Students, Search & Seizure Statutes

"Hey Teachers! Leave The Kids Alone!"

By Adam Sheppard

Last summer, the issue of school searches and student's privacy rights was brought to the forefront of public consciousness when the Supreme Court decided *Safford United School District No. 1 v. Redding,* 129 S.Ct. 2633 (June 25, 2009). Safford involved a strip search of a 13-year-old middle school student by school officials based on a tip from another student that she possessed over-the-counter pain relief pills (which were prohibited under school rules without advance permission). No pills were found. The student's mother filed suit against the school district and school officials alleging that the strip search violated her daughter's Fourth Amendment rights. The Court held that school officials were justified in searching the student's backpack and outer clothing but that the search of her undergarments was unreasonably intrusive. 129 S.Ct. at 2642. However, the Court stopped short of imposing civil liability on the school officials. Id. at 2643. A school official searching a student is entitled to qualified immunity unless the search is shown to be in violation of "clearly established law." Id. The Court in Safford found that the strip search of Savana Redding did not violate "clearly established law." Id.

Deference to School Officials

That the Safford-court protected school officials from civil liability should not come as a shock. *See id.* Starting with the seminal case of *New Jersey v. TLO,* 469 U.S. 325, 105 S.Ct. 733 (1985), in which the Supreme Court did away with the warrant and probable cause requirements in the school setting, courts have exhibited a seemingly blind deference to the judgments of school officials. Colorful examples include: *Thomas v. Roberts,* 323 F.3d 950 (C.A.11 2003), where the court granted qualified immunity to school officials and a police officer who conducted a group strip-search of a fifth grade class in search of a missing $26; *Williams v. Ellington,* 936 F.2d 881 (6th Cir. 1991), upholding a strip search of a high-school student for drugs despite there being no reason to believe that the student was secreting drugs next to her body; and *Cornfield by Lewis v. Consolidated High School Dist. No. 230,* 991 F.2d 1316 (7th Cir. 1993), where the Seventh Circuit upheld a strip-search of a sixteen-year-old over his mother's objection based on a school official's observation of an "unusual bulge" in the student's sweatpants and prior suspicions about the student. Such cases exemplify the deference which the courts typically accord to a school official's decision to conduct a search.

Expansive School Codes and Other Intrusive Measures

Legislatures have also ceded extensive authority to school officials to conduct student searches. Several states, including Illinois, have passed school codes which authorize warrantless, suspicionless, searches of "lockers, desks, parking lots, and other school property and equipment owned or controlled by the school, as well as personal effects left in those places and areas by students…" *See* 105 ILCS 5/10-22.6 (e) (2009). "As a matter of public policy, the [Illinois] General Assembly finds that students have no reasonable expectation of privacy in these places and areas or in their personal effects left in these places and areas." *Id.* Some Illinois high schools, particularly those in the suburbs of the "North Shore," are also requiring students to sign contracts which grant school administrators extensive authority to search students' belongings and vehicles. (Our office recently represented a

student who signed such a contract and was subjected to a search and seizure).

Drug testing of students who participate in sports as well as a host of other extracurricular activities has also become increasingly common. In *Board of Education of Independent School Distric No. 92 of Pottawatomie County v. Earls,* 536 U.S. 822, 122 S.Ct. 2559 (2002), the Court authorized drug testing of students who participate in "competitive" extracurricular activities including, the Academic Team, Future Homemakers of America, band, and choir. In December, I met with high school students as part of the Constitutional Rights Foundation Chicago's Equal Justice Program held annually at the Dirksen Federal Building. Many students voiced concerns over the increase in student drug testing.

High school and college officials are also monitoring students' Facebook accounts and other social networking sites. A student in Mississippi recently filed a federal lawsuit against the school district and her cheerleading coach alleging that the coach required each member of the cheerleading squad to reveal the passwords to their Facebook accounts. The coach allegedly disseminated information from the student's account to other school officials. (The case is *Jackson v. Pearl Public School District, et al,* 3:2009cv00353, currently pending in the Southern District of Mississippi).

Other Legislation

In addition to school regulations, there are a growing number of local and state laws which target teens. For example, individuals who are found guilty or plead guilty to a charge of Minor in Possession of Alcohol–even if they receive a disposition of court "supervision"–face a three-month suspension of their driving privileges in addition to any criminal penalty that may be imposed. (Cross reference 235 ILCS 5/16-20 with 625 ILCS 5/6-206(a)(43)). For a motorist under the age of 21, if a police officer has probable cause to believe that the motorist has driven after consuming any amount of an alcoholic beverage–e.g., if the officer detects the odor of an alcoholic beverage on the motorist's breath–then, based on the zero tolerance law, the motorist's driving privileges will be automatically suspended and the motorist does not have the opportunity to contest the suspension in court. (The motorist can challenge his or her suspension in an administrative hearing at the Secretary of State but a Secretary of Secretary of State hearing officer, not a judge, hears the matter). In contrast, adult DUI arrestees are afforded an opportunity to challenge the grounds for their statutory summary suspensions in court. 625 ILCS 5/2-118.1. There is also a strong movement across the nation to raise the driving age to 17 or 18 years old. (One such bill was proposed in Illinois but it did not pass).

The Illinois Criminal Code also treats young adults in a disparate manner. Unlawful possession of a handgun is a felony if the defendant is under 21 but a misdemeanor if the defendant is over 21. *See* 720 ILCS 5/24-1.6 (I). Persons under 18 years of age may not receive a tattoo unless they are accompanied by a parent or legal guardian. *See* 720 ILCS 5/12-10 (2009). An individual who tattoos a person under 18 years of age is guilty of a Class A misdemeanor. *See id.* The same is true with respect to body piercings, including a tongue piercing–written consent from a parent or legal guardian is required. *See* 720 ILCS 5/12-10.1 (2009).

The Illinois Parental Notice of Abortion Act of 1995 (750 ILCS 70/1, *et. seq.*) has become the subject of recent litigation. The law requires doctors to give the parents or guardians of girls 17 years old or younger 48 hours' notice before providing them with abortions. The law had been enjoined and dormant since its passage but this past summer the Seventh Circuit dissolved the permanent injunction, paving the way for resurgence of the law. *See Zbaraz v. Madigan,* 572 F.3d 370 (7th Cir. 2009).

Other legislation which grabbed the attention of Chicagoans was the so-called "Event Promoter's Ordinance." In the wake of the E2 nightclub tragedy, the Department of Business Affairs and Licensing introduced an ordinance that would have required that all music "promoters" be at least 21 years old even if the venue in question did not serve alcohol. (Draft Ordinance 4-157). The term, "promoters," would have included those who are "indirectly responsible for the organization or amusement of an event," those who receive shares of the admission fees, or those who receive compensation or consideration from donors or sponsors of the event. *Id.* Thus, the ordinance could have operated to bar college-aged musicians and entertainers from booking their own gigs. The City Council ultimately tabled the ordinance among strong public opposition. However, the proposed ordinance is revelatory of the trend in local government towards greater intervention in the lives of young people.

Judicial Review

Statutes which contain age-based restrictions are rarely overturned on equal protection grounds because such statutes are analyzed under the deferential "rational basis" standard. *See Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). So long as an age classification bears a "rational relationship" to a legitimate state purpose, it will generally be upheld. *Id.* As one court aptly put it, "[i]f there is any conceivable basis for finding a rational relationship, the court will uphold the law." *Crusius ex rel. Taxpayers of State of Ill. v. Illinois Gaming Bd.,* 348 Ill.App.3d 44, 54 (1st Dist. 2004). Nevertheless, it is incumbent on attorneys and civil rights activist to carefully scrutinize provision that are aimed at young people. Justice Brandeis warned over 80 years ago: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575 (1928) (Brandeis, J., dissenting opinion). ■

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