats or promises made by you or anyone else to obtain consent? [8.5]

- ☐ If the student giving consent is under the age of eighteen, was a parent or legal guardian given the opportunity to participate in the waiver process? If not, why not? Was the student told that he/she could withhold consent until a parent or guardian could be consulted? [8.6]

- ☐ Did you tell the student/parent why you were asking for permission to search and describe what you were looking for? [8.3]

- ☐ Was the student/parent advised of the right to refuse to give consent and that there would be no recriminations for doing so? [8.3]

- ☐ Did the student reasonably believe that you would proceed to conduct the search whether he/she consented or not? (Explain.) [8.3]

- ☐ Was the student/parent advised of the right to limit the scope of the consent search to particular places or things to be searched, and of the right to withhold consent as to particular places and things? [8.12] (*Note:* You may not use a student's refusal to consent to search a particular object or location as evidence that the student is hiding something at that location.)

- ☐ Was the student/parent advised that they may terminate consent at any time without having to give a reason for doing so?

- ☐ Was the student/parent present during the execution of the search? If not, did the student/parent knowingly give up the right to be present during the execution of the search? **[8.11]**

  - ☐ How did you know that the student was aware that he/she could watch the search being conducted? (e.g., did you advise the student of this right?) **[8.11]**

- ☐ Was the execution of the consent search limited to the scope of the consent that was given (i.e., limited to places/objects specifically described in the signed form)? **[8.12]**

  - ☐ Did the signed consent form authorize the search of the student's *entire* locker, including any backpacks or other closed containers stored therein)

- ☐ Did the student/parent at any time revoke or withdraw permission to search? If yes, did you immediately stop searching? **[8.11]** (*Note:* You may not use a withdrawal of consent as evidence that you were getting close to uncovering an incriminating object.)

  - ☐ If you continued to search after consent was withdrawn or revoked, did you at that point have reasonable grounds to believe that a further search would reveal evidence of an offense/infraction? (See *Authority to Initiate the Search* checklist.)

THIS PAGE LEFT INTENTIONALLY BLANK

III. GENERAL SEARCH AND INSPECTION PROGRAMS

These checklists refer to generalized or suspicionless searches that are not limited to a single or specific location and that are not based upon a particularized suspicion that a specific, identified student has committed an offense or an infraction of the school rules. General searches and inspection programs are *planned* events that are designed to respond to serious security and discipline problems and that serve to discourage students from bringing or keeping dangerous weapons, drugs, alcohol, and other prohibited items on school grounds. Because these inspections are planned events, school officials should carefully read and follow the provisions of Chapter 4 of the *New Jersey School Search Policy Manual* and should also be familiar with the provisions of Chapter 2 of the Manual.

A. Locker Inspection Program (No Law Enforcement Involvement). [4.4]

☐ Were students and members of the school community afforded notice in writing of the nature and purpose of the locker inspection program? **[4.4B]**

☐ Were students advised that evidence of a crime discovered during an inspection program would have to be turned over to appropriate law enforcement authorities? **[4.4B and F]**

☐ Did appropriate school officials make findings concerning the scope and nature of the security and discipline problems to be addressed by the locker inspection program? (See *Facts Justifying General Search Policies.*) **[4.4A]**

☐ Was the principal goal of the program to prevent and discourage students from bringing or keeping prohibited items on school property, and not to apprehend or prosecute students who violate the law or school rules? **[4.4A]**

☐ Was the locker inspection program described in a *written* plan that clearly spells-out the procedures to be followed? **[4.4C]**

☐ Was the plan approved by the local board of education, school district superintendent and building principal? **[4.4C]**

☐ Did the written plan provide objective criteria designed to reduce the discretion of school officials in selecting those lockers that would be searched? **[4.4C]**

- ☐ Did the plan provide that all lockers in the school would be opened and searched at roughly the same time?

- ☐ If only certain lockers would be opened, did the plan provide for a random drawing method to select those lockers to be opened?

- ☐ Did the plan provide that all inspections would be conducted by persons who are specifically "designated by the local board of education"? **[4.4D]**

  - ☐ Were those designated persons thoroughly familiar with the neutral plan?

- ☐ Did the plan provide assurances that inspections would be conducted in a manner that minimizes the degree of intrusiveness? **[4.4D]**

  - ☐ Did the plan provide that inspections would be limited to looking for items that do not belong on school property or in a locker?

  - ☐ Did the plan provide that personal possessions would not be damaged?

  - ☐ Did the plan provide that school officials conducting the inspections would not read personal notes or entries in diaries or journals?

- ☐ Did the plan provide that all persons conducting inspections would be thoroughly familiar with the procedures to be followed in the event of the discovery of a firearm? **[4.4D; 14.1A]**

- ☐ Did the plan provide that all persons conducting inspections would be familiar with the requirements of state law and regulations concerning when evidence of a crime must be turned over to law enforcement authorities? **[4.4D; 14.1A to G]**

- ☐ Did the persons conducting the inspections receive training on how to recognize drugs, drug paraphernalia, and weapons? **[4.4E]**

- ☐ Did the plan limit the inspection program to lockers, desks, or similar storage facilities provided by the school for use by students? **[4.4H]** (*Note:* School officials would be authorized and permitted to open and inspect any closed containers or objects stored in a locker that had been selected and opened pursuant to the neutral plan.)

B. Use of Drug-Detection Canines.

The use of scent dogs is a dramatic tactic designed to convey to students in the strongest possible terms that neither school authorities nor law enforcement agencies will

tolerate illicit drugs on school property. These operations require careful planning. School officials and law enforcement officers involved in the planning or execution of any canine school search must read and follow the provisions of Chapter 4.5 of the *New Jersey School Search Policy Manual* and should also be familiar with the provisions of Chapter 2 of that Manual.

The use of a law enforcement drug-detector dog to sniff the exterior surface of a locker does not constitute a "search" for purposes of the Fourth Amendment or Article I, Paragraph 7 of the New Jersey Constitution. **[4.5B]** However, the act of opening a locker in response to a dog's alert *does* constitute a search. Where any law enforcement officer or canine is involved, it is strongly recommended that a search warrant be obtained before opening a locker or any other container or object in response to a dog's positive alert. **[4.5D(1)]**

- ☐ Were students and parents given written notice of the intention and authority of school officials to invite drug-scent dogs to conduct suspicionless sweep inspections on school property? **[4.5F(1)]**

- ☐ Did this notice refer to all places or items that might be subject to such canine inspection (e.g., lockers, desks, handbags/purses, backpacks, outer clothing removed from students, and vehicles brought on school property)? **[4.5F(1)]**

  - ☐ Did the notice advise students and parents that students may be ordered to vacate a room and to leave behind their outer clothing or other possessions so that they could be examined by scent dogs? **[4.5E1 and 2; 4.5F(1)]**

- ☐ Did school officials solicit input from parents, teachers, and other members of the school community before conducting a canine operation (e.g., host a parent input night to discuss the proposed policy)? **[4.5F(2)]**

- ☐ Was the canine operation conducted in accordance with a written plan of operation? **[4.5F(3)]**

- ☐ Did the plan provide objective criteria to minimize the discretion of a dog handler and school official in selecting places to be inspected? **[4.5F(3)]**

- ☐ Did the plan specify procedures designed to minimize the degree of intrusion and inconvenience to students and faculty? **[4.5F(11)]**

- ☐ Did the plan make certain that all persons involved in the execution of the operation would keep the timing of the specific operation *strictly confidential* up to the moment that the canine units would come on to school grounds and begin to conduct their sweep? **[4.5F(7)]**

- ☐ Was a room set aside in the school to serve as a command center from which to coordinate all activities? **[4.5F(3)]**

- ☐ Did the plan provide that a school official would be assigned to the command center and bring with him/her a master list of all locker assignments and a roster of enrolled students, as well as a list of parents or legal guardians so that they could be contacted promptly in the event that a dog alerts to a locker assigned to their child? **[4.5F(3)]**

- ☐ Did the plan provide that all canine units and support teams would be thoroughly briefed on the layout of the school, the areas to be inspected, and any areas that are "out of bounds"? **[4.5F(3)]**

- ☐ Did the plan provide that at all times while canines are present on school grounds, students would be restricted to their classrooms or to locations that would not be swept? **[4.5F(3)]**

- ☐ Did the plan include provisions to ensure that drug-detection dogs do not come into direct contact with students? **[4.5F(9); 2.8; 3.2B(4)]**

  - ☐ Did the operational plan provide that students would not be present during an actual sweep or otherwise be able to know whether a dog has alerted to a particular locker?

- ☐ Did appropriate school officials carefully document their findings to demonstrate why it is necessary and appropriate to use drug-detection dogs? **[4.5F(4)]**

  - ☐ Did these findings spell out the nature and scope of the problem that exists in the school, and why the proposed use of drug-detection canines will help to address the problem? (See *Facts Justifying General Search Policies.*)

- ☐ Did the County Prosecutor or the Director of the Division of Criminal Justice approve the use of the canine to conduct a suspicionless sweep of the school? **[4.5F(6)]**

- ☐ Was the plan approved by appropriate education officials (i.e., the school board, district superintendent and/or building principal)? (*Note:* The board of education should not be advised of the exact date and time when inspections will occur; the number of people aware of the exact time of these planned operations should be kept to an absolute minimum.) **[4.5F(7)]**

- ☐ Was the local police department aware of the operation and given adequate opportunity to prepare for any disturbance that might result from the operation? **[4.5F(8)]**

- ☐ Did the plan provide steps to facilitate obtaining a search warrant from a Superior Court judge? **[4.5D(1); 4.5F(8)]**

  - ☐ Did the plan provide for a prompt, in-person appearance before the judge to present the facts establishing probable cause?

  - ☐ Was the track record of the animal(s) fully documented and stored on a wordprocessing system so that a written search warrant application could be quickly prepared, sworn to, and presented to the judge for review and approval?

  - ☐ Was an assistant prosecutor or deputy or assistant attorney general present to review and approve the warrant application before it is submitted to a judge?

  - ☐ Did school officials have on hand a master list of locker assignments so that the identity of a student whose locker was alerted to could be quickly determined and included in the warrant application?

- ☐ Were steps taken to secure and stand guard over the locker while a warrant was obtained? **[4.5D(1)]**

- ☐ Did the plan provide steps to minimize disruption of the educational environment? (Explain.) **[4.5G(11)]**

- ☐ Was the plan limited to the examination of lockers and the contents of lockers? **[4.5E]**

  - ☐ Did the plan provide that students would be required to vacate their classrooms and leave behind backpacks, handbags, and articles of outer clothing to be inspected by drug-detection dogs? (If yes, police and school officials must pay

special attention to the provisions of Chapter 4.5E of the *New Jersey School Search Policy Manual*.)

☐ Did the plan provide for a public awareness follow-up seminar to discuss the results of the operation? **[4.5F(13)]**

C. Facts Justifying General Search Policies.

The following facts and circumstances have been held to be relevant by courts in deciding whether suspicionless search policies are an appropriate and reasonable response to a school's drug, alcohol, or weapons problem. Note that the facts and circumstances demonstrating the nature and scope of the problem should be spelled-out for each separate school building and/or grade level that will be subject to the suspicionless search policy. Furthermore, these facts and circumstances should be incorporated into written findings by the school board, superintendent and/or building principal *before* the search policy is implemented. **[2.9; 4.4A; 4.5F(4); 13.3D; 13.3F(2)]**

- empirical studies/surveys of student drug and alcohol use and attitudes;
- recent incidents where drugs/alcohol were found on school property;
- increase in the number of incidents of violence, vandalism, or weapons-related offenses;
- increase in the incidence of disciplinary problems and disruptions;
- increase in number of students suspended/expelled for disciplinary infractions involving drugs, alcohol, or weapons;
- information received from students (explain);
- information received from parents (explain);
- information received from teachers and staff members (explain);
- observations by teachers of suspicious activity by students, such as passing small packages amongst themselves in hallways;
- increase in the number of students referred to or participating in substance abuse programs;
- increase in number of students found to be under the influence of an intoxicating substance;
- observation of students in possession of large amounts of money; and,
- increase in use of pay phones by students.