THE LEGAL AID SOCIETY
JUVENILE RIGHTS PRACTICE
MANUAL FOR CHILDREN'S LAWYERS
Representing Children In Juvenile Delinquency Proceedings:
Juvenile Search And Seizure Issues

Gary Solomon
August, 2023

JUVENILE SEARCH AND SEIZURE ISSUES

By: Gary Solomon

Updated: 8/23

Table of Contents

I. Notice Of Intent To Offer Physical Evidence

Pursuant to FCA §330.2(2), the presentment agency must serve upon the respondent notice of its intention to offer evidence "described in section 710.20 or subdivision one of section 710.30 of the criminal procedure law .... Such notice must be served within fifteen days after the conclusion of the initial appearance or before the fact-finding hearing, whichever occurs first, unless the court, for good cause shown, permits later service and accords the respondent a reasonable opportunity to make a suppression motion thereafter. If the respondent is detained, the court shall direct that such notice be served on an expedited basis."

The way in which FCA §330.2(2) was drafted has given rise to a controversy that should be noted. Criminal Procedure Law §710.20, which is referred to in FCA §330.2(2), includes types of evidence which can be the subject of a suppression motion, but are not included in the notice requirement in CPL §710.30. For instance, CPL §710.20 includes tangible evidence, and, through the incorporation by reference of CPL §60.45, involuntary statements made to private individuals.

In Matter of Eddie M., 110 A.D.2d 635, 487 N.Y.S.2d 122 (2d Dept. 1985), the Second Department held that tangible evidence is covered by the notice requirement in FCA §330.2(2), but concluded that since the respondent had knowledge of the presentment agency's intention to introduce a gun that was the subject of a possession charge, there was good cause to dispense with the notice requirement. See also Matter of Alex C., 207 A.D.2d 745, 616 N.Y.S.2d 959 (1st Dept. 1994). But see Matter of Luis M., 83 N.Y.2d 226, 608 N.Y.S.2d 962 (1994) (§330.2(2) does not require presentment agency to serve notice of intent to offer statement made by respondent to person not involved in law enforcement).

II. School Searches And Seizures

A. Constitutional Standard

In New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985), the Supreme Court held that the Fourth Amendment applies to searches conducted by public school officials. The court noted that a child has a legitimate expectation of privacy protecting the child from a search of the person, or a search of personal property brought into the

school:

> Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

469 U.S. at 339. The Fourth Amendment does not apply to searches by private school officials. See, e.g., Limpuangthip v. United States, 932 A.2d 1137 (D.C. Ct. App. 2007) (officers at private university who had been appointed as Special Police Officers by mayor were not state actors when they participated in dormitory search; they did not exercise arrest power, their involvement was peripheral, and University administrator, not SPOs, made decision to conduct search).

However, after weighing students' privacy interests against the substantial interest of school officials in maintaining discipline, the court rejected use of the probable cause standard, and concluded that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." 469 U.S. at 341. "Under ordinary circumstances, a search of a student by a teacher or other school official will be `justified at its inception' when there are 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" [emphasis supplied]. Id. at 341-342. Thus, as was the case in T.L.O., where the search was directed at cigarettes, suspicion of criminal activity is not the only ground for a search. The Supreme Court did not decide whether "individualized suspicion is an essential element of the reasonableness standard," but hinted that it is not by noting that exceptions are

appropriate when privacy interests are minimal or where other safeguards assure that the "official in the field" does not possess too much discretion. Id. at 342, n. 8.

The T.L.O. ruling did not materially change the law in New York. Prior to T.L.O., the New York Court of Appeals had held that, "[g]iven the special responsibility of school teachers in the control of the school precincts and the grave threat, even lethal threat, of drug abuse among school children, the basis for finding sufficient cause for a school search will be less than that required outside the school precincts" [citations omitted]. People v. Scott D., 34 N.Y.2d 483, 488, 358 N.Y.S.2d 403, 408 (1974).

In Matter of Gregory M., 82 N.Y.2d 588, 606 N.Y.S.2d 579 (1993), the Court of Appeals held that the "reasonable suspicion" standard controls under the New York State Constitution. The Court of Appeals did not specifically hold that the "reasonable suspicion" standard includes an "individualized suspicion" element. However, that standard has always included an individualized suspicion component when applied in search and seizure cases, and a "reasonable suspicion" test is distinguishable from the "reasonableness" test articulated in T.L.O. And, in support of its decision to apply a lower standard in cases involving conduct that falls short of a full-blown search (see [C] below), the court noted that the Supreme Court has disclaimed any intent to require individualized suspicion in all school search contexts. Consequently, it appears that the Court of Appeals would require as a matter of State Constitutional law that individualized suspicion be present in any case involving a full search. See also People v. Taylor, 625 N.E.2d 785 (Ill. App. Ct., 4th Dist., 1993); In re William G., 709 P.2d 1287 (Calif. 1985) (individualized suspicion test adopted).

Finally, it should be remembered that generalized searches of numerous students which are based on legitimate security concerns, and are reasonable in scope, may be proper even in the absence of individualized suspicion. See, e.g., Matter of Elvin G., 12 N.Y.3d 834, 882 N.Y.S.2d 671 (2009) (family court erred in failing to order suppression hearing where respondent alleged that school dean ordered students in classroom to stand and empty pockets in attempt to discover cell phone or electronic device that had disrupted class, and presentment agency claimed that dean had asked students to put bookbags on desks and respondent had voluntarily removed knife from

pocket); In re Sean A., 191 Cal.App.4th 182 (Cal. Ct. App., 4th Dist., 2010) (search upheld where it was conducted pursuant to policy under which every student who left campus and then returned was subject to search upon return, students and parents received notice of policy as part of school's behavior code, and search was carried out without touching student, who was required only to empty pockets; purpose was to prevent students who left in violation of school rules from bringing in harmful objects such as weapons or drugs); Matter of Haseen N. 251 A.D.2d 505, 674 N.Y.S.2d 700 (2d Dept. 1998) (court upholds administrative search involving patdown of students on Halloween in effort to prevent recurrence of prior Halloween incidents); Brannum v. Overton County School Board, 516 F.3d 489 (6th Cir. 2008) (plaintiffs adequately alleged Fourth Amendment violation where school authorities installed and operated video surveillance equipment in boys' and girls' locker rooms; students could reasonably expect that no one, including school authorities, would videotape them without their knowledge, in various states of undress, while they changed clothes for athletic activity, and this measure was disproportionate to claimed policy goal of assuring increased school security); In re Lisa G., 23 Cal.Rptr.3d 163 (Cal. Ct. App., 4th Dist., 2005) (mere disruptive behavior did not justify search of purse for identification document so teacher could write referral); Thompson v. Carthage School District, 87 F.3d 979 (8th Cir. 1996) (where school bus driver informed principal that there were fresh cuts on bus seats, and students told principal that there was a gun at school that morning, direction to all male students to take off their shoes and socks and empty their pockets was reasonable, minimally intrusive command).

However, when school officials engage in more intrusive conduct after a student sets off or refuses to pass through a metal detector, or otherwise fails to voluntarily comply with procedures, the constitutional issues become more complex.

B. Application Of Exclusionary Rule

Although the Supreme Court did not decide in New Jersey v. T.L.O. whether the exclusionary rule applies in the school search context, the Court of Appeals held in People v. Scott D. that, "if there is not sufficient cause [for a school search], the exclusionary rule must be applied in a criminal prosecution to evidence obtained

illegally." 34 N.Y.2d at 488. See also In re William G., supra, 709 P.2d 1287. It has also been held that the exclusionary rule applies at school disciplinary proceedings. See Matter of Juan C., 223 A.D.2d 126, 647 N.Y.S.2d 491 (1st Dept. 1996), rev'd on other grounds 89 N.Y.2d 659, 657 N.Y.S.2d 581 (1997). But see Thompson v. Carthage School District, 87 F.3d 979 (8th Cir. 1996) (exclusionary rule does not apply); Gordon v. Santa Ana Unified School District, 162 Cal. App.3d 530 (Ct. App., 4th Dist., 1984) (exclusionary rule not applicable).

C. Intrusions Other Than Full-Blown "Search"

Since police conduct that falls short of a search is governed by lower standards [see People v. DeBour, 40 N.Y.2d 210, 386 N.Y.S.2d 375 (1976)], it appears that similar conduct by school officials will be tested under lower standards.

In Matter of Gregory M., supra, 82 N.Y.2d 588, the respondent, who was required by school policy to leave his book bag with a school security officer before reporting to the Dean's office, tossed the bag on a metal shelf, causing a metallic "thud" that the officer thought was "unusual." The officer ran his finger over the outer surface of the bottom of the bag and felt the outline of a gun. After the officer summoned the Dean, who also felt the shape of a gun, the bag was brought to the Dean's office and opened by the head of school security, who recovered a gun.

While recognizing that "reasonable suspicion" is required for searches such as that conducted in New Jersey v. T.L.O., the Court of Appeals concluded that the investigative touching of Gregory M.'s bag can, like a "Terry" frisk, be categorized as a "limited search." Consequently, a "less strict justification" than reasonable suspicion is required. 82 N.Y.2d at 593. See also Matter of Thomas G., 83 A.D.3d 1065 (2d Dept. 2011) (school safety officer had reasonable grounds to suspect respondent was armed and acted reasonably where, after respondent placed hand down front waistline of pants after twice being told not to and slid hand from pants to inside shoulder of jacket, officer patted down pockets of jacket and did not feel anything but then ran hand along sleeves and felt small, hard object, and then opened zipper of jacket, observed tear in shoulder and turned sleeve up, and small cellophane bag containing white pill later determined to be Xanax fell from sleeve). Although it was a container that was "frisked"

in Gregory M., it should be noted that there is already a line of cases in New York that permits a protective seizure, "frisk" or search by an officer of a container within the suspect's reach when the officer has a reasonable suspicion that the suspect is armed and that the container might contain a weapon. See, e.g., People v. Lewis, 82 N.Y.2d 839, 606 N.Y.S.2d 146 (1993); People v. Brooks, 65 N.Y.2d 1021, 494 N.Y.S.2d 103 (1985); People v. Davis, 64 N.Y.2d 1143, 490 N.Y.S.2d 725 (1985); People v. Tratch, 104 A.D.2d 503, 479 N.Y.S.2d 250 (2d Dept. 1984). Cf. People v. Meachem, 115 A.D.2d 370, 495 N.Y.S.2d 667 (1st Dept. 1985).

Although the Court of Appeals' analysis in Gregory M. is not cause for optimism, it may still be possible to argue that a frisk of the person, which is substantially more intrusive than the touching in Gregory M., requires reasonable suspicion. That standard was used in Matter of Ronald B., 61 A.D.2d 204, 401 N.Y.S.2d 544 (2d Dept. 1978).

However, it appears that the mere detention of a student by school officials, in a manner that would require reasonable suspicion if a police officer were involved, would, given the analysis in Gregory M., require something less than reasonable suspicion. Indeed, it can even be argued that the detention of a student (e.g., removal from a classroom to be held in a school security office) involves no constitutionally cognizable loss of liberty, since a student is already "detained" in school pursuant to the Education Law. See In re Randy G., 28 P.3d 239 (CA 2001) (liberty “is scarcely infringed if a school security guard lead the student into the hall to ask questions about a potential rule violation”; detentions of minor students are not improper as long as they are not arbitrary, capricious or for the purpose of harassment).

However, coercive measures employed by school officials that go beyond the usual restraints associated with school attendance may be unlawful. See Doe v. Aberdeen School District, 42 F.4th 883 (8th Cir. 2022) (unlawful seizures occurred when defendant and aides picked up and carried child into little room, held door shut, and forbade her from leaving until she completed tasks unrelated to disciplinary violation, staff shuttered another child in calm-down corner with physical barriers and prevented him from leaving, and grabbed him to push him into swimming pool, and another child was pinned down to strip his clothes off); also rose to the level of seizures; however, no

seizures occurred when one child was carried to gym class and another child was kept atop a horse, which were actions not radically different than what typical student might experience); K.W.P. v. Kansas City Public Schools, 931 F.3d 813 (8th Cir. 2019) (no constitutional violation where school-employed officer handcuffed seven-year-old second grader who had resisted officer's directive to accompany him to office and attempted to flee upon removal from the classroom for being disruptive; reasonable officer could conclude that keeping child in handcuffs for 15 minutes until parent arrived was reasonable course of action; and principal's failure to intervene was reasonable in light of previous experience with child, who, just two months earlier, tried to leave playground after getting mad at principal for instructing him not to hit others, and actively resisted by trying to pull away from principal); Jones v. Hunt, 410 F.3d 1221 (10th Cir. 2005) (student was in custody when she was questioned by social worker and uniformed officer in small, confined school counselor's office to which student had been sent by school official after threatening suicide, and warned that she would be arrested if she did not agree to live with her father and that her "life would be hell"); Wallace v. Batavia School District, 68 F.3d 1010 (7th Cir. 1995) (while attempting to maintain order and discipline, a school official violates the Fourth Amendment only when he or she seizes a student in an unreasonable manner). Cf. People v. Alls, 83 N.Y.2d 94, 608 N.Y.S.2d 139 (1994) (Miranda warnings required when prison inmate is subject to restraints beyond those ordinarily involved in prison confinement).

Finally, given the Gregory M. decision, it does not appear that school officials need any justification when they question a student under circumstances that would constitute a request for information or a common law inquiry under People v. DeBour, supra, 40 N.Y.2d 210.

D. Locker Searches

In New Jersey v. T.L.O., the Supreme Court did not decide "whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies." 469 U.S. at 337, n. 5.

Clearly, in most instances there is constitutional protection against a search of a student's locker by the police. In People v. Overton, 20 N.Y.2d 360, 283 N.Y.S.2d 22

(1967), vacated and remanded 395 U.S. 85, 89 S.Ct. 252 (1968), reaffirmed 24 N.Y.2d 522, 301 N.Y.S.2d 479 (1969), three detectives obtained a search warrant directing a search of two students, one of whom was the defendant, and their lockers. A vice-principal consented to a search of the defendant's locker, where the detectives found four marijuana cigarettes. While applying the Fourth Amendment, the Court of Appeals noted that "[a] depository such as a locker or even a desk is safeguarded from unreasonable searches for evidence of a crime" [citation omitted]. 20 N.Y.2d at 361. However, the court held that, since the defendant had, like all students, given the lock combination to his home room teacher for filing, and was aware that he did not have exclusive control over the locker as against school authorities, the vice-principal had authority to consent to the search. See also United States v. Davis, 967 F.2d 84 (2d Cir. 1992) (friend of defendant had authority to consent to search of footlocker shared by defendant and the friend).

It also appears that students have a legitimate expectation of privacy protecting them from unreasonable searches of lockers by school officials. See Commonwealth v. Cass, 666 A.2d 313 (Pa. 1995). However, under circumstances similar to those present in People v. Overton, supra, 20 N.Y.2d 360, a student might have only a limited privacy interest protecting against such a search. Indeed, in Overton the court noted that "the school issues regulations regarding what may and may not be kept in the lockers and presumably can spot check to insure compliance." 20 N.Y.2d at 363. In any event, it is clear that the existence of school regulations limiting a student's privacy interests, and a student's awareness of those regulations, are important factors in determining whether a search is reasonable. Compare State v. Jones, 666 N.W.2d 142 (Iowa 2003) (students have legitimate expectation of privacy, but school may engage in reasonable searches in furtherance of duty to maintain proper educational environment) and Commonwealth v. Cass, supra, 666 A.2d 313 (Code of Student Conduct required reasonable suspicion that contraband will be found in locker) with In re Patrick Y., 746 A.2d 405 (Md. 2000) (no reasonable expectation of privacy where statute and Board of Education by-law provided that lockers could be searched); Isiah B. v. State, 500 N.W.2d 637 (Wis. 1993) (where school system promulgated, and gave students notice

of, a written policy under which the school retained ownership and possessory control of lockers, students had no expectation of privacy and random searches were permissible); Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981) ("Inasmuch as the school had assumed joint control of the locker it cannot be successfully maintained that the school did not have the right to inspect it") and State ex rel. T.L.O., 463 A.2d 934, 943 (N.J. 1983) (this is the New Jersey Supreme Court's opinion in the T.L.O. case; court notes that student is justified in believing that master key to locker will be employed at his or her request, but expectation of privacy might not arise if school carries out policy of regularly inspecting lockers). See also In re Patrick Y., 723 A.2d 523 (Md. Ct. App., 2000), aff'd 746 A.2d 405 (after receiving information from unnamed source that there were drugs and/or weapons in middle school area, school was entitled to conduct generalized search of every locker in middle school).

Of course, even when school officials are justified in opening a student's locker, subsequent intrusions that are broader than necessary should be challenged. For instance, when a search of one locker is conducted because of a specific report concerning a particular student's possession of a gun, or when random searches are conducted because of more general but well-founded concerns about weapons, the patdown of a bulge in an article of clothing found in a locker might be supportable [see, e.g., Isiah v. State, supra, 500 N.W.2d 637 (after lifting coat that was unusually heavy, security official patted down pocket, felt hard object and recovered gun)], but a full search of all the pockets of a student's clothing might not. In New Jersey v. T.L.O., the court found reasonable the opening of T.L.O.'s purse to look for cigarettes.

E. Desk Searches

Particularly in view of the Court of Appeals' holding in People v. Overton, supra, 20 N.Y.2d 360, it is unlikely that a student would be able to establish more than a very limited expectation of privacy in a desk. Indeed, in any school setting in which a student moves around from classroom to classroom during the course of a day, a particular desk is used by any number of students, each of whom has to expect that other persons will be storing and examining items in the desk. It might be possible to invoke a more substantial privacy interest in a desk (or in a locker, for that matter) if the desk is used

by only one student, and its contents are hidden from plain view, and there is no policy putting the student on notice that the contents are subject to inspection. Cf. O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1987) (public employee had reasonable expectation of privacy in his desk and file cabinets where he did not share his desk or file cabinets with any other employees, had occupied the office for 17 years, and kept personal items in the office).

It should be noted that, in a delinquency proceeding in which it is alleged that the respondent possessed contraband recovered from a desk, the access possessed by other students may form the basis for a successful defense. See, e.g., Matter of Melvin V., 165 A.D.2d 662, 560 N.Y.S.2d 39 (1st Dept. 1990).

F. Cell Phones

In G.C. v. Owensboro Public Schools, 711 F.3d 623 (6th Cir. 2013), the court found no reasonable grounds to believe that a search of the student's cell phone would uncover evidence of unlawful activity after a teacher caught him sending text messages. The student's documented drug abuse and suicidal thoughts, without more, did not justify the search. The court refused to adopt a rule under which using a cell phone on school grounds would automatically trigger an unlimited right to search any content stored on the phone. See also Jackson v. McCurry, 762 Fed.Appx. 919 (11th Cir. 2019) (search of student's cell phone did not violate clearly established federal law where another student alleged that bullying text messages were sent to other students, and allegation was corroborated by two other students, and policies outlined in school handbook prohibit both bullying and rude or disrespectful behavior towards other students; it was at least arguable that there were reasonable grounds for suspecting that search would turn up evidence that student violated rules of school, nothing in New Jersey v. T.L.O. establishes that search of high-school senior's text messages for evidence of bullying would be excessively intrusive, and, although school official allegedly expanded search and reviewed messages between student and persons other than informant students, official could reasonably assume that student could disguise contacts and messages from them).

In Riley v. California, 134 S.Ct. 2473 (2014), the Supreme Court held that officers must generally secure a warrant before searching a cell phone seized from an individual who has been arrested, and that the search incident to arrest exception does not apply. It is worth wondering whether the Riley decision should extend to cell phone searches by school officials.

G. Informants

It is not uncommon for school authorities to conduct a search after a student or a teacher has reported that a person is in possession of contraband. When a "full-blown" search is conducted, and, therefore, individualized suspicion is required, it appears, for instance, that a face-to-face report by a student who states that he or she has observed a named student in possession of a gun or drugs would be sufficient. See Matter of A.J.C., 355 Or. 552 (Or. 2014) (State constitutional school safety exception to warrant requirement supported principal's reasonable suspicion-based search of parts of juvenile's backpack that could contain a gun where school counselor had passed on to principal another student's report that juvenile had stated to her the night before that he was going to bring gun to school to shoot her and possibly other students); People v. Cartagena, 189 A.D.2d 67, 594 N.Y.S.2d 757 (1st Dept. 1993), lv denied 81 N.Y.2d 1012, 600 N.Y.S.2d 200 (reasonable suspicion justified frisk where man pointed to defendant during face-to-face conversation with officer and stated that he had seen defendant "brandishing" a gun); J.A.R. v. State, 689 So.2d 1242 (Fla. App., 2d Dist., 1997). Even in the absence of an allegation that the informant actually observed contraband, it appears that a face-to-face report by a student who alleges that a named suspect is in possession of contraband would also be sufficient, even if the informant could not later be identified. See Matter of Frankie M., 200 A.D.2d 479, 606 N.Y.S.2d 232 (1st Dept. 1994); People v. Harris, 175 A.D.2d 713, 573 N.Y.S.2d 280 (1st Dept 1991), lv denied 79 N.Y.2d 827, 580 N.Y.S.2d 208. In fact, it has been held that an anonymous tip that names a suspect can, under some circumstances, provide reasonable suspicion. See People v. Harry, 187 A.D.2d 669, 590 N.Y.S.2d 256 (2d Dept. 1992), lv denied 81 N.Y.2d 789, 594 N.Y.S.2d 736 (1993) (stop and frisk was justified where anonymous tipster named defendant and stated that he was at a

specified location with a gun).

Needless to say, a report by a teacher that a particular student has a gun or other contraband will ordinarily provide reasonable suspicion. Cf. Matter of Ronald B., supra, 61 A.D.2d 204. However, when the informant-teacher's source of information is entirely unknown, a challenge should be raised to the reliability of the report, and, as in cases involving the "fellow officer" rule [see, e.g., People v. Lypka, 36 N.Y.2d 2l0, 366 N.Y.S.2d 622 (1975)], it should be argued that reasonable suspicion cannot be demonstrated unless the informant-teacher or other school official is produced in court and testifies concerning the source of his or her belief that the student was in possession of contraband. See People v. Lee, 193 A.D.2d 529, 598 N.Y.S.2d 456 (1st Dept. 1993) (when issue was raised by defense counsel, People were required to establish source and nature of report from Philadelphia police that led to stop of defendant).

H. Metal Detectors

Although they are conducted in the absence of individualized suspicion, school metal detector searches fall into a general category of regulatory searches that are often upheld as reasonable law enforcement or security measures. In People v. Scott, 63 N.Y.2d 518, 483 N.Y.S.2d 649 (1984), the Court of Appeals, while upholding the use of a drunk driving roadblock, noted that "[t]he permissibility of a particular practice is a function of its `reasonableness,' which is determined by balancing its intrusion on the Fourth Amendment interests of the individual involved against its promotion of legitimate governmental interests" [citations omitted]. 63 N.Y.2d at 525. Included in an analysis of such a practice is "the degree of discretion in the officials charged with carrying it out." Id.

Particularly in view of the compelling state interest in keeping guns out of the public schools, and the minimal intrusion involved in the mere scanning of a student or his or her possessions, it does not appear that the mere use of metal detectors to screen students entering a public school is vulnerable to constitutional attack. See People v. Kuhn, 33 N.Y.2d 203, 209, 351 N.Y.S.2d 649, 653 (1973) (court upholds use of airport magnetometers, and notes that use of the device "involves a minimal intrusion

requiring the traveler to simply walk through the device without any physical contact"); Bozer v. Higgins, 204 A.D.2d 979, 613 N.Y.S.2d 312 (4th Dept. 1994) (limited physical and electronic searches of persons entering courthouse are reasonable under Federal and State Constitutions); People v. Rincon, 177 A.D.2d 125, 581 N.Y.S.2d 293 (1st Dept. 1992), lv denied 79 N.Y.2d 1053, 584 N.Y.S.2d 1021; In re F.B., 726 A.2d 361 (Pa. 1999), cert denied 528 U.S. 1060, 120 S.Ct. 613 (school-wide metal detector scans and bag searches upheld); State v. J.A., 679 So.2d 316 (Fla. App., 3rd Dist., 1996), appeal denied 689 So.2d 1069 (1997), cert denied 522 U.S.831; People v. Pruitt, 662 N.E.2d 540 (Ill. App., 1st Dist., 1996), appeal denied 667 N.E.2d 1061 (random school metal detector searches upheld); People v. Spalding, 3 Misc.3d 1052, 776 N.Y.S.2d 765 (Crim. Ct., Bronx Co., 2004) (search of defendant's knapsack as he attempted to enter courthouse was proper); cf. Matter of Haseen N. supra, 251 A.D.2d 505 (court upholds administrative search involving patdown of students on Halloween in effort to prevent recurrence of prior Halloween incidents); Thompson v. Carthage School District, 87 F.3d 979 (8th Cir. 1996) (where school bus driver informed principal that there were fresh cuts on bus seats, and students told principal that there was a gun at school that morning, direction to all male students to take off their shoes and socks and empty their pockets was reasonable, minimally intrusive command). But see B.C. v. Plumas Unified School District, 192 F.3d 1260 (9th Cir. 1999) (dog sniff of student's person is search under Fourth Amendment, and, in absence of reason to believe there was drug problem in school, random and suspicionless search of student was unreasonable).

However, when school officials engage in more intrusive conduct after a student sets off or refuses to pass through a metal detector, or otherwise fails to voluntarily comply with procedures, the constitutional issues become more complex.

First of all, it is important to note that a student's awareness that a metal detector search will be done, and his or her conscious choice to bring contraband to school despite the elevated risk of getting caught, do not negate all privacy interests. The authorities cannot neutralize privacy interests simply by providing notice that searches will be conducted. "The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped or that all

homes would be searched." United States v. Davis, 482 F.2d 893, 905 (9th Cir. 1975). However, advance notice may affect the weight of the privacy interest, see In re F.B., supra, 726 A.2d 361 (students and parents were repeatedly warned that students would be arrested if they brought weapons or drugs to school); People v. Waring, 174 A.D.2d 16, 20, 579 N.Y.S.2d 425, 428 (2d Dept. 1992) (given longstanding practice of searching persons and luggage at airports, "it is difficult to see how anyone could assert a reasonable expectation of privacy in a package which is being brought onto an airplane or through an airport sterile area"), or result in a finding that a person impliedly consented to certain intrusions. See People v. Rincon, supra, 177 A.D.2d 125; United States v. Davis, 482 F.2d 893, 913 (9th Cir. 1973); People v. Spalding, supra, 3 Misc.3d 1052 (courthouse search). But see D.I.R. v. State, 683 N.E.2d 251 (Ind. Ct. App., 1997) (although student was aware of routine electronic wand searches, she did not impliedly consent to manual search conducted when she arrived late).

In People v. Dukes, 151 Misc.2d 295, 580 N.Y.S.2d 850 (Crim. Ct. N.Y. Co., 1992), the court upheld the use of a hand-held scanning device, and the subsequent recovery of a knife which was removed by the respondent upon request from a manila folder that was in a bag which had set off the device. The court concluded that the procedure was sustainable as an "administrative search." While recognizing that, unlike a student, an airport passenger who triggers a device remains free to leave and avoid a more intrusive search, the court nevertheless concluded that the governmental interest in school security justifies further intrusions. The court discussed in detail the Board of Education guidelines governing the use of metal detectors and found them "minimally intrusive" despite the fact that a student does not enjoy the right to terminate a search at any stage. While citing Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972), in which the Sixth Circuit upheld a regulation requiring all persons entering a federal courthouse to submit to a search of their briefcases and packages for explosives and other dangerous weapons, the court noted that "[a]n attorney, much like a student, has little choice in the matter when an appearance in court is required." 151 Misc.2d at 300. However, the court in Dukes failed to mention that although the regulations upheld in Downing v. Kunzig state that those who refuse to permit a search cannot take the articles they carry

into the building, those regulations do not prevent such persons from leaving the building without being subjected to a search. Except when the manner and circumstances surrounding a particular student's attempt to leave the school provide grounds to pursue and seize the student and then conduct a forcible patdown or search, it can be argued that a student who is not truant may leave the school without interference. Compare Spear v. Sowders, 71 F.3d 626 (6th Cir. 1995) (prison officials must give visitor option of aborting visit before conducting administrative body cavity search or detaining person while awaiting a warrant); People v. Parker, 672 N.E.2d 813 (Ill. App., 1st Dist., 1996) (defendant was illegally seized when officer stopped him as he was leaving school and told him he had to go through detector); Gadson v. State, 668 A.2d 22 (Md. 1995) (prison visitor had right to depart before detention and canine sniff) and United States v. Davis, supra, 482 F.2d 893 (airport screening is reasonable administrative search, but passenger must be allowed to choose not to fly) with United States v. Brugal, 209 F.3d 353 (4th Cir. 2000) (driver's decision, after passing drug checkpoint signs, to leave highway at exit where there was no activity contributed to reasonable suspicion); State v. Mack, 66 S.W.2d 706 (Mo. 2002) (driver's sudden exit at remote off ramp to avoid upcoming drug checkpoint justified stop).

Even assuming that security concerns justify the search of a bag that might contain a weapon, the search of the student's person involves more complex issues. First of all, in many cases it will not be clear that a student's removal of an object at an officer's "request" was genuinely consensual. In those cases, it will be possible to argue that the removal of the object constituted a search. See Doe v. Renfrow, 475 F. Supp. 1012, 1024 (N.D. Ind. 1979), remanded on other grounds 631 F.2d 91 (7th Cir. 1980), cert denied 451 U.S. 1022, 101 S.Ct. 3015 (1981). But see People v. Rincon, supra, 177 A.D.2d 125 (since defendant was forewarned by 2 clearly posted signs that he and his possessions would be searched before he could enter courthouse, defendant impliedly consented to search of paper bag removed from his waist pouch after he initially set off detector and then passed through without his pouch and did not set off detector). It can also be argued that the activation of a metal detector, and the officer's touching of an object that "may have activated the ... device," do not constitute sufficient

grounds to believe that a weapon is present. Thus, in view of the fact that the interdiction of weapons is the reason for metal detector scans, a forcible "search" of the student's pocket seems difficult to justify when the officer does not feel the shape of a gun or knife, or some other weapon or item of contraband. Indeed, in Matter of Gregory M. the Court of Appeals conceded that the metallic "thud" caused by the respondent's bag did not provide reasonable suspicion. See also Doe v. Renfrow, supra, 475 F. Supp. 1012. Moreover, just as a suspect's lawful refusal to comply with a police request ordinarily does not elevate the level of suspicion, a student's refusal to remove an item should not be viewed as a suspicious circumstance.

I. Random Drug Testing And Drug Dogs

Fourth Amendment analysis of random drug testing of students involves consideration of the privacy interest affected, the character of the intrusion, and the nature of the government's interest and the efficacy of the means chosen to further that interest. See Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 122 S.Ct. 2559 (2002) (random, suspicionless drug testing of all high school students participating in extracurricular activities did not violate Fourth Amendment); Vernonia School District v. Acton, 515 U.S. 646, 115 S.Ct. 2386 (1995) (school district's interest in preventing student athletes from using drugs justified random urinalysis drug testing of student athletes); Doe v. Little Rock School District, 380 F.3d 349 (8th Cir. 2004) (police of conducting random, suspicionless searches of secondary students' persons and belongings without notice violated Fourth Amendment where fruits were regularly turned over to law enforcement authorities and only generalized concerns were cited); Theodore v. Delaware Valley School District, 836 A.2d 76 (PA, 2003) (policy authorizing random, suspicionless drug and alcohol testing of students seeking parking permits or participating in extracurricular activities satisfies State Constitution only if school district shows specific need); Joye v. Hunterdon Central Regional High School Board of Education, 826 A.2d 624 (N.J. 2003) (using Veronia "special needs" analysis, court upholds, under State Constitution, high school's random drug and alcohol testing program for all students who participate in athletic and non-athletic extracurricular activities, or who possess school parking permits).

Regarding drug dogs, see Burlison v. Springfield Public Schools, 708 F.3d 1034 (8th Cir. 2013), cert denied 134 S.Ct. 151 (no constitutional violation where school conducted drug dog exercise in which plaintiff and other students and teacher were instructed to leave room and leave personal items behind; there was proof of immediate need for drug dog procedure due to drug problem, separating students from property avoids potential embarrassment, ensures that students are not targeted by dogs, and decreases possibility of dangerous interactions between dogs and children, and plaintiff normally would not have been able to access or move backpack during class time without permission).

J. Strip Searches

In New Jersey v. T.L.O., the Supreme Court noted that "the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." 469 U.S. at 343. The extreme invasion involved in a strip search raises the bar and requires more justification than a typical search. See Safford v. Redding, 557 U.S. 364, 129 S.Ct. 2633 (2009) (although school officials were acting on reasonable suspicion that child had brought forbidden prescription and over-the-counter drugs to school, and search of backpack in child's presence and in relative privacy of office was not excessively intrusive, nor was search of child's outer clothing, Fourth Amendment was violated when child was told to pull bra out and to side and shake it and pull out elastic on her underpants, exposing her breasts and pelvic area; before search can "reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts," there must be reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing); T.R. v. Lamar County Board of Education, 25 F.4th 877 (11th Cir. 2022) (no qualified immunity for defendants where student strip searched and exposed to possible viewing by others in absence of reasonable suspicion; while other students indicated they had seen plaintiff smoking marijuana cigarette, students did not indicate she hid them in her underwear and there was no evidence that any other students at school had previously hidden contraband under clothing); Byrd v. Maricopa County Sheriff's Department, 629 F.3d 1135 (9th Cir. 2011) (cross-gender strip search

of pretrial detainee unreasonable in absence of emergency or exigent circumstances); Kennedy v. Dexter Consolidated Schools, 955 P.2d 693 (N.M. 1998) (nude search requires at least individualized suspicion, while requiring student to strip to undergarments does not always require such suspicion); Phaneuf v. Fraikin, 448 F.3d 591 (2d Cir. 2006) (uncorroborated tip from known informant regarding student's possession of marijuana did not justify strip search); State ex rel. Galford v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1992) (strip search was unreasonable where school officials suspected student of stealing $100 from a teacher's purse). See also People v. Hall, 10 N.Y.3d 303, 856 N.Y.S.2d 540 (2008), cert den'd 129 S.Ct. 159 (strip search may be founded on reasonable suspicion that arrestee is concealing evidence underneath clothing and search must be conducted in reasonable manner; to advance to visual cavity inspection, police must have specific factual basis supporting reasonable suspicion that arrestee secreted evidence inside body cavity, visual inspection must be conducted reasonably, and, if object is visually detected or other information provides probable cause that object is hidden inside arrestee's body, warrant must be obtained before conducting body cavity search unless emergency situation exists).

K. School Official Acting As Police Agent

Although it was held in People v. Bowers, 77 Misc.2d 697, 356 N.Y.S.2d 432 (App. Term, 2d Dept. 1974) that a school security officer appointed by the Police Commissioner must be held to standards governing the police, more recent authority suggests that security officers with the New York City Board of Education's Division of School Safety are considered school employees for the purpose of school search rules. Commonwealth v. J.B., 719 A.2d 1058 (Pa. Super. Ct. 1999) (school security officers governed by reasonable suspicion standard unless acting at behest of law enforcement); cf. Matter of Dwayne H., 173 A.D.2d 466, 570 N.Y.S.2d 89 (2d Dept. 1991), lv denied 79 N.Y.2d 752, 580 N.Y.S.2d 199 (operations report made by security officers was not Rosario material). Indeed, in Matter of Gregory M. the search was conducted by school security officials. See also In re Randy G., 28 P.3d 239 (CA 2001); but see State v. Meneese, 282 P.3d 83 (Wash. 2012) (school search exception to warrant requirement not applicable to search conducted by fully commissioned,

uniformed police officer acting as school resource officer; school search exception is designed for school teachers and administrators who have substantial interest in maintaining discipline and must act swiftly, while SRO is law enforcement officer whose job involves discovery and prevention of crime).

In New York City, the Police Department's assumption of responsibility for school security may, under some circumstances, make it easier to argue for application of traditional search and seizure protections rather than the modified protection provided by New Jersey v. T.L.O. Compare In re Steven A., 308 A.D.2d 359, 764 N.Y.S.2d 99 (1st Dept. 2003) (reasonable suspicion standard applied to search by School Safety Officer, who was civilian employee of Police Department assigned exclusively to school security); Matter of Josue T., 989 P.2d 431 (NM Ct.App. 1999) (reasonableness standard applied to search, conducted upon request of school officials, by police officer assigned full-time to school as resource officer); People v. Dilworth, 661 N.E.2d 310 (Ill. 1996) ("liaison police officer," who worked full-time at a high school for students with behavioral disorders, was governed by T.L.O. standard); Wilcher v. State, 876 S.W.2d 466 (Tex. Ct. App., 1994) (court applies reasonable suspicion standard to search by police officer for school district); In re S.F., 607 A.2d 793 (Pa. Super. Ct., 1992) (court applies reasonable suspicion standard to search by plainclothes police officer for school district) and Matter of Ana E., 2002 WL 264325 (Fam. Ct., N.Y. Co.) (reasonable suspicion standard applied to search by School Safety Officer working under supervision of Police Department) with State v. Tywayne H., 933 P.2d 251 (N.M. App., 1997), cert denied 934 P.2d 277 (officers providing security for after-prom dance were governed by probable cause standard); In re A.J.M., 617 So.2d 1137 (Fla. Dist. Ct. App., 1st Dist., 1993) (probable cause required where it was officer who conducted search, although court notes that State did not argue that school resource officer was not an officer for purposes of the probable cause standard); People v. B.R., 63 Misc.3d 1233 (City Ct. of Mount Vernon, 2019) (showup identification not police-arranged where police officer assigned to school as School Resource Officer was present when identification took place, but it was School District Safety Officers who arranged showup) and People v. Butler, 188 Misc.2d 48, 725 N.Y.S.2d 534 (Sup. Ct., Kings Co.,

2001) (School Safety Officer employed by police improperly questioned defendant in absence of Miranda warnings).

However, if school officials conduct a search under circumstances in which it is clear that they were acting as agents of the police, the search must be tested against constitutional rules governing the police, including the warrant requirement and probable cause standard. Such an agency relationship would arguably exist when a search is conducted pursuant to a policy developed by school authorities in conjunction with the police, or when the police have become actively involved in a particular case. Compare People v. Ray, 65 N.Y.2d 282, 491 N.Y.S.2d 283 (1985) (Bloomingdale's course of conduct in employing special police officer on premises to process arrests did not constitute government involvement requiring that store detective provide Miranda warnings before turning suspect over to authorities; "[t]he private surveillance, apprehension and questioning of defendant was in no way instigated by the special police officer or undertaken upon the official behest of a law enforcement agency" and "[d]efendant was neither identified as a suspect by the police nor questioned in the furtherance of a police-designated objective"); People v. Rodriguez, 135 A.D.3d 1181 (3d Dept. 2016) (child protective services worker not police agent where he was on task force that included law enforcement, but did not consult with law enforcement regarding plans to interview defendant and law enforcement was not present at interview); People v. Cooper, 99 A.D.3d 453 (1st Dept. 2012), lv denied 21 N.Y.3d 1003 (no police-dominated atmosphere where police apprehended defendant and turned him over to store personnel to permit them to perform store's routine administrative procedures, which included giving defendant notice that he was prohibited from entering store again; police had no vested interest in outcome of store's private procedures, which were not designed to elicit potentially inculpatory evidence, and were not involved with, and did not orchestrate or supervise, actions of store employees); In re K.S., 183 Cal.App.4th 72 (Cal. Ct. App., 1st Dist., 2010) (T.L.O. standard governed despite police role in providing information supporting school's search and presence of officers at search; while extent of police role in search will determine whether T.L.O. applies, so long as school official independently decides to search and then invites law enforcement

personnel to attend search to help ensure safety and security of school, it would be unwise to discourage school official from doing so at least where it is reasonable to suspect that contraband inimical to secure learning environment is present); In re Tateana R., 64 A.D.3d 459, 883 N.Y.S.2d 476 (1st Dept. 2009), lv denied 13 N.Y.3d 709 (no custodial interrogation where dean's goal was to recover stolen iPod and officer provided minimal input and participation was directed at locating iPod, not obtaining confession; even if there was state action, respondent was not in custody since dean's office ordinarily is not considered additional restraint for student who is not free to leave school without permission, and being summoned to dean's office is unpleasant but not unusual occurrence for student); In re Angel S., 302 A.D.2d 303 (1st Dept. 2003) (although fire marshals were present when principal conducted questioning, they did not prompt or have any input into the questioning) and People v. Hussain, 167 Misc.2d 146, 638 N.Y.S.2d 285 (Sup. Ct., Queens Co. 1996) (Child Welfare Administration caseworker was not police agent)

with State v. Antonio T., 352 P.3d 1172 (N.M. 2015) (presence of law enforcement officer during assistant principal's questioning converted school disciplinary interrogation into criminal investigatory detention and triggered application of the statute requiring knowing, intelligent and voluntary waiver of Miranda rights before statement may be used against child in juvenile delinquency proceeding); N.C. v. Commonwealth, 396 S.W.3d 852 (Ky. 2013), cert denied 134 S.Ct. 303 (court suppresses un-Mirandized custodial statements made by juvenile in response to questions from school assistant principal, in presence of armed deputy sheriff assigned to high school as School Resource Officer, who had been with assistant principal when juvenile was taken out of class); People v. Rodas, 145 A.D.3d 1452 (4th Dept. 2016) (right to counsel violated where there was such a degree of cooperation between caseworker and police that caseworker acted as agent of police); People v. Slocum, 133 A.D.3d 972 (3d Dept. 2015) (child protective services caseworker acted as agent of police when she questioned defendant in jail; caseworker acknowledged that she worked closely with police in certain investigations and that officer was present in room as she was speaking with defendant); Jackson v. Conway, 763 F.3d 115 (2d Cir. 2014), cert denied

135 S.Ct. 1560 (caseworker was aware of possibility that investigation could support criminal prosecution, and should have known that questions were reasonably likely to evoke incriminating response); People v. Wilhelm, 34 A.D.3d 40 (3d Dept. 2006) (statements suppressed where caseworkers were members of county-wide, multidisciplinary team comprised of members of District Attorney's office and police and social service agencies; team met regularly to enhance prosecutorial process, and caseworkers cooperated with DA's office by providing information when requested; before interviewing defendant, caseworkers worked with members of team, including Assistant District Attorney and police investigators, and supervising caseworker was told by ADA that she would be called to testify at grand jury proceedings; and, after interviewing defendant, caseworkers met with ADA to discuss "results of the interview" and progress of investigation); People v. Greene, 306 A.D.2d 639, 760 N.Y.S.2d 769 (3rd Dept. 2003), lv denied 100 N.Y.2d 594, 766 N.Y.S.2d 170 (2003) (CPS caseworker had agency relationship with law enforcement authorities given the common purpose of Family Violence Response Team, the cooperative working arrangement through the structure of the FVRT, and the understanding that incriminating statements obtained by CPS caseworker would be communicated to police agency); People v. Miller, 137 A.D.2d 626, 524 N.Y.S.2d 727 (2d Dept. 1988) (questioning of defendant by his mother in presence of police was "pervaded by governmental involvement"); People v. Warren, 97 A.D.2d 486, 467 N.Y.S.2d 837 (2d Dept. 1983), appeal dism'd 61 N.Y.2d 886, 474 N.Y.S.2d 473 (1984) (chief of bank security was agent of police when he questioned defendant, who was handcuffed and surrounded by detectives) and People v. Crosby, 180 Misc.2d 43, 688 N.Y.S.2d 398 (Dist. Ct., Nassau Co., 1999) (police were present when store detective interrogated defendant).

It is immaterial that the idea for a search originated with school officials if the police subsequently played a role. See United States v. Knoll, 16 F.3d 1313, 1320 (2d Cir. 1994). The physical presence of a police officer during a search would obviously provide a good basis for the use of an agency analysis. Cf. People v. Miller, 137 A.D.2d 626, 524 N.Y.S.2d 727 (2d Dept. 1988) (questioning of defendant by his mother in presence of police was "pervaded by governmental involvement"); People v. Warren, 97

A.D.2d 486, 467 N.Y.S.2d 837 (2d Dept. 1983), appeal dism'd 61 N.Y.2d 886, 474 N.Y.S.2d 473 (1984) (chief of bank security was agent of police when he questioned defendant, who was handcuffed and surrounded by detectives); but see In re K.S., 183 Cal.App.4th 72 (Cal. Ct. App., 1st Dist., 2010) (T.L.O. standard governed despite police role in providing information supporting school's search and presence of officers at search; while extent of police role in search will determine whether T.L.O. applies, so long as school official independently decides to search and then invites law enforcement personnel to attend search to help ensure safety and security of school, it would be unwise to discourage school official from doing so at least where it is reasonable to suspect that contraband inimical to secure learning environment is present).

It can also be argued that an ongoing agency relationship has been created by the "Gun Free Schools Act" [see Educ. Law §3214(3)(d)], which requires that school officials notify the Family Court presentment agency whenever a student under 16 years of age is found with a firearm. Cf. State v. Helewa, 537 A.2d 1328 (N.J. Super., App. Div., 1988) (given child protection caseworkers' statutory obligation to report abuse and neglect to county prosecutor, un-Mirandized statement to caseworker during custodial interview is not admissible in criminal proceeding).

L. Search Outside School Premises

Although a student's flight from school during an investigation by school authorities might eliminate immediate security concerns, it may be that a school official can legally pursue the student and conduct a search outside school premises. See People v. Jackson, 65 Misc.2d 909, 319 N.Y.S.2d 731 (App. Term, 1st Dept. 1971), aff'd 30 N.Y.2d 734, 333 N.Y.S.2d 167 (1972) (where defendant had a bulge in his pocket and continually put his hand in the pocket and took it out, and "bolted" for the door while being escorted to the Coordinator of Discipline's office, the Coordinator was justified in chasing defendant and grabbing defendant's hand, resulting in the recovery of a set of "works"). See also J.P. v. Millard Public Schools, 830 N.W.2d 453 (Neb. 2013) (T.L.O. reasonableness standard not applicable to off-campus search of student's vehicle; T.L.O. standard applies only when search is conducted in furtherance of school's

education-related goals while student is on school property or engaged in school-sponsored activities and under control of school); State v. Best, 987 A.2d 605 (NJ, 2010) (school administrators need only satisfy reasonable grounds standard, rather than probable cause standard, to search student's vehicle parked on school property); Commonwealth v. Williams, 749 A.2d 957 (Pa. Super. Ct., 2000), appeal denied 764 A.2d 1069 (2001) (school police officers had no authority to search interior of vehicle parked off of school property).

M. Arrest Of Student

The arrest of a student by a school security officer who has been designated a "special patrolmen" and, therefore, is a peace officer with full arrest powers under CPL §140.25, requires probable cause. In Matter of William J., 203 A.D.2d 144, 610 N.Y.S.2d 234 (1st Dept. 1994), the court found "probable cause" justifying detention of the respondent by security guards, but noted that there is "wider latitude" in the school context.

Moreover, according to CPL §140.30(1), which is made applicable in delinquency cases by FCA §305.1(1), a person who is not a police or peace officer may arrest a juvenile for a felony only when the juvenile "has in fact committed such felony," and for a misdemeanor when the juvenile "has in fact committed such offense in [the arresting person's] presence." There is no reason why this provision should not apply to any school official when he or she physically retrains a student in a manner that would constitute an "arrest." Although it is true that school officials are labeled state actors when they search a student, that label has been used in a limited manner to justify application of constitutional protections. The fact remains that school officials are private persons to whom CPL §140.30(1) applies.

III. Arrest For Non-Crime

A child under sixteen may properly be arrested for a violation (in the absence of a misdemeanor or felony charge) if it reasonably appears to the arresting officer that the child is over sixteen. See Matter of Jamal S., 28 N.Y.3d 92 (2016) (based on respondent's representation that he was 16 years old and conduct in street, officers had

probable cause to arrest for disorderly conduct); In re Michael W., 295 A.D.2d 134, 742 N.Y.S.2d 828 (1st Dept. 2002), lv denied 98 N.Y.2d 614, 751 N.Y.S.2d 169 (2002); Matter of Charles M., 143 A.D.2d 96, 531 N.Y.S.2d 346 (2d Dept. 1988); Matter of Christopher B., 122 Misc.2d 377, 471 N.Y.S.2d 228 (Fam. Ct. N.Y. Co., 1984); cf. Matter of Victor M., 9 N.Y.3d 84, 845 N.Y.S.2d 771 (2007).

When the charge against the respondent requires proof that an officer was performing a "lawful" duty [see PL §195.05 (obstructing governmental administration in the second degree); PL §120.05(3) (assault in the second degree)], or that an arrest was "authorized" [see PL §205.30 (resisting arrest)], the case may turn on evidence concerning the physical appearance of the respondent at the time of arrest. The holdings in Michael W. and Matter of Charles M., supra, 143 A.D.2d 96 could also be applied when a respondent moves to suppress physical evidence, since the existence of probable cause to arrest a child under sixteen solely for a "violation," such as disorderly conduct (PL §240.20) or second-degree harassment (PL §240.26), will also depend upon the apparent age of the child.

What the case law does not address is whether, in order to protect children from being arrested and detained for significant periods of time for offenses over which the family court has no jurisdiction, the police should be required to conduct whatever inquiry is appropriate and practicable under the circumstances in an effort to ascertain the child's true age. Even assuming, arguendo, that a child's statement of his or her age would not preclude a lawful arrest if the officer reasonably believes the child may not be telling the truth, there is no principled reason not to require the police to provide the child with an opportunity to produce identification or other documents that buttress the child's claim, or provide contact information for a parent or other relative, or a responsible adult such as a teacher, who could be contacted quickly. In the absence of such a requirement, the police are left with unfettered discretion to make age-related judgment calls for which they may have no particular expertise or training.

IV. Detention Of Runaways

A. Statutory Authorization

Family Court Act §718 provides as follows:

> (a) A peace officer, acting pursuant to his special duties, or a police officer may return to his parent or other person legally responsible for his care any male under the age of sixteen or female under the age of eighteen who has run away from home without just cause or who, in the reasonable opinion of the officer, appears to have run away from home without just cause. For purposes of this action, a police officer or peace officer may reasonably conclude that a child has run away from home when the child refuses to give his name or the name and address of his parent or other person legally responsible for his care or when the officer has reason to doubt that the name or address given are the actual name and address of the parent or other person legally responsible for the child's care.
>
> (b) A peace officer, acting pursuant to the peace officer's special duties, or a police officer is authorized to take a youth who has run away from home or who, in the reasonable opinion of the officer, appears to have run away from home, to a facility certified or approved for such purpose by the office of children and family services, if the peace officer or police officer is unable, or if it is unsafe, to return the youth to his or her home or to the custody of his or her parent or other person legally responsible for his or her care. Any such facility receiving a youth shall inform a parent or other person responsible for such youth's care.

In Matter of Terrence G., 109 A.D.2d 440, 492 N.Y.S.2d 365 (1st Dept. 1985), the First Department used a probable cause standard while determining whether the police were justified in detaining the respondent by escorting him to a Port Authority police room. The court concluded that the respondent's "presence in an area known to be a national gathering place for runaways, his admission that he was only fifteen years old and that he had come to New York from a distant state, and his inability or refusal to provide the police with a local address" supported a "reasonable opinion" that the respondent was a runaway. See also Matter of Marrhonda G., 81 N.Y.2d 942, 597 N.Y.S.2d 662 (1993) (runaway detention was supported by probable cause where respondent, who was traveling alone and acting nervous, lied about her age, could not

produce identification, said her mother could not be contacted, and could not provide an address or phone number for a relative for whom she said she was waiting); In re Giselle F., 272 A.D.2d 83, 707 N.Y.S.2d 103 (1st Dept. 2000) (police had probable cause where respondent was unable to produce identification or recall where she had been recently, lacked familiarity with the area and had an odor of marijuana, her "boyfriend" admitted that they had been smoking marijuana together, and the officer was skeptical about the boyfriend's statement that he was living at respondent's parents' home); In re Shamel C., 254 A.D.2d 87, 678 N.Y.S.2d 619 (1st Dept. 1998) (detention proper where officer received conflicting stories about how respondent and his companion were related and what their destination was, and respondent was unable to produce identification); Matter of Michael J., 233 A.D.2d 198, 650 N.Y.S.2d 6 (1st Dept. 1996) (detention upheld where respondent, who looked about 15 and was alone at Port Authority Bus Terminal at about 10:30 p.m. on a school night, gave evasive answers to questions about name, destination, purpose and traveling companion); Matter of James J., 228 A.D.2d 167, 644 N.Y.S.2d 171 (1st Dept. 1996) (detention upheld given respondent's youthful appearance, confusion about destination, presence alone in Port Authority Bus Terminal, lack of identification and initial lie about being with mother); Matter of Marangeli M., 199 A.D.2d 189, 605 N.Y.S.2d 290 (1st Dept. 1993) (runaway detention upheld where respondent, who appeared to be very young, was approached at Port Authority Bus Terminal and lied about her age, had no identification, and said she was "hanging out"); Matter of Mark Anthony G., 169 A.D.2d 89, 571 N.Y.S.2d 481 (1st Dept. 1991) (runaway detention upheld where respondent, who appeared youthful, was alone and glancing around in a vacant area of the Port Authority Bus Terminal at 12:30 a.m., had no luggage except a small bag draped over his arm, initially said he was with someone and then said he was traveling alone, said he was fifteen but could not produce identification, and did not respond initially when asked for his destination but then said he was going to Boston); Matter of Doris A., 145 Misc.2d 222, 546 N.Y.S.2d 310 (Fam. Ct. N.Y. Co., 1989), aff'd on other grounds 163 A.D.2d 63, 557 N.Y.S.2d 82 (1st Dept. 1990) (§718 requires some inquiry by officer concerning name, address and age prior to detaining juvenile); Matter of De Crosta, 111 Misc.2d

716, 444 N.Y.S.2d 999 (Fam. Ct., Columbia Co., 1981) (detention proper where respondent was hitchhiking while he was so intoxicated as to be incoherent).

B. Non-Custodial Questioning

By referring only to an officer's authority to "return" a child to his or her parent, and to "take the child . . . to a facility," §718 fails to provide standards governing an officer's authority to merely approach and question a suspected runaway in a manner that would constitute a level one or level two intrusion under the type of analysis applied to police activity in People v. DeBour, 40 N.Y.2d 210, 386 N.Y.S.2d 375 (1976). In Matter of Gissette Angela P., 172 A.D.2d 117, 120, 577 N.Y.S.2d 774, 775 (1st Dept. 1991), aff'd 80 N.Y.2d 863, 587 N.Y.S.2d 596 (1992), the court, while citing DeBour, implied that there are some controls on police behavior when it concluded that a detective at the Port Authority bus terminal "had the statutory authority and even the duty to approach and question an unaccompanied child in a location known to be frequented by truants and runaways and to have a high incidence of drug activity" [citations omitted]. Thus, it should be argued that a DeBour-type analysis must be used when a respondent challenges runaway-related police intrusions that fall short of a custodial detention, and that such lesser intrusions can be challenged when they are not justified by the circumstances.

C. Frisk And Search Of Runaway

In Matter of Terrence G., supra, 109 A.D.2d 440, the First Department held that, "[t]o ensure the safety of respondent, other detained runaways and themselves," the police were justified in conducting a patdown search of the respondent after taking him to a detention area. In Matter of Mark Anthony G., supra, 169 A.D.2d 89, the court held that, for the same reasons, the officers were entitled to "frisk" the respondent's bag by feeling the outside. Then, in Matter of Gissette Angela P., supra, 172 A.D.2d 117, the court, noting that "there is no theoretical distinction to be drawn between criminal and non-criminal detention," concluded that a full search was justified once the respondent was detained under §718. Id. at 120. The correctness of that ruling became unclear given the Court of Appeals' decision in Matter of Marrhonda G., supra, 81 N.Y.2d 942. While rejecting the use of a "plain touch" exception to the warrant requirement to justify

the search of a bag after the respondent was taken into custody as a suspected runaway, the court noted that "[t]he officers could have justifiably searched the bag if ... respondent had been placed under arrest and the bag then searched as an incident thereto." 81 N.Y.2d at 945. Thus, although the court did not expressly rule on the propriety of a search conducted incident to a runaway detention, there is reason to believe that the Court of Appeals would not conclude, as did the First Department in Gissette Angela P., that a runaway detention is "theoretically" equivalent to an arrest. See also Matter of Gabriela A., 23 N.Y.3d 155 (2014) (restraint of PINS who has absconded is not same as criminal arrest and PINS who resists is not resisting arrest under Penal Law §205.30). The First Department did an about-face and ruled in Matter of Bernard G., 247 A.D.2d 91, 679 N.Y.S.2d 104 (1st Dept. 1998) that only a patdown may be done, and noted that previously it may have created the misleading impression that a runaway detention has the same Fourth Amendment implications as an arrest and that a full search is justified.

V. Detention Of Truants

A. Authority Of Police Officer

In Matter of Shannon B., 70 N.Y.2d 458, 522 N.Y.S.2d 488 (1987), the respondent argued that, by granting the authority to detain suspected truants to attendance officers in Education Law §3213, the Legislature intended to withhold such authority from the police. The Court of Appeals rejected that argument and concluded that the police have the authority to detain truants. The court cited the general grant of authority in §435(a) of the New York City Charter.

B. Level Of Suspicion

Although the police must have probable cause to believe that a child is a runaway before detaining the child under FCA §718, there is not yet a clear rule in truancy cases. In Matter of Shannon B., supra, 70 N.Y.2d 458, the court rejected the respondent's argument that the person detaining the child must be certain the child is, in fact, a truant. The court found it sufficient that the respondent, an apparently school-age child, was on the street a half-block away from the nearest school during school hours,

and was unable to give an explanation for her absence. See also Matter of Darnell C., 305 A.D.2d 405, 759 N.Y.S.2d 739 (2d Dept. 2003) (where officer approached respondent during school hours and respondent then resisted and committed acts constituting obstructing governmental administration, officer reasonably believed that respondent was truant); Matter of Michael C., 264 A.D.2d 842, 695 N.Y.S.2d 423 (2d Dept. 1999) (officer was entitled to approach respondent in order to return him to school when he observed respondent in public during school hours); Matter of D'Angelo H., 184 A.D.2d 1039, 584 N.Y.S.2d 699 (4th Dept. 1992), lv denied 80 N.Y.2d 758, 589 N.Y.S.2d 309 (detention upheld where respondent told officer he was late for school); Matter of Devon B., 158 A.D.2d 519, 551 N.Y.S.2d 283 (2d Dept. 1990) (stop justified where respondent was on street at 11:25 a.m.); People v. Garibaldi Fernandez, 2008NY070957, NYLJ, 3/27/09 (Crim. Ct., N.Y. Co.) (youth officer properly attempted to make inquiry under Education Law and common-law right of inquiry as to why defendant was not at school during school hours, and, when defendant failed to respond and ran away, officers had right to pursue and detain him). In Shannon B., the court rejected as unpreserved a claim that probable cause is required.

Given the existence of a probable cause requirement in runaway cases, and the absence of statutory guidelines for police behavior in the truancy context, it can certainly be argued that probable cause is required. See Colon-Berezin v. Giuliani, 88 F.Supp.2d 272 (S.D.N.Y. 2000) (in §1983 action, court concludes that complaint adequately alleges that plaintiff was arrested for truancy without probable cause and that there exists a discriminatory policy of detaining minority students). In fact, the New York City Police Department's Procedure No. 215-07 provides that "[w]hen a minor, who reasonably appears to be over the age of six and less than eighteen, who is observed outside of school on a day of instruction *and it is ascertained that the minor is truant*" (emphasis supplied), the officer must take the minor into custody and deliver him/her to principal or his or her designee at the school attended, if known, or deliver the minor to the truancy intake site if the minor's school cannot be determined or it is impractical to return the juvenile to that school.

On the other hand, as in runaway cases, it seems clear that the police can

approach and question a child based upon a lower level of suspicion. People v. Garibaldi Fernandez, 2008NY070957, NYLJ, 3/27/09 (Crim. Ct., N.Y. Co.); cf. Matter of Devon V., supra, 158 A.D.2d 519.

C. Frisk Of Truant

No court has suggested that the police can routinely search suspected truants after they are taken into custody. However, there is authority supporting a right to conduct a protective frisk. See Matter of D'Angelo H., supra, 184 A.D.2d 1039; see also NYPD Procedure No. 215-07 ("Truants may be frisked to ensure the uniformed member's safety. An electronic metal detector may be used for this purpose, if available").

VI. Detention Under Child Protection Laws

In Matter of Jose R., 201 A.D.2d 260, 607 N.Y.S.2d 23 (1st Dept. 1994), the First Department held that the police were entitled to take the respondent into protective custody under FCA §1024 after they repeatedly saw him alone during early morning hours on a street corner known for narcotics and weapons-related arrests. See also Matter of Jaime G., 208 A.D.2d 382, 617 N.Y.S.2d 13 (1st Dept. 1994) (officers were entitled to approach after respondent had twice ignored officers' warnings to leave a dangerous neighborhood late at night). Although the court in Jose R. upheld a stationhouse frisk that was conducted after an officer noticed a bulge in the respondent's pants pocket, the court in no way suggested that a frisk is automatically justified, and, in fact, pointedly noted that prior to that time, the respondent had not been frisked, searched or handcuffed. Certainly, it cannot reasonably be argued that the police should be able to conduct a frisk whenever a child is taken into "protective" custody as a possibly neglected or abused child. But see In re J.O.R., 820 A.2d 546 (D.C. Ct. App., 2003), cert denied 540 U.S. 934, 124 S.Ct. 355 (2003) (officer may conduct full search when taking child into custody pursuant to court order).

The standard governing detentions under FCA §1024 is found in §1024(a)(i): a person must have "reasonable cause to believe that the child is in such circumstance or condition that his continuing in [his or her] place of residence or in the care and custody

of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health ...." It should also be noted that the person taking the child into custody must "bring the child immediately to a place approved for such purpose by the local social services department ...." In Matter of Jose R., supra, 201 A.D.2d 260, the child was taken instead to the precinct, a problem not discussed by the First Department.

VII. Curfews

In Anonymous v. City of Rochester, 13 N.Y.3d 35, 886 N.Y.S.2d 648 (2009), a Court of Appeals majority struck down Rochester's nighttime curfew for juveniles.

The curfew provided: “It is unlawful for minors to be in or upon any public place within the City at any time between 11:00 p.m. of one day and 5:00 a.m. of the immediately following day, except that on Friday and Saturday the hours shall be between 12:00 midnight and 5:00 a.m. of the immediately following day.” A minor is defined as “[a] person under the age of 17 [but] [t]he term does not include persons under 17 who are married or have been legally emancipated.” The curfew was inapplicable if the minor can prove that he/she "was accompanied by his or her parent, guardian, or other responsible adult"; "was engaged in a lawful employment activity or was going to or returning home from his or her place of employment"; "was involved in an emergency situation"; "was going to, attending, or returning home from an official school, religious or other recreational activity sponsored and/or supervised by a public entity or a civic organization"; "was in the public place for the specific purpose of exercising fundamental rights such as freedom of speech or religion or the right of assembly protected by the First Amendment of the United States Constitution or Article I of the Constitution of the State of New York, as opposed to generalized social association with others"; or "was engaged in interstate travel.” Under the curfew, a police officer "may approach a person who appears to be a minor in a public place during prohibited hours to request information, including the person's name and age and reason for being in the public place” and “may detain a minor or take a minor into custody based on a violation of [the curfew] if the police officer . . . reasonably believes

that the [curfew has been violated] and . . . that none of the exceptions . . . apply." A violation of the curfew constituted a violation under the Penal Law.

The Court of Appeals held that the curfew violated the Federal and New York State Constitutions. First, the Court concluded that intermediate scrutiny, rather than strict scrutiny, applies. Although children have rights protected by the Constitution, they can be subject to greater regulation and control by the state than can adults. An unemancipated minor does not have the right to freely come and go at will, and juveniles, unlike adults, are always in some form of custody and their right to free movement is limited by their parents' authority to consent or prohibit such movement. Although parents have a fundamental due process right, in certain situations, to raise their children in a manner as they see fit, the ordinance is not directly aimed at curbing parental control over their children. The purpose of the juvenile curfew is, in part, to prevent victimization of minors during nighttime hours, and thus it easily falls within the realm of the government's legitimate concern.

Under intermediate scrutiny, defendants had to show that the ordinance was "substantially related" to the achievement of "important" government interests. Although City officials perceived a pressing need to respond to the problem of juvenile victimization and crime as a result of the tragic deaths of three minors, those incidents would not have been prevented by the curfew. Although crime statistics show that minors are suspects and victims in roughly 10% of violent crimes committed between curfew hours, what the statistics really highlight is that minors are far more likely to commit or be victims of crime outside curfew hours and that it is the adults, rather than the minors, who commit and are victims of the vast majority of violent crime during curfew hours. The curfew imposed an unconstitutional burden on a parent's substantive due process rights. It failed to offer parents enough flexibility or autonomy in supervising their children. An exception allowing for parental consent to the activities of minors during curfew hours is of paramount importance to the due process rights of parents.

Judge Graffeo concurred because the law conflicted, in part, with Family Court Act. § 305.2, and the objectionable portion of the law could not be severed from the remainder. Section 305.2(2) specifies that a police officer "may take a child under the

age of sixteen into custody without a warrant in cases in which he may arrest a person for a crime under article one hundred forty of the criminal procedure law." The term "crime" includes only misdemeanors and felonies, not violations. Judge Graffeo rejected the City's argument that the ordinance merely authorized "temporary detention," not an arrest. "Semantics aside, the reality is that the ordinance permits a police officer to take custody of a minor, perhaps handcuff the offender, conduct a pat-down search (which could lead to the discovery of illegal contraband or a weapon), place the child in the back of a police car and transport the child to a detention facility. This . . . bears all of the hallmarks of a traditional arrest, not some short-term custodial intervention conducted solely for the safety and welfare of the child detained."