Defending Clients Who Have Been Searched and Interrogated at School

A Guide for Juvenile Defenders

National Juvenile Defender Center

with

Barton Juvenile Defender Clinic, Emory University School of Law

Youth Advocacy Project, Committee for Public Counsel Services

The mission of the National Juvenile Defender Center (NJDC) is to ensure excellence in juvenile defense and promote justice for all children. We believe that all youth have the right to zealous, well-resourced representation and that the juvenile defense bar must build its capacity to produce and support capable, well-trained defenders. We work to create an environment in which defenders have access to sufficient resources, including investigative and expert assistance, as well as specialized training, adequate, equitable compensation, and manageable caseloads. NJDC provides training, technical assistance, resource development, and policy reform support to juvenile defenders across the country. NJDC disseminates relevant and timely information in research reports, advocacy guides, and fact sheets.

The Barton Juvenile Defender Clinic at Emory Law School is an in-house legal clinic dedicated to providing holistic legal representation for children in delinquency and status offense proceedings. Student attorneys represent child clients in juvenile court and provide legal advocacy in the areas of school discipline, special education, mental health, and public benefits, when such advocacy is derivative of a client's juvenile court case. Students also engage in research and participate in the development of public policy related to juvenile justice issues.

The Youth Advocacy Project (YAP) is a unit of the Massachusetts' Committee for Public Counsel Services (CPCS), the state-wide public defender agency. YAP assists children in delinquency and youth offender proceedings with zealous representation in court, educational advocacy, psychological assessments, and individualized referrals to community resources. In October 2009, CPCS will expand juvenile representation in Massachusetts with the formation of the Youth Advocacy Department (YAD). YAD will lead, train, and support the entire juvenile defense bar with the understanding that representing young people at a time when they face a legal crisis provides advocates with a unique opportunity to effect a "course correction" by addressing their many life needs beyond simply their immediate legal needs.

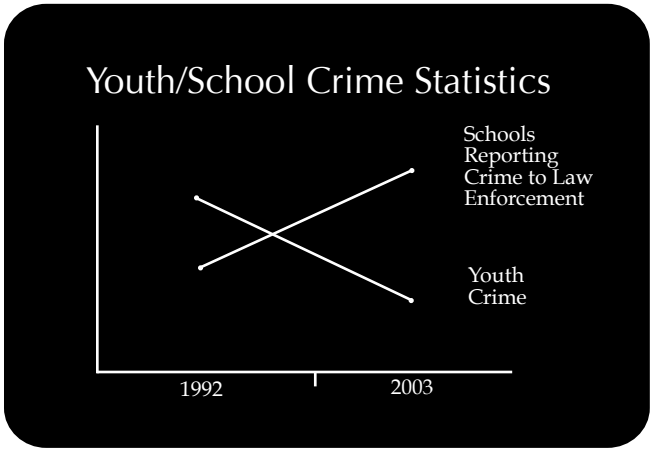
Defending Clients Who Have Been Searched and Interrogated at School

A Guide for Juvenile Defenders

As delinquency courts across the country handle an increasing number of referrals from schools, juvenile defenders often defend clients who have been searched or interrogated on campus. This guide provides a general overview of the law governing school searches and interrogations and practice tips for keeping out evidence obtained in violation of clients' rights. Because case law varies from state to state, and some state constitutions provide broader protections than the federal constitution, it is critical that you research the law in your jurisdiction.

Criminalization of Students

With the adoption of "zero tolerance" approaches to school discipline spurred on by the Gun-Free Schools Act in 1994, school suspensions and expulsions have been on the rise.[1] At the same time, school officials have increased their collaboration with law enforcement and referred youth to juvenile court for behavior that in the past would have resulted in nothing more than a trip to the principal's office. Together, zero tolerance and the increasing reliance on law enforcement by schools have led to the criminalization of student behavior.[2] Significantly, the rise in school-referral cases does not reflect an increase in school crime. In fact, between 1992 and 2003, the percentage of schools reporting at least one crime to law enforcement rose from 57% to 63% even though youth crime at school declined by approximately 50%.[3] Moreover, as numerous studies have shown, this criminalization of students disproportionately affects students of color, who are more likely to be excluded from school, arrested, and referred to juvenile court than other students, even though they do not commit more offenses at school.[4]



School-Specific Offenses

Common delinquency charges stemming from school referrals include disturbing the peace, disorderly conduct, and terroristic threats. In addition, students are being charged with criminal conduct under new state laws that define crimes in a school-specific context,[5] such as disrupting class or school assemblies, talking back to teachers, and loitering or trespassing on school grounds. Treating such fairly typical student behavior as criminal reflects a significant departure from how school discipline was administered in the past.

Reliance on Local Police Officers and School Resource Officers

Compounding the problem, many districts are now turning to law enforcement to enforce discipline rules and laws on campus, and many jurisdictions now require schools to report a broader range of criminal activity to police departments.[6] In some instances, schools will call local police officers to come to campus when crimes are alleged to have occurred. In many jurisdictions, however, school districts now have full-time certified law enforcement officers, commonly referred to as school resource officers ("SROs"). SROs can be assigned to the schools through various arrangements:

- Some school districts enter into agreements with the local law enforcement agency to provide SROs (sometimes called "liaison officers") to a school or set of schools.[7]
- Other districts participate in the federal School Resource Officer program, administered by the Department of Justice's Office of Community-Oriented Policing Services. These SROs typically follow the "TRIAD" model of serving as teacher, counselor, and law enforcement officer.[8] While the amount of time spent on each of these roles varies greatly among districts and officers, the primary function of SROs is to support law enforcement goals.[9]
- Some districts, particularly large urban districts, have their own police departments ("school police") which provide full-time, in-house officers who are employed directly by the school district rather than the local law enforcement agency and who have all the powers of local law enforcement with jurisdiction limited to the school.[10]

For ease of reference, we will use the term SRO here broadly to refer to law enforcement officers assigned to a school or set of schools. The role of SROs, scope of their powers, and philosophy vary from district to district and school to school. Thus, defenders must look at memoranda of understanding and policies in their particular districts to determine the role SROs play in interrogations and searches. The role SROs play can impact the legal analysis.

Overview of School Interrogations Law

Students are frequently referred to courts on the basis of statements made to principals, SROs, or other law enforcement officers. In determining the admissibility of statements obtained through interrogations at school, courts will look at a number of factors to determine whether *Miranda* applies and whether the statements were voluntarily made.[11]

1. Does *Miranda* apply to the school interrogation?

Under *Miranda v. Arizona*,[12] incriminating statements made during custodial interrogations are inadmissible unless the individual is first advised that he has the right to remain silent, right to consult with counsel and to have counsel present during the interrogation, and right to have an attorney provided if he cannot afford one. Note, however, that statements suppressed because of *Miranda* violations can still be used to impeach respondents who testify at trial.[13] The United States Supreme Court has never addressed the applicability of *Miranda* to school interrogations, but many state courts have found it to be applicable in certain situations.

☑ Did the Scenario Constitute a Custodial Interrogation?

Miranda applies only in situations involving custodial interrogations. Courts use the following objective test to determine whether a custodial interrogation took place:

> If, given the circumstances surrounding the interrogation, a reasonable person would not have felt free to terminate the interrogation and leave, a custodial interrogation occurred and *Miranda* applies.[14]

The Supreme Court has left open the question of whether a suspect's age is a factor trial courts should consider in making this determination.[15] State courts have split in addressing this issue.[16]

"Students do not shed their constitutional rights ...at the schoolhouse gate."

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).

☑ Who Interrogated the Student?

Who interrogated the student?	Does *Miranda* Apply?
School personnel	**No.** Generally, school personnel (e.g., principals) acting alone may question a student without complying with *Miranda* because administrators are primarily responsible for education and discipline, not law enforcement.[17]
Police Officer	**Yes.** *Miranda* warnings apply when a police officer interrogates a student and the scenario constitutes a custodial interrogation.[18]
SRO	**Varies by jurisdiction.** In most jurisdictions, SROs are treated as law enforcement officials and *Miranda* warnings apply when an SRO interrogates a student and the scenario constitutes a custodial interrogation.[19]
School personnel working in conjunction with law enforcement	**It depends.** When a school administrator acts in conjunction with an officer to question a student, courts will generally look at the following factors: • Is the school administrator acting as an agent of law enforcement? • Does the situation constitute a custodial interrogation? ***Miranda* generally applies if:** • School administrator acts at the behest of law enforcement, and it is a custodial interrogation[20] • Law enforcement controlled the interrogation or played a larger role and it is a custodial interrogation[21] ***Miranda* generally does not apply if:** • School administrator controlled the interrogation[22]

2. If the student waived his *Miranda* rights, was the waiver voluntary, knowing, and intelligent?

If a student is read her *Miranda* rights and waives them, the courts will look at whether the waiver was voluntary, knowing, and intelligent.[23]

Many experts on adolescent development "question whether juveniles possess the cognitive ability, maturity, and judgment necessary to exercise legal rights," including the capacity to knowingly, voluntarily, and intelligently waive their *Miranda* rights.[24] The Supreme Court has similarly pointed to the developmental differences between adolescents and adults, and in *Roper v. Simmons,* the Court noted that "juveniles are more vulnerable or susceptible to...outside pressures."[25] In fact, numerous Supreme Court cases have affirmed the importance of considering a juvenile's youth and maturity level in assessing the voluntariness of a confession.[26]

Voluntary
The decision to waive the rights must not have been coerced.

Knowing and Intelligent
The youth must understand the meaning of the rights and the implications of a waiver.

Assessing the Validity of a *Miranda* Waiver

☑ **Totality of the Circumstances Test**
To determine whether a juvenile's waiver was voluntary, knowing, and intelligent, the majority of jurisdictions use a "totality of the circumstances" test, which includes evaluating the following factors:[27]

- The juveniles' age, experience, education, background, and intelligence
- Whether the juvenile has the capacity to understand:
  - » the warnings given to him
  - » the nature of the juvenile's Fifth Amendment rights
  - » the consequences of waiving those rights
- The context of the questioning, including the relationship between the juvenile and the questioner

☑ **Interested Adult Rule**
A minority of jurisdictions also use the "interested adult" rule to determine whether the waiver was valid. Jurisdictions vary somewhat in the specific requirements, but generally, according to this rule, a juvenile may not be deemed to have voluntarily waived the privilege against self-incrimination unless he had the opportunity to consult with, and have present at interrogation, an adult who is interested in his welfare.[28]

3. Was the student's statement voluntary, even if *Miranda* does not apply?

Even in situations in which *Miranda* warnings are not required, a statement must be voluntary (i.e., free from official coercion) to be admissible.[29] It is important to note that when a court rules a statement inadmissible on *Miranda* grounds, the statement is available to the prosecution for impeachment purposes if the youth testifies at trial. When a court determines that a statement was involuntary under the Due Process Clause, however, that statement may not be used to impeach the youth if he testifies at trial.[30] Thus, it is important to make a voluntariness claim both independent of, and in conjunction with, any claims that *Miranda* was violated. Key points relevant to the voluntariness inquiry include the following:

- The question of voluntariness is assessed based on the "totality of circumstances."[31]
- Under the federal constitution, and in a majority of states, the prosecution bears the burden of proving the statement was voluntary by a preponderance of the evidence. Note that a minority of states require proof beyond a reasonable doubt under state law.[32]
- For an incriminating statement to be considered involuntary and inadmissible, there must be a causal link between coercive state activity and the making of a statement.[33]
- A respondent's age should be considered in the inquiry because the respondent's youth makes him more susceptible to coercion and an "easy victim of the law."[34]
- An inability to exercise free will due to a mental impairment does not alone render a statement involuntary.[35] However, when officials purposely exploit such mental state to elicit an incriminating statement, such statement will likely be found involuntary.[36]

Even in situations in which *Miranda* warnings are not required, a statement must be voluntary (i.e., free from official coercion) to be admissible.

The Fourth Amendment prohibits unreasonable searches and seizures at schools.

In *New Jersey v. T.L.O.*, the United States Supreme Court held that the Fourth Amendment prohibition against unreasonable searches and seizures applies to searches at public schools and school-related functions.[37] The Fourth Amendment acts as a restraint on all governmental action and is not limited to searches and seizures performed by law enforcement officers.[38] Public school officials are considered state actors for purposes of school searches and are not exempted from Fourth Amendment restrictions based on *in loco parentis* status.[39] Though *T.L.O.* did not reach the issue of whether "the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities,"[40] lower courts have applied the exclusionary rule in such cases.[41]

Courts use either the probable cause or reasonable suspicion standard for determining reasonableness of the search, depending on the following factors:[42]

- Who initiated the search?
- Who performed the search?

Probable Cause is a "practical, non-technical evidentiary showing of individualized criminal wrongdoing that amounts to more than reasonable suspicion**,** but less than proof beyond a reasonable doubt."[43]

Reasonable Suspicion is a "practical, non-technical evidentiary showing of individualized [ ] wrongdoing that amounts to less than probable cause and considerably less than a preponderance of evidence, but more than an inchoate hunch."[44]

Under *T.L.O.*, reasonable suspicion for searches by school officials relates to "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law ***or the rules of the school***."[45]

The Supreme Court has described the "required knowledge component of probable cause for a law enforcement officer's evidence search as one that raises a 'fair probability' or 'substantial change' of discovering evidence, whereas the lesser reasonable suspicion standards can be described as a "moderate chance" of finding evidence of wrongdoing."[46]

Person Conducting Search	Standard that Applies
Police Officers Acting Alone	**Probable Cause** Generally, courts are more likely to require probable cause when: • an outside police officer conducts the search or the police officer is ultimately responsible to a law enforcement agency, • the purpose of the search is to uncover criminal activity, and • the officer, not the school officials, has initiated the search.[47]
School Officials Acting Alone	**Reasonable Suspicion** • The lower "reasonable suspicion" standard strikes the balance between the student's legitimate expectation of privacy and the school's interest in maintaining a safe and effective learning environment.[48] • "The reasonableness standard should ensure that the interests of students will be invaded no more than is necessary" to preserve school order.[49]
SRO Acting Alone	**Reasonable Suspicion (typically):** • Courts consider who employs the officer, who the officer reports to, and the officer's assigned duties.[50] • The majority of jurisdictions find that reasonable suspicion is required based on a finding that a police officer acting as an SRO is more closely connected to the school than the police department.[51] • Some courts have distinguished between school police officers employed by the school district (which require reasonable suspicion) and those employed by an outside police department and assigned to the schools (which require probable cause).[52]

Person Conducting Search	Standard that Applies
School Officials Acting in Concert with Law Enforcement	*Jurisdictions vary* **Reasonable Suspicion is typically required when:** • the school mainly controls the search[53] • law enforcement involvement is minimal (*in most jurisdictions*)[54] • school officials initiate the investigation and law enforcement officers search a student at the request or direction of school officials[55] • school officials perform searches based on information from, or in the presence of, law enforcement officers[56] **Probable Cause is required:** • usually when a law enforcement officer generally works outside of the school system and is simply on assignment at the school (if officer is not acting under school's direction)[57] • in a few jurisdictions, for all searches performed by law enforcement officers, regardless of who initiated the search[58] • when school official is acting at the behest of law enforcement[59]

Probable cause is required when school officials conduct a search at the behest of law enforcement.[59]

Courts Use a Two-Prong Test to Determine "Reasonable Suspicion."

1. Was the search justified at its inception?

Courts will look at whether reasonable grounds existed for suspecting that the search would turn up evidence that the student violated the law or school rules.

Factors found to constitute reasonable grounds:	Factors found <u>not</u> to constitute reasonable grounds:
• A reliable anonymous tip[60] • A school official witnessing an act or overhearing a conversation[61] • A reliable tip from another student[62] • Student's physical indications of being under the influence of alcohol or drugs[63] • Student's past record of the same behavior[64] • Common sense conclusions about individual behavior, when based on more than a hunch[65]	• A hunch[66] • A tip from an unreliable source[67] • "Furtive gestures" or noncooperation[68] • Student's status as a rule breaker[69] • Association with wrongdoers[70]

☑ Individualized Suspicion

Some jurisdictions have held that a search is justified at inception only where there is individualized suspicion that the search will yield evidence of the suspected violation.[71] However, the Supreme Court has twice held that random drug testing of students in extracurricular activities, without individualized suspicion, is constitutional.[72]

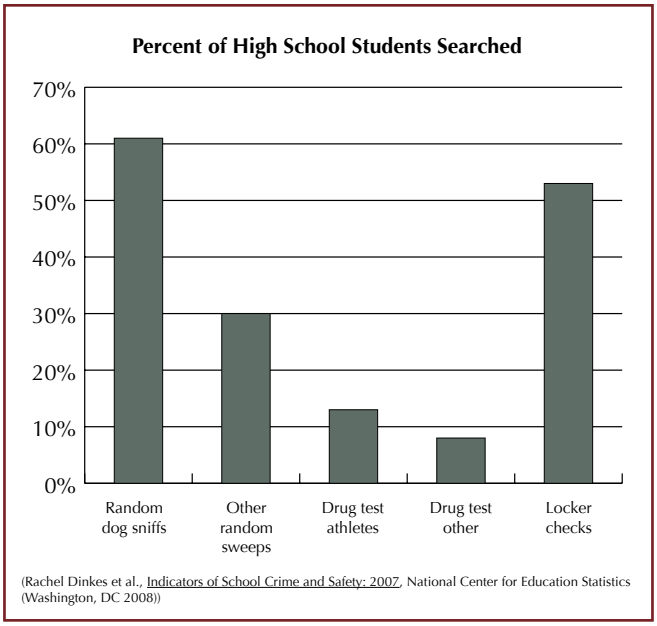
Individualized suspicion may not be required when:

1. Privacy interests are minimal; and
2. An important governmental interest would be placed in jeopardy by a requirement of individualized suspicion. [73]

2. Was the search permissible in scope?

Courts will look at whether the search was reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[74]

- Generally less intrusive searches, such as pat frisks, are more likely to be found permissible in scope, while more intrusive searches, like strip searches, are more likely to be found impermissible.[75] For example, in *Safford Unified School District #1 v. Redding*, the United States Supreme Court held that a strip search of a 13-year-old student by school officials because they suspected that she had brought prescription and over-the counter drugs to school was unconstitutional because there was no reason to suspect the drugs presented a danger or were hidden in her underwear.[76]



(Rachel Dinkes et al., Indicators of School Crime and Safety: 2007, National Center for Education Statistics (Washington, DC 2008))

- However, each case is very fact-specific. Considerations include:
  - » the nature of the infraction
  - » the age of the student
  - » the steps taken to confirm an allegation before resorting to a search
  - » whether there were reasonable grounds for suspicion.[77]

- Courts weigh the intrusiveness of the search against the school's interest.[78]

Courts weigh the intrusiveness of the search against the school's interest.[78]

Intrusiveness of Search/Privacy Interest

While students may have an expectation of privacy in the following areas, the search might still be valid.

Type of Search	Privacy Interest/Reasonable in Scope
Lockers	Many students view their lockers as a private space, and a number of lower courts have held that students have a reasonable expectation of privacy in their lockers.[79] Most courts, however, have found otherwise.[80] In fact, many student handbooks specifically state that lockers are the property of the school and not the individual student.
Random Drug Testing	Courts have held that drug tests are minimally intrusive searches which do not represent a significant invasion of students' privacy.[81]
Strip Searches	The United States Supreme Court has found that "both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities."[82]
Pat-Down and Pocket Searches	While courts recognize that students' privacy interests are high in searches of their person,[83] courts rarely find such searches to be overly intrusive.[84] Instead, such searches are most often found to be unconstitutional because they were not justified at their inception.[85]
Bags, Purses, or Personal Belongings	The same is true of bags and personal belongings.[86] However, case law has not clearly addressed students' privacy interests in bags and personal belongings stored in lockers.[87]
Drug-Sniffing Dogs	The privacy interest involved is determined by the object being sniffed. For example, dog sniffs of lockers and cars are generally found less intrusive than dog sniffs of persons.[88]
Metal Detectors	Courts have held metal detectors to be minimally intrusive.[89]

School's Interest

The nature of the infraction can implicate the school's interest in maintaining a safe and orderly environment.

Nature of Infraction	School's Interest
Stolen Money	The governmental interest in recovering stolen money is low, requiring that searches for money be minimally intrusive. For instance, strip searches seeking stolen money are often found unconstitutional, while pat-down searches have been upheld.[90]
Drugs	Courts have consistently found a legitimate governmental interest in keeping drugs out of school.[91] However, some courts have required that there be evidence of a drug problem in order for schools to be justified in group searches for drugs.[92]
Weapons	Similar to drugs, weapons are a serious societal problem that schools can take measures to guard against.[93]

If the student consents to the search, neither probable cause nor reasonable suspicion is required.

- Consent cannot be established by merely showing "acquiescence to a claim of lawful authority."[94]
- Consent must be voluntary (based on totality of circumstances).[95]
- Consent can be voluntary even if the student is not informed that he has the right to refuse.[96]
- If the student is held unlawfully, then the consent will be a fruit of that violation.[97]

Practice Tips for Juvenile Defenders

Practice Tip Always consider filing a motion to suppress the statement and/or all evidence seized.

- Research the law in your jurisdiction.
- Look to other jurisdictions for guidance where the law in your state is unclear.
- Don't forget to cite to the federal and state constitutions in your motion.
- Make sure your affidavit in support of the motion sets out the facts you are relying on and is based on personal knowledge.

Practice Tip Obtain all relevant documents, including all discovery.

Client records

- Transcripts, progress reports, standardized testing, attendance records
- Special education records (referrals, evaluations, Individualized Education Programs (IEPs), pre-referral services, psychological testing)
- Discipline records (including records from less formal hearings for short-terms suspensions, as well as more formal hearings for long-term suspensions/expulsions)
- Correspondence between the school and the parent
- Mental health and counseling records

Documents relating to the incident

- All police reports
- All school reports about the incident
- All witness statements
- Surveillance videos
- Records from any discipline proceedings (both written and tape-recorded)
- *Miranda* waiver forms

Documents relating to the relationship between SRO and local police department

- School policies, including policies and procedures on searches and interrogations at school and at school-related events
- Employment documents
- Memoranda of understanding
- Training manuals
- Student handbook (Note: many school handbooks address searches at school-related functions, searches of lockers, and other areas)

Practice Tip Consider the following methods for obtaining the relevant documents:

Subpoena
Useful for police reports about school-related incident, school records (Be aware of the rules regarding the use of subpoenas in your jurisdiction; if the district attorney will find out you are obtaining your client's record, it may be better to use a client release form.)

Client Release
Useful for medical, mental health and counseling records, as well as school records

Open Records / Freedom of Information Request
Useful for policy memos, training manuals, law enforcement or SRO personnel files

Practice Tip Thoroughly investigate the circumstances of the interrogation or search.

Determine who questioned or searched the student.

- **Police**
  If there is a custodial interrogation by the police, *Miranda* warnings must be given. Consider filing a discovery motion regarding questioning techniques used by the police and trainings attended by police. Be aware of the law in your jurisdiction regarding questioning of juveniles by police.

  If there was a search and the police and school personnel were involved, review all discovery and witness interviews to see if you can make the argument that the probable cause standard must apply. Also, review all school handbooks, school polices, and memoranda of understanding to determine the relationship between the police department and the school.

- **School Personnel**
  Research the case law in your jurisdiction. Most jurisdictions do not require *Miranda* when questioning is done exclusively by school personnel.

  Analyze the facts of your case. Can you establish that the police controlled the questioning? If so, argue a *Miranda* violation occurred.

  If there was a search, review all discovery and witness interviews and review all school handbooks and memoranda of understanding to establish that the school was acting as an agent of the police

- **School Resource Officer/School Police**
  Research your jurisdiction's case law to determine the relevant standards.
    - Obtain employment documents, employment contracts, and memoranda of understanding to establish a relationship between the school resource officer and local police department.
    - Obtain school and district handbook on policies and procedures and memoranda of understanding between the school and the police department.

Practice Tip  For Interrogations

Was there a *Miranda* violation?

Whether *Miranda* warnings were not given or were not fully given, find out who was in the interrogation room and whether the student's parents/guardian were called or present in the interrogation room.

Consider interviewing every witness prior to the motion hearing. You want specifics about who was in the room, what the set up was and how the entire questioning took place. You also want to know how the warnings were given: Was a form given to the student to read? Does your client speak English? If, not, was there an interpreter? Was the *Miranda* waiver form in the client's native language? If the warnings were read to the student, were all the rights read?

- Obtain copy of *Miranda* waiver form.
- Obtain any and all police reports, school reports regarding the incident.
- Obtain any and all tape recordings of the interrogation.
- Obtain memoranda of understanding and school handbooks on polices and procedures.
- Get copies of the student's school records, including any special education records and psychological evaluations. (This will help you determine whether your client really understood the significance of the warnings.)
- Get copies of the student's mental health records and medical records.

Was the waiver knowing, intelligent, and voluntary?

- Did your client understand the words and phrases that were used when *Miranda* was administered?
- Could your client appreciate the significance of the warnings? (How might statements be self-incriminating and how might they be used against him/her in court?)
- Was the waiver voluntary?
- Remember that just because your client said he/she understood the rights does not necessarily mean he/she actually did.
- Be aware of the standard of proof in your jurisdiction.[98]

Was the statement voluntary?

Even if *Miranda* rights were read, the issue of whether the statement was voluntary should be raised.

- You want to obtain the same records/reports as above.
- Interviewing witnesses to the interrogation is important for determining if you can establish that the student's will was overcome.
- Review client's records to see if you can establish that she/he is susceptible to outside pressure.
- Review the literature on adolescent brain development and be familiar with the language in *Roper v. Simmons*. Cite where applicable.[99]
- Review and cite the research on waiver of *Miranda* and juveniles.[100]
- You cannot just raise the issue of voluntariness in your motion and supporting brief. At the hearing, you will need evidence to support an involuntary confession.

Consider retaining an expert.

- Consider having your client evaluated by an expert as to the waiver of *Miranda* and the voluntariness issue. Have an expert evaluate your client as close in time to the event. Do not educate your client prior to an evaluation on what the rights mean.
- If an adult was present to provide guidance to your client, consider having the adult evaluated for his/her understanding of *Miranda* and ability to provide guidance to your client.
- Make sure the expert has expertise in the area of juvenile forensics and has substantial knowledge in the area of adolescent development and the research on waiver of *Miranda* by youth.

Practice Tip For Searches

- Look to see whether the student had an expectation of privacy in the place to be searched. Do the student handbooks or school policies cover the type of search that was conducted?
- Did the search occur on school grounds or at a school-related function? Look to the policies and procedures in your jurisdiction.
- Was there individualized suspicion? Look at the level of information the person conducting the search had prior to the search.
- If the search was based on a tip, was that tip reliable? File discovery motions to get the names of unnamed informants.
- If the search was based on direct observations, consider arguing the behavior can be viewed as innocent behavior.
- Could the area searched reasonably accommodate the items authorities were looking for?[101]
- If the police conducted the search with, or in the presence of, school officials, look at the school policies and procedures and investigate the case fully to argue the probable cause standard should apply.

Practice Tip Prepare for the Motion to Suppress Hearing.

- Be prepared for all arguments by the state.
- Be aware of the burden of proof and production in your jurisdiction.
- Lay proper foundation of your expert.
- Make sure you have summoned all the witnesses.
- Move to sequester the witnesses.

Practice Tip At Trial

- If the Motion to Suppress was denied, remember to object to the evidence or statement at trial to preserve the issue for appeal.

- For interrogations

    - » Challenge the voluntariness of the confession at trial.[102]

    - » Consider hiring an expert to challenge the validity of the statement.

    - » If you are in a jurisdiction that follows the "humane practice rule" such as Massachusetts and Rhode Island, make sure you request a *voir dire* outside the presence of the jury before the statement is admitted into evidence at trial.[103]

Tips for Juvenile Defenders to Keep Out Evidence Obtained in Violation of Client's Rights

Step One Simultaneously explore issues and gather information.

Explore Issues

Who
- Police officer?
- School resource officer (SRO)?
- School official?
- Combination of actors?

Where
- Location of search?
- Expectation of privacy?
- On school grounds?
- On school bus?
- School-related function?
- Location of questioning?

Why
- Based on a tip?
- Based on individualized suspicion?
- Based on a general concern?
- For student safety/welfare?

How
- In custody?
- Questionning techniques?
- Parent present?
- Conditions at time?
- Strip search? Pat down?

Gather Information

What

Client records
- School transcripts, testing, attendance records
- Special ed records (testing, IEPs)
- Discipline records (local & district)
- Correspondence
- Mental health/counseling records

Incident documents
- Police reports
- School reports
- Witness statements
- Surveillance videos/tape recordings
- Formal or informal discipline
- *Miranda* waiver forms

School and police policy records
- Searches and interrogations at school
- Employment documents
- Memoranda of understanding
- Training manuals
- Student handbook

How
- Subpoena (police records)
- Open Records/Freedom of Info (policy memos, training manuals, personnel files)
- Client/Parent Release Form

Step Two File a motion and request evidentiary hearing.

Interrogations

- If the student was questioned by police and the student was in custody, *Miranda* warnings must be given
- If questioned by SRO/school police, research state law to determine whether *Miranda* applies - obtain documents to establish the police/SRO/school relationship
- If questioned by school personnel exclusively, most jurisdictions do not require *Miranda*
- Challenge knowing and voluntary waiver of *Miranda*
- Challenge voluntariness of confession

Searches

Who searched the student?

- Police officer
  - » probable cause standard applies
- Police and school official or SRO
  - » review school policies and police/school agreements for agruments that probable cause standard should apply
- School official
  - » reasonable suspicion standard usually applies, but search for facts to argue school was police agent

Step Three Prepare for and conduct hearing and trial.

Consider an expert

- Opinion regarding waiver of *Miranda* and/or voluntariness of confession
- Have evaluation close in time to event
- Remember not to educate your client about the meaning of the rights to avoid skewing the evaluation
- If adult was present, consider having adult evaluated for understanding of *Miranda* and ability to provide guidance
- Expert must have expertise in area of juvenile forensics and have knowledge of adolescent devlopment and research on waiver of *Miranda* by youth

Hearing and trial

Hearing

- Be prepared for state's arguments
- Be aware of burden of proof and production in your state
- Lay proper foundation for your expert
- Summon all witnesses
- Move to sequester witnesses

Trial

- Raise voluntariness of statement at trial if in humane jurisdiction
- If not humane jurisdiction, call expert to challenge validity of statement
- If motion to supress denied, object to statement/evidence for appeal

Endnotes

1 The Act required local educational agencies to expel for at least one year students who brought firearms to school, though it allowed for modifications to be made on a case-by-case basis. *See* 20 U.S.C. § 7151 (2005). States have greatly expanded the list of offenses subjected to zero tolerance policies to include things like drug possession, possession of weapons other than firearms, and other school-based offenses.

2 Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 Ariz. L. Rev. 1067, 1069 (2003).

3 Eleftheria Keans, *Student Interrogations by School Officials*, 27 B.C. Third World L.J. 375, 406 (2007).

4 *See* Advancement Project *et al.*, Education on Lockdown: The Schoolhouse to Jailhouse Track 8 (March 2005); Russell J. Skiba *et al.*, The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment 6 (June 2000)) (available at http://www.indiana.edu/~safeschl/cod.pdf) (noting, "If anything, African American students appear to receive more severe school punishments for less severe behavior.")

5 *See* Julius Menacker & Richard Mertz, *State Legislative Responses to School Crime*, 85 Ed. Law. Rep. 1 (1993) (reviewing state statutes in 36 states relating to school crime specifically).

6 Pinard, *supra* note 2, at 1079-80.

7 *Id.* at 1068, 1083.

8 *See* http://www.schoolsecurity.org/resources/school-resource-officers.html (last visited November 17, 2008). *See also* Peter Finn *et al.*, Case Studies of 19 School Resource Officer (SRO) Programs (2005) (available at http://www.ncjrs.gov/pdffiles1/nij/grants/209271.pdf).

9 *See* Pinard, s*upra* note 2, at 1077-78. *See also* Finn, *supra* note 8. (In case studies of 19 sites, SROs reported big differences in the amount of time spent teaching and mentoring versus law enforcement. In one district, for example, SROs made more arrests per officer than regular patrol officers, while the SRO in another district made no arrests in an entire school year.)

10 *See* Pinard, *supra* note 2, at 1083.

11 For an in-depth discussion of school interrogations, see Paul Holland, *Schooling* Miranda*: Policing Interrogation in the Twenty-First Century Schoolhouse,* 52 Loy. L. Rev. 39 (2006).

12 384 U.S. 436, 467-471 (1966).

13 *Harris v. New York*, 401 U.S. 222, 226 (1971); *Oregon v. Hass*, 420 U.S. 714, 722-724 (1975).

14 *See Thompson v. Keohane*, 516 U.S. 99, 112 (1995). In *Miranda*, the Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. In its post-*Miranda* decisions, the Court has also established the *Miranda* custody test as whether the suspect has been placed under "'formal arrest or restraint on freedom of movement' of the degree associated with

a formal arrest." *California v. Beheler,* 463 U.S. 1121, 1125 (1983) (citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

15 See *Yarborough v. Alvarado*, 541 U.S. 652, 663-665 (2004) (applying federal standard set out in *Thompson v. Keohane*, 516 U.S. 99 (1995)) to hold that it was reasonable for lower court not to consider defendant's age in finding that 17-year-old defendant was not in custody for *Miranda* purposes because he was not threatened with arrest, was offered breaks, his parents were just outside in the lobby, and he was released home). Though the Court held that the state court's failure to consider Alvarado's age for purposes of custody inquiry was not unreasonable, five Justices did endorse the proposition that age should be generally taken into account in the *Miranda* analysis of custody.

16 Compare *People v. Croom*, 883 N.E.2d 681, 689 (Ill. App. 4th Dist. 2008) (declining to adopt a modified reasonable person standard to account for the juvenile's youth and experience on the grounds that such a modification "incorporates a subjective factor into an objective test"); *In re Interest of Tyler F.*, 755 N.W.2d 360, 370-371 (Neb. 2008) (declining to consider suspect's age in a custody inquiry); S*tate v. Turner*, 838 A.2d 947, 965 n. 17 (Conn. 2004) (rejecting the defendant's "age, his unfamiliarity with our criminal justice system, [and] his presence in this country for two years" as relevant to the objective *Miranda* custody inquiry) with *In re R.H.*, 2008 WL 501595 at*5 (Ohio App. 2008) (expressly acknowledging the 11-yr-old suspect's youth as relevant to the custody inquiry); *B.M.B. v. State*, 927 So.2d 219, 223 (Fla. App. 2d Dist. 2006) (accounting for the juvenile suspect's age and experience with law enforcement as part of a custody analysis); *Commonwealth v. A Juvenile*, 402 Mass. 275, 277 (1975) (The test for custody is how a reasonable person in the juvenile's position would have understood his/her position)(emphasis added).

17 *Matter of Navajo County Juvenile Action No. JV91000058*, 901 P.2d 1247, 1249 (Ariz. 1995) (*Miranda* warnings not necessary when principal interrogated student because principal was responsible for school safety, administration, and discipline and had independent responsibility to investigate a student infraction, and even though he intended to tell police about results of investigation, he did not act at the behest or direction of police); *People v. Shipp,* 239 N.E.2d 296, 298 (Ill. App. 1968) (defendant's statements to principal admissible because "the calling of a student to the principal's office for questioning is not an 'arrest' and he is not in custody of police of other law enforcement officials"); *Com. v. Ira I.,* 791 N.E.2d 894, 901 (Mass. 2003) (questioning of students by assistant principal does not constitute custodial interrogation because the assistant principal was acting in the scope of his employment and the police did not control, initiate, or influence the investigation). Courts have gone even further in refusing to find custodial interrogations by school administrators, even where the school administrator plans to turn over incriminating statements to law enforcement. *See, e.g., Com. v. Snyder*, 597 N.E.2d 1363, 1369 (Mass. 1992) (stating that "the fact that the school administrators had every intention of turning the marihuana over to the police does not make them agents or instrumentalities of the police in questioning Snyder").

18 *State v. D.R.*, 930 P.2d 350, 353 (Wash. App. 1997) (finding that *Miranda* warnings were required during police interrogation of student in principal's office because of the fact that officer failed to inform student he was free to leave, student's youth, the naturally coercive nature of the school and principal's office environment for children of his age, and the obviously accusatory nature of the interrogation).

19 *See, e.g., State v. Doe*, 948 P.2d 166, 173 (Idaho 1997) (holding *Miranda* applied to fifth grader's statements made during questioning by SRO because student reasonably believed he was in custody when he received a mandatory directive to report to faculty room, he knew the interviewer was a police officer, and he was not informed that he could leave or refuse to answer questions); *In re Welfare of D.J.B.*, 2003 WL 175546 (Minn. App. 2003) (interrogation of student by SRO was custodial even though SRO told student he was free to leave because student was pulled out of class without expla-

nation, SRO shut the door and sat between the student and the door during the interrogation, student was not informed of his right to an attorney or to have his parents present, and interrogation was recorded; the "soft *Miranda*" rights the SRO office gave were not proper because a reasonable person would have believed he was in custody) (unpublished opinion). *But see In re L.A.*, 21 P.3d 952, 960-61 (Kan. 2001) (school security officer was not required to read *Miranda* warnings during investigation of violation of school policy).

20 *State v. Tinkham*, 719 A.2d 580, 583-84 (N.H. 1998) (principal not required to give *Miranda* warnings where not acting as instrument or agent of police). *See also State v. Heirtzler*, 789 A.2d 634 (N.H. 2002).

21 *In re Welfare of G.S.P.,* 610 N.W.2d 651 (Minn. Ct. App. 2000) (finding custodial interrogation existed where assistant principal and school liaison officer worked together to question a student; the two went together to the students' class to take him to the office and the assistant principal told the student he needed to answer the questions and explained that he would turn the interrogation over to the officer once he had asked some questions himself).

22 *M.H. v. State*, 851 So.2d 233 (Fla. App. 2003) (finding that mere presence of SRO does not amount to custodial interrogation requiring *Miranda* warnings where seventh grader was taken by SRO to school official's office and school official interrogated student in front of SRO, who asked only one question); *In Interest of J.C.*, 591 So.2d 315, 316 (Fla. App. 1991) (situation in which assistant principal questioned student in front of SRO and SRO "could have asked a question or two" does not constitute custodial interrogation as SRO involvement was *de minimis*); *J.D. v. Com.,* 591 S.E.2d 721, 725 (Va. App. 2004) (where SRO is present but silent during questioning of student by associate principal, *Miranda* warnings not required because SRO did not direct questioning and the student was not in custody when questioned).

23 *Miranda v. Arizona*, 384 U.S. 436, 444, 475 (1966).

24 Barry C. Feld, *Juvenile' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 Minn. L. Rev. 26, 27 (2006). *See also* Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134-1166 (1980).

25 543 U.S. 551, 569 (2004).

26 *See Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (suppressing confession by 14-year-old and noting that "he cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights…and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself."); *In Re Gault*, 387 U.S. 1, 55 (1967) (stating that the "greatest care must be taken to assure that the admission [of an adolescent] was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair"). *See, e.g., In re Andre M.,* 88 P.3d 552, 556 (Ariz. 2004) (finding that when "state fails to establish good cause for barring a parent from a juvenile's interrogation, a strong inference arises that the state excluded the parent in order to maintain a coercive atmosphere or to discourage the juvenile from fully understanding and exercising his constitutional rights").

27 *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (holding that respondent's request to speak with his probation officer did not constitute a *per se* invocation of his Fifth Amendment rights but acknowledging that in a particular case, the juvenile's age and experience may indicate that such a request invoke the right to remain silent). *See also* Kenneth J. King, Waiving Childhood Goodbye: How Juvenile

Courts Fail to Protect Children From Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights, 2006 Wis. L. Rev. 431 (noting that 35 states and District of Columbia apply the totality of circumstances test).

28 *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 657 (Mass. 1983) (child under 14 must have an actual consultation with a parent or an interested adult, the interested adult must understand the warnings and have the opportunity to explain the rights to the juvenile so that the juvenile understands the significance of waiver of these rights. For juveniles over age 14 "there should ordinarily be a meaningful consultation with the parent, interested adult or attorney to ensure that the waiver is knowing and intelligent." If there is no consultation the statement can be admissible if the record shows a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile); *In the Matter of B.M.B.*, 955 P.2d 1302, 1312-13 (Kan. 1998) (holding that juvenile under 14 years old must have opportunity to consult with parent, guardian, or attorney about whether he will waive right to attorney and privilege against self-incrimination, and both parent and juvenile must be advised of these rights); *State v. Presha*, 748 A.2d 1108, 1114-15 (N.J. 2000) (holding that interested adult rule applies to youth under age 14 , and for those over 14 years old, the absence of a parent is highly significant factor to consider in the totality of circumstances test; *In Re E.T.C.,* 449 A.2d 937, 940 (Vt. 1982)(juveniles must be given opportunity to consult with an adult generally interested in the welfare of the youth and independent of the prosecution, and the independent interested adult must be informed of and aware of the youth's rights).

29 *Colorado v. Connolly*, 479 U.S. 157 (1986).

30 *Mincey v. Arizona*, 437 U.S. 385, 397-398, 402 (1978).

31 *Boulden v. Holman*, 394 U.S. 478, 480 (1969).

32 *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (preponderance of the evidence standard applies under federal law). *See also State v. Lawrence*, 920 A.2d 236, 251 (Conn. 2007)(noting that majority of states, like Connecticut, follow the preponderance of evidence standard). State cases requiring proof beyond a reasonable doubt include *Burton v. State*, 292 N.E.2d 790 (Ind. 1973); *Harrison v. State*, 285 So.2d 899, 890 (Miss.1973); *State v. Yough*, 231 A.2d 598 (N.J. 1967); *Commonwealth v. Jackson*, 731 N.E.2d 1066, 1070 (Mass. 2000).

33 *Connolly*, 479 U.S. at 167.

34 *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948) (reversing the admissibility of the confession of a 15-year-old male based on the young age of the defendant, the duration and time of the interrogation, and the exclusion of parents and counsel). *See Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (holding that confession of a 14-year-old boy who was isolated from any "friendly adults" was involuntary because someone of his age would not have an understanding of the consequences of the questions asked him or how to protect his own interests or assert his constitutional rights); *U.S. v. Morales*, 233 F. Supp. 160, 167-8 (D. Mont. 1964) (holding statement made by a 16-year-old defendant was involuntary and inadmissible in a juvenile delinquency case, and noting that the Supreme Court has "referred repeatedly to the fact that youth and inexperience must be considered in determining whether any confession is voluntary"). *See also Roper v. Simmons*, 543 U.S. 551, 569 (2005) (court distinguished juvenile offenders from adult offenders based on, among other things, finding that juveniles are more susceptible to negative influences and outside pressures and juveniles are "more susceptible to psychological damage").

35 *Connolly*, 479 U.S. at 164-67.

36 *Id.* at 165 (distinguishing *Blackburn v. Alabama*, 361 U.S. 199, 206-8 (1960), in which police knew of the defendant's history of mental problems and exploited this by confining him to a crowded small room for an eight- to nine-hour interrogation).

37 469 U.S. 325, 333 (1985).

38 *Id.* at 335.

39 *Id.* at 336-37.

40 *Id.* at 333, n.3.

41 *See, e.g., In re William G.*, 709 P.2d 1287, 1298 n.17 (1985); *R.S.M. v. State*, 911 So.2d 283 (Fla. App. 2005); *State v. Pablo R.*, 137 P.3d 1198 (N.M. App. 2006); *In the Interest of Dumas*, 515 A.2d 984 (Pa. Super. Ct. 1986).

42 For a more in-depth discussion of schools searches, *see* Pinard, *supra* note 2; *see also* Josh Kagan, *Re-appraising TLO's "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & Educ. 291 (2004).

43 Phillip A. Hubbart, Making Sense of Search and Seizure Law: A Fourth Amendment Handbook 170 (2005). *See also Texas v. Brown*, 460 U.S. 730, 742(1983) ("probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' . . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false") (internal citation omitted).

44 Hubbart, *supra* note 43, 170.

45 *T.L.O*, 469 U.S. at 341-342 (emphasis added).

46 *See Safford Unified Sch. Dist. #1 et al. v. Redding*, 129 S.Ct. 2633, 2639 (2009).

47 Pinard, *supra* note 2, n.68. *See, e.g., State v. Tywayne H.*, 933 P.2d 251 (N.M. Ct. App. 1997) (applying probable cause standard where two police officers providing security at school dance initiated a search and had only minimal contact with school officials); *In Interest of Angelia D.B.*, 564 N.W.2d 682, 687 (Wis. 1997); *Patman v. State*, 537 S.E.2d 118, 120 (Ga. 2000).

48 *New Jersey v. T.L.O.*, 469 U.S. 325, 340-1 (1985).

49 *Id.* at 343.

50 *See, e.g., State v. Serna*, 860 P.2d 1320, 1323-25 (Ariz. 1993) (applying reasonable suspicion standard to public high school security personnel employed by the school and considered agents of the principal); *T.S. v. State*, 863 N.E.2d 362 (Ind. App. 2007) (applying reasonable suspicion standard to police officer employed by school); *In re Steven A.*, 764 N.Y.S.2d 99 (N.Y. App. Div. 2003) (applying reasonable suspicion standard for civilian employed of police department assigned exclusively to school security); *State v. Tywayne H.*, 933 P.2d 251 (N.M. Ct. App. 1997) (applying probable cause standard to law enforcement officers employed by police department and stationed at school dance who acted on their own discretion); *Com. v. J.B.*, 719 A.2d 1058, 1065-66 (Pa. Super. Ct. 1998) (holding police officer to "reasonable suspicion" standard because police officer was employed by school); *In re. J.F.M.*, 607 S.E.2d 304, 307 (N.C. App. 2005) (reasonable suspicion standard applies to situations in which SRO,

acting in conjunction with school officials, detains a student on school premises); *Patman v. State*, 537 S.E.2d 118, 120 (Ga. 2000) (applied probable cause standard to police officer working on special assignment in school). *See generally* Pinard, *supra* note 2.

51 *See, e.g., T.S.*, 863 N.E.2d at 371; *In re William V.*, 111 Cal.App.4th 1464, 1469-1471 (2003); *State v. D.S.*, 685 So.2d 41, 43 (Fla. Dist. Ct. App. 1996); *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996) (applying reasonable suspicion standard to police liaison officer working full-time at alternative school to handle both discipline problems and criminal activity); *J.B.*, 719 A.2d at 1066 (individualized searches of students by school officials, including school resource officers, are subject to reasonable suspicion standard under the Pennsylvania Constitution). *But see State v. Scott*, 630 S.E.2d 563 (Ga. 2006) (school resource officer is considered a law enforcement officer, not a school official, for 4th Amendment purposes).

52 *S.A. v. State*, 654 N.E.2d 791, 795 (Ind. Ct. App. 1995) (reasonable suspicion applies to searches by police officer employed by Indianapolis Public Schools Police Department); *Wilcher v. State*, 876 S.W.2d 466, 468-69 (Tex. Ct. App. 1994)(upholding search based on reasonable suspicion by officer employed by Houston Independent School District); *In Interest of S.F.*, 607 A.2d 793, 796 (Pa. Super. Ct. 1992) (upholding search, based on reasonable suspicion, by police officer employed by the School District of Philadelphia).

53 *See, e.g., Martens v. Dist. No. 22*, 620 F. Supp. 29, 31 (N.D. Ill. 1985) (in this civil action, court held probable cause was not required where a sheriff's deputy, who was at the school on an unrelated matter and who encouraged student to cooperate in search, did not assist in developing the facts that motivated the search and did not direct the search); *State v. N.G.B.*, 806 So. 2d. 567, 568 (Fla. Dist. Ct. App. 2002) (holding that reasonable suspicion applied to school resource officer's search even though the officer was "not a school official" and was employed by a law enforcement agency because a teacher initiated the investigation and asked officer to help search a student for drugs).

54 *See., e.g., In re D.D.*, 554 S.E.2d. 346, 352-353 (N.C. Ct. App. 2001).

55 *See, e.g., In re Josue T.,* 989 P.2d 431, 435-38 (N.M. 1999) (reasonable suspicion standard applies to search by SRO at request of school official); *D.S.*, 685 So.2d at 43 (school board police officers who participate in searches initiated by school officials or who act on their own authority need only reasonable suspicion); *In Interest of Angelia D.B.*, 564 N.W.2d at 690-91 (same).

56 S*ee, e.g., State v. McKinnon*, 558 P.2d 781, 784-85 (Wash. 1977) (applying "reasonable suspicion" standard for search performed by school principal based on tip from police department because law enforcement "merely relayed information" and did not instigate or direct the search).

57 *See*, *e.g.*, *Patman v. State*, 537 S.E.2d at 120 (search conducted by a police officer on special assignment held to "probable cause" standard); *State v. Tywayne H.*, 933 P.2d 251 (N.M. Ct. App. 1997) (law enforcement officers employed by police department and stationed at school dance held to "probable cause" standard).

58 *See, e.g., State v. K.L.M.*, 628 S.E.2d 651, 653 (Ga. 2006) (applying probable cause standard to police officer even though search initiated by school official); *A.J.M. v. State*, 617 So.2d 1137, 1138 (Fla. App. 1993) (applying probable cause standard to school resource officer, paid by sheriff's office, who conducted search at request of principal). *But see State v. N.G.B.*, 806 So.2d at 569 (disagreeing with *A.J.M. v. State*).

59 *State v. Heirtzler*, 789 A.2d 634, 638-41 (N.H. 2001); *F.P. v. State*, 528 So.2d 1253, 1254 (Fla. App. 1988); *D.S.*, 685 So.2d at 43; *M.J. v. State*, 399 So.2d 996, 998 (Fla. App. 1981); *Picha v. Wielgos*, 410 F. Supp. 1214, 1219-21 (N.D.Ill. 1976).

60 *See, e.g., Martens*, 620 F. Supp. at 32 (school officials had reasonable suspicion to search a student after an anonymous tip from a parent claiming her daughter had purchased marijuana from the student); *McKinnon*, 558 P.2d at 785 (school officials had reasonable grounds to search a student based on an anonymous tip called into the police department). B*ut see In re A.T.H.*, 106 S.W.3d 338, 343-45 (Tex. App. 2003) (school security officer's pat-down search of student was not justified at its inception because an anonymous tipster provided the location and physical description of the student, but no knowledge of concealed criminal activity).

61 *See, e.g., People v. Ward*, 233 N.W.2d 180, 183 (Mich. 1975) (school official had reasonable suspicion to search a student after a teacher reported witnessing the student exchange pills with another student); *In re Michael R.*, 662 N.W.2d 632, 636 (Neb. App. 2003) (school officials had reasonable suspicion to sear based on, *inter alia*, fact that security officer overheard juvenile telling another student that he had some "big bags," which officer knew was slang term for marijuana).

62 *See, e.g., Matter of Gallegos*, 945 P.2d 656, 658 (Or. 1997) (information provided by student to school officials about another student's possession of handgun gave officials probable cause for search, even though informant-student had record of absences and tardiness because officials had never known or heard of informant lying, cheating or making up stories.); *S.C. v. State*, 583 So.2d 188, 192-93 (Miss. 1991) (school officials had reasonable grounds to search student's locker and bag after another student reported that the student possessed two handguns); *In re L.A.*, 21 P.3d 952, 959 (Kan. 2001) (school officials had reasonable suspicion to search student after a tip from Crime Stoppers organization based on information from a student). B*ut see Redding v. Safford Sch. Dist. #1*, 531 F.3d 1071, 1082-83 (9th Cir. 2008) (noting that "we do not treat all informant tips as equal in their reliability" and "we are most suspicious of those self-exculpatory tips that might unload potential punishment on a third party), *aff'd in part, rev'd in part*, 129 S.Ct. 2633 (2009).

63 *See, e.g., Shamberg v. State*, 762 P.2d 488, 489, 492 (Alaska Ct. App. 1988) (school official had reasonable suspicion to search the car of a student, who school officials observed was glassy eyed, flushed, and walking into things); *J.B.*, 719 A.2d at 1062 (school police officer had reasonable grounds to search student who was staggering in the halls with his eyes closed and speech slurred).

64 *See, e.g., State v. Baccino*, 282 A.2d 869, 872 (Del. Super. Ct. 1971) (school official had reasonable suspicion to search student's coat for contraband because the student was reluctant to relinquish the coat, was out of class illegally, and was known to the school official to have used drugs in the past).

65 *See, e.g., People v. Dilworth*, 661 N.E.2d 310, 321 (Ill. 1996) (police liaison officer had reasonable suspicion when he searched student's flashlight, after observing student meeting with another student who teachers had overheard talking about selling and bringing drugs to school); *Wynn v. Board of Educ. of Vestavia Hills*, 508 So.2d 1170, 1171-1172 (Ala. 1987) (teacher had reasonable grounds to search two students that had been alone in the classroom when money was stolen); *In Interest of Doe*, 887 P.2d 645, 652 (Haw. 1994) (school official had reasonable grounds to search the purse of a student who was one of four students standing in an area where school officials smelled the odor of burning marijuana).

66 *See T.L.O.*, 469 U.S. at 345-46. *See also Sostarecz v. Misko*, No. 97-CV-2112, 1999 WL 239401 (E.D. Pa. Mar. 26, 1999) (strip search of student for drugs after teacher reported student's "inappropriate behavior" in class was not justified at its inception).

67 *See, e.g., Fewless v. Board of Educ. of Wayland Union Schools*, 208 F. Supp. 2d 806, 819-820 (W.D. Mich. 2002) (strip search of student for drugs was not justified at its inception when based on information from students with highly questionable credibility given their potential ill motives as they were serving detention for bullying the accused student).

68 *See In re William G.,* 709 P.2d 1287, 1297 (Cal. 1985) (student's "furtive gestures" to hide his calculator case, standing alone, did not provide reasonable grounds for school official to search student's calculator case).

69 *See, e.g., Commonwealth v. Damian D.*, 752 N.E.2d 679, 683 (Mass. 2001) (search of student known for skipping classes was unlawful at inception when there was no evidence tying truancy to a reasonable belief that the student possessed contraband); *Cales v. Howell Public Schools*, 635 F. Supp. 454, 456 (E.D. Mich. 1985) (reasonable suspicion requires more than belief that student violated some rule or law, but instead requires a reasonable belief that a specific rule or law was broken and search will produce evidence of that violation).

70 *See, e.g., People v. Scott D.*, 315 N.E.2d 466, 490 (N.Y. 1974) (search of student's person by school officials, based in part on the student's association with a classmate who was under suspicion of dealing drugs, was not reasonable and was therefore unconstitutional).

71 *See e.g., Willis v. Anderson Community School Corp.,* 158 F.3d 415, 420 (7th Cir. 1998) ("'to be reasonable under the Fourth Amendment, a [school] search must ordinarily be based on individualized suspicion or wrongdoing'") (quoting *Chandler v. Miller*, 520 U.S. 305, 313 (1997)); *Interest of* Doe, 887 P.2d at 655 ("individualized suspicion" is a necessary element in determining reasonableness of school searches); *Dilworth*, 661 N.E.2d at 321, *cert. denied*, 517 U.S. 1197 (1996) (individualized suspicion required for school search).

72 *See Board of Education of Independent School Dist. No. 92 Pottawatomie County v. Earls*, 536 U.S. 822, 837-38(2002) (policy requiring all students who participated in competitive extracurricular activities to submit to drug testing was a reasonable means of furthering the school district's important interest in preventing and deterring drug use and therefore did not violate Fourth Amendment); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (school's random drug testing policy for athletes did not violate Fourth Amendment given the decreased expectation of privacy for students and student athletes, the relative unobtrusiveness of the search, and the severity of the need to deter drug use by schoolchildren).

73 *Earls*, 536 U.S. at 829-30; *Acton*, 515 U.S. at 661. *See also Thompson v. Carthage*, 87 F.3d 979, 983 (8th Cir. 1996) (search of all male students in 6th – 12th grades permissible as search – request to empty pockets and remove shoes – was minimally intrusive and search was for weapons); *Beard v. Whitmore Lake School Dist.*, 402 F.3d 598, 604-5 (6th Cir. 2005) (though individualized suspicion is not always required, in this case the scope of the search was impermissible given the highly intrusive nature of the search and the minimal governmental interest); *Rudolph, ex. Rel. Williams v. Lowndes County Bd. of Educ.*, 242 F. Supp.2d 1107, 1115 (M.D. Ala. 2003) (finding a requirement of individualized suspicion in this case because the search was more than minimally invasive).

74 *T.L.O.*, 469 at 342.

75 *See, e.g., Thomas v. Roberts*, 261 F.3d 1160, 1168-70 (11th Cir. 2001), *vacated*, 536 U.S. 953 (2002), *reinstated*, 323 F.3d 950 (11th Cir. 2003) (strip search of class of 5th grade students for stolen $26 was impermissible in scope, while pat-down of one student was permissible); *Beard v. Whitmore Lake School Dist.*, 402 F.3d 598, 605-06 (6th Cir. 2005) (strip searches of over twenty students to locate stolen prom money were overly intrusive when school officials were without reason to suspect that any particular

student was responsible for alleged theft); *Serna*, 860 P.2d at 1325 (search of student's pockets by law enforcement officer sent to investigate a fight was permissible in scope).

76 129 S.Ct. 2633, 2643 (2009).

77 *See, e.g.,Cornfield v. Consolidated High School Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993) (strip search of special education student believed to be "crotching" drugs was reasonable because of student's past history with drugs and school officials used least invasive methods given the circumstances).

78 *See, e.g., Linke v. Northwestern School Corp.*, 763 N.E.2d 972, 985 (Ind. 2002) (finding random drug-testing of students constitutional after weighing the school's interest in maintaining a safe environment conducive to learning against the student's expectation of privacy and the intrusiveness of the search).

79 *See, e.g., Com. v. Snyder*, 597 N.E.2d at 1366 (barring an express understanding to the contrary, students have reasonable and protected expectation of privacy in their school lockers); *In Interest of Dumas*, 515 A.2d at 986 (a teacher's seeing cigarettes in a high school student's hand did not provide reasonable suspicion for a search of the student's locker for drugs).

80 *See, e.g., Greenleaf v. Cote*, No. CIV. 98-250-B, 2000 WL 863217 (D. Maine Mar. 3, 2000) (students' expectation of privacy in their lockers is not clearly established); *In re Patrick Y.*, 746 A.2d 405, 414 (Md. 2000) (finding no reasonable expectation of privacy where state law and board of education by-law provided that lockers are school property and subject to search); *Shoemaker v. State*, 971 S.W.2d 178, 182-83 (Tex. App. 1998) (relying on fact that lockers remained under control of school, school administrators possessed master key to all lockers, and student handbook stated that lockers may be searched at any time to find no reasonable expectation of privacy in lockers); *In the Interest of Isiah B.*, 500 N.W.2d 639, 649 (Wis. 1993) (rejecting argument that students have reasonable expectation of privacy in lockers based on school policy that retained ownership and possessory control of lockers); *Commonwealth v. Cass,* 709 A.2d 350, 357 (Pa. 1998) (search of lockers was a minimally intrusive invasion of the students' privacy interests because of "the limited expectation of privacy in that unique setting" where school officials had access to lockers and could make repairs to them without informing students). *See also State v. Jones*, 666 N.W.2d 142, 150 (Iowa 2003) (while students have a legitimate expectation of privacy in their lockers, the annual school-wide locker cleanout was not overly intrusive in light of the circumstances and the school's legitimate interest in maintaining a safe and clean environment).

81 *See Earls*, 536 U.S. at 834; *Acton*, 515 U.S. at 660.

82 *Safford Unified Sch. Dist.*, 129 S.Ct. at 2641. *See also Thomas*, 261 F.3d at 1168-69 (finding that "students had an important privacy interest in not being unclothed involuntarily" and distinguishing facts from *Vernonia* because theft of $26 "does not present such an extreme threat to school discipline or safety that children may be subject to intrusive searches without individualized suspicion"); *Carlson v. Bremen High School Dist. 228*, 423 F.Supp.2d 823, 827 (N.D. Ill. 2006) (belief that students stole money because they were the last to leave the locker room was insufficient to provide reasonable suspicion for a strip search of students).

83 *See, e.g., T.L.O.*, 469 U.S. at 337.

84 *See, e.g., State v. Barrett*, 683 So.2d 331, 338 (La. App. 1996) (search of pockets reasonable and constitutional because of decreased expectation of privacy defendant had as a student, the relative unobtrusiveness of the search and the severity of the need); *In Interest of S.F.*, 607 A.2d 793, 796 (Pa. Super.

Ct. 1992) (search of pockets reasonable in scope when officer observed conduct of student which included quickly hiding a plastic bag and wad of money in his pocket); *Russell v. State*, 74 S.W.3d 887, 893 (Tex. App. 2002) (pat-down search of pockets reasonably related to objective of determining whether student had a gun and was not excessively intrusive).

85 *See, e.g., In the Matter of Appeal in Pima County Juvenile Action No. 80484-01,* 733 P.2d 316, 317-18 (Ariz. Ct. App. 1987) (there was no reasonable suspicion to justify principal's command that student empty his pockets where there were reports of drug use in the school but no personal knowledge and specific reports regarding this particular student's use or possession of drugs); *Greenleaf*, 2000 WL 863217 (search of student's pockets and backpack was not justified at its inception because it came from a third-hand source). *But see Thomas*, 261 F.3d at 1168 (suspicionless pat-down search of student for stolen $26 was reasonable).

86 *See, e.g., Doe v. Little Rock School Dist.*, 380 F.3d 349, 352-53 (8th Cir. 2004) (blanket search practices authorizing suspicionless searches of students' belongings violated the Fourth Amendment where students had a legitimate privacy interest and there was no evidence to justify schools' random classroom search policy); *In re William G.*, 709 P.2d at 1297 (no reasonable suspicion justified school official's search of student's calculator case where there was no prior knowledge or information relating the student to the possession, use, or sale of illegal drugs or other contraband).

87 *See, e.g., Greenleaf*, 2000 WL 863217 (students' expectation of privacy in lockers not clearly established; manner in which search of lockers, backpacks, and containers were conducted found reasonable especially in light of school's interest in preventing drug abuse); *In re Patrick Y.*, 746 A.2d at 414 (students had no reasonable expectation of privacy in lockers, so reasonable suspicion or probable cause were not required for locker searches; court declined to address search of book-bag within locker); *In re Adam*, 697 N.E.2d 1100, 1107 (Ohio Ct. App. 1997) (although recognizing that "a student does not lose his expectation of privacy in a coat or book bag merely because the student places these objects in his locker," finding that search of bag in locker was reasonable when there was knowledge and admission that student was smoking cigarettes and odor of marijuana).

88 *See, e.g., B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1266-68 (9th Cir. 1999) (dog sniff constitutes a 4th Amendment search and the search was unreasonable because the school lacked any evidence of a drug problem); *Cass,* 709 A.2d at 357 ("Case law makes clear that a canine sniff is *not* a search under the 4th Amendment" and use of dogs to sniff lockers and searches of lockers flagged by the dogs were constitutional because of "the limited expectation of privacy" in setting where school officials had access to lockers) (emphasis added); *In re Dengg*, 724 N.E.2d 1255, 1260(Ohio 1999) (police had probable cause to search student's car when drug-sniffing dog alerted handler of presence of drugs in car; it did not matter that student was detained in classroom during search and was not present during the search).

89 *See, e.g., People v. Dukes*, 580 N.Y.S.2d 850, 853 (N.Y. Crim Ct. 1992) (the intrusion involved in a school metal detector search was not greater than necessary to satisfy governmental interest in security underlying need for search); *Doe v. Little Rock School Dist.*, No. LR-C-99-386, 1999 WL 33945744 (E.D. Ark. Aug. 26, 1999) (same); *In re S.S.,* 680 A.2d 1172, 1176 (Pa. Super. Ct. 1996) (same).

90 *See, e.g., Thomas*, 261 F.3d at 1168 (in an effort to find $26 taken from classroom, strip search of classroom students was impermissible in scope, while pat-down search of outside student was permissible in scope).

91 *See, e.g., Earls*, 536 U.S. at 834 (school does not need evidence of pervasive drug problem within school, and instead the epidemic of drug use in society at large is enough to justify schools in preemptive action to curb drug abuse.); *Acton*, 515 U.S. at 662-665 (school had rampant drug problem that was

led by student athletes and caused sports injuries); *Greenleaf*, 2000 WL 863217 (searches of students' lockers were reasonable because of school's interest in addressing the apparent drug problem).

92 *See, e.g., Doe v. Little Rock School Dist.*, 380 F.3d at 356 (random classroom search of students' belongings was unconstitutional because students had greater privacy interest and school had no evidence of school-wide drug or weapon problem to justify random classroom search policy); *Burnham v. West*, 681 F. Supp. 1160, 1166-67 (E.D. Va. 1987) (group searches for drugs were unconstitutional where there was no evidence of drug use to justify the searches).

93 *See, e.g., Doe v. Little Rock School Dist.,* No. LR-C-99-386, 1999 WL 33945744 (E.D. Ark. Aug. 26, 1999) (finding that state has compelling interest in providing a safe environment for students and stating that "with the recent outbreak of gun violence at schools, schools should be permitted to take some reasonable preventive measures to guard against gun violence on school property"); *Dukes*, 580 N.Y.S.2d at853 ("Weapons in schools, like terrorist bombings at airports and courthouses, are dangers which demand an appropriate response"); *In re S.S.,* 680 A.2d at 1176 (noting "the high rate of violence in the Philadelphia public schools" and holding that the school's interest in ensuring security and educating its students far outweighed student's privacy interest).

94 *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

95 *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). *See also* Com. v. Krisco Corp., 653 N.E.2d 579, 585 (Mass. 1995); *In re J.M.*, 619 A.2d 497, 502-04 (D.C. 1992) (factors that may render a person vulnerable to coercion include youth, emotional disturbance, lack of education and mental deficiency).

96 *U.S. v. Drayton*, 536 U.S. 194, 206-07 (2002).

97 *Florida v. Royer*, 460 U.S. 491, 501 (1983).

98 Courts "indulge every reasonable presumption against waiver of fundamental Constitutional rights." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

99 In *Roper v. Simmons*, 543 U.S. at 569-70, the Supreme Court noted three fundamental differences between juveniles and adults that bear on culpability. First, juveniles lack immaturity and have an underdeveloped sense of responsibility which often lead to ill-considered decisions. Second, juveniles are more susceptible to outside, negative influences, such as peer pressure. Third, juveniles' personalities are less fixed and more transitory than adults. These developmental differences have bearing upon issues around consent. *See also* Steinberg and Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003).

100 *See generally* Feld, *supra* note 23; Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 Wis. L. Rev. 431; Jodi L. Viljoen and Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms,* 29 L. & Hum. Behav. 723 (2005); Rona Ambrovitch, Karen Higgins-Bass and Stephen Bliss, *Young Person's Comprehension of Waivers in Criminal Proceedings*, Canadian J. of Criminology 309 (1993); Barbara Kaban and Ann E. Tobey, *When Police Question Children: Are Protections Adequate?*, 1 J. Ctr. for Child. & Cts. 151-160 (1999); Thomas Grisso, Juveniles' Waiver of Rights: Legal and Psychological Competence (1981); Grisso, *supra* note 24, at 1134-1166. *See also* Barry C. Feld, *Juveniles' Waivers of Legal Rights: Confessions, Miranda, and the Right to Counsel*, *in* Youth on Trial: A Developmental Perspective on Juvenile Justice 105-120 (Thomas Grisso and Bob Schwartz eds. 2000).

101 *See T.J. v. State*, 538 So.2d 1320, 1321-1322 (FL. 2d Dist. App. Ct. 1989) (scope of search of 15-year-old student was unreasonable when, based on information that either she or another student had a knife at school, assistant principal searched student's purse and, finding no knife, unzipped a small side pocket inside the purse where marijuana was found).

102 *See Crane v. Kentucky*, 476 U.S. 683 (1986).

103 *Commonwealth v. Tavares*, 430 N.E.2d 1198, 1206 (1982) (At trial, the judge must find, beyond a reasonable doubt, that the statement is voluntary. A *voir dire* is conducted out of the presence of the jury. The issue of voluntariness is then submitted to the jury, and they must be instructed that the Commonwealth has the burden of proving the statement was voluntary beyond a reasonable doubt); *State v. Dennis*, 893 A.2d 250, 262 (R.I. 2006) (Humane Practice Rule "requires that judge and jury make separate and independent determinations of voluntariness and the defendant's statement may not serve as a basis for conviction unless both judge and jury determine that it was voluntarily made").

Developed by Katayoon Majd (National Juvenile Defender Center), Randee Waldman (Barton Juvenile Defender Clinic), and Wendy Wolf (Youth Advocacy Project of the Committee for Public Counsel Services). We would like to thank Catherine Kim of the American Civil Liberties Union for sharing her insights and research with us during the development of this publication, and Professor Paul Holland at Seattle University School of Law for his invaluable comments on an earlier draft. Law students Mehtab Brar, Jennifer Cox, Julie Kim, Chelsey Tulis, and Stefanie Winston, and NJDC policy advocates Jessica Beck and JiSeon Song provided excellent research assistance. We would also like to thank Currey Cook for his contributions.

National Juvenile Defender Center

1350 Connecticut Avenue NW, Suite 304
Washington, DC 20036
Phone: 202.452.0010
Fax: 202.452.1205
www.njdc.info
inquiries@njdc.info