The Quantum Leap: From a Backpack Search to a Strip Search. The Supreme Court Decides, *Safford Unified School District #1 v. Redding*

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June 2009

Parents, educators, and community members want and expect that their public schools will be safe places for children. Public schools are also places where students carry their constitutional rights with them inside the schoolhouse gate. Therein is the challenge for educators: the school must provide an environment that is conducive to and safe for learning and students have the rights of free speech,[1] due process,[2] and the right to be free from unreasonable search and seizure.[3] Public schools must serve both of these ends.[4] On June 25, 2009, the United States Supreme Court handed down a decision in *Safford Unified School District #1 v. Redding*,[5] that helps to define that balance. On one side is the student's legitimate expectations of privacy and security; on the other side is the substantial interest of teachers and administrators to maintain discipline in the school.

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[1] *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).
[2] *Goss v. Lopez*, 419 U.S. 565 (1975).
[3] *New Jersey v. T.L.O.*, 469 U.S. 325 (1985
[4] Public schools "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" (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)).
[5] 557 U.S. _____ (2009).

In this case a student reported to the assistant principal that certain students were bringing drugs and weapons to school. A week later the same male student gave the assistant principal a white pill and said that Marissa Glines had given it to him. The white pill was a prescription strength 400mg Ibuprofen used for pain relief. The assistant principal removed Marissa from class. When Marissa's planner was searched a couple of small knives, a cigarette lighter and a cigarette were found. No pills were found in the planner. A subsequent search of Marissa's pockets in his office discovered four more white prescription strength Ibuprofen pills and a blue 200mg Naprosyn. The assistant principal asked where she got the blue pill to which Marissa replied "It must have slipped in when she gave me the IBU 400s." When asked "who she is", Marissa said Savannah Redding an honors student who was one of her friends. Possession of over-the-counter medication and/or prescriptions medication is banned unless prior permission has been secured.

The assistant principal called Savana to his office. She admitted that the day planner, which was setting on his desk was hers but that the small knives and cigarette lighter and cigarette were not hers. She had lent the planner to Marissa. When asked about the pills Savana denied having them or knowing about them. She agreed to a search. A search of her backpack and her outer clothing turned up empty, no pills. Next Savannah was taken to the nurse's office where two females directed Savana to disrobe to her bra and underwear. No pills were found. Savana was next directed to pull her bra out at the side, shake it, and to pull out her underwear at the crotch and to shake it. Again, no drugs were found.

The Fourth Amendment and the Public School

Search and seizure, a Fourth Amendment protection, in public schools is governed by the Supreme Court decision *New Jersey v. T.L.O.*[6] The High Court held that students' have a constitutional right to be free from unreasonable search and seizure but given the special nature of the public school that right was less than for a citizen who was not a student. Rather than probable cause as a basis for a search, school officials need only show that the search of student was based on reasonable suspicion a lower standard than probable cause. The Court fashioned a two-part test to ascertain if reasonable suspicion was established. First, the search must be justified at its inception and second the search will be permissible in its scope when the search measures are related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[7]

The Supreme Court in the *Safford* case followed the precedent of *New Jersey v. T.L.O.* and did not alter the basic structure of the two-pronged test of inception and scope nor the basic trigger of reasonable suspicion for educators and not the higher probable cause standard required of the police. Justice Stevens joined by Justice Ginsburg, describes the case thusly, "This is, in essence, a case in which clearly established law meets clearly outrageous conduct."[8] The High Court, however, did add depth to the

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[6] 469 U.S. 325 (1985).
[7] *Id*. at 342.
[8] *Safford Unified School District #1 v. Redding*, 557 U.S. _____ (2009), *slip op*. at 1 (Opinion of Stevens, J.)

quality of what is necessary as the scope of the search expands, especially when the search expands to the intrusiveness of a strip search.

The Supreme Court had two issues before it. First, was the strip search of Savana Redding constitutional and second whether the school officials who ordered and conducted the strip search were entitled to qualified immunity from liability.

Justice Souter delivered the opinion of the Court joined by Chief Justice Roberts, and Justices Scalia, Kennedy, Breyer, and Alito. The majority found that the search was unconstitutional. Justices Stevens and Ginsburg concurred in the judgment about the unconstitutionality of the search. Justice Thomas dissented characterizing the majority opinion as a "deep intrusion into the administration of public schools exemplifies why the Court should return to the common-law doctrine of *in loco parentis* . . . allowing schools and teachers to set and enforce rules and to maintain order."[9]

The majority also held that there was enough of a difference in judicial opinions to "require immunity for the school officials in this case."[10] Therefore, the school officials were entitled to qualified immunity because it was not clearly established at the time of the search that the strip search of a 13 year-old female student for prescription strength Ibuprofen was unconstitutional. Justices Stevens and Ginsburg dissented from this part and Justice Thomas concurred in this judgment. In effect, eight Justices found that the strip search of Savana was unconstitutional (Souter, Roberts, Scalia, Kennedy, Breyer, Alito, Stevens, and Ginsburg) and seven held that the educators were entitled to

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[9] *Safford*, 557 U.S. *slip op*. at 1 (Opinion of Thomas, J.)

[10] *Safford Unified School District No 1 v. Redding*, 557 U.S. at *slip op*. at 12 (Opinion of the Court).

qualified immunity from liability (Souter, Roberts, Scalia, Kennedy, Breyer, Alito, and Thomas).

The High Court affirmed the Ninth Circuit *en banc* decision which found the search to be unconstitutional, reversed the Court of Appeal's holding that the school officials did not have qualified immunity, and remanded the case for a finding of whether the school district was liable for the unconstitutional search.

Majority Opinion—An Unconstitutional Search

The Supreme Court's opinion provides much for educators to digest, understand, and incorporate into their practice. First, the search must be reasonable at its inception. The Court found that Marissa's statement that the pills came from Savanna, that Savana and Marissa were on "friendly terms", that Marissa had Savana's planner, even though no pills were found in the planner, and that Marissa and Savana had been identified with a "rowdy" group of students gave rise to a reasonable suspicion at the inception of the search. Consequently, the search of Savana's backpack and outer clothing was justified.

It was the scope of the search where the school officials went afoul of the Constitution. Under *T.L.O.*, the scope of a search must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."[11] It was at this point that the content of the suspicion did not match the expansion of the search. There was sufficient suspicion based on evidence to search the backpack and the outer clothing. But there was no additional evidence that would lead a reasonable educator to conclude that a search of Savana's underwear and bra would reveal the pills. The assistant

[11] *Id*. at 9 citing *New Jersey v. T.L.O*. 469 U.S. at 342.

principal did not ask Marissa any follow up questions: was there a likelihood that Savana presently had the pills; when did Marissa receive the pills from Savana; and where might Savana be hiding the pills. If Savana gave the pills to Marissa a day ago, a few days, ago, or a week ago, what was the likelihood that Savana would still have the pills secreted in her underwear or bra? A search of Marissa's bra and underwear did not reveal any pills, therefore, why would a search of Savana's underwear and bra reveal the pills became an unanswered or even an unasked question.

In essence, the Court asked on what basis did the scope of the search expand. There was no new evidence to make the "quantum leap from outer clothes and backpacks to exposure of intimate parts."[12] Because some students have hidden contraband in their underwear (crotching drugs) is insufficient to form a justification for expanding the search of the scope. The Court wanted more than just "general background possibilities" as a basis for the intrusive search.

A second issue associated with the scope of the search is the degree of danger associated with the contraband. Justice Souter writes, "nondangerous school contraband does not raise the specter of stashes in intimate places" and "what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity."[13] The High Court seems to say that had the contraband been more dangerous than prescription strength Ibuprofen, the scale of necessary evidence of suspicion for a strip search may slide more towards the school authorities' ability to justify the expanded scope.

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[12] *Id*. at 11.
[13] *Id*. at 10.

The strip search of a student is not a trivial matter. The Supreme Court appears to carve out a special place for it in the possibly scope of a search. The Court states, "The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions."[14]

Implications for Educators

There are three walk-away implications from *Safford*. First, school officials must be able to articulate specific evidence as to why the strip search for contraband will reveal the suspected drugs/weapons. There must be articulable reasons for why the contraband is hidden in intimate places beyond a generalized notion of that is where they could be found. A strip search is in a category of its own. Second, school officials have been put on notice by the Supreme Court that the strip search of a student can violate the student's constitutional rights. Therefore, qualified immunity for liability will no longer be available to educators thus increasing the chances of individual liability for their actions. Third, the more dangerous the contraband the greater likelihood of the scope being found to be constitutional. This also means that strip searches for the benefit of a third party, such as missing money will come to the courts with a greater degree of scrutiny.

Clearly, administrators and other school officials must approach strip searches with extreme caution. The Supreme Court has focused strip searches with a critical eye. Has the administrator demonstrated that heightened due diligence was used to reasonably ascertain that suspected contraband will be found hidden in intimate places before

[14] *Id*. at 11.

students were required to expose those places? In other words, does the content of the suspicion match the degree of the intrusion?[15] Has the school official weighted the severity of danger with the expanded scope of the search? The Supreme Court has not necessarily given a red light to all strip searches, but the caution light has been lit.

The Supreme Court found a reasonable place for both liberals and conservatives, with the exception of Justice Thomas who considered the search to be constitutional,[16] to protect public school students from strip searches without first finding that there is reasonable and direct suspicion to make the search more intrusive. The school officials were found to not be liable in this case, but all school officials have now been served notice to tread lightly in this area.

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[15] *Id*. at 9.

[16] Justice Thomas asserts that "the majority has confirmed that a return to the doctrine of *in loco parentis* is required to keep the judiciary from essentially seizing control of public schools." (*slip op*. at 22 (Opinion of Thomas, J.)).