

Inside School Law

Spring 2001
Volume 2, Issue 3

Sensible strategies and preventive practices for NSBA National Affiliates

Breathalyzers at the Prom

Can schools conduct Breathalyzer tests of students at after-school events?

By Thomas E. Wheeler II, Locke Reynolds, Indianapolis
and Julie E. Lewis, NSBA staff attorney

If a couple of students are acting drunk and rowdy at the junior prom, is it constitutionally permissible for school officials to give those students Breathalyzer tests?

A Breathalyzer test, like urinalysis, is a search. As such, it is covered by the Fourth Amendment, which prohibits unreasonable searches and seizures by public school officials. Under the Fourth Amendment, a search is reasonable if three requirements are met:

1. There must be probable cause to conduct the search;
2. There must be a warrant, or circumstances justifying a warrantless search; and,
3. The procedures used to search must be reasonable.

When law enforcement officials are involved in a search, the Supreme Court has generally required that they obtain a judicial warrant. In public schools, however, the Supreme Court has recognized that certain "special needs" make the warrant requirement unworkable. Existing case law makes it clear that schools may conduct suspicionless drug testing of students who participate in extracurricular activities. But what about Breathalyzer testing at school dances and other school-related events?

Implied consent

School dances and other events often fall

under the definition of extracurricular activity, which means that participation is voluntary and a privilege. Because students have voluntarily chosen to attend a school dance, it can be argued that they have agreed to submit to a Breathalyzer in exchange for admittance. Some schools explicitly state this on the ticket for the event, making the student's consent express rather than implied. Other schools have students sign "consent to be tested" forms in exchange for the privilege of attending school events.

However, some case law suggests it would be unreasonable and unconstitutional to conduct blanket Breathalyzer testing of all students attending a school event when testing could be done on the basis of suspicion. In other words, a chaperone or monitor who observes a visibly intoxicated student, or smells alcohol on a student's breath, would have reasonable suspicion to submit that particular student to a Breathalyzer test.

Technical difficulties

Note, however, that using Breathalyzers presents procedural problems. If your school district is considering using Breathalyzers, be sure to follow your state's requirements regarding commercial-grade machines—and be sure that the people administering the tests have been properly trained. There could be significant liability for your district if the Breathalyzer produces false-positive

test results and it turns out that the machine was not commercial grade or that untrained individuals were conducting the test.

You could turn to law enforcement officials to administer the tests, but this could undermine the reduced standard of reasonable suspicion that is applied to searches by school officials, subjecting the search to the heightened standard of probable cause instead.

Which standard applies?

Courts are split on whether police involvement warrants the higher standard of probable cause or not. If a law enforcement officer conducts the tests, any positive test could lead to the immediate arrest of the student for the illegal consumption of alcohol. In addition, if positive test results must be reported to police, this could change the character of the search and, along with it, the standard applied.

National School Boards Association

1680 Duke Street

Alexandria, VA 22314-3493

(703) 838-6722

Fax: (703) 683-7590

E-mail: info@nsba.org

<http://www.nsba.org>



Inside School Law

Sensible strategies and preventive practices for NSBA National Affiliates

Inside School Law is published periodically by the NSBA National Affiliate Program in cooperation with the NSBA Council of School Attorneys and the NSBA Office of General Counsel. Copyright 2001, NSBA.

Executive Director
Anne L. Bryant

Deputy Executive Director
Harold P. Seamon

General Counsel
Julie Underwood

Staff Attorneys:
Edwin Darden, Naomi Gittins, Julie Lewis

Associate Executive Director, Constituent Services:
Don E. Blom

Assistant Executive Director, Marketing and National Affiliate Programs:
Marilee Rist

Director, Council of School Attorneys
Susan R. Butler

Manager, National Affiliate Program
Bonita Metz

About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U.S. Virgin Islands.

About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join provided they are members in good standing of their state school boards association.

About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

In a 1995 Supreme Court case that involved the drug testing of student athletes (*Vernonia School District 47J v. Acton*, 515 U.S. 646), the court upheld the school district's student athlete drug policy, which called for random urinalysis testing. The justice writing the majority opinion believed the testing should be permitted because the search was "undertaken for prophylactic and distinctly nonpunitive purposes" (*Vernonia*, 515 U.S. at 658 n.2). But if the testing results in punitive sanctions to students, the higher standard of probable cause may be applied.

State authorization

It is important to check whether your state has a statute that allows school districts to use Breathalyzers. For example, Wisconsin statute section 118.45 authorizes such use upon reasonable suspicion. The results of the test may be used as evidence in a disciplinary proceeding (as may a student's refusal to take the test). The relevant portion of the statute reads as follows:

118.45 Tests for alcohol use. A school

board employee or agent, or law enforcement officer, as defined in section 102.475(8)(c), authorized by a public school board may require a public school pupil, including a charter school pupil, to provide one or more samples of his or her breath for the purpose of determining the presence of alcohol in the pupil's breath whenever the authorized employee, agent or officer has *reasonable suspicion* [italics added] that the pupil is under the influence of alcohol while the pupil is in any of the circumstances listed in sections 125.09(2)(b)1 to 3 (on school premises; in a motor vehicle, if a pupil attending the school is in the motor vehicle; or while participating in a school-sponsored activity). The authorized employee, agent or officer shall use a breath screening device approved by the department of transportation for the purpose of determining the presence of alcohol in a person's breath to determine if alcohol is present in the pupil's

Case In Point

Juran v. Central School District
898 F.Supp. 728
July 19, 1995
U.S. District Court, Oregon

A high school senior at Central High School in Independence, Ore., sued school officials and police officers, alleging that his federal and state constitutional rights were violated when he was suspended and denied permission to participate in a senior awards ceremony. The suspension occurred after school officials took the student, as well as several others, to the police station, where a Breathalyzer test indicated he had been drinking alcohol.

The plaintiff, along with 72 other students, was on a school-sanctioned senior field trip when one of the students became ill and admitted he had been drinking. The school's vice principal also noticed that another student appeared to have passed out. Soon after, a student reported to the vice principal that several others, including the plaintiff, had been drinking alcohol at a party the evening before.

The principal asked the students who had been drinking to identify themselves. When none did, he ordered the buses to

return to the school, where they were met by the police at about 6:15 a.m. The police suggested that all the students be subjected to a Breathalyzer test to determine which ones had been drinking. The buses were then driven to the police station, and all of the students were tested.

School authorities intended to proceed with the field trip after finding out which students had been drinking, but that wasn't possible because of the time it took to test them all.

The plaintiff was tested at 6:58 a.m., and his blood-alcohol level was .033. As a result, the police issued a citation, and the school suspended the plaintiff for three days. The suspension would have prevented the plaintiff from participating in an awards ceremony and in graduation exercises, but the school board modified the punishment so that he could participate in graduation exercises.

The District Court held that the school district had probable cause to administer the Breathalyzer test. The court also held that the delay necessary to obtain a search warrant to administer the Breathalyzer test justified a warrantless search. Finally, the court determined that the plaintiff's due process rights were not violated.

breath. The results of the breath screening device or the fact that a pupil refused to submit to breath testing shall be made available for use in any hearing or proceeding regarding the discipline, suspension or expulsion of a student due to alcohol use. No school board may require a pupil to provide one or more samples of his or her breath for the purpose of determining the presence of alcohol in the pupil's breath until the school board has adopted written policies regarding disciplines or treatments that will result

from being under the influence of alcohol while on school premises or from refusing to submit to breath testing to determine the presence of alcohol in the pupil's breath.

The bottom line

If the police conduct the Breathalyzer test, it may be considered a search without probable cause. If the school tests everyone, it may be a search without reasonable individualized suspicion. So, what should you do?

Under current law, a school official may constitutionally test a student, with the assis-

tance of law enforcement, if the school official has a reasonable suspicion to believe that student is under the influence of either alcohol or narcotics.

Our advice: Use normal supervision at after-school events and use Breathalyzers only when you have some suspicion to believe students are under the influence of alcohol or some other narcotic substance. A visual inspection at the door could reveal which students appear to have been drinking. A decision to give those students a Breathalyzer test would be based on reasonable suspicion.

Harassment or Free Speech?

Yes, schools can adopt anti-harassment policies targeting sexual orientation discrimination

By Julie E. Lewis, NSBA Staff Attorney

Are you confused by the recent decision issued by the U.S. Third Circuit Court of Appeals in *Saxe v. State College Area School District*? If so, you're not alone. On Feb. 14, 2001, the court struck down a Pennsylvania school district's anti-harassment policy because it found the policy too broad. Although the decision applies only to the Third Circuit (New Jersey, Delaware, Pennsylvania, and the Virgin Islands), the case has useful lessons for school districts nationwide on how to create constitutionally sound anti-harassment policies.

The case

State school board member David Saxe, who also serves as an unpaid volunteer in the State College Area School District, sued the district on behalf of himself and his two children, charging that the district's anti-harassment policy violated his First Amendment right to free speech. In his complaint, Saxe stated that, as Christians, he and his children believe that homosexuality is a sin and that they believe they have a right to speak out against it. Saxe's attorney, Brian Brown of the American Family Association's Center for Law and Policy, said the district's policy has a "chilling effect" on the Saxe family's ability to exercise its First Amendment rights.

The lower court concluded that the policy prohibited no more speech than was already unlawful under federal and state anti-

discrimination laws and held that the policy was constitutional. The appeals court, however, disagreed. In a 3-0 decision by the Third Circuit Court of Appeals, the district's policy restricting "unwelcome" and "offensive" speech on public school grounds was struck down.

"There is no categorical 'harassment exception' to the First Amendment's free speech clause," wrote Court of Appeals Circuit Judge Samuel A. Alito. The opinion also stated that the school's policy "prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law."

The rationale for the decision

Although the U.S. Third Circuit Court of Appeals determined that the harassment policy in this case was unconstitutional, it highlighted the importance of preventing discrimination in schools by saying that prevention is a legitimate and compelling governmental interest. The appeals court simply felt that State College Area School District's policy went beyond current anti-discrimination laws in that it prohibited harassment based on "other personal characteristics" that are not protected under federal law. The definition of "other personal characteristics" in the school's policy included, among other things, clothing, physical appearance, social skills, peer group, income, intellect, educational program, hobbies, or values.

The court explicitly said it was not sug-

gesting "that a public school may never adopt regulations more protective than existing law; it may, provided that those regulations do not offend the Constitution."

Creating a policy

How can your school district create a policy that does not offend the Constitution?

Under existing law, a school may prohibit lewd, vulgar, or profane language. A school may also regulate school-sponsored speech on the basis of any legitimate pedagogical concern. Speech falling outside these categories may be regulated only if it would *substantially disrupt* school operations or interfere with the rights of others.

To prohibit speech that falls outside these categories, the school district must show that its restrictions are necessary to prevent substantial disruption or interference with the work of the school or the rights of other students. The district could do so by providing a particular reason for anticipating substantial disruption if such speech is not prohibited. In order to meet the substantial disruption test, a school district would have to show that a realistic threat exists; that is, the district must be able to point to a well-founded expectation of disruption, based on past incidents arising out of similar speech.

If your school has had several incidents of violence in which gay students were threatened, beat up, or denied access to school activities and events, you might be able to make the case for an anti-harassment policy that includes discrimination on the basis of sexual orientation. But the bottom line is that you cannot prohibit speech simply out of a desire to avoid discomfort and unpleasantness. And you cannot prohibit speech because of a remote apprehension of a possible disturbance.

Case In Point

West v. Derby Unified School District
206 F.3d 1358
U.S. Tenth Circuit Court of Appeals
March 21, 2000

T.W., a Kansas middle school student, sued the Derby Unified School District after he was suspended for three days for drawing a Confederate flag. T.W. alleged that the district's policy against racial harassment or intimidation violated his First Amendment free speech rights. In this case, the school district had adopted a Racial Harassment and Intimidation policy in response to incidents of racial tension between black and white students at Derby High School during 1995. The relevant part of the policy states:

District employees and student(s) shall not racially harass or intimidate another student(s) by name calling, using racial or derogatory slurs,

wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Aryan Nation-White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all-inclusive). Violations of this policy shall result in disciplinary action by school authorities. For students there will be a three-day out-of-school suspension for the first offense with a required parent conference prior to readmittance....

The school district was able to show that in early 1995, several verbal confrontations occurred between black and white students at Derby High School. Some white students wore shirts displaying an image of the Confederate flag, while some black students wore shirts with a large X, indicating support for the teachings of Malcolm X. Members of the Aryan Nation and Ku Klux Klan became active off campus, cir-

culating racist materials to students. Around the same time, graffiti reading "KKK" and "KKK Killer" appeared around the campus. School officials also received reports of racial incidents on school buses and at football games, and at least one fight broke out as a result of a student wearing a Confederate flag headband.

The Derby Middle School was not immune from the problem. Although racial tension was not widespread and involved relatively few students at this grade level, incidents occurred involving students who drew the Confederate flag on their notebooks and arms.

In response, the school district organized a task force of parents, teachers, and other community members, which recommended the adoption of a racial harassment policy. The school district subsequently adopted the policy at issue in this case, and the number of racial harassment incidents in the district decreased substantially.

At the beginning of each school year, all students at the middle school are required to review a student handbook that sets forth the district's policies, including the harassment and intimidation policy. T.W. signed an acknowledgment form stating, "I have reviewed and understand the disciplinary policy at DMS as outlined in the DMS agenda book." Teachers at the middle school then reviewed the policies in the handbook with students, including T.W. After T.W. was