

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. 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*, 102 S. Ct. (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*, S. Ct. (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.

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."

In *Siegert v. Gilly*, 111 S. Ct. (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. 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.

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.

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. N.J.S.A. 18A:40A-12b. Anabolic steroids is a schedule three narcotic.

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

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 student's 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. 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. 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.

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.

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.

Silver Platter Doctrine: 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 warrant-less 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.

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 book-bag 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 "pat-down," 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.

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. 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, ~ 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. 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.

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.

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.)

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.

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 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.

A sweep search or suspicion less 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.

2. GENERAL PRINCIPLES

2.1. Privacy Rights Versus Property Rights.

A search entails an invasion of privacy, The United States Supreme Court recognized in *New Jersey vs. 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 necessities of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such non-disruptive 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, non-contraband 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.

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.

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.

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. 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 Hemele, (1990) ruled that under the State Constitution, a person retains an expectation of privacy in garbage that is placed out for collection. Although the exact parameters of the Hemele 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. more complete discussion of the "plain view" doctrine. So too, the Hemele 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.

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. 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.

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.

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

Consent is one of the recognized exceptions to the probable cause and warrant requirements imposed upon law enforcement officers. 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. 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.

Similarly, it is unlikely that the New Jersey Supreme Court would embrace the concept of "implied consent." 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. 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.

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 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. 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.

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. The Attorney General, the county prosecutors, and other law enforcement agencies in this state cannot vouch for the effectiveness of these private services and offer no claim that a positive alert by a privately-owned and handled drug-detection animal constitutes probable cause or even reasonable grounds to believe that the locker or other area identified by the animal contains a controlled dangerous substance.

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. Furthermore, the act of disposing of 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. 2C:29-3a(3) and N.J.S. 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) 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, 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.

2.8. Using the "Least Intrusive Means."

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. 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 tactic 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 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.

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.

2.9. The Need to Make Findings.

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. 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." *Vernon School District v. Acton*, (1995). 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.

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.

Thus, in *Desilets V Clearview Reg Bd of Educ*, (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.

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. The issue, ultimately, is whether the policies or procedures employed are a reasonable response to the problem that exists in the school.

2.11. "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. 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. 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.

2.12. Broad Supervisory Authority of Schools

Public school officials exercise considerable control and authority over schoolchildren. In fact the State "Legislature has specifically charged school officials to maintain order, safety and discipline." Statutes give school officials the authority to prevent disorderly conduct by pupils, N.J.S. 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. 18A:6-1).**

Although the authority exercised by school officials over students is pervasive and sweeping, it is not without limitation. Indeed, the school environment today, 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 the prisoner and the schoolchild stand in wholly distinct circumstances, separated by the harsh facts of criminal conviction and incarceration. 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."

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**

3.1. School Searches Entail a Balancing of Competing Interest

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.

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. In order to preserve such an environment, school officials have a substantial interest in maintaining discipline in the classroom and on school grounds.

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, The United States Supreme Court recently reaffirmed that the nature of those rights is what is appropriate for children in school. 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. 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.

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. 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 T.L.O. Two Part Test

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.

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 information can be found in a certain place.

The decision to initiate a search entails a **four-step analytical process**:

1. First, the school official must have reasonable grounds to believe that a law or school rule has been broken.
2. 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.
3. 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].)
4. Fourth, the school official must have reasonable grounds to believe that the sought-after evidence - the type of which the official should have in mind ~ initiating the search - would be found in a particular place associated with the student(s) suspected of committing the violation or infraction.

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.

In *State v Moore*, N.J. Super. (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.

So too, in *State v Biancamano*, N.J. Super. (App. Div. 1995) (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."

Regarding 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. 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.

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.

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.

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.

Although there is little case law 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*, N.J. Super. Ct. (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. 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. 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.

The court, 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.

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.

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.

Note, however, that depending on the available information and the nature of the infraction, it may in any event be appropriate to search the student's locker, backpack, etc. even if the student has surrendered contraband. 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.**

Same rules apply to any property searched: When a search is 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.

Searches of Vehicles. One question that sometimes arises is whether school officials a non-consensual search of a student-owned or operated vehicle that is not parked on school grounds. 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 or a student-owned or operated vehicle that is not parked on school grounds. (Note: 2010 Case State v. Best LEH Volume 1).

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. 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.

a) a law or school rule has been broken;

b) a particular student (or group of students whose identities are known) has committed the violation of law or school rule infraction;

c) the violation or infraction is of a type for which there may be physical evidence of the violation or infraction;

d) 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.

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.**

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.

4.2. Legal Standards and History.

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).

N.J.S.A. 18A:36-19.2. 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.

After the enactment of this statute, the United States Supreme Court held that a suspicionless search may be permissible when the search serves "special needs, beyond the normal need for law enforcement. (This is for school order, safety and discipline.) Most recently, the United States Supreme Court in *Vernonia Sch. Dist V Acton*, (1995), applied this principle to sustain the constitutionality of random, suspicionless drug testing of high school students participating in interscholastic athletic competitions.

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. The practice of providing **advance specific notice** would afford students both the opportunity and practical incentive to remove prohibited (and highly personal) items.

On the other hand, 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. 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. 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.*

Any locker inspection program conducted pursuant to the authority of N.J.S. 18A:36-19.2 should at a minimum include the following components and features:

A. Findings

School Officials 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.

In *Commonwealth v Cass*, 709 e.,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 and observations of students exhibiting physical signs of drug use such as dilated pupils, or a growing number of students carrying pagers and increased use of pay phones by students
- * increased use of the student assistance program for counselling students with drug problems and calls from concerned parents;
- * students in possession of large amounts of money;
- * more common outbursts of profane language and rude behavior in classes and direct school staff observations of students using and glamorizing drugs and alcohol;

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. 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.

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 school year, notice should also be provided in the student handbook and at the time that lockers are assigned for student use. 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.

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.

Neutral Plan

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.

A "neutral plan" is one that is based on objective criteria established in advance by appropriate school authorities. This 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.

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 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. (Note: This is similar to the Kirk Plan)

Note 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.

Note 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.

Finally and most 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.

D. Execution.

All inspections should be conducted by those persons who are specifically "designated by the local board of education." All persons conducting the inspections should be thoroughly familiar with the neutral plan and must stick to it. 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. Officials conducting the inspections should not read personal notes or entries in diaries or journals.

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, 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.

4.5. Drug-Detection Canines.

A. Overview. 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 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 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. 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.

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.

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.

The United States Supreme Court held that the use of a law enforcement drug-detector dog to sniff the exterior surface of a container (i.e., student locker) is, at most, a "minimally intrusive" act - one that does not constitute a "search" for purposes of the Fourth Amendment. **The canine's sniff is sui generis.**

It is assumed 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. Although, some private companies make scent dogs available to schools, 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.

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.

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 that a scent dog's sniff is "sui generis." However, the rule announced in this Manual generally prohibiting scent dogs from being used to sniff students or clothing while being worn by students 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*, 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.

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.

The United States Supreme Court's decision in *Place* does not mean that the use of drug-detection dogs is permissible in all circumstances. 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.

In *State V Cancel*, (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.

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*, (1987).

In *Commonwealth V Martin*, (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. 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.

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."

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." 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. **Note** that in *Commonwealth v. Casso* (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.

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 \$639558.00 in currency* (D.C. Cir. 1992); *United States v. Carr*, (3rd Cir. 1994) suggesting 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). 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.

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. Unfortunately, there is as yet no reported New Jersey opinion dealing with this precise issue.

In an unreported Appellate Division decision, *State v. Lorenzo Medina*, 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. (Note that 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.

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."

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:

- (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. For example, 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 search warrant.**

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." 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* (1968)). Note also that Municipal Court Judges have no authority to issue telephonic search warrants.

The application for any search warrant must be reviewed and approved by a designated and experienced assistant prosecutor or deputy or assistant attorney general. 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.

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. Preferably 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 addition, in order to minimize the intrusiveness of the search, schoolchildren ordinarily should not be present during the execution of the search warrant. 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.

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.

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. In light of New Jersey's strict rules governing consent searches 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.

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. *State v. Johnson*, (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."

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. *State v Santana*, (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 Satana* 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.)**

(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. 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. 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.

Using a Canine Alert to justify a Search Conducted by a School Official

If the school officials open a locker in response to a scent dog's alert, it is unclear whether that search will be governed by the rules that apply to school authorities, or to the stricter rules that must be followed by police? 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.

According to the 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 section 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. (Here, a potential legal issue rises.) 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. 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.

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. 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."

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.

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 be interposed at any time, including after the operation has commenced.

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 found 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.

The Problem of "Parallel" Criminal and Non-Criminal Investigations

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.

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.

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. It is not clear whether courts will focus on the primary objective or purpose of the inspection program 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.

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.*

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. 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.

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.

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.

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 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. Individual students within a classroom should not be singled out for this form of inspection. 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.

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.

Using Canines to Examine Backpacks Handbags and Other Portable Containers

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.)

The preferred practice is to have law enforcement officers conduct the search pursuant to a warrant or a recognized exception to the warrant requirement. In all cases 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.

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.*

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.

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 *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.

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.

(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. 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.

(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. 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. 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.

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.

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.

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.

(5) 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 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 at 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.

(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.

(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.

(9) No Contact Between Canine 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. 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 a Search Warrant Application 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. 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.

(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.

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.

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.

(13) Public Awareness Follow-Up. In addition to soliciting parental input before conducting a canine operation, 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. 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.

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.

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.

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.

Before deploying metal detectors, school officials should consider whether there are other alternatives to deter students from trying to bring weapons into school buildings. 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.

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. 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 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.

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.

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.

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.

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-through unit, or (3) to examine the clothing or property of specific students who are suspected to be carrying concealed weapons

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 or ethnicity.

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-through magnetometer.

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. 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.

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 "pat-down" must begin in the precise area or part of the student's person where the scanning device was activated.

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.)*

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 "pat-down" or "frisk" of the student's *outer clothing*, for the purpose of identifying a potential weapon. **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.

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 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. 18A:6-4.2 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 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.

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. 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, 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. 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. This eliminates the potential abusive exercise of discretion and by subjecting everyone to this form of intrusion, there is no stigma attached to the search.

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.

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 through 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.)*

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.

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 or mug shots. 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. 2A:156A-1, 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. 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.



14. COOPERATION BETWEEN EDUCATION AND LAW ENFORCEMENT OFFICIALS

14.1. Referrals to Law Enforcement Agencies.

A. Firearms. 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. 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, 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," N.J.S. 18A:37-7, 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.

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 seizes 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. 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. **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.

C. Illicit Drugs. Subject only to certain federal confidentiality rules 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 of 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. 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). This information would include (1) the exact location where the substance or paraphernalia was first discovered, (2) the identity of all persons who had custody of the substance or paraphernalia following its discovery or seizure, and (3) the identity of any pupil or staff member believed to have been in actual or constructive possession of the substance or paraphernalia (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 substance 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. 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. 9:6-8.10 and N.J.A.C. 6:29-9.1 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 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 (Law Div. 1989) made clear that the statutory duty to report suspected child abuse applies to every citizen.

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.

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. 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. 9:6-8.10 to immediately report suspected child abuse.

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. 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.

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.

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 payoff 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.

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. 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.

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. 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. 18A:37-2.1.

