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Michael W. Simpson

University of Wisconsin, Madison

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The Most Special Need of All: The Right to Be Left Alone Analysis of Chicago Public Schools Metal Detector Policy

Michael W. Simpson
University of Wisconsin-Madison

Abstract

Metal detectors have become common educational equipment. This paper analyzes the development, evolution, and legal basis for the Chicago Public Schools metal detector policy. The paper agrees that schools are indeed special places with special needs, but reaches a different conclusion on school search law than the current Supreme Court.

“The right to be left alone is indeed the beginning of all freedoms.”
-Supreme Court Justice William O. Douglas (Quotes about Liberty)

The Policy

Four years after the United States Supreme Court made clear that the special nature of public school officials did not relieve them from the constitutional responsibility of the Fourth Amendment as carried to state officials by the Fourteenth Amendment and that public school students have rights to be protected from encroachment by public school officials, the Chicago Public Schools (hereafter CPS) enacted their first policy on search and seizure (*New Jersey v. T.L.O.* (1985) (hereafter *T.L.O.*) ; Board Report #89-0222-P02). This policy provided that metal detectors could be used in schools where the principal and the local school council determined such was needed to “provide a safe and proper educational environment.” School security officers were sworn police officers. Only they could operate metal detectors. The Bureau of Safety and Security had to be notified of detector use. If they determined the school safe and orderly, the use of metal detectors ceased. This policy added no costs to the CPS since they used metal detectors from the police department.

Changes were made to the policy in 1992. The requirement that only school security officers, who also were sworn police officers, could operate metal detectors was eliminated. The school security plan created by the principal and the local school council did not have to include the use of metal detectors. The general superintendent could use metal detectors as needed at any school to provide for the health, safety, and welfare of students (Board Report #92-0923-P01). There apparently had not been a major investment in detectors by the CPS as they continued to borrow from law enforcement.

The 1996 policy clarifies that by that time most of the CPS high schools and several other schools had walk-through metal detectors and still others had their own hand-held metal detectors (Board Report #96-0522-P01). Garrett Electronics is one of the largest manufacturers of metal detectors. Sales increased 200% in 1994 and future sales were expected to skyrocket (Portner as cited in Bjorklum, 1996, p.2).

The 1996 policy represented a major change and put into place the structure of the current policy. This structure revolves around three types of metal detector screenings: random, as-needed, and daily (Board Report

#96-0522-P01, sect. III). Randomness referred to days chosen and not the selection of students (sect. III (1)). As-needed screenings responded to particular safety concerns or special events (sect. III (2)). Daily screenings were conducted when the principal determined the educational environment required screenings and the local school council agreed by majority vote (sect. III (3)). School personnel could operate the detectors with available School Patrol units, including roving units and the Chicago Police Department officers. Detailed guidelines provided for a sign to be posted outside that “Any person entering this building may be subject to search.” Schools with student handbooks were to include metal detector information. Details were provided about creating sex-differentiated lines, handling of belongings, emptying pockets, provision of tables, and the progression of ever more intrusive search as the detector activated.

The 1999 changes made clear the authority of the school board’s CEO and the general superintendent’s authority to require metal detector searches in any of the three categories without the need of local school council approval (Board Report #99-0526-P02).

The current policy was adopted February 27, 2002, with board report number 02-0227-P01 approving section 409.3 of the Chicago Public Schools Policy Manual. The stated purpose is to foster a proper educational environment and to promote safety and welfare of students. Weapons and drugs on school grounds and in the surrounding areas threaten this purpose (Introduction). The metal detector search expanded to explicitly include student bookbags, purses, and other personal belongings (sections III., IV.). Additional language has been added to the random screenings provision that defines random screenings those searches not conducted on a regular basis and not brought about by particular safety concerns or special events. The policy states that such searches are effective and necessary in detecting and deterring the possession of weapons and the violence weapons bring. Language making the local school council approval necessary for random screenings was eliminated (sect. III A.). New section V provides for searches of less than the entire student body. The principal can choose not to conduct a metal detector search, search all students, or utilize the Office of Technology Services randomly assigned number. This number determines which students in line are selected for metal detector search. The principal must enter their decision on the three choices into the school computer system.

The current process for schools with permanent metal detectors is that signs are posted outside that indicate any person entering is subject to search. The process in the policy only directs the search of students. Students are to enter one of two lines determined by sex. Male staff are assigned to the male line; female staff to the female line. Students are directed to empty pockets and to place other belongings on table for scanning. These belongings are physically examined only if the hand-held detector is activated. Students are patted down if their walk-through activates the alarm. They are retested with a hand-held wand. They are then escorted to a more private place if the alarm sounds again. A more thorough search of the person is conducted. No body cavity search is allowed. If any questions arise, officials are to contact the law department. If a weapon is found, the Chicago Police Department **must** be called (Chicago Public School Manual, section 409.3 IV).

The Policy: Legal Authority

“Of all tyrannies, a tyranny exercised for the good of its victims may be the most oppressive.... those who torment us for our own good will torment us without end, for they do so with the approval of their consciences.” – C.S. Lewis (Quotes about Liberty)

The original 1989 policy cited three cases in support of the policy: *New Jersey v. T.L.O.* (1985); *Doe. v. Renfrow* (1979); and *People v. T.A.* (sic *J.A.*)(1980). Only the *T.L.O.* case remains from this original list in support of the policy. The *Doe* case arose out of Indiana when a school brought in drug-sniffing dogs with uniformed police officer handlers. The court stated that the standard of reasonableness in the public school setting is not probable

cause but a “reasonable cause to believe” that a school rule or law is violated if such is done to provide a safe, ordered, and healthy educational environment (p.1021). The court noted the independent evidence indicating actual evidence of drug abuse within the school. School officials did not rely on a generalized fear of drugs and violence within general society (p. 1021). The presence of the police officer did not make the search a criminal search because the school requested the officer with an agreement that no arrests would occur (p.1019).

The Illinois trial court in *People v. J.A.* (1980) suppressed evidence when a school dean of students who was also a juvenile officer for the police department searched and seized drugs from a student's coat. The trial court determined the dean of students lacked probable cause. The appellate court reversed finding that students have constitutional rights except where such are precluded by laws which enhance protection of the minor (p. 960). The standard for determining the reasonableness of public school official searches is reasonable suspicion and not probable cause. Public school officials are not law enforcement officers and are charged with the health and welfare of the students. A lesser standard for a search is appropriate (p. 962).

The important concerns in these early cases were the involvement of law enforcement, the purpose of the school search, the independent evidence of both a problem in that particular school or with the particular individual, and whether probable cause or some lesser standard applied to searches by public school officials.

In *New Jersey v. T.L.O.* (1985), the U.S. Supreme Court established that the Fourth and Fourteenth Amendments apply to public school officials. While students have a legitimate expectation of privacy, such is accommodated to the need for school order. Reasonableness is determined by examining the totality of the circumstances. The twofold inquiry of T.L.O. has influenced school search cases significantly. This test requires that the search be justified in its inception and that the actual search be reasonably related in scope to the original justifying circumstances. Inception is justified by reasonable suspicion that search will turn up evidence of violation of either law or school rules. Permissible scope involves a measure reasonably related to the objectives and is not excessively intrusive considering the age and sex of the student and the nature of the infraction. Thus, the search of a purse by a school principal was upheld. The U.S. Supreme Court left the question of individualized suspicion unanswered (footnote 8 at 342).

The *Renfrow* (1979) and *J.A.* (1980) cases discussed above are no longer used as legal references in the policy. In their stead are two automobile checkpoint cases: *Michigan Dept. of State Police v. Sitz* (1990)(hereafter *Sitz*) and *People v. Bartley* (1985). In addition, *People v. Pruitt* (1996)(hereafter *Pruitt*) is cited and dealt directly with the public school metal detector issue. *New Jersey v. T.L.O.* continues to be cited as a case of major constitutional import for school searches.

The United States Supreme Court upheld Michigan's automobile sobriety checkpoint program against Fourth Amendment challenge (*Sitz*, 1990). The Court chose the balancing test of the illegal immigrant checkpoint case over the special needs beyond law enforcement balancing test of the U.S. Customs drug testing program for employees in sensitive positions (*Sitz*, p. 450). The challengers to the checkpoint argued that the state needed more than a normal law enforcement purpose to stop people without individualized suspicion or probable cause. The Court noted only that the question before them was a challenge to the checkpoints generally and that detention of individuals in a more extensive way may require individualized suspicion (*Sitz*, p. 451). The checkpoint balancing test examines the nature of the state interest, the subjective and objective intrusion, and the degree that the seizure advances the public interest. The Court determined that the state interest in stopping drunk driving was great (*Sitz*, p. 451). The objective intrusion is measured by the duration and intensity of the investigation. The subjective intrusion is measured by what the law abiding citizen would sense in fear and surprise (*Sitz*, p.452). The Court looked for some evidence that the stops lead to arrests to determine if the stops advanced the public interest. The majority determined the intrusions minimal and found that two or three arrests out of 124 stops advanced the public interest (*Sitz*, p.455). The state courts had found that the programs were ineffective and that the subjective intrusion was great. The

program was invalidated. Justices Brennan and Marshall questioned the lack of individual suspicion requirement in the majority opinion (*Sitz*, p.457). They state that, “Some level of individualized suspicion is a core component of the protection of the Fourth Amendment against arbitrary government action (*Sitz*, p. 457).” They note that this case was different than the *U.S. v. Martinez-Fuerte* (1976) illegal immigrant checkpoint case because in that case, the flow of traffic made it impossible to allow a particularized study. In *Sitz*, police can observe impaired driving. The *Martinez-Fuerte* case had been the only case where the Court upheld suspicionless seizure upon the general public prior to *Sitz* (p. 458). Justices Stevens, Brennan, and Marshall discussed the difference in intrusion between permanent, fixed checkpoints with notice and random, unannounced investigatory seizures (*Sitz*, pp. 462, 463). They were concerned with broad discretion in determining when and where the roadblock could be conducted (*Sitz*, p. 464). These dissenters also remind us of important principles of most import in our fear-driven times when they cite the Justice Brandeis dissent in *Olmstead v United States* (1928) which was also cited by Justice Brennan in his opinion in *T.L.O.* that:

“Moved by whatever momentary evil has aroused their fears, officials --perhaps even supported by a majority of citizens—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of ‘the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.’ (*Sitz*, p. 458)”

People v. Bartley (1985) approved an Illinois sobriety checkpoint system that had extensive guidelines, was planned in advance, and was publicized beforehand. No probable cause or individualized suspicion is required where a roadblock stopped everyone, had set procedures and guidelines which bridled field discretion, were not roving patrols, and were designed to meet a compelling state interest. Reasonableness was determined by balancing the intrusion against the public interest. The intrusion concerned both subjective and objective considerations. The objective analysis looked at the duration and the physical circumstance. The subjective determination focused on psychological factors. The main concern here is to avoid unbridled field discretion such as seen in roving patrols. Key factors were that supervisors made judgments based on guidelines, the area was safe and well-lighted, every one was stopped, and there was advanced publicity. The Illinois court anticipated the *Sitz* decision and the balancing test.

People v. Pruitt (1996) is the only school metal detector case used in the CPS policy as support. The case involved students in the CPS and the 1992 policy discussed above. The court stated that the so-called policy “contains little in the way of standards for when and how the metal detector searches are to be conducted. It is virtually no policy at all (546).” CPS undertook a major revision after the *Pruitt* decision. Despite this policy failure, the court upheld the search and seizure of a gun from Pruitt based upon a random metal detector day at Fenger High School conducted by a swarm of forty uniformed Chicago Police officers (*Pruitt*, p. 544).

The court in *Pruitt* listed out principles for school searches which it said was instructed by three cases: *New Jersey v. T.L.O.* (1985), *Vernonia School District v. Acton* (1995) (allowed school to conduct random urinalysis for drugs of student-athletes citing special needs of public school context), and *People v. Dilworth* (1996) (approved search by school liaison officer of a flashlight based upon reasonable suspicion). The principles are:

The Fourth and Fourteenth Amendments apply to searches by public school officials.

Society recognizes public school student’s subjective expectancy of privacy as legitimate. (See Illinois statute below regarding expectancy of privacy in public schools)

State cannot compel attendance at schools and then conduct unreasonable searches of legitimate non-contraband items they carry

School officials cannot claim parent's immunity to justify search.

A lower standard for school searches is justified to protect and maintain a proper educational environment.

Legality of a student search is determined by whether it is reasonable under all the circumstances.

The search must be reasonable in its inception and reasonably related in scope to the reason that justified search.

A search is justified at inception when there are reasonable grounds for suspecting the search will turn up evidence that the student has violated or is violating the law or rules of the school.

A search's scope is justified when measures adopted are reasonably related to the objectives and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. The state's power over schoolchildren permits a degree of supervision and control that could not be exercised over free adults.

Special needs exist in the public school context that makes the probable cause and warrant requirements impracticable.

The test to determine whether special needs exist requires a balance of competing interests of the individual and the state. The factors are: the nature of the privacy interest, the character of the intrusion as minimal or significant, and the nature and immediacy of the governmental concern.

A liaison police officer is in the same position as a school official for Fourth Amendment purposes.

By analogy to the other "administrative search" cases, individual suspicion is not required for a metal detector screening directed and controlled by school officials for the purpose of protecting and maintaining a proper educational environment for all students, not to investigate and secure evidence of a crime, and where all students walked through and no official discretion or opportunity to harass was

involved. The unanswered question of T.L.O. is answered: individual suspicion is not an essential requirement for an "administrative search".

The court found that the screening was justified in its inception based upon the "reality of violence in the schools (p. 547)." It had rejected the specific act of violence proffered by the school as too remote, yet accepted "what everybody else knows: violence and the threat of violence are present in public schools (p. 546)." So much for Brandeis' advocacy of the courts as standing against the majority roused by whatever momentary evil creates fear.

The CPS policy also bases its authority on a state statute that authorizes schools to search places and areas owned or controlled by the school in order to maintain order and security (105 Ill. Comp. Stat. 5/10-22.6(e), 2004). Officials are authorized to search personal effects left in such places without notice or consent of the student. The legislature declares as a matter of public policy that students have no reasonable expectation of privacy in such places and areas. Disciplinary action is authorized. Evidence may be turned over to the police. We are reminded of what a federal court said in *Jones v. Latexo* (1980), "But the mere announcement by officials that individual rights are about to be infringed upon cannot justify the subsequent infringement."

This section has shown the development of the law on which the CPS policy is based. Early cases exhibited the court's concerns with the use of law enforcement officers in schools and with a need for some particular evidence of concern either for a particular school or a particular individual. Recent developments base suspicion-less searches on the violence or drug problem in schools generally. Schools have special needs outside of law enforcement to justify checkpoint type searches similar to automobile checkpoints. David Hume warned, "It is seldom that liberty of any kinds is lost all at once (Quotes about Liberty)." Edmund Burke in a letter to the sheriffs of Bristol proclaimed, "The true danger is when liberty is nibbled away, for expedience, and by parts (Quotes about Liberty)."

Schooling as a Roadblock: Is attending school really like driving a car?

The United States Supreme Court has not ruled directly on the use of metal detectors in public schools. Two of the four cases cited in the CPS policy concern automobile sobriety roadblocks. Metaphor is an important policy tool (Bardach, 2000, pp. 14,16). However, when our most fundamental rights are at stake, we must consider the

accuracy of the metaphor.

Driving an automobile in Illinois is a privilege (*People v. Turner*, 1976). No one is forced to drive. Driving is reserved for those of significant age and ability (625 Ill. Comp. Stat. 5/6-103, 2004). Children between the age of seven and sixteen must attend school (105 Ill. Comp. Stat. 5/26-1, 2004). The state does not force people to drive or tell them where to drive. The state compels schooling in the district where the student resides unless the student is capable of paying for private schooling. The great number of children must attend the designated school. “Thus, there is a critical difference between one who, as a condition of a freely elected choice, consents to be searched, and one who is forced to be searched as a condition to something not freely chosen (Ferraraccio, 1999, p. 225). This argument also applies to the airport and courthouse metaphors. Adults can choose to travel many ways. No one is compelled to enter the courthouse except under some judicial order.

The automobile roadblock cases involve a stop of the driver, a short conversation with a police officer, and production of a driver’s license. Courts have found that this is minimally intrusive. Courts have noted that metal detector searches are similarly minimally intrusive. The duration is short. Students must merely walk through the detector. Subjective intrusion is reduced by signs posted outside and guidelines and procedures that limit discretion in who gets searched. This focus on the method of search fails to examine the nature of the information revealed. True consideration of intrusiveness asks what the search reveals (Ferraraccio, 1999, p. 225). Wiretaps and electronic surveillance cause no intrusion if we simply examine the objective and subjective elements the courts use in roadblock cases. The person is not detained at all and since they do not know of the surveillance, have no fear. Yet such searches are protected under the Fourth Amendment (*Katz v. U.S.*, 1957). Metal detectors indiscriminately activate with any metal object. Once activated, CPS students are patted down. This pat down search may reveal contents far beyond the justification for the initial search for weapons. As the cases show, school officials and police are not likely to ignore non-weapon contraband turned up as a result of the search. Courts are not protecting the students since the search was within the scope of the original justification. Thus, a coin mistakenly left in a pocket or a metal button on clothing can cause a student to be patted down. A coin in the automobile driver’s pocket or a metal button on their clothing does not subject them to a pat down search.

The United States Supreme Court invalidated an automobile roadblock in *City of Indianapolis v. Edmond* (2000; hereafter *Edmond*). The roadblocks were established to stop the flow of illegal drugs. The court held that since this purpose is indistinguishable from a general interest in crime control, the searches were unreasonable and violated the fourth Amendment. The Court did not allow the severe and intractable nature of the drug problem to determine whether individualized suspicion is necessary. The mere secondary purpose of highway safety is a ruse that would allow all sorts of checkpoints without any limits. The Court is charged with looking at the primary purpose. The Court noted that exceptions to individualized suspicion have been approved only where there are special needs beyond law enforcement (p.37 citing *Vernonia*, 1995) or in certain administrative situations where appropriate limits were in place (p.37 citing *Martinez-Fuerte* 1976, *Sitz* 1990).

Edmond (2000) should cause concern for a CPS policy based upon automobile roadblock cases. The CPS policy’s purpose is to insure a proper educational environment. The policy authorizes school officials to seize any contraband revealed through searches (Chicago Public Schools Manual, section 409.3 Introduction). The Chicago Police Department **must** be called if a weapon is found (409.3 IV). Children are being charged with various crimes arising from the search by schools. Metal detectors search for weapons. If something sets the alarm off, a pat down may reveal a bulge. The bulge may be caused by many things including illegal drugs. Mere possession of drugs is hardly an immediate threat of violence against the school or students therein. While it may be appropriate for the school to discipline the student in light of the special control the school has over students and the non-adversarial relationship between educator and student, it does not follow that criminal charges should be supported from a search to find weapons which do pose a threat directly to the school and the students and were the direct reason for the

metal detector. A strong argument could be made that these metal detector screenings are nothing more than general law enforcement roadblocks. The courts have failed to recognize the difference between school sanctions and law enforcement actions in the school context or the difference between other contraband and weapons. The Eighth Circuit Court of Appeals recognized the difference in *Thompson v. Carthage* (1996) when it ruled the exclusionary rule did not apply to expulsion hearing. Schools are special places charged with educating future citizens.

Special Needs

Pruitt (1996) case is right in line with the trends of the Supreme Court. *Pruitt* relied on what everyone knows: schools are violent (546). Thus, the suspicion to justify search has moved from some students are bad to all students are bad; from individualized suspicion to general suspicion of youth. The United States Supreme Court has gone from reliance on some immediate school concerns and problems in *Vernonia v. Acton* (1995) to requiring no showing of a violence or weapon problem in *Board of Education v. Earls* (2002). In essence, schools are special places and since drugs and violence are ravaging our nation, especially the public schools, the state has an interest that trumps the need of individuals. Of course, all of this is done to create a proper educational environment.

Our youth are seen as bad. “Children are being treated like criminals although they have committed no crime (Daviduke, 2001, p. 6).” Metal detectors send the message to students that their schools and fellow students are dangerous (Ferraraccio, 1999, p.228). We must wonder whether students living in fear can learn (Daviduke, p. 5). The effective deputization of school staff leads to alienation between students and teachers (Daviduke, p.4).

All of our children have the special needs to be loved and respected. We must show them how to be good people and good citizens. We should show them that mass hysteria is no reason for vitiating important individual rights. People have been lead to believe that school violence is growing and rampant. This is contrary to the evidence. Metal detectors and other oppressive methods fall especially hard on the poor and students of color. We must ask, “What are we teaching or children?”

The Policy: Conclusion

The CPS policy on metal detectors was drafted in response to the *Pruitt* case. The purpose of maintaining a proper educational environment by protecting students from violence is what the courts say justifies a lower standard than the probable cause and warrant requirements of the Fourth Amendment. Schools have special needs beyond normal law enforcement to insure a safe learning environment. The CPS policy provides notice and has guidelines to restrict discretion of field officials so that students are not arbitrarily singled out. The search is justified in its inception because of the need to prevent weapons from entering the school and since schools are violent places, such a search will likely turn up weapons. The metal detector is designed to detect weapons and simply requires a walk-through by the student. The state needs to immediately stop violence. Thus, the balance weighs in favor of the state. The CPS policy should pass legal muster despite possible concerns discussed above about the automobile analogy among others.

However, just because we can do something doesn't mean we should. Our schools are indeed special places. They may either incubate democracy or totalitarianism. Are we preparing future citizens with such a lowered expectancy of privacy that the government may simply do as they please? We should remember the words of Justice Stevens, dissenting in *TLO*:

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they

take with them in life. One of the most cherished ideals is the one contained in the Fourth Amendment: that government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstances (pp. 385-6).

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Simpson: The Most Special Need of All
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