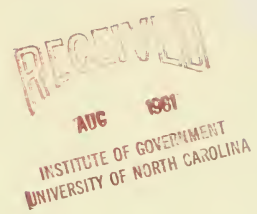

SCHOOL LAW BULLETIN INDEX

(1970 – 1975)

Editor: Robert E Phay

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School Law Bulletin

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Editor

NEW INSTITUTE SERVICE TO SCHOOL SYSTEMS

School board attorneys are now receiving the Institute's Legislative Reports. The basic report of our service is the DAILY BULLETIN. It contains a digest of each bill introduced in the House or Senate and a summary of all legislative action taken on the floor of each chamber. Other legislative reports include a WEEKLY BULLETIN OF LOCAL LEGISLATION, a WEEKLY LEGISLATIVE SUMMARY (a discussion and analysis of noteworthy legislation), and a variety of end-of-session reports and analyses. School board chairmen and superintendents should contact their school attorney for information on pending school legislation.

SEARCHES OF STUDENTS AND LOCKERS

Until recently, the school's right to search a student's person or his locker has been little questioned. The Fourth Amendment's prohibition against unreasonable searches and seizures, as applied to the states and their instrumentalities through the Fourteenth Amendment, was generally thought inapplicable to school searches.[1] Several recent court opinions, however, clearly indicate that this is not so.

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[1]Only two early cases involving searches of public school students were found -- both from Tennessee. One is Phillips v. Johns, 12 Tenn. App. 354 (1930), a civil action by a student seeking damages for trespass because of a search by a teacher. The teacher had searched the child by removing her clothes because she had been in a room from which money was missing. The court held that the teacher's in loco parentis authority extended only to her proper duties as a teacher and could not be used to recover money for a third person. It then reversed the directed verdict for the teacher and remanded the case for a new trial on the question of whether the search was made for the benefit of the teacher or for the ethical training of the child.

In Marlar v. Bill, 181 Tenn. 100, 178 S.W.2d 634 (1944), the Tennessee Supreme Court upheld a teacher's examination of a boy's pockets conducted after a dime was found to be missing from a room he had entered during recess, in violation of school regulations. The court said that the teacher was attempting to clear the boy of suspicion of theft and, therefore, was acting in the child's best interest.

The Fourth Amendment's prohibition against illegal searches has generally been construed to permit a search only when (1) a warrant has been issued authorizing it, (2) there is probable cause and circumstances are such that obtaining a warrant would frustrate the purpose of the search, or (3) a valid arrest has been made and the search is incident to the arrest. If a search is made that violates these requirements, several consequences may result. An individual making an illegal search may be sued in civil court for violation of the privacy of the person whose property is searched[2] and, under certain circumstances, may be criminally prosecuted. Another result of an illegal search is that the evidence or contraband obtained may not be introduced in a criminal proceeding. The fourth possible consequence of an illegal search is that the evidence obtained may be inadmissible in a school disciplinary procedure.

Most of the litigation on alleged illegal searches has involved searches of students' lockers that have produced evidence later sought to be introduced in a criminal prosecution against the student. In *Overton v. New York*,[3] the United States Supreme Court ordered a new hearing of a narcotics prosecution in which the conviction of a student was based on the discovery of drugs

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[2]See Phillips v. Johns, 12 Tenn. App. 354 (1930).

[3]20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967), vacated and remanded, 393 U.S. 85 (1968), original judgment aff'd at 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969). One law review article said of the original court of appeals decision: "In this entire discussion of the obligation and duty of school officials no mention is made of the Fourth Amendment and no case is cited It appears the decision is one of pure policy in granting almost absolute power to those responsible for administering the schools....Of all the opinions writte by Judge Keating, Overton is the most disappointing." 36 BROOKLYN L. REV. 41, 5 (1969), See also 38 FORDHAM L. REV. 344 (1969).

in his locker by police who were without a valid warrant but had permission from the vice-principal to search the locker. The New York Court of Appeals upheld the search on the theory that the principal had not been coerced by the invalid warrant to consent to the search, but had acted under his independent duty to inspect a locker when suspicion arises as to its contents. A fact important to this decision is that the principal had the combinations of all the locks and the students knew that they did not have exclusive possession of the lockers vis-a-vis the school authorities. On appeal, the Supreme Court remanded the case to the New York Court of Appeals for determination of whether the principal had acted under duress. The court of appeals essentially restated its earlier decision, finding that the vice-principal had exercised an independent "duty" to search, a duty claimed by the vice-principal and tacitly approved by the court.

In another case, the Kansas Supreme Court upheld a burglary conviction based upon the discovery of stolen goods found in a bus station locker that was entered by a key removed from the defendant's school locker.[4] The defendant had consented to the principal's opening his school locker in the presence of the police. The court upheld the search on the bases of the defendant's uncoerced consent and the nature of the school locker. It said that although the student may control his school locker in reference to fellow students, his possession is not exclusive in reference to the school and its officials. As in *Overton*, the fact that the principal had a master list of all lock combinations and a key that would open all school lockers

[4]State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969), cert. denied 90 S.Ct. 966 (1970).

was important to the court's decision. The court considered the right of inspection inherent in the authority vested in school administrators to manage schools and protect other students.[5]

From these and several related college domitory search cases,[6] it appears that the school may search a student's locker without a warrant or the student's permission when it has reasonable grounds for the search. Also, the school may authorize the police to conduct a search when they have reasonable grounds to believe that a crime has been committed and that evidence in reference to the crime may be within the locker. As a federal district court said in *Moore v. Student Affairs Committee of Troy*

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[5]See In re Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969), in which a California Court upheld a narcotics conviction based on evidence obtained from a search of a locker by a principal. The search was without a warrant and without the student's consent. With questionable logic, the court held that the principal was not a governmental official within the meaning of the Fourth Amendment. For Fourth Amendment purposes, the principal was considered to be a private citizen and not acting under the authority of the state. If the search had been a joint operation with police, however, the court agreed that the search would be tainted with state action and therefore illegal.

A similar holding in connection with a juvenile court proceeding is found in Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970).

[6]See, e.g., Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968), and People v. Kelley, 195 Cal. App. 2d 669, 16 Cal. Rptr. 177 (Dist. Ct. App. 1961). But see People v. Cohen, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (Dist. Ct. 1968), a case concerning a search of a student's dormitory room at Hofstra University, in which the court noted: "Certainly, there can be no rational claim that a student will self-consciously waive his constitutional right to a lawful search and seizure. Finally, even if the doctrine of implied consent were important to this case, the consent is given, not to police officials, but to the university and the latter cannot fragmentize, share, or delegate it." Id. at 709.

See Comment, Public Universities and Due Process of Law: Students Protection against Unreasonable Search and Seizure, 17 KAN. L. REV. 512 (1969); and Comment, College Searches and Seizures: Privacy and Due Process Problems on Campus, 3 GA. L. REV. 426 (1969).

State University[7] -- a case upholding a search that was made without a warrant, under the student's protest, and not incidental to a legal arrest -- the Fourth Amendment prohibition against unreasonable searches and seizures is not violated when there is "a reasonable belief on the part of the college authorities that a student is using a dormitory room for a purpose which is illegal or which would otherwise seriously interfere with campus discipline."[8] Evidence obtained from such searches can be used to convict a student in a criminal prosecution. Clearly, the evidence also can be used in a non-criminal student expulsion proceeding.

Searches of the student's person should be considered in a different category from locker searches, particularly when a criminal prosecution is possible. Unlike a locker or a dormitory room, which the student might expect to be inspected occasionally, things carried on his person he can reasonably expect to be free from search. Consequently, regular Fourth Amendment standards for the search are much more likely to be applied by the courts. Thus, if a search of a student's person might lead to a criminal prosecution, a school official should make the search only when there is (1) a warrant, (2) probable cause and circumstances that would frustrate the purpose for the search if a warrant were obtained, or (3) a valid arrest.

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[7] 284 F. Supp. 725 (M.D. Ala. 1968).

[8] Id. at 730. The requirement that the search be made when there is "reasonable belief" is less stringent than the normally required "probable cause" that a crime has been committed. Two primary reasons are given for the lower standard of reasonable belief. One is that the student cannot reasonably expect his room to be a place free of school inspection. The second reason is that the school, with some in loco parentis duty, must protect other students from a student suspected of unlawful activity. One precaution that school officials can draw from these cases if they wish to search lockers within the Fourth Amendment requirements is that the school must publicize its locker policy, reserving the right to search a student's locker and stating that a student cannot expect his locker to be free from inspection when the school finds its inspection necessary to maintain school operation and to protect other students.

By limiting searches of the student's person to these conditions, the school official protects both himself from possible suit and the evidence for admission at a possible criminal trial.

However, if the school conducts a search of either a locker or the student's person that does not satisfy the Fourth Amendment requirements, the question remains whether it can use the evidence as basis for suspending or expelling the student. At least one commentator on the subject of searches of high school students thinks that evidence illegally obtained under Fourth Amendment standards cannot be used against the student in a disciplinary proceeding that may lead to expulsion or suspension.[9] This conclusion is reached by analogizing the school's disciplinary procedure with a criminal procedure. To my knowledge, however, no court has held evidence inadmissible in a school expulsion hearing on the basis that the method of its procurement violates Fourth Amendment requirements; it seems unlikely that any court will soon do so.[10] Nevertheless, in fairness to the student, and to avoid having students think that their privacy has been invaded, the school should always seek the student's permission before conducting a search and should obtain a warrant for a search of his body if circumstances permit. Only when it has "reasonable grounds" to think that a student possesses weapons or has committed a crime and that the evidence

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[9]Knowles, Crime Investigation in the School: Its Constitutional Dimensions, 4 J. OF FAMILY LAW 151, 159 (1964).

[10]It should be pointed out, however, that the standards for school searches are contrary to several other decisions involving such administrative searches as fire and health inspections. See, e.g., Camera v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967).

[11]Almost every rule has its exceptions. A general search of all lockers after a bomb threat or to reduce substantial traffic in narcotics are examples of when a general search should be upheld as a proper exercise of school responsibility.

or contraband is on the student's person or in his locker should the school conduct the search without the student's permission. Fishing expeditions for evidence of school violations are illegal and should be ruled out as a matter of school policy.[11]

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RECENT COURT DECISIONS

North Carolina Anti-Busing Statute Declared Unconstitutional--*Swann v. Charlotte Mecklenburg Board of Education,* 312 F. Supp. 503 (W.D.N.C. 1970).

One of the more controversial statutes enacted by the 1969 General Assembly was G.S. 115-176.1, which prohibited the assignment of students to a school on the basis of race or for the purpose of achieving racial balance. The statute also provided that "involuntary busing" for the purpose of achieving racial balance is prohibited and may not be supported by public funds. For a discussion of the background of this statute and some of the constitutional problems it raised, see Phay, *Elementary and Secondary Education,* 36 POPULAR GOVERNMENT, 39, 45-47 (1969).

A three-judge federal district court declared both the provisions of G.S. 115-176.1 prohibiting assignments on the basis of race to achieve racial balance and those on busing to be unconstitutional. Fourth Circuit Judge J. Braxton Craven said the provisions of G.S. 115-176.1 conflict with several United States Supreme Court opinions that "require school boards to consider race for the purpose of disestablishing dual systems" [*Green v. School Board of New Kent Co.*, 391 U.S. 430 (1968); *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954); and *Brown II,* 349 U.S. 294 (1955)]. Speaking of racial balancing, the court said, "[A] school board in taking affirmative steps to desegregate its system, must always engage in some degree of balancing....[A] flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment...[And] the statute's prohibition against 'involuntary busing' also violates the equal protection clause."

[See also, *Lee v. Nyquist,* 39 U.S.L.W. 2212 (Nov. 20, 1970), in which a three-judge federal district court declared New York's anti-busing statute unconstitutional as a violation of the equal protection clause. The New York statute antedated G.S. 115-176.1 and was used in drafting North Carolina's statute.]

ATTORNEY GENERAL'S OPINION

Subject: Technical Institutes--Scholarship Loan Fund for Teachers

Requester: A. C. Davis, Controller, N.C. Board of Education (7 October 1970)

Facts: Teacher obtained loan under Scholarship Loan Fund for Prospective Teachers (Art. 18 of Chap. 116). G.S. 116-174(5) provides that a teacher is entitled to a credit of $350 plus all accrued interest toward satisfaction of the loan for each year taught in a North

Carolina public school. Teacher taught in a technical institute (James Sprunt) which was under contract with State Board of Education and the Duplin County Board of Education.

Question: Does teaching in a technical institute established by contract between the state and local boards of education constitute teaching in a public school for satisfaction of the requirement of G.S. 116-174(5)?

Conclusion: Yes. A "contract" technical institute established under G.S. 115A-5 and operated pursuant to a contract between the State Board and a local board of education is "a branch or satellite of the public school system." The technical institute fulfills the obligation of the public schools for adult education under G.S. 115-199, is included within the school board's budget, and is subject to some control by the local school board. Thus a teacher who teaches in a technical institute of this type is entitled to credit on a loan made for prospective teachers. [A copy of this opinion may be obtained from the Attorney General or the Institute.]

RECENT PUBLICATIONS

NOLPE School Law Journal, Vol. 1, No. 1, Fall, 1970. Edited by M.A. McGhehey and published semiannually by the National Organization on Legal Problems of Education, 825 Western Ave., Topeka, Kansas. Single copy - $2.50 to non-members

This first issue contains eight articles. Subjects range from the rights of nontenured teachers to academic freedom in the classroom. NOLPE has begun an important new service for those who want to keep up with developments in the school law field.

Robert E. Phay and Jasper L. Cummings, Jr., Student Suspensions and Expulsions: Proposed School Board Codes. Institute of Government, University of North Carolina at Chapel Hill, 1970. 50 pages. Copies are $3.00 plus 3% sales tax

Trustee Responsibility for the Campus in Crisis, edited by Robert E. Phay, Institute of Government, University of North Carolina at Chapel Hill, 1970. 71 pages. Copies are $3.00 plus 3% sales tax.

This booklet contains thirteen presentations to a conference for university trustees on the subject of the campus in crisis. The presentation sought answers to the question of how to prevent and deal with crisis situations and examined the role of the law in the institutional setting as it affects the rights and responsibilities of students, faculty, administration, and trustees.

ANNOUNCEMENTS

School Attorneys' Conference -- The annual conference of school attorneys will be held at the Institute on February 5-6, 1971. Subjects include: Drugs and Students, Legal Problems of Community Colleges, Bond Procedures for School Finance, Status of School Desegregation, and School Codes on Student Conduct.

School Board Members' Conference -- Will be held at the Institute of Government on May 11-12, 1971.