

south dakota's guide to

student rights & responsibilities

Designed for School Attorneys

S D Attorney General's Office and S D
Department of Education
and Cultural Affairs

Table of Contents

Introduction.....	3	Suspension and Expulsion.....	11
Safe School Projects	4	School Records.....	13
Student Rights and	6	Search and Seizure	15
Responsibilities		Locker Searches.....	18
Conduct off School.....	7	Search by Drug-Sniffing Dogs ...	18
Grounds		Suspicionless Searches	18
Corporal Punishment	7	Terroristic Threats and	21
Restriction on Dress	8	False Reporting	
and Grooming		Appeals.....	22
Flag Salute and Pledge	8	Conclusion.....	22
of Allegiance		Contact Numbers	22
Freedom of Expression.....	9		
School Rules.....	10		
Possession of Tobacco,	10		
Alcohol, Drugs,			
and Firearms			

Introduction

I am pleased to provide school attorneys with this updated version of the South Dakota Guide to Student Rights and Responsibilities.

This publication is a reference guide for school law and school safety issues. Although we have attempted to give an overview of the subject area, this guide is not a comprehensive exposition on all aspects of the law. This guide is not intended as an official opinion of the Office of the Attorney General.

Schools are tasked with the responsibility of providing an education for our kids in a safe and secure environment. This duty to assure student and teacher safety has come to the forefront in recent years because of the tragic events in several schools nationwide. In this process of assuring safety, it is important that we don't overlook the rights of students. We believe this guide will help sort out the rights and responsibilities of students, schools, teachers and administrators.

This guide was put together through the cooperative efforts of DECA and the Office of the Attorney General. We are fortunate to have a strong educational system in South Dakota. We hope this guide will serve as a useful reference tool for all people striving to maintain our high standards.

If you have any comments, questions, or suggestions concerning this guide, please contact either DECA or the Office of the Attorney General.



Mark Barnett
Attorney General
State of South Dakota

Safe School Projects

Recent school tragedies such as those in Littleton, Colorado; Jonesboro, Arkansas; and Pearl, Mississippi, have raised the awareness of school administrators and school boards about the safety of students and teachers in school settings. Those tragedies present questions about the responsibility and role of school districts in protecting students and staff.

In South Dakota, all children are entitled to a free public education. That entitlement includes the right to be in a safe environment, free of negative influences. The South Dakota Legislature has made it clear that the general operation, management, and supervision of public schools is vested in the local school board. State and federal law regulates certain areas, most notably student possession of guns, drugs, and alcohol. However, these restrictions do not prevent local school boards from establishing policies to further address these concerns. Thus, school boards have the right and responsibility to develop policies and procedures to ensure that their students receive a quality education in a safe, secure environment. In that vein, school boards can and should

develop policies to address topics including discipline, behavior, contraband, and search policies within their schools.

Diversity supports the idea of local control of school districts. South Dakota, although classified as a rural state, has a population center in Sioux Falls of more than 100,000 people, and the Sioux Falls School District is responsible for educating approximately 18,800 students. In contrast, the Conde School District is responsible for educating 73 students. While all districts must be concerned about their students safety and education, some of the issues confronting the Sioux Falls School District are not the same as those facing the Conde School District. Therefore, it is essential that local school boards have the opportunity to develop policies and procedures to address their specific needs.

It is important to remember that although courts have emphasized the authority of local school officials over school districts, students "do not shed . . . their constitutional rights at the schoolhouse gates." **Tinker v. Des Moines Independent Community School**

District, 393 U.S. 503, 560 (1969).

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental (inalienable) rights which the state must respect, just as they themselves must respect their obligations to the state.
Tinker v. Des Moines, 393 U.S. 503.

It is critical that school legal counsel is involved in the development and implementation of school policies and procedures to ensure that students' rights are protected in the process of maintaining safe, quality schools. This guide is simply meant to provide information about the rights and responsibilities of public school students in South Dakota and the role of local communities in school safety. The exact nature and extent of any legal right or duty depends upon circumstances unique to a particular case. These guidelines should not be considered a final statement of all student rights or responsibilities.

It is recommended that each school district:

- Establish a formal written policy on student conduct, safety, and welfare;
- Make the written policy public and accessible to all students, parents, and community members;
- Define student rights and responsibilities as specifically as possible within the policy, as well as;
- Identify unacceptable student behavior and consequences that may be imposed when such behavior occurs;
- Develop forms to be used by school personnel, including consent to search, search report form, rights to privacy with respect to lockers and/or vehicles in school parking lots.

The code of conduct should include student conduct and safety; policies for students who are disruptive on school grounds or at school activities or events; disciplinary actions including suspension, expulsion, and use of physical force;

gang-related activities; and misuse or abuse of technology, including the Internet.

While this is not an exhaustive list of concerns involving schools and school districts, this guide attempts to address some of the common questions raised about school safety issues.

Rights and Responsibilities

It is the **S**tudent's Right to:

- attend school free of charge;
- attend school and participate in school activities at no expense even though married or pregnant;
- attend school until age 21, or graduation from high school, at public expense, including free textbooks and instructional materials;
- expect that the school will be a safe place for all students to gain an education;
- expect that the school will provide an educational program that meets special needs, abilities and talents and also meets the standards established for all schools by the state legislature and the South Dakota Board of Education;
- exercise freedom of speech, press and expression of views;

- exercise freedom of assembly;
- receive due process and equal protection;
- dress in such a way as to express individual personality;
- establish and participate in student government.

It's the **S**tudent's Responsibility to:

- attend school daily, except when excused or ill, and arrive on time for all classes;
- protect and show respect for public property;
- pay only costs that are of a personal nature or for participation in voluntary activities;
- obey all restrictions on students in accordance with board rules and regulations;

- be aware of all rules and regulations for student behavior and act in accordance with them;
- participate in and take advantage of the educational opportunities provided by the school;
- respect the human dignity and worth of all other individuals;
- refrain from libel, slanderous remarks and obscenity in verbal and written expression;
- refrain from disobedience, misconduct or behavior that disrupts the educational process;
- respect the reasonable exercise of authority by school administrators and teachers in maintaining discipline in the schools and at school sponsored activities;
- dress in a manner that meets fair standards of propriety, safety, health, and good taste;

- take an active part in student government by running for office, or voting for the best candidates; make problems known to the school staff through student representatives;
- assume a rule is in effect until it is waived, altered, or repealed.

Conduct off School Grounds

Students do not automatically leave the control of the school authorities once they leave the school grounds. It is well settled in the law that school officials have the authority to control student conduct off school grounds and outside school hours. As early as 1859, a boy, overheard making a derogatory comment about his teacher, was disciplined the following day even though the comments were made outside of the school day and off school grounds. The court upheld the punishment because the boy's remarks could undermine management of the

school. More recent cases have supported this position.

Even when students are engaged in school-sponsored activities after school hours, they are still subject to the authority of school officials whether or not the activity occurs on school property. In situations where the behavior was not part of a school sponsored activity, school officials may still discipline students for out-of-school activities when that conduct may affect the safety and well-being of the student, other students, or school officials. Disciplinary action may also be considered when the activity causes damage to school property or makes management of the school more difficult.

Corporal Punishment

South Dakota law allows for "physical force" when reasonable and necessary.

SDCL 13-32-2. *Superintendents, principals, supervisors, and teachers and*

their aids and assistants, have the authority to use the physical force that is reasonable and necessary for supervisory control over students. Like authority over students is given any person delegated to supervise children who have been authorized to attend a school function away from their school premises and to school bus drivers while students are riding, boarding, or leaving the buses.

Another law protects the proper use of force.

SDCL 22-18-5. To use or attempt or offer to use force upon or toward the person of another is not unlawful if committed by a parent or the authorized agent of any parent, or by any guardian, teacher or other school official, in the exercise of a lawful authority to restrain or correct his child or ward and if restraint or correction has been rendered necessary by the misconduct of such child or ward, or by his refusal to obey the lawful command of such parent, or authorized agent, guardian, teacher or other school official, and the force used is reasonable in manner and moderate in degree.

Although South Dakota law does allow the use of physical force in maintaining discipline in schools, the parameters of the acceptable level of force have not been established. It is strongly recommended that schools develop policies and procedures on the use of physical force and the degree of physical force allowed. We also recommend that all staff be trained on those policies and procedures. It is not advisable to use force in the absence of such guidelines and training. The Office of Attorney General and Department of Education and Cultural Affairs do not recommend the use of physical force, but the statutes set out above do set the parameters for its use.

As our statutes dictate, the amount of force used must be reasonable and necessary given the student's age and sex, conduct of the student, and threat of harm to other students, staff, and the student. Schools should be careful to use the minimum amount of force necessary to control the situation. It is also helpful if the discipline occurs when multiple authority figures are present, and the student is isolated from other students to prevent escalation of a

potentially volatile situation. A "show of force" by authorities can often defuse a tense situation, and if fewer students present during the "show of force" it will decrease the risk of injury or intervention by other students.

Restriction on Dress and Grooming

It is well established that students have a constitutionally protected right to govern their appearance while attending a public school. To justify restrictions on this right, the school district must meet a "substantial burden of justification." That is, school boards must show that there is an overriding public purpose to be served by limiting students' rights to appear dressed in a certain fashion. The justification cannot be based on speculation or prior restraint. The school district must demonstrate that the style of dress or grooming restricted disrupts the ongoing school program, invades the rights of others, or is a health or safety hazard.

Recent cases have supported school districts' attempts to reduce the "gang influence" in dress and grooming. Again, the schools must demonstrate the discipline or other problems that resulted from the "gang influence" in dress and grooming. Prior restriction may not be constitutionally undertaken unless the restriction is accompanied by discipline, health, or safety reasons supporting the style of dress or grooming.

Flag Salute and Pledge of Allegiance

The school board may legally provide for a flag salute and pledge of allegiance as a regular school exercise. Students cannot, however, be required to take part in these or other patriotic activities. A dissenting student should have a valid reason (such as religious preference or a claim of a First Amendment privilege) for not participating and should respect those who do participate by remaining silent or by requesting permission to leave the area.

Moreover, while students do not have to salute the flag, they may not, under state law, willfully and maliciously abuse or show contempt for the flags of the United States of America or South Dakota. SDCL 22-9-1. There may be constitutional restrictions on these principles.

Freedom of Expression

Connected with the limited authority to regulate dress and grooming, courts have granted schools the right to restrict certain types of student expression. As early as 1969, the United States Supreme Court, in **Tinker**, 393 U.S. 503, confirmed that students have constitutionally protected rights with respect to freedom of speech or expression in the school setting. Like other rights, however, this right is not unlimited. Wearing armbands or freedom buttons has been upheld. But when a disturbance occurs, the board may reasonably limit free expression.

The United States Supreme Court in Bethel v. Fraser, 478 U.S. 675 (1986)

and **Hazelwood School District v. Kuhlmeier**, 108 S.Ct. 562 (1988), reinforced the rights of school administrators to provide for a positive school climate. In those cases, the court sent a clear signal that inappropriate individual expression that negatively influences others will not be constitutionally protected. The high court has also given school authorities more discretion in monitoring school sponsored journalism, plays, and other expression that is part of the curriculum.

First Amendment rights of students in the public school are not automatically coextensive with the rights of adults in other settings and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school. **Hazelwood School District v. Kuhlmeier**, 108 S.Ct. 562 (1988).

Under the First Amendment, an offensive or vulgar form of expression may be acceptable when an adult makes the comment as part of a political forum, but

the same latitude is not required in school settings. Schools have the right and responsibility to regulate the use of vulgar and offensive terms in public speech in the school setting.

School Rules

The school board and staff may legally make reasonable and necessary rules governing the conduct of students in school. The rule-making power, however, is not unlimited; it must operate within statutory and constitutional restraints. A board of education has only those powers which are enumerated in the laws of the state, or which are necessarily implied for the orderly operation of the school.

The First Amendment spells out the constitutional rights of all Americans to freedom of religion, association, speech, press, peaceable assembly, and petition. The Fourteenth Amendment guarantees equal protection of the law and due process of law. The greater the loss of freedom through the operation of a board rule, the more careful the board must be in assuring due process protections to students. School boards may not make rules that are arbitrary, capricious, or outside the authority given to them by the Legislature. Board rules must stand the test of fairness and reasonableness.

While there is no hard and fast definition of what is reasonable, a rule is generally considered so if it utilizes a rational means of accomplishing some legitimate school purpose.

Constitutionally protected activity may not be infringed unless school officials can show that the failure to regulate would create a material and substantial disruption of school work and discipline, invade the rights of others, or would result in a clear and present danger to the health, morals, safety, or general welfare of others. Whether such a restraint is necessary is for the board and its representatives to prove through factual evidence and not through opinions. School rules are assumed to be "reasonable" until they are rescinded, waived, or overturned by a court. The first priority of the student should, therefore, be to obey the rules while working through channels to help change those that do not meet student approval.

Possession of Tobacco, Alcohol, Drugs, and Firearms

The South Dakota Legislature has decreed that possession of tobacco and alcohol by minors is prohibited. In addition, possession of controlled substances and marijuana are crimes in South Dakota, unless an authorized healthcare provider specifically prescribes the controlled substance. Some substances are deemed so dangerous that their possession may not be legal, even by prescription. Severe state and federal penalties are provided for violations under state law and the federal "SAFE AND DRUG-FREE SCHOOLS ACT."

For example, **SDCL 13-32-9** provides suspension from extracurricular activities for controlled substance and marijuana violations. School officials are duty bound to observe and enforce these laws.

In addition, both the federal "GUN-FREE SCHOOLS ACT OF 1994" and **SDCL 13-32-7** prohibit the presence of any

firearm or dangerous weapon on school grounds.

SDCL 13-32-7. *Any person, other than a law enforcement officer, who intentionally carries, has in his possession, stores, keeps, leaves, places or puts into the possession of another person, any firearm or air gun, whether or not the firearm or air gun is designed, adapted, used or intended primarily for imitative or noisemaking purposes, or any dangerous weapon, on or in any elementary or secondary school premises, vehicle or building or any premises, vehicle or building used or leased for elementary or secondary school functions, whether or not any person is endangered by such actions, is guilty of a Class 1 misdemeanor. This section does not apply to starting guns while in use at athletic events, firearms or air guns at firing ranges, gun shows and supervised schools or sessions for training in the use of firearms. This section does not apply to the ceremonial presence of unloaded weapons at color guard ceremonies.*

Finally, dangerous weapon is defined in **SDCL 22-1-2(10)** as "any firearm, knife

or device, instrument, material or substance, whether animate or inanimate, which is calculated or designed to inflict death or serious bodily harm." Whether an item is a dangerous weapon is a factual question that should be discussed with legal counsel.

Suspension and Expulsion

Suspension and expulsion are disciplinary measures involving removal and exclusion from school. Short-term suspension is an exclusion from school for ten (10) days or less. Long-term suspension is an exclusion from school for more than ten (10) days but not more than ninety (90) days. Expulsion is exclusion from school for not more than twelve (12) months. Expulsion and long-term suspension are reserved for school board action, and a hearing must be provided. A short-term suspension does not require a formal hearing before the school board, but the student must be given an opportunity to be heard.

Detentions and in-school suspensions require no formal due process hearing. The formality and need for documentation of procedures quickly escalates when the exclusion exceeds ten (10) days. This is because state law grants students an "entitlement" to education. The student may not be deprived of this entitlement by the government (i.e. school) without due process of law. Students' rights to suspension and expulsion hearings are outlined in state law as follows:

SDCL 13-32-4. *The school board of every school district shall assist and cooperate with the administration and teachers in the governance and discipline of the schools. The board may suspend or expel from school any student for violation of rules or policies or for insubordination or misconduct, and the superintendent or principal in charge of the school may temporarily suspend any student in accordance with **SDCL 13-32-4.2.** The rules or policies may include prohibiting the following:*

- the consumption or possession of beer or alcoholic beverages on the school premises or at school activities;
- the use or possession of a controlled substance, marijuana, drug paraphernalia, cigarettes, and huffing materials, without a valid prescription, on the school premises or at school activities; and
- the use or possession of a firearm, as provided in **SDCL 13-32-7**, on or in any elementary or secondary school premises, vehicle, or building or any premises, vehicle, or building used or leased for elementary or secondary school functions or activities.

In addition to administrative and school board disciplinary action, any violation of **SDCL 13-32-7** shall be reported to local law enforcement authorities.

The period of expulsion may extend beyond the semester in which the violation, insubordination, or misconduct occurred. Any expulsion for consumption or possession of beer or alcoholic beverages may not extend beyond ninety school days. If a student has intentionally

brought a firearm onto school premises, the expulsion may not be for less than twelve months.

However, the superintendent or chief administering officer of each local school district or system may increase or decrease the length of a firearm-related expulsion on a case-by-case basis. The South Dakota Board of Education shall promulgate rules pursuant to SDCL ch. 1-26-26 to establish administrative due process procedures for the protection of a student's rights. The administrative due process procedures shall include a requirement that the school give notice of a student's due process rights to the parent or guardian of the student at the time of suspension or expulsion. Each school district board shall provide a procedural due process hearing, if requested, for a student in accordance with such rules if the suspension or expulsion of the student extends into the eleventh school day.

This section does not preclude other forms of discipline which may include suspension or expulsion from a class or activity.

This section does not prohibit a local school district from providing educational services to an expelled student in an alternative setting.

SDCL 13-32-4.2. The school board in any district may authorize the summary suspension of pupils by principals of schools for not more than ten school days and by the superintendent of schools for not more than ninety school days. In case of a suspension by the superintendent for more than ten school days, the pupil or his parents or others having his custodial care may appeal the decision of the superintendent to the board of education. Any suspension by a principal shall be immediately reported to the superintendent who may revoke the suspension at any time. In event of an appeal to the board, the superintendent shall promptly transmit to the board a full report in writing of the facts relating to the suspension, the action taken by him and the reasons for such action; and the board, upon request, shall grant a hearing to the appealing party. No pupil may be suspended unless:

- The pupil is given oral or written notice of the charges against him;

- *The pupil is given an oral or written explanation of the facts that form the basis of the proposed suspension; and*
- *The pupil is given an opportunity to present his version of the incident.*

In the event of a suspension for more than ten school days, if the pupil gives notice that he wishes to appeal the suspension to the board, the suspension shall be stayed until the board renders its decision, unless in the judgment of the superintendent of schools, the pupil's presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, in which case the pupil may be immediately removed from school, and the notice and hearing shall follow as soon as practicable.

These statutes do not preclude other forms of discipline, which may include suspension or expulsion from a class or activity.

The South Dakota Board of Education has adopted a due process procedure that must be used by a public school

when suspending or expelling students. Copies of the South Dakota Board of Education's rules should be available in every school.

Additional procedures may be required when disciplining special education students. The South Dakota Board of Education has adopted due process procedures that public schools should follow when considering suspension or expulsion of special education students.

School Records

Students' school records are confidential. Authorized school personnel, parents (whether custodial or not), legal guardians, students who have reached age 18, state and local education officials, and persons with court orders may inspect student records. Others must have the parent's written permission. It is the school's responsibility to know who has been allowed access to records and to keep careful record of what was released to whom and for what purpose. School

officials are notified when access to student records is terminated by court order.

In general, federal and state law on student records (FERPA) restricts the release of information in a student's permanent file to outside agencies without a court order or parental permission. This does not mean that school officials cannot discuss a student's behavior with law enforcement or social services without a court order or parental permission.

School officials must be cautious in their dealings with outside agencies to limit the information they give to such agencies. They can only share information that is outside of the student's educational record. For example, a school principal could inform law enforcement that he or she found a student with spray paint cans in his locker, where there was a recent rash of vandalism in the school. School officials cannot share with law enforcement that the student's grades have recently dropped and attendance has been sporadic. However, if a teacher is aware of a student's absence from a specific

class, that teacher may share that information with law enforcement. In the absence of a warrant or court order, first-hand knowledge is needed for a teacher to share information with law enforcement. With a valid court order, law enforcement may have access to the information in the student's file. Peer grading of work has been held to not be a violation of FERPA.

Under the state's compulsory attendance laws, parents have the right to inform themselves of their child's progress in school. School officials can be required to interpret the contents of the file or to explain the meaning of test results. In the case of parents with children receiving special education services, records must be available five (5) days prior to any meetings or hearings regarding IEPs, evaluations, or placements.

Parents may challenge the contents of their child's records and request a withdrawal of information. If the school declines the request, parents may insist upon a hearing. If the hearing officer determines the information in question is accurate and appropriate, the content will

remain, but parents are allowed to provide a written rebuttal to be permanently attached to the document or information.

The following policy should govern the collection and administration of student records:

- A student's permanent file shall include only this information: identifying data (including names and addresses of parents or guardian), birth date, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, and possibly medical records;
- Any other records shall be available only to the student or parents or guardian of the student and the school staff. All records shall be governed by strict safeguards for confidentiality and shall not be available to others in or outside of the school except upon the consent of a parent or 18-year-old student. These other records shall be considered temporary and shall be destroyed when the individual leaves the school;

- All records shall be open to challenge by an 18-year-old student or the parents or guardian of the student;
- A student's opinion shall not be disclosed to any outside person or agency;
- A student shall be free from punitive actions in evaluations of academic competency and in college or job references because of individual opinions; and
- When a student reaches the age of eighteen (18), all rights concerning school records transfer from the parents to the student. Parents no longer have a legal right to examine their child's records without the child's permission (there is a limited exception allowing parental access where the parent can prove that the student is dependent on the parent).

The school can make no charges for record searches or information retrieval, but may charge only a reasonable fee for photocopying. In the case of special education records, such photocopying

charges cannot preclude parental access to records.

Search and Seizure

The United States Supreme Court in **New Jersey v. T.L.O.**, 469 U.S. 325 (1985), recognized that when school personnel look through a student's purse or backpack, this constitutes a search for Fourth Amendment purposes. The right of school personnel to conduct a search on school grounds is broader than for a search conducted outside of the school context. The United States Supreme Court in **Veronia School District 47J v. Acton**, 515 U.S. 646 (1995), stated that "students within the school environment have a lesser expectation of privacy than members of the population generally." That does not mean that school personnel have carte blanche to search a student's belongings or person. The **T.L.O.** case defined the parameters when school personnel conduct a search on school grounds. The student's expectation of privacy must be balanced against the substantial interest of school

personnel in maintaining discipline and fostering an environment where learning can take place.

In **T.L.O.**, the Court established a two-part test to determine the legality of school searches by school personnel:

The legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider "whether the . . . action was justified at its inception"; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." **T.L.O.**, 469 U.S. at 341.

A search can be executed if there are reasonable grounds for suspecting that evidence of violation of law or school rule will be discovered during the proposed search. One must also consider the scope of the search with respect to the age, and sex of the student, and the nature of the rule violation. Intrusive

searches are more questionable than a pat-down search. For example, a strip search of teenage girls (or boys) by a teacher for \$50 would not be a permissible search.

Inspecting the student's person or possessions, such as purse, backpacks, or clothing, would constitute a search for Fourth Amendment purposes. Pat downs or physically examining a person or his possessions constitute a search. Movement of items or opening sealed containers to have a "plain view" of an area would constitute a search. In contrast, observing items in plain view is not a search. Observing abandoned items or where ownership is not claimed would not be a search. Detecting sights or smells in a normal fashion is not a search. Peering in the windows of a vehicle does not constitute a search unless the car is entered in some fashion.

Ordinarily, for school officials to conduct a search of student or students, there must be reasonable suspicion that: 1) a law or school rule has been violated; 2) the student or students have violated the rule or law; and 3) evidence of the violation would likely be found in a particular place

or manner. For example, if the violation is possession of a weapon such as a gun, a search of the suspect's backpack, purse, or car would be justified, but a search of a coin purse would not be. A gun could not be in a coin purse. However, during a justified search, evidence may be discovered that would authorize an expanded search. For example, during the search for the gun, marijuana was discovered, possession of which is a violation of state law and school rules. In that circumstance, a search of the coin purse would be justified. In limited circumstances, some searches may be undertaken without any suspicion. See the suspicionless search section for more information.

The concept of reasonable suspicion is based on common sense, considering all of the facts and circumstances in a given situation. A mere hunch or supposition is not reasonable suspicion. Since the question of reasonable suspicion may arise following the search, it would be prudent for local school districts to develop a form to document the facts and circumstances that justified the search at its inception and the scope and procedures followed during a specific

search. This protects the school district from liability and the individual student from an unreasonable search. There must be reasonable suspicion for each individual to be searched. Blanket searches of an entire group are not protected except under specific circumstances.

A particular type of search that should almost never be used is a "strip search." As the name implies, this type of search is particularly invasive. Courts have indicated that "the Fourth Amendment applies with its fullest vigor against any indecent or indelicate intrusion on the human body." **Horton v. Goose Creek Independent School District**, 690 F.2d 470 (5th Cir. 1982). Even if the student is not asked to remove any or all clothing in the "strip search," any search that involves inspection of the body is particularly invasive and is not condoned by the courts, except in rare circumstances.

Schools should be particularly cautious about conducting strip searches. Courts will carefully review the facts justifying a "strip search." Clearly, "strip searches" should not be considered for minor

infractions or where immediate danger is not at issue. That is not to suggest that "strip searches" are never justified. "Strip searches" may be necessary to detect the presence of controlled substances or weapons. Because of the danger involved in those activities, the "strip search" might, in rare circumstances, be justified.

Again, there must be individualized reasonable suspicion at the outset, and the search must be limited to what is necessary to find evidence. In other words, "strip searches" of an entire class would not be recommended to look for a small amount of money. When school personnel have reasonable suspicion that a student or students have on their person weapons that put the student body in danger, a "strip search" is likely justified. However, if the weapon is a gun, it is unnecessary that the student's undergarments be removed, because the weapon would be visible through the undergarments.

Schools should establish policies and particular procedures for all searches.

These policies should be devised to

minimize the intrusion on any student's privacy.

An Important Caveat

The general principles outlined about searches of students may not apply when law enforcement are involved or present during the search. Even if law enforcement are not directly involved, but school personnel are acting as agents of law enforcement, the principles are different. When law enforcement is involved in a search of students or school property there must be, at a minimum, probable cause to search. Law enforcement's use of a drug dog on school property is later in this document.

A student has the right to counsel if he or she is being questioned by law enforcement as a suspect or witness to a potential crime. Prior to questioning, the student also maintains the right to inform parents of the situation. The student does not have to talk to law enforcement.

When the investigation involves child abuse, the parents may or may not be notified as provided by South Dakota law. Finally, law enforcement may arrive

at the school with a search or arrest warrant. Schools should have formal legal policies in place about law enforcement's access to students during school hours.

Under certain circumstances, individualized reasonable suspicion may not be necessary before school personnel can conduct a search. See section 4.

Consent

When students consent to a search of their person or belongings, the Fourth Amendment is not impacted. It is recommended that a standard consent form be included in the local school district's code of conduct. If school officials have reasonable suspicion to conduct a search, consent is not necessary. In contrast, if a student consents to a search, reasonable suspicion is not at issue. It is important that the consent be knowing and voluntary. This determination will depend upon the facts and circumstances surrounding the consent in each case. The court will review "the effect [that] the totality of the

circumstances had upon the will of the [student] and whether [his] will was overborne." **State v. Anderson**, 2000 S.D. 45, ¶ 80, 608 N.W.2d 644, 667. There are many factors that will be considered in making this ruling. For example, was the consent in writing; did the student have access to food and water; was there any physical restraint or physical barriers; what is the level of intelligence and/or experience and age of the student; what was the length of any detention; and was the student told he was free to leave? This is not an inclusive list of factors.

It may also be helpful to review factors that have been utilized to determine the voluntariness of a consent outside a school setting. See generally **Anderson**, **Supra**, and **State v. Darby**, 1996 S.D. 127, 556 N.W.2d 311. It is also important to have the student sign a consent form prior to the search. The student may not be coerced or forced to provide consent or the consent is invalid. In addition, the denial of consent may not be used to form reasonable suspicion or to punish the student for violation of school rules.

Reasonable suspicion may develop during a consensual search that would justify continuing the search even after consent is withdrawn.

Locker Searches

Locker searches have long been endorsed because the lockers belong to the school and are loaned to the students during the school year for their use. Some courts have indicated that when the students have put their personal items in the locker, they have privacy rights in the contents of the lockers. Therefore, the lockers are not school property and not subject to search without reasonable suspicion unless students have been informed that the lockers are school property and can be searched by school personnel. South Dakota courts have not specifically addressed this issue. If local districts intend to search lockers on a random basis, it is prudent for them to post notice in their code of conduct and/or in visible places in the school. It is not appropriate, however, for a district to select only certain students' lockers for inspection. That policy is constitutionally suspect.

Also, vehicles in a school parking lot may be searched if there is reasonable suspicion that evidence of a violation of law or school rule will be found inside. As previously indicated, looking in the windows of a car parked in a parking lot and observing evidence of a rule violation is not a search. Schools may want to include notice in their code of conduct that cars parked on school property are subject to search. This information should also be posted conspicuously in the school. The written notice reduces the expectation of privacy of students. That notice does not authorize random searches of the interiors of students' personal cars. Reasonable suspicion or consent is still required before the vehicle may be searched.

Search by Drug-Sniffing Dogs

A sniff of a closed container by a drug detection dog is not a search because it is "minimally intrusive." *United States v. Place*, 462 U.S. 696 (1983). Therefore, when drug dogs are brought to a school to "sniff" cars, lockers, bookbags, or purses, it is not a search for Fourth

Amendment purposes. Opening the container, whether it be a car, bookbag, or purse, is a search and must be based, at a minimum, on probable cause, if the dog belongs to law enforcement. Again, when law enforcement is involved in searches on school grounds, even if law enforcement does not conduct the actual search, the standards to justify the search may differ. It is likely that a positive "hit" by the drug dog would constitute probable cause, warranting the search of the container.

Suspicionless Searches

While searches of students by school personnel have traditionally required individualized reasonable suspicion, recent cases have approved suspicionless searches in schools under limited circumstances. **Veronia School District 47J v. Acton**, 515 U.S. 646 (1995). In *Veronia*, all school athletes were subject to random drug tests because of the prevalence of widespread drug use by athletes in that school district. A fact significant to the Court was that the school district could demonstrate problems with drug use by student athletes and the attempts used

to remediate the drug use in that specific district. Besides the physical dangers inherent with drug use by athletes, discipline problems had increased, and the student athletes were role models for the other students.

The test for suspicionless searches is one of reasonableness. **Board of Education v. Earls**, 2002 WL 1378649 (U.S. Supreme Court, June 27, 2002). In determining reasonableness of suspicionless searches of students, the court requires a “fact-specific balancing of the intrusion on the children’s Fourth Amendment rights against the promotion of legitimate governmental interests.” Among the considerations are the nature of the privacy interest compromised; the character of the intrusion; and the nature of immediacy of the school’s concerns.

In Earls, a drug testing policy requiring testing of all students in “competitive extra-curricular activities” was upheld where there was evidence of drug use in the schools, the giving of a urine sample was completed behind a closed rest room stall door, and the results were confidential and not used for disciplinary or criminal purposes.

This area of the law continues to evolve. If a school district decides to institute a program of suspicionless drug testing, it must have a factual basis for it, and it must carefully craft the program in close consultation with the school’s attorney. There must be a factual basis for suspicionless drug testing, as the court held in Chandler v. Miller, 520 U.S. 305 (1997). This remains the law even after the Earls decision.

Courts have not clearly addressed the issue of suspicionless searches of students for weapons. The danger and immediate need to discover weapons on school grounds would suggest that suspicionless searches of students through metal detectors or other non-invasive methods will be approved. It is still unclear whether the courts would support a more invasive suspicionless search for weapons of a particular group, unless it can clearly be established that this group is a danger to the school and there is reason to believe that the students to be searched possess weapons. It is important to emphasize that these searches cannot be used as a pretext to target certain individuals.

Random searches of students as they enter or leave school grounds would appear permissible based on existing case law. Again, if a school has reasonable suspicion to believe that a student has a weapon, they are justified to conduct a search of that person.

Summary

The type of search and the justification for the search depends on the extent and invasiveness of the search. The more invasive the search, the more procedural safeguards are required. Thus, the search of a student’s backpack requires less justification and procedural safeguards than a rarely justified “strip search” of students. The more invasive search may be acceptable depending on the possible outcome. That is, if the alleged contraband is a gun or a bomb, and the risk of injury to students is great, a more invasive search may be justified.

Generally speaking, searches of lockers and parking lots, and the use of metal detectors by school personnel are permissible. Searches of students require individualized suspicion unless the factual situation is such that a search

without individualized suspicion is required to address an immediate existing problem. In other words, there must be a real or perceived emergency. The courts have cautioned that blanket searches of the entire student body should not be condoned, except under very limited circumstances.

Seizure

The Fourth Amendment also regulates the seizure of an individual or his property. A seizure is an interference with a student's freedom of movement or interference with a student's possessory interest in property. Schools are unique in that a large number of students are in a small area with a limited number of teachers and/or staff to control the students. The United States Supreme Court has acknowledged the difficulties inherent in controlling students while providing a quality education. Moreover, during the school day, students are under the control of school personnel rather than their parents or guardians. Thus, in a school setting, restrictions on a student's freedom of movement or possessory interest in property are ongoing. For example, students need to

be in a specific class and not wandering the halls, and students may be restricted in what they bring to school or whether they can carry a backpack to class. These are not seizures for Fourth Amendment purposes.

There may be circumstances, however, where because of the conduct of a student, the student's freedom of movement may be more restricted. The principles outlined on searches would also be applicable here. In addition, when law enforcement comes to the school to arrest a student or seeks to question a particular student, the district should establish policies to address those situations, so that the school district is not involved in taking away a student's constitutional rights.

Furthermore, when the specific circumstances suggest that the student, because of mental health or other issues, is an immediate danger to himself or others, state law, such as SDCL ch. 27A-15, lays out specific procedures that should be followed to protect the individual student's rights and protect the other students and staff in the school. Detention in such a situation would be

warranted until the student is controlled or is moved to an appropriate place. School districts have broad authority to regulate local schools. For more information, see the section on Suspension and Expulsion.

Terroristic Threats and False Reporting

In 2002, the South Dakota Legislature adopted a statute that significantly broadened crimes involving terroristic threats and the placing of hazardous or injurious devices or substances. The new statutes are found in SDCL Chapter 22-14A.

These new statutes make several changes. SDCL § 22-14A-22 previously prohibited false reporting of a bomb, and made doing so a Class 6 felony, punishable by up to two years in the South Dakota Penitentiary. It also imposed all costs of such a report on the person making the report. The 2002 amendment broadened this crime to include threats of placing dangerous chemicals, biological agents, poisons or harmful radioactive substances. Now, false reporting of either a bomb or destructive device, or of chemicals, biological agents, poisons, or harmful radioactive substances is punished equally under the law.

In addition, SDCL § 22-14A-24 prohibits the use of any substance or device to intentionally communicate a threat. Any person who communicates a threat by leaving any substance or device, that

causes either serious public inconvenience or the evacuation or serious disruption of any building, place of assembly, facility of public or school transport, or school related event is guilty of this new crime. It is a Class 4 felony, punishable by up to 10 years in prison. This crime can be committed by actually leaving a harmful substance in any place, or by using an apparent dangerous weapon, destructive device, dangerous chemical, biological agent, poison, or harmful radioactive substance. One thus can be guilty of the Class 4 felony by using an apparent substance, not just the substance itself.

In addition, the new § SDCL 22-14A-25 makes it a Class 5 felony (punishable by up to five years in prison) to possess, transport, use, or place any hoax substance or hoax destructive device with the intent of causing anxiety, unrest, fear, or personal discomfort. A hoax substance is any substance that would cause a person to reasonably believe that it is a harmful substance.

A hoax destructive device is any device that would cause a person to reasonably believe that it is a dangerous explosive or incendiary device or similar destructive device.

Upon being convicted of any of these crimes, the defendant may be ordered to make restitution to local, county, or state public service agencies for any costs incurred, damages and financial loss or property damage sustained as a result of the commission of the crime.

None of these statutes may be construed to create any cause of action against a person based upon or arising out of an act relating to any good faith response to a terrorist act or attempted terrorist act. Thus, those responding in good faith to terrorist acts are not subject to these statutes.

It is believed that these amendments and strengthening of the statutes will not only permit a more effective response to terrorist acts, threats, and hoaxes, but will also impose all costs upon those who commit such crimes.

Appeals

A person dissatisfied with a decision has the right to appeal to a higher authority. Thus, the student may appeal a decision of a teacher to the principal, and the principal's decision to the superintendent. If still not satisfied, the superintendent's decision may then be appealed to the board. Any school board action may be appealed to the circuit court and ultimately to the State Supreme Court. (SDCL Ch.13-46)

Contact Information

Office of the Attorney General
500 East Capitol
Pierre, SD 57501
Telephone: 605-773-3215

Department of Education
and Cultural Affairs
700 Governors Drive
Pierre, SD 57501
Telephone: 605-773-5669
Fax: 605-773-6139

Conclusion

School safety is a concern for everyone. Schools have the difficult job of protecting students and staff while providing a quality education. In that vein, courts have recognized the unique role of schools in school discipline and safety. Schools still have an obligation to protect the constitutional rights of students within their supervision and should be aware of those rights as they develop policies and procedures.

Revised July 2002 by the Attorney General's Office and the Department of Education and Cultural Affairs.