

# LAW WISE



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Greetings from the Kansas Supreme Court and the Kansas Bar Association (KBA). Welcome to this edition of *Law Wise* and the fourth edition of the 2011-2012 school year.

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## Welcome

Welcome back to *Law Wise*! Our spring issues continue this year's theme of the Bill of Rights relevant to schools and students. This month we focus on recent cases in which students or their parents alleged Fourth Amendment violations based on school searches, drug testing of student athletes, or discipline. Did they win? Read on to find out. You may be surprised at the results.

We also invite you to review the September 2009 issue of *Law Wise*, which focused on the Fourth Amendment rights of students and examined in more detail some of the general principles which are applied in the following cases.

## THE FOURTH AMENDMENT IS A HOT TOPIC

By Kathryn Gardner

The Fourth Amendment generally provides that the people shall be secured in their persons, houses, papers and effects against unreasonable searches and seizures. The United States Supreme Court recently decided that the government's warrantless installation and use of a GPS on a suspect's car violates the Fourth Amendment. The Court held that the government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment. The government unsuccessfully contended that a person traditionally has little or no reasonable expectation of privacy in the outside of their car, where the GPS was attached, thus no search occurred. The Court focused instead on the concern for the government's trespass on the "effect," which needed no reasonable expectation of privacy. Have your students read the decision in *United States v. Antoine Jones*, dated January 23, 2012, for more information. It should spark a good debate!

## RECENT CASES REGARDING THE FOURTH AMENDMENT IN SCHOOLS.

### 1. SEARCHES OF STUDENTS

In our first case, a Kansas high school teacher noticed one of his students acting "really, really different" while standing at his locker talking with some of his friends. After watching the student for three to five minutes before classes started, the teacher thought that the student was either ill or "under the influence of something." The teacher told the school counselor about the student. The student, the acting principal, and two law enforcement officers then came to the office.

## CALENDAR OF EVENTS

January 29, 2012	Kansas Day
March 24, 2012	Regional Mock Trial Competition
March 30-31, 2012	State Mock Trial
May 3-6, 2012	National Mock Trial Competition (Albuquerque, N.M.)
June 14, 2012	Flag Day



When the acting principal entered the office, the SRO asked if he wanted the student to empty his pockets. The acting principal said, "Yes, that would be the normal procedure that we'd go through." The SRO then asked the student to empty his pockets. The student asked if he had to, and, upon being told that he did, emptied his pockets, disclosing two small baggies of marijuana. The student was charged and convicted of possession of marijuana and possession of drug paraphernalia. The student then appealed his case to the Kansas Court of Appeals, contending that the evidence should have been suppressed (not introduced at trial) because it had been discovered during an illegal search and seizure.

The student contended that the search was a law enforcement search which generally requires probable cause or a warrant, rather than a school search, which merely requires reasonable suspicion or reasonableness. The Court disagreed, finding that the school officials acted in conjunction with, not at the direction of, the law enforcement officers, who had no part in the search other than being present, and who had not initiated the investigation. Accordingly, the search did not require probable cause, and was found to be legal because it was supported by reasonable suspicion and was reasonably related to the circumstances that prompted the search. See *State v. Burdette*, 43 Kan.App.2d 320, 323 (Kan.App. 2010).

## 2. SUSPICIONLESS DRUG TESTING OF STUDENTS

Did you know that state-compelled collection and testing of urine constitutes a "search" subject to the demands of the Fourth Amendment? *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989).

In our second case, a school district in Oklahoma required all middle and high school students to consent to urinalysis testing for drugs in order to participate in any extracurricular activity. A faculty monitor waited outside the closed restroom stall for the student to produce a sample, listening for "the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody." The monitor then poured the sample into two bottles, sealed them, and placed them into a mailing pouch along with a consent form signed by the student. High school students and their parents sued for equitable relief to stop the testing, alleging that the school's policy violated the Fourth Amendment.

The United States Supreme Court disagreed, holding that the school district's suspicionless drug-testing policy was a reasonable means of furthering the school district's important interest in preventing and deterring drug use among its schoolchildren, and therefore did not violate the Fourth Amendment. *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002). The Court reviewed the Policy for "reasonableness" and found the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. In contrast to the criminal context, a probable-cause finding is unnecessary for searches in the public school context because it would unduly interfere with maintenance of the swift and informal disciplinary procedures that are needed.

The Court found the Policy to be reasonable because the students affected by it had a limited expectation of privacy; the degree of intrusion caused by the policy was negligible given the method of collection of urine samples; and the only conse-

quence of a failed drug test was to limit a student's privilege of participating in extracurricular activities. It was thus unnecessary for the school to demonstrate any identifiable drug abuse problem among a certain number of those tested, or that drug testing that group would actually redress its drug problem. See also *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding suspicionless drug-testing of high school athletes).

## 3. DISCIPLINE OF STUDENTS – EXTENSIVE USE OF TIMEOUT ROOM

In our third case, we examine a Tenth Circuit case in which a teacher who was confronted with an "almost impossible behavioral problem" repeatedly used a timeout room as punishment for a student's disruptive behavior. (The Tenth Circuit is the Court of Appeals for the federal courts in various states, including Kansas.) In *Couture v. Board of Educ. of Albuquerque Public Schools*, 535 F.3d 1243 (10th Cir. 2008), a teacher was faced with the task of educating a first-grader who had severe emotional and mental health problems, including repeated outbursts in which he threatened and assaulted teachers and students alike. The student frequently interrupted class and made it impossible for the teacher to instruct the other students. He repeatedly cursed at the teachers and students, threatened the physical safety of the teachers, punching them and kicking them in the shins, and also threatened and frightened the other children with statements such as: "I'm going to throw hot oil on you and kill you."

When the teacher could not control the student's behavior, the teacher placed the student in a small timeout room for five to twenty-five minutes. This was done 21 times for a total of approximately 12 hours during a period of approximately two and one-half months. While in the timeout room, the student sometimes scratched and kicked at the door while shouting curse words and death threats. The teacher put black construction paper on the window to prevent the student from looking out of the room and making faces at the other students in the class, and ignored the student's repeated pleas to get out so he could use the bathroom. The student urinated on himself while in the timeout room, and may have thrown up in it. The teacher claimed she was faced with a "boy who cried wolf" situation because the student consistently tried to escape from the room by offering a plethora of excuses.

The student's mother sued the school district and school officials, alleging among other matters that the use of the timeout room violated the student's Fourth Amendment right to be free from unreasonable seizures.

The Court disagreed, and found that the repeated use of the timeout room as punishment for the student's disruptive and defiant behavior did not violate the Fourth Amendment. The Court emphasized that its function was to evaluate whether the educators transgressed constitutional limits on their treatment of the student, not to determine whether the teacher's action comported with proper educational policy. As the Court stated:

"Pedagogical misjudgments (even assuming these were misjudgments, which we cannot say), do not, without more, expose teachers to liability under the Fourth Amendment .... Supreme Court opinions reinforce our disinclination to insert ourselves into the evaluation of educational policy

and techniques. “[T]he education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). *Couture*, 535 F.3d at 1254.

Whether the timeouts were a good or effective teaching method was not the relevant question: the question was only whether the seizure was unreasonable under the circumstances.

The Court found that temporarily removing the student, given the threats he often posed to the emotional, psychological, and physical safety of the students and teachers, was “eminently reasonable.” His placement in timeout room for refusing to do his school work was justified at its inception, and the lengthy timeouts were reasonably related to the school’s objective of behavior modification. The Court found that timeouts are a constitutionally acceptable form of discipline for a student’s defiance, even when safety is not an issue. ■

## COURT EDUCATION VIDEO AVAILABLE

The Kansas Supreme Court has released a new educational video along with talking points on four court-related topics. The video, called *Justice in Kansas*, and the talking points may be accessed below.

**Justice in Kansas Video:** Published by the Kansas Supreme Court, produced in January 2009 and hosted by then-Chief Justice Robert E. Davis, the video provides information regarding the structure and function of the Kansas Judicial Branch. Copies of the video are available upon request to teachers or anyone interested in law-related education. Contact Ron Keefover, Education and Information Officer of the Office of Judicial Administration, Topeka, (785) 296-4872 to order. Video is approximately seven (7) minutes in length. Windows Media Player 9.0 or above is required. <http://bit.ly/kbaWMP>

### Talking Points:

- Interesting facts regarding the Kansas Judicial System
- Types of courts
- Case statistics
- Jury service in Kansas
- About Kansas courts

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## Take a Field Trip!

Looking for a field trip idea? Interested in an interactive learning experience? Want to give your students a chance to meet with a federal judge? Need materials to help you teach about the courts?

Contact the U.S. District Court for the District of Kansas for help! We offer tours of our three courthouses and fun, timely, and interactive EDUCATIONAL programs designed for students of all ages.

Check out the program offerings at [www.uscourts.gov/outreach/index.html](http://www.uscourts.gov/outreach/index.html) and contact Neely Fedde, the Court’s Public Outreach Specialist, at [neely\\_fedde@ksd.uscourts.gov](mailto:neely_fedde@ksd.uscourts.gov) or (913) 551-6692 for more information or to schedule a session in our Kansas City, Wichita, or Topeka courthouses or at your school.

## A SHORT LESSON ON THE 4TH AMENDMENT

1. This short lesson on the Fourth Amendment can be used with students Grades 5 and higher. The objective of the lesson is to quickly acquaint students with the protections in the Fourth Amendment and to explore some Fourth Amendment situations involving young people.

2. Materials needed: Sufficient copies for all participants of materials used. (All handouts and attachments are available at <http://members.mobar.org/civics/ShortLesson.htm>)

3. Distribute copies of the Fourth Amendment or make an overhead. Read together as a class. Depending on time, consider discussing these aspects of Fourth Amendment:

- Why did the men who wrote the Constitution want a right like this included? (The colonists had experienced unannounced searches by the British and the right to be free from unreasonable searches was a right English citizens enjoyed and the colonists felt should have been accorded to them.)
- How important is this right to you?

4. Two questions that are almost always litigated with Fourth Amendment issues are: did a search really occur; and was the search reasonable.

- What is a search? (Put up overhead of kinds of searches or distribute copies.)
- Depending on the class, you may want to consider discussing that the right to be free of unreasonable searches, also means that there is an expectation of privacy in the thing being searched. Give some examples of something private: home, locker, car, purse, pockets, hotel room. But

what about a friend's house or a friend's car? What would you say about trash bags in front of your home? What would you see about heat radiating from your home?

- A search with a warrant is considered per se reasonable. What is the warrant requirement? Who can get a warrant? Who do they get the warrant from? (You may want to discuss use of informants, observations, etc.)
- What is reasonable when there is no warrant? Discuss exceptions. (See handouts)

5. What do you think happens to evidence that the police or the government obtains from an illegal search—one where there was no warrant and one that does not fall within one of the exceptions? Prior to 1961, the court would basically say that it was illegal but still allow the evidence. In 1961, in a landmark case called *Mapp. v. Ohio*, the Supreme Court created the exclusionary rule. (Explain how there is a hearing, how sometimes cases are thrown out.)

6. Do the role plays (below) with the students. After each role play, explore the various Fourth Amendment issues. (Attached are explanations of both cases.) Keep these aspects of the role play in mind:

- At the time *TLO* was decided, it was not illegal for minors to possess cigarettes.
- The *It's My Body* role play makes it clear that there is not probable cause for the urine testing in this school—there is no drug problem.

<http://members.mobar.org/civics/ShortLesson.htm>

### FOURTH AMENDMENT (TWO ROLE PLAYS)

#### I. It's My Body (first role play)

**Setting:** High School classroom during a meeting for winter sports

**Players:** **Coach Champ** — Girls' basketball coach,  
**Coach Winner** — Boys' basketball coach,  
**Jack and Jill** — Players

**Coach Champ:** All of you players need to know that at any time we can require you to give us a urine sample.

**Jack:** No way! That is an invasion of our privacy.

**Coach Winner:** The United States Supreme Court says we can do it and we will.

**Jill:** Why are you doing this?

**Coach Champ:** To test for drug use among the athletes.

**Jack:** I didn't think we had a drug problem in this school

**Coach Winner:** We don't, but we are going to test so we can keep drugs out.

**Jill:** I don't think the United States Supreme Court allows you to do that.

**Coach Champ:** The school lawyers, Joanie Cochran and Mark Clark, say we can legally do this.

**Jack:** Those two got their law degrees by correspondence courses.

1. Who's right, the coaches or the students? See *Vernonia v. Acton*, 115 Supreme Court Reporter, Page 2386.
2. Additional activity: Have the students read the *Vernonia* decision and list the necessary criteria for allowing the urine testing.

<http://members.mobar.org/civics/Body.htm>

#### II. It's My Locker (SECOND ROLE PLAY)

**Setting:** School hallway in front of Peter's and Patty's lockers.

**Players:** **Ms. Jones** — the principal,  
**Patty and Peter** — two students

**Ms. Jones:** Peter and Patty, please open your lockers. It has been reported to the office that you brought pagers to school. You know it is against the rules to have a pager at school.

**Peter:** I do not have a pager in my locker. I will not open this locker without you getting a search warrant.

**Patty:** I also do not have pagers in my locker. Unless you have a search warrant, you have no right to search my locker.

**Ms. Jones:** I have here the combinations to both of your lockers. If you will not open the lockers for me, I will open them on my own.

**Peter:** If you find anything, you cannot use it against me to punish me.

**Patty:** Don't you know anything about the Fourth Amendment? You can't just search anywhere that you want. This is my private locker.

1. Who is right? Patty and Peter? The principal?
2. If the principal does not find anything, does this mean she violated Patty's and Peter's Fourth Amendment rights?
3. Did the principal need a reason to search their lockers?
4. See *T.L.O. v. New Jersey*. (In this case, the U.S. Supreme Court held that if the school had probable cause to believe that a school rule had been broken, a search could be made.)

<http://members.mobar.org/civics/Locker.htm>

## LAW-RELATED EDUCATION CLEARING HOUSE ...WHERE?

**This is no longer a mystery!** The Kansas Bar Association's Law-Related Clearinghouse is located in the Teachers College Resource Center, room #224 of Visser Hall, on the campus of Emporia State University. Packed on the shelves are a wide variety of civics resources for Kansas educators. A brief scan of the collection shows that there are booklets, books, games and kits, mock trial simulations, videos, DVDs, and more.

So why is this collection so unknown? For me *that* is a huge mystery! Any time that I can find valuable materials in my content area, ready to use with students, I consider that a resource that I will call upon again and again. I think that this collection may have been overlooked in the search for effective materials for students because of the variety of other resources offered here at the Teachers College Resource Center. I have excellent reason to believe that this non-use will change! The Kansas Bar Association, steered by their Public Services Manager, Kelsey Schrempp, has put their valuable dollars to work for educators! New, timely audio-visual materials have been ordered and will soon invigorate this collection. Now, all you will need to do is be first in line to check out these brilliant new additions to the collection. The new additions will be available in mid December and some are listed in the above Clearinghouse Resources.

The hours at the Center are 9 a.m. to 6 p.m. Monday through Thursday, and 9 a.m. through 5 p.m. on Friday. For more information, call (620) 341-5292 or email me at [jromeise@emporia.edu](mailto:jromeise@emporia.edu).

Janice Romeiser  
Director Teachers College Resource Center/Instructional Materials Center  
Emporia State University

*The Kansas Bar Association Law-Related Education Clearinghouse Inventory catalog is available. To request a new copy, please call Kelsey Schrempp, KBA Public Services Manager, at (785) 234-5696 or email her at [kschrempp@ksbar.org](mailto:kschrempp@ksbar.org).*

## TERRIFIC TECHNOLOGY FOR TEACHERS



### Check out these great websites ...

[http://bit.ly/KBALW\\_Locker](http://bit.ly/KBALW_Locker) – This Missouri bar site has several lesson plans, handouts, and attachments that explore the Fourth Amendment in the school context. Some of them are highlighted above.

[http://bit.ly/KBALW\\_Amend4](http://bit.ly/KBALW_Amend4) – This site has many resources about the Fourth Amendment, from its history to its application in specific situations.

<http://bit.ly/wncBVM> – Here's a teaching module which you can present in one or two class periods, which teaches high school students about their Fourth Amendment rights in school.

<http://1.usa.gov/ymq5UJ> – This site from the United States Courts gives a short summary of landmark supreme court cases about students, and includes the TLO case noted above.

<http://bit.ly/zlvvOd> – This site has online activities for students relating to the Fourth Amendment.

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