

January 2011

## Constitutional Rights of a Student: "Strip-Searched"

Amy J. Sluszka

Follow this and additional works at: <http://scholarship.law.umassd.edu/umlr>

---

### Recommended Citation

Sluszka, Amy J. (2011) "Constitutional Rights of a Student: "Strip-Searched"," *University of Massachusetts Law Review*: Vol. 6: Iss. 1, Article 7.

Available at: <http://scholarship.law.umassd.edu/umlr/vol6/iss1/7>

This Note is brought to you for free and open access by Scholarship Repository @ University of Massachusetts School of Law. It has been accepted for inclusion in University of Massachusetts Law Review by an authorized administrator of Scholarship Repository @ University of Massachusetts School of Law.

## CONSTITUTIONAL RIGHTS OF A STUDENT: “STRIP-SEARCHED”

---

AMY J. SLUSZKA, ESQ.\*

### I. INTRODUCTION

Over the last two decades, school children across the country have become victims of violence at the hands of their own classmates. On April 20, 1999 in Columbine, Colorado, twelve high school students and one teacher were shot and killed when two other students (Eric Harris and Dylan Klebold) brought semi-automatic weapons to school. Similar episodes have resulted in innocent children losing their lives in a very gruesome and merciless way. Instigated by fear, parents and school officials have demanded that something be done to ensure a safe environment where children can learn and prosper.

Although this fear and demand for change are justified, the actions of the school officials in the case of a strip search of a young girl were not.<sup>1</sup> On October 8, 2003 school officials asked a thirteen-year-old girl (Redding) to strip down to her underwear.<sup>2</sup> She was then asked to pull her underwear away from her body to expose her breasts and pelvic area so that the school officials could see if she was concealing prescription strength ibuprofen (a tip they had received from another student).<sup>3</sup> When this search revealed nothing but her naked young body, she was allowed to dress and return to class.<sup>4</sup>

---

\* Graduate of the Southern New England School of Law, 2010, North Dartmouth, MA and member of the CT and MA Bars.

<sup>1</sup> See *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009).

<sup>2</sup> *Id.* at 2635.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Schools are given the difficult responsibility of balancing a student's legitimate expectation of privacy against the school's need to maintain safety and order. Deferring to the school officials' discretion is beneficial because when danger to the other students is imminent (such as in the case of Columbine), a swift course of action is imperative. However, granting schools *carte blanche* to search a child's body is unreasonable.

In 1985, in *New Jersey v. T.L.O.*, the United States Supreme Court established precedent with regard to searches of students in schools.<sup>5</sup> In the case of *T.L.O.*, the school officials searched a female student's purse looking to find cigarettes or other smoking paraphernalia.<sup>6</sup> In 2009, the Court was again asked to look at the constitutionality of searches of students in *Safford Unified School District v. Redding*.<sup>7</sup> But, in *Redding*, the search went much further while the item sought could arguably be considered no more harmful than a cigarette.<sup>8</sup> While in contrast to *T.L.O.*,<sup>9</sup> the Supreme Court found in *Redding* that the search was unreasonable.<sup>10</sup> But even in *Redding*, it would not go so far as to punish the school officials who conducted the search.<sup>11</sup> Perhaps the Court granted immunity because it did not want to create an environment where school officials are afraid to do their jobs, and thus adding to the problem of safety in schools. But, without fear of liability, will school officials continue to go too far? The strip search endured by Redding has forced society and the Supreme Court to once again look at the constitution as applied to children in schools. How can we teach lessons and instill morals in schools if they are unsafe? How can we make children accountable for their actions without violating their rights?

---

<sup>5</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>6</sup> *Id.*

<sup>7</sup> *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009).

<sup>8</sup> *Id.* at 2635.

<sup>9</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>10</sup> *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633, 2635, 2643 (2009).

<sup>11</sup> *Id.* at 2633.

## II. THE FOURTH AMENDMENT

The Fourth Amendment provides that “the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”<sup>12</sup> An individual’s Fourth Amendment rights inherent in the Constitution are not to be taken lightly. Specifically, the Fourth Amendment protects people, not places.<sup>13</sup> Here, the “people” are students.

Case law has clearly established the application of the Fourth Amendment with regard to police officers.<sup>14</sup> But, in 1985 the Supreme Court of the United States established the application of the Fourth Amendment with regard to searches of students in public schools conducted by school officials.<sup>15</sup> The Fourth Amendment’s prohibition of unreasonable searches and seizures applies to searches conducted by public school officials, and thus is not limited to searches carried out by law enforcement officers.<sup>16</sup>

The decision in *T.L.O.* changed the Court’s prior view that school officials act *in loco parentis* (in place of the parent) but instead “. . . act as representatives of the State . . . .” when carrying out searches.<sup>17</sup> School officials, therefore, “. . . cannot claim parents’ immunity from the Fourth Amendment’s strictures.”<sup>18</sup> For practical reasons, school officials are not required to obtain a warrant before searching a student, nor do they need probable cause to conduct a search.<sup>19</sup> The reason for this distinction from law enforcement is because the safety of the rest of the children is imminent and obtaining a warrant can mean a lengthy judicial process. Thus, the complication is defining the line between protecting school children as a whole and respecting the rights of an individual child.

---

<sup>12</sup> U.S. CONST. amend. IV.

<sup>13</sup> *Katz v. United States*, 389 U.S. 347, 353 (1967).

<sup>14</sup> *See Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>15</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 326.

It is well established that students do not “shed their constitutional rights . . . at the schoolhouse gate.”<sup>20</sup> The United States Supreme Court has held that protection is applicable to searches and seizures conducted by state actors, including public school officials, via the Fourteenth Amendment.<sup>21</sup> Reasonableness is the touchstone in any assessment of the constitutionality of a search or seizure, and while, in most cases, reasonableness demands a warrant and a showing of probable cause, such is not necessarily the case in the public school context.<sup>22</sup>

### III. THE UNITED STATES SUPREME COURT: *NEW JERSEY V. T.L.O.*

*T.L.O.*, provided that “the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search . . . and should not be excessively intrusive in light of the student’s age and sex and nature of the infraction.”<sup>23</sup> One can deduce that the Court established a 2-prong test for determining the constitutionality of a search of a student’s person or belongings: (1) the search must be reasonable; and (2) the search must not be excessively intrusive taking into consideration the age, sex, and violation committed by the student.<sup>24</sup> As is required by law enforcement conducting a search, the search by the school official must be reasonable at its inception and reasonable in its scope.<sup>25</sup>

A search will be deemed reasonable at its inception if there are reasonable grounds for the school official to suspect that the search will reveal evidence that the student either has or will violate the law or rules of the school.<sup>26</sup> In *Redding*, the

---

<sup>20</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>21</sup> *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652 (1995).

<sup>22</sup> *Bd. of Educ. of Indep. Sch. Dist. v. Earls*, 536 U.S. 822, 828 (2002).

<sup>23</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 337–42 (1985).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 326.

ground for the inception of the search was a tip from another student.<sup>27</sup> To be reasonable in its scope, the means of the search must be “. . . reasonably related to the objectives of the search . . .” while also taking into account the “. . . age and sex [of the student] . . .,” as well as the suspected violation.<sup>28</sup> Here, the threshold of evidence is not probable cause, but only reasonable suspicion.<sup>29</sup> In *T.L.O.*, the Court sets forth a step-by-step analysis of the reasonableness of the search conducted by the school official.<sup>30</sup>

The reasonableness was tested at the inception of the search, the manner in which the search was conducted, and the further search into the student’s purse once the original evidence was revealed.<sup>31</sup> Here, the principal was informed by another school official that two students had been smoking in the lavatory in violation of the school ban.<sup>32</sup> One could argue that that the tip in this case is presumably reliable since it was given by another school official and not by another student or anonymous source, as was the case in *Redding*.<sup>33</sup>

Before the principal commenced the search, the student was questioned about her involvement with the alleged violation (smoking cigarettes in the lavatory in violation of school rules).<sup>34</sup> Next, the principal looked into the student’s purse where he found cigarettes and rolling papers.<sup>35</sup> The presence of the rolling papers reasonably led the principal to believe that there may be other drug paraphernalia in the student’s purse.<sup>36</sup> A further, more thorough, search of the purse confirmed his suspicion.<sup>37</sup> During a search, reasonableness must be present on a continuum; from its inception to conclusion and at every step therein.<sup>38</sup> From the

---

<sup>27</sup> *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009).

<sup>28</sup> *T.L.O.*, 496 U.S. at 326.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009).

<sup>34</sup> *T.L.O.*, 469 U.S. at 328.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 330.

Court's analysis, one can deduce that suspicion deemed reasonable to search a student's locker may not be reasonable to warrant the search of a student's clothing or unclothed body.

Only after careful consideration, did the Court find that the search in *T.L.O.* was not a violation of the student's constitutional rights.<sup>39</sup> This landmark case stressed the importance of a student's constitutional rights while also establishing a standard by which school officials can abide and still maintain order and safety in the school:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.<sup>40</sup>

#### *A. The "Reasonableness" Standard*

If *T.L.O.* did not establish a clear, bright-line rule for which school officials to abide by, then *Redding* did not make it any clearer. Determining "reasonableness" is a challenge that lawyers and judges face every day, so it is no wonder that the standard is also confusing to school officials. By the very nature of their positions as caretakers and educators of

---

<sup>39</sup> *Id.* at 326.

<sup>40</sup> *T.L.O.*, 469 U.S. at 334 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

children, the standard to which they are held with regard to the Fourth Amendment is already somewhat relaxed.<sup>41</sup>

In almost every area of the law, we are held to a standard of “reasonableness” in a given situation. In tort, the standard of reasonableness is whether or not a “reasonable person” would have acted the same under the circumstances. In order to calculate damages for a breach of contract, the court must look to see if the injured party “reasonably relied” on the contract. If a criminal defendant wants to use self-defense as an affirmative defense, he must prove that he used “reasonable force.” And, if an attorney wants to avoid disbarment, she must act as a “reasonable attorney.” We are even afforded beyond a “reasonable” doubt as burden of proof.

When the law finds an action to be unreasonable for one purpose, it may not be for another. For example, in *Redding*, the Court held that the search of Redding was unreasonable for Fourth Amendment purposes, but it found that the school officials’ actions were not unreasonable enough to subject them to liability.<sup>42</sup> It is alarming that the decision in *Redding* turned on the *object* of the search and not the *type* of search. By virtue of its decision in *Redding*, the Supreme Court tells us that a strip search of high school student is *not* inherently unreasonable.<sup>43</sup>

### B. *Qualified Immunity in Redding*

In *Redding*, the Supreme Court reasoned that the lower court’s inconsistent interpretation of *T.L.O.* warranted qualified immunity for the school officials.<sup>44</sup> The Court ultimately held that the potential dangers of a prescription strength ibuprofen do not give rise to warrant a strip search of a student.<sup>45</sup> To the author, this is just common sense. But, by granting the school officials immunity from civil liability,

---

<sup>41</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 326 (1985).

<sup>42</sup> *See Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009).

<sup>43</sup> *Id.*

<sup>44</sup> *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633, 2643 (2009).

<sup>45</sup> *Id.* at 2642.

one could argue that the Court is stating that this is not common sense to a “reasonable person” (as defined by the law).

From the standpoint of a parent whose child has been the subject of a strip search, this outcome must be incomprehensible and incite nothing but disappointment and frustration. After exhausting all of the resources at the school, the parent looks to the Court for justice and, yet, they find none. After *Redding*, it is clear that the matter remains unresolved. There is still no bright-line law that if violated, will subject school officials to legal liability and civil damages.

The Court grants qualified immunity when the individual does not have reason to know his or her actions would subject him or her to liability under the law. The trouble with this is that the circumstances surrounding the search will never be exactly the same. Does this mean that the school officials should always be granted immunity?

#### IV. THE SIXTH CIRCUIT

The case of *Williams v. Ellington* is most factually similar to *Redding*.<sup>46</sup> In *Williams*, a female high school student was suspected of possessing drugs, and this suspicion ultimately lead to a strip search.<sup>47</sup> In *Williams*, the student produced the contraband when confronted by school officials regarding a tip from another student.<sup>48</sup> However, the school officials were not satisfied because “. . . the brown vial [produced] did not match the description given by [the other student].”<sup>49</sup> Their dissatisfaction lead to a search of the girl’s locker and purse.<sup>50</sup> When the search revealed no drugs, the student was then asked to take of her shirt, pull her pants down to her knees, and remove her shoes and socks.<sup>51</sup> No drugs were found. The court granted the school officials qualified

---

<sup>46</sup> See *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991).

<sup>47</sup> *Id.*

<sup>48</sup> *Williams v. Ellington*, 963 F.2d 881, 883 (6th Cir. 1991).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

immunity and held that the search was reasonable as set forth by *New Jersey v. T.L.O.*<sup>52</sup> The Sixth Circuit's interpretation of *T.L.O.* is misguided.<sup>53</sup> In *T.L.O.*, the student being searched initially denied the infraction.<sup>54</sup> But in *Williams*, the student produced a small vial of "rush" (the white powdery substance that had been seen by the tipster).<sup>55</sup> In *T.L.O.*, the inception of the search of the student's purse was reasonable because the school official had reasonable suspicion that the search would reveal evidence of wrongdoing.<sup>56</sup> In *Williams*, the student voluntarily produced evidence of wrongdoing, but was still subjected to a search.<sup>57</sup> In *Williams*, the court used the voluntary production of the "rush" as the basis for the search,<sup>58</sup> but if the court had followed the standard set forth in *T.L.O.*, the search would never have commenced.<sup>59</sup>

In *Williams*, the court refers to the reasonableness of the extended search into the zippered pocket of the student's purse in *T.L.O.*, and uses this example to justify the extended search into the student's locker, pockets, clothing, and undergarments.<sup>60</sup> The court incorrectly drew a nexus between the search of a zippered pocket in a purse and a student's unclothed body.<sup>61</sup>

When no new evidence was found at each stage of the search, reasonable suspicion was no longer present. The fact that the school officials extended the search into more and more intrusive areas is unreasonable. Perhaps, if the student had not turned over the vial, a search would have ensued and once the vial was found the school officials would have stopped.

---

<sup>52</sup> *Id.* at 886.

<sup>53</sup> *See* *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>54</sup> *Id.* at 328.

<sup>55</sup> *Williams v. Ellington*, 936 F.2d 881, 887 (6th Cir. 1991)

(explaining that "rush" is a legal substance, the inhalation of which is illegal).

<sup>56</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>57</sup> *Williams*, 936 F.2d at 887.

<sup>58</sup> *Id.*

<sup>59</sup> *See* *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>60</sup> *Id.*

<sup>61</sup> *Williams*, 936 F.2d at 887.

The Sixth Circuit determined, based on its understanding of *T.L.O.*, that the “[school officials] were not unreasonable, in light of the item sought . . . in conducting a search so personally intrusive in nature.”<sup>62</sup> Because of *Redding*, society now knows just how wrong the Sixth Circuit’s reasoning was.<sup>63</sup> In *Redding*, at the very least, the Court held that the strip search of the student was unconstitutional based on what the school officials were searching for (prescription strength ibuprofen):<sup>64</sup>

Because the suspected facts pointing to Savana did not indicate that the drugs presented a danger to the students or were concealed in her underwear, [the school official] did not have sufficient suspicion to warrant extending the search to the point of making Savana pull out her underwear.<sup>65</sup>

In contrast, the Sixth Circuit relied on the following interpretation of *T.L.O.* for its rationale and holding that the school officials were entitled to qualified immunity and the search of the student was reasonable:

A thorough review of *T.L.O.* reveals that the Court was careful to protect a school official’s right to make discretionary decisions in light of the knowledge and experience of the educator and the information presented to him or her at the time such decision was made. Like police officers, school officials need discretionary authority to function with great efficiency and speed in certain situations, so long as these decisions are consistent with certain constitutional safeguards. To question an official’s every decision with the benefit of

---

<sup>62</sup> *Id.*

<sup>63</sup> *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2636.

hindsight would undermine the authority necessary to ensure the safety and order of our schools.<sup>66</sup>

While the court correctly states the standard established by *T.L.O.*, it applies it too liberally to the facts at hand.<sup>67</sup>

In 2005, the United States Court of Appeals for the Sixth Circuit was faced with yet another case involving the strip search of students.<sup>68</sup> In *Beard v. Whitmore Lake School District* more than twenty students (both male and female) were searched because another student's "prom money" that was allegedly stolen during a gym class.<sup>69</sup> Here, the court held that the search was unreasonable because ". . . a search undertaken to find money serves a less weighty governmental interest than a search undertaken for items that pose a threat to the health or safety of students, such as drugs or weapons."<sup>70</sup> Although the court held that the searches were unreasonable and unconstitutional it still granted the school officials qualified immunity. It held that "[t]he law, at the time the searches were conducted, did not clearly establish that the searches were unreasonable under the particular circumstances in [the] present case."<sup>71</sup>

## V. THE ELEVENTH CIRCUIT

The Eleventh Circuit was faced with the issue of strip searches in *Thomas v. Roberts*.<sup>72</sup> Here, the court held that the searches were unreasonable because they were conducted without "individualized suspicion."<sup>73</sup> In this case, the entire

---

<sup>66</sup> *Williams v. Ellington*, 936 F.2d 881, 886 (6th Cir. 1991).

<sup>67</sup> *See generally Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009).

<sup>68</sup> *See Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005).

<sup>69</sup> *Id.* at 601.

<sup>70</sup> *Id.* at 605.

<sup>71</sup> *Id.* at 606.

<sup>72</sup> *Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003).

<sup>73</sup> *Id.* at 951.

fifth grade class was searched for a missing twenty-six dollars.<sup>74</sup>

The children were taken to their respective restrooms in groups of four or five and were asked to pull down their pants and lift up their shirts.<sup>75</sup> “Officer Billingslea, a male, searched the boys: as each boy dropped his pants, [he] visually inspected the boys’ underwear to ensure that the money was not inside.”<sup>76</sup> And, “[m]ost of the girls were asked to lift their bras and expose their breasts to ensure that the money was not hidden under their bras.”<sup>77</sup>

In this case, the court cites the lack of assistance provided by the Supreme Court’s decision in *T.L.O.*:

[T]he *T.L.O.* Court made no “attempt to establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different” from those presented by the facts of the *T.L.O.* case. *T.L.O.* made clear only that a search of a high school student’s purse for cigarettes is reasonable if the student was accused of smoking and then denied the allegation.<sup>78</sup>

This reasoning is what society should fear. Because even though the Supreme Court set precedent in *Redding*<sup>79</sup> with regard to strip searches in schools, it’s the lower court’s subsequent interpretation that can harm children going forward. Although many would argue once again that common sense should have kept these strip searches from occurring, the court in *Thomas* argues otherwise.<sup>80</sup> In determining whether or not the school officials are eligible for qualified immunity, the court goes on to state that:

---

<sup>74</sup> *Id.* at 952.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Thomas*, 323 F.3d at 954 (citing *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 828 (11th Cir. 1997) (*en banc*)).

<sup>79</sup> *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009).

<sup>80</sup> *Thomas v. Roberts*, 323 F.3d 950, 954 (11th Cir. 2003).

If the salient question is whether *T.L.O.* gave the [school officials] “fair warning” that a “strip search” of an elementary school class for missing money would be unconstitutional, then the answer must be “no.” *T.L.O.*’s balancing test will, in most instances, call for school officials to speculate as to whether a court applying the balancing test to specific facts would find a search unreasonable.<sup>81</sup>

If school officials are left to use their own discretion when considering the appropriate circumstances to search a student, then what is reasonable? It is unclear how any school official’s discretion could lead them to the understanding that it is reasonable to strip search a fifth-grade child for twenty-six dollars. But the court disagrees.<sup>82</sup> It found that the school official’s actions were not so egregious as to “fall within the slender category of cases in which unlawfulness of the conduct is so obviously at the core of what the Fourth Amendment prohibits that clarifying case-law is unnecessary.”<sup>83</sup>

## VI. A CLOSER LOOK AT QUALIFIED IMMUNITY

In 1975, the Supreme Court set forth the immunity standards for school officials in *Wood v. Strickland*.<sup>84</sup> In *Wood*, the Court held that

. . . school officials are entitled to a qualified good-faith immunity from liability for damages under [the Civil Rights Act however] they are not immune from such liability if they knew or reasonably should have known that the action they took within their sphere of

---

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 953 (citing *United States v. Lanier*, 520 U.S. 259 (1997); *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997)).

<sup>83</sup> *Id.*

<sup>84</sup> *Wood v. Strickland*, 420 U.S. 308 (1975).

official responsibility would violate the constitutional rights of the student affected . . .

<sup>85</sup>

This qualified immunity from a suit for damages is afforded to school officials pursuant to 42 U.S.C. § 1983. The court further stated that “the Civil Rights Act is not intended to be a vehicle for federal court correction of errors in the exercise of school officials’ discretion that do not rise to the level of violations of specific constitutional guarantees.”<sup>86</sup>

In reaching its conclusion, the Court makes it a point to ensure that a student’s constitutional rights are not forgotten, asserting “[t]hat absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.”<sup>87</sup> It deems that the school official’s so-called good faith is to be tested both subjectively and objectively.<sup>88</sup> The school official must “be acting sincerely and with a belief that he is doing right.”<sup>89</sup> Objectively, the school official, “. . . who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges.”<sup>90</sup>

The position of a school official requires a level of education and common sense, along with a sensitivity and awareness of the impressionable mind of a young student. It requires the individual to remember not only the power of an academic education, but also the powerful scar that can be left on a child from a different kind of education. The great responsibility of maintaining a safe and healthy environment

---

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 320.

<sup>88</sup> *Id.* at 321.

<sup>89</sup> *Id.*

<sup>90</sup> *Wood v. Strickland*, 420 U.S. 308, 322 (1975).

for children to learn must somehow be balanced by the importance of civility.

It is reasonable to grant school officials some degree of deference to determine what steps need to be taken in order to maintain a safe and healthy environment for learning, but not at the cost of subjecting children to strip searches. With the freedom the courts have allowed thus far, using their discretion, school officials have deemed it reasonable to strip search a student for the following reasons:

- (1) Alleged wrongdoing based upon information provided by another student;<sup>91</sup>
- (2) Missing twenty-six dollars;<sup>92</sup>
- (3) Missing a couple of hundred dollars;<sup>93</sup>
- (4) Prescription strength ibuprofen;<sup>94</sup>
- (5) Cocaine.<sup>95</sup>

In each one of these instances, the search was found to be unreasonable, but the school officials were all granted immunity from civil damages. In looking at each set of these facts, common sense tells us that the actions of the school officials were wrong. But yet, we do not hold them accountable for their actions simply because of this notion that the law was unclear and they could not have reasonably known that what they were doing was unconstitutional.

Apart from the constitutional argument, it is hard to understand how an educated person in today's society would not know that to strip search a child is wrong. In none of these cases were the parents even notified that their child would be the subject of a strip search. Aren't criminals afforded more rights than this. Does society need to start teaching children that they have a right to a phone call and an

---

<sup>91</sup> See *Williams v. Ellington*, 936 F.2d 881, 886 (6th Cir. 1991); see also *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009).

<sup>92</sup> See *Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003).

<sup>93</sup> See *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005).

<sup>94</sup> See *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009).

<sup>95</sup> See *Williams*, 936 F.2d at 886.

attorney before they comply what their teacher is asking of them?

## VII. CONCLUSION

According to the United States Supreme Court, its decision in *T.L.O.* did not create a clearly established rule of law with regard to strip searches by school officials of students in public schools.<sup>96</sup> Unfortunately because of this, there are a number of children who have undergone highly intrusive searches that have subsequently been found to be unconstitutional.<sup>97</sup> Although *T.L.O.* set forth the two-prong test for a reasonable search of a student, it did not keep students from being searched unreasonably and in violation of their constitutional rights.<sup>98</sup> As a result, school officials across the country have enjoyed complete deference to their discretion, as well as immunity from liability.<sup>99</sup>

As of June 2009, the Supreme Court established precedent by virtue of its decision in *Redding*,<sup>100</sup> but unfortunately, past cases reveal that unless the circumstances are exactly on point, school officials will not be subject to liability for a strip search.<sup>101</sup> There will always be an argument in favor of qualified immunity when circumstances of a case do not match precisely with a precedent.

It is foreseeable that strip searches in schools are not over, and it is the author's fear that until the courts are willing to pierce through the veil of qualified immunity for school officials, there will be no change. Perhaps parents can serve their children best by educating them of their constitutional rights and teaching them that it is ok to say "no" when a teacher asks them to take off their clothes. At this juncture, it is unclear whether or not the decision in *Redding* will expose school officials to liability in the future (unless of course, it is

---

<sup>96</sup> See *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009).

<sup>97</sup> See, e.g., *supra* sections III–IV.

<sup>98</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>99</sup> See, e.g., *Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003).

<sup>100</sup> See *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009).

<sup>101</sup> See, e.g., *supra* sections III–IV.

a case involving a strip search of a student for prescription strength ibuprofen).