COURTSIDE

Outstripping Students Again

BY PERRY A. ZIRKEL

IN THE late 1990s, Safford Middle School, which is in a rural area of eastern Arizona, adopted a policy prohibiting the "nonmedical use, possession, or sale of drugs on school property or at school events." The policy defines drugs as including not only controlled substances but also alcoholic beverages and prescription or over-the-counter drugs except with the permission of school authorities. A stimulus for adopting this policy was an incident in which a student brought a prescription drug to school and distributed it to classmates, one of whom became seriously ill and wound up being hospitalized.

On 22 August 2003, the school held a dance to celebrate the beginning of the new academic year. During the dance, several staff members noticed unusually rowdy behavior and the smell of alcohol coming from a small group of students, including Savana, an honor-roll eighth-grader, and her friend Marissa. Later in the evening, staff members found a bottle of alcohol and a package of cigarettes in the girls' restroom. No official action was taken at that time.

On 1 October 2003, another student at the school, whose name was Jordan, and his mother requested and participated in a meeting with the principal and vice principal. Jordan's mother explained that a few nights ago her son had become violent with her and was sick to his stomach, a result — according to Jordan — of his having taken some pills a classmate had given to him at school. Jordan reported that specific students had brought drugs and weapons to school. He identified Savana as having served alcohol to her classmates at a party she hosted at her home prior to the August dance.

On 8 October 2003, Jordan asked to meet with the vice principal and handed him a white pill that he said Marissa had given to him. He also claimed that a group of students were planning to take pills at lunch. The vice principal took the pill to the school nurse, who iden-

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tified it as "ibuprofen 400 mg," a dosage available only by prescription.

Based on this information, the vice principal went to Marissa's classroom to escort her to his office. As she stood up, he noticed a black planner lying on the empty desk next to her. He asked her whether the planner was hers, and she said no. He handed it to the teacher and promised to attempt to find the owner. Soon thereafter, the teacher discovered that the planner contained knives, lighters, a cigarette, and a permanent marker. He promptly conveyed this information to the vice principal.

At the office, the vice principal, in the presence of Helen Romero, a female administrative assistant, asked Marissa to turn out her pockets and open her wallet. She complied, producing one blue pill, several white pills, and a razor blade. When asked about the blue pill, which the nurse subsequently identified as "Naprosyn 200 mg," an over-the-counter drug used to treat pain and inflammation, Marissa said: "I guess it slipped in when she gave me the IBU 400s." When the principal asked her, "Who is she?" Marissa identified Savana. Upon questioning about the planner, Marissa continued to deny ownership and similarly disclaimed knowledge of its contents.

The vice principal then directed Romero to escort Marissa to the nurse's office and conduct a search of her clothing and person for more pills. At the nurse's office, Romero closed the door, which locked automatically, and asked the nurse to observe. Next, she instructed Marissa to 1) remove her shoes and socks, 2) lift up her shirt and pull out her bra band, and 3) take off her pants and pull out the elastic of her underwear. Marissa complied, and no further contraband was found.

Meanwhile, the vice principal retrieved Savana from her classroom and escorted her to his office. After stressing the importance of telling the truth, he showed Savana the black planner, and she acknowledged that it was hers but claimed that she had loaned it to Marissa several days earlier to help her hide some things from her parents. She denied knowing what those things were. When he then showed her the pills, she denied any knowledge of them. Next, he advised her that he had received a report that she had been passing pills to her classmates and asked whether she had any objection to being searched. She asserted that the report was completely false and that she did not mind being searched. He summoned Romero to serve as a witness, and he searched Savana's backpack to no avail. He directed Romero to take Savana to the nurse's office for a search of her person.

When they arrived at the nurse's office, Romero again asked the nurse to serve as observer. Savana was wearing a vest-like jacket, stretch pants, and a T-shirt, none of which had pockets. Romero directed Savana to 1) remove her jacket, shoes, and socks; 2) take off her pants and shirt; 3) pull her bra out and to the side and shake it, resulting in the exposure of her breasts; and 4) pull her underwear out at the crotch and shake it, exposing her pubic area. The search did not produce any pills. Immediately thereafter, Romero gave Savana her clothes and allowed her to get dressed. At no time during the search did Romero or the nurse touch Savana, nor did they attempt to contact her mother.

The next day, when Savana's mother complained to the principal after finding out what had been done, he replied that there was no problem, "because we didn't find anything."

On 21 April 2004, Savana's mother filed a civil rights suit in state court on Savana's behalf, claiming that the school authorities had violated her Fourth Amendment rights. On 19 May 2004, the district defendants, via a motion for removal, transferred the case to federal court.

On 25 March 2008, the federal district court granted the district defendants' motion for summary judgment, holding that the search of Savana met the initiation and scope standards that the Supreme Court had established in 1985 in *New Jersey* v. *T.L.O.* Savana's mother filed an appeal with the Ninth Circuit.

On 21 September 2007, a panel from the Ninth Cir-

cuit Court of Appeals affirmed in a 2-to-1 decision.[1] The two appellate judges in the majority agreed with the lower court that the school officials had complied with the two-pronged standard of *T.L.O.* With regard to the first prong, which requires reasonable suspicion, not probable cause, to initiate the search, the majority cited several key and cumulatively sufficient pieces of information: 1) Marissa's corroborating identification of her friend Savana, upon the vice principal's direct investigation based on Jordan's tip; 2) Savana's acknowledged ownership and contraband-related loan of the incriminating planner; and 3) Jordan's independent and reasonably believable — even if incorrect — information about Savana's alcohol-related role in connection with the August dance.

This case reflects the gradual but significant shift from the student-rights era of *Tinker* to the safety/security priority of today.

The second and more pertinent standard in this case assesses the scope of the search, based on the multiple factors of whether "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[2] On the first factor, the majority concluded that the governmental interest at stake, barring the unauthorized use of prescription drugs on school premises, was not as pressing as the barring of controlled substances but was nevertheless important in terms of student safety, as demonstrated in this case by the incident that originally stimulated the pertinent policy, by Jordan's recent harmful experience, and by his report of the imminent plan for a pill-laden lunch. Moreover, the majority reasoned that the small size of the contraband and the school officials' exhaustion of less intrusive measures based on reliable information added support for the reasonableness of the search in relation to its objectives.

With regard to the second factor, the majority observed that 1) two employees of the same gender as Savana conducted the search in the privacy of the nurse's office with the door securely locked, 2) they did not physically touch her in any way during the search, 3) they did not have her remove her underwear, and 4) they immediately arranged for her to put her clothing back on. Finally, the majority rejected Savana's argument that the school's failure to contact her mother or at least have her disrobe behind a screen violated her Fourth Amendment rights. The court cited the Supreme Court's student drug-testing decisions that reasoned that school officials need not use the least-restrictive alternative in conducting searches under the Fourth Amendment.[3]

The dissenting judge cited the following dicta from an earlier Ninth Circuit case: "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principal of human dignity."[4] With regard to the first prong, he opined that the school officials had reasonable suspicion for a nonintrusive search but not for the inception of a strip search. With regard to the second prong, he expressed abhorrence at the exposure of Savana's breasts and pubic area based on another student's tip regarding ibuprofen and, after a fruitless backpack search, in the absence of any evidence that Savana was employing alternative methods of concealment. Responding to the defendants' argument that they had not had Savana remove her underwear, the dissenting judge observed: "Under these circumstances, it is difficult to see how the fact that school officials did not completely undress her is of any constitutional significance. Indeed, perhaps the most alarming aspect of the school's position is that school officials seem to believe that strip searching of students should be considered a routine matter." While acknowledging some modern court decisions that upheld strip searches of public school students, he characterized their factual circumstances as clearly distinguishable, concluding — with indirect reference to *Tinker* v. *Des Moines Community School District* — that Savana's "constitutional rights did . . . disappear at the schoolhouse gate."

Facing adverse but not insuperable odds, Attorney Andrew Petersen, who is representing Savana and her mother, has filed a petition seeking a rehearing before the full membership of the Ninth Circuit, contending that the dissenting opinion in this case "hits the nail on its head." Attorney David Pauole, who represents the district defendants, countered that the majority opinion "reached the right result by properly applying the reasonableness standard," thus making such a rehearing unnecessary.

THIS decision, as it currently stands, is remarkable for more than one reason. First, it reflects rather poignantly the gradual but cumulatively significant shift from the student-rights era of *Tinker* to the pervasive

safety/security priority today, fueled by Columbine, 9/11, Virginia Tech, and the warlike mentality extending from drugs to terrorism. When I first started teaching school law almost 30 years ago, one of the accepted precepts was "Do not strip search students."[5] In the past two decades, in the wake of the Supreme Court's landmark decision in *T.L.O.* and during its more recent district-friendly student drug-testing decisions,[6] some lower courts have continued the previous line of case law,[7] but countervailing judicial authority has accumulated in the defendant districts' favor.[8] Thus we revisit the subject of student searches to trace the arc of the proverbial pendulum, which remains poised at its most intrusive end.[9] And although the disappearance of students' constitutional rights is an overstatement, it is difficult to deny the dissenting judge's observation about the alarming routinization of student strip searches. He was referring to the Safford officials' treatment of Marissa as well as Savana and the principal's no-problem comment to Savana's mother, but his comment also fits the frequency and outcomes of the modern case law. In any event, this decision and its relatively recent predecessors suggest a case-by-case approach, based on the particular circumstances, rather than a *per se*, or absolute, rule in either direction.

Second, contrary to common conceptions among school officials, the court's opinion reveals that the following factors were not legally determinative: 1) the facile notion that the school officials only "asked" the student and that she supposedly consented, 2) the equally shaky notion that because the student was still wearing undergarments the school officials did not actually strip search her, and 3) the lack of resulting contraband (which neither invalidates nor validates the search, because the proper measuring point was at the time of initiating the search).

Third, reflecting the same paradigmatic shift, the courts have recently rejected the constitutional claim that school officials must contact parents before searching or seizing (i.e., interrogating) students.[10] In response to an increasing police presence and police tactics in school, the federal courts have similarly been largely,[11] if not entirely,[12] hands-off.

Finally, this Ninth Circuit denuding decision goes only as far as what it deems constitutionally permissible. School officials are urged to look to the higher standards of some state laws and to their ethical norms to keep schools as educative exemplars for respecting the dignity of individuals, partnering with parents, and opting for less-intrusive alternatives while striving for safety. Indeed, the Safford Unified School District recently at least modestly modified its policy as follows: "Disrobing of a student is overly intrusive for purposes of most student searches and is improper without express concurrence from school district counsel."

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1. *Redding* v. *Safford Unified Sch. Dist.*, 504 F.3d 828 (9th Cir. 2007). I obtained supplementary information via e-mail exchanges in late November and early December 2007 with attorneys Andrew Petersen and David Pauole, who represented Savana and the defendants, respectively.

2. *New Jersey* v. *T.L.O.*, 469 U.S. 325, 342 (1985).

3. *Bd. of Educ.* v. *Earls*, 536 U.S. 822, 837 (2001); and *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 663 (1995).

4. *Calabretta* v. *Floyd*, 189 F.3d 808, 919 (1999). This quotation was dicta in *Calabretta*, because its factual context was a social worker's strip search of a child in the family's home. However, the quotation is attributable to an early strip search of a student in the public school context, which was prior to various intervening precedents that have changed the settled state of the law. *Doe* v. *Renfrow*, 631 F.2d 91, 92-93 (7th Cir.1980).

5. See, for example, *Bellnier* v. *Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977); and *Potts* v. *Wright*, 357 F. Supp. 215 (E.D. Pa. 1973). See also *Doe* v. *Renfrow* in note 4.

6. See notes 2-3. For a wider view, see, for example, Perry A. Zirkel, *A Digest of Supreme Court Decisions Affecting Education* (Bloomington, Ind.: Phi Delta Kappa Educational Foundation, 2001). For a recent empirical study, see Anastasia D'Angelo and Perry A. Zirkel, "An Outcome Analysis of Student-Initiated Education Litigation: A Comparison of 1977-1981 and 1997-2001 Decisions," *West's Education Law Reporter*, vol. 226, 2008, pp. 539-55.

7. *Phaneuf* v. *Fraikin*, 448 F.3d 591 (2d Cir. 2006); *H.Y.* v. *Russell County*, 490 F. Supp. 2d 1174 (M.D. Ala. 2007); *Carlson* v. *Bremen High Sch. Dist.*, 423 F. Supp. 2d 823 (N.D. Ill. 2006); *Watkins* v. *Millennium Sch.*, 290 F. Supp. 2d 890 (S.D. Ohio 2003); *Bell* v. *Marseilles Elementary Sch.*, 160 F. Supp. 2d 883 (N.D. Ill. 2001); *Konop* v. *Northwestern Sch. Dist.*, 26 F. Supp. 2d 1189 (D.S.D. 1998); *Oliver* v. *McClung*, 919 F. Supp. 1206 (N.D. Ind. 1996); *Kennedy* v. *Dexter Consol. Sch.*, 10 P.3d 15 (N.M. 2000); and *State* v. *Mark B.*, 433 S.E.2d 41 (W. Va. 1993).

8. *Cornfield* v. *Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993); *Williams* v. *Ellington*, 936 F.2d 881 (6th Cir. 1991), *Teague ex rel. C.R.T.* v. *Texas City Indep. Sch. Dist.*, 386 F. Supp. 2d 893 (E.D. Tex. 2005); *Rinker* v. *Sipler*, 264 F. Supp. 2d 181 (M.D. Pa. 2003); *Rudolph* v. *Lowndes County Bd. of Educ.*, 242 F. Supp. 2d 1107 (M.D. Ala. 2003); and *Singleton* v. *Bd. of Educ.*, 894 F. Supp. 386 (D. Kan. 1995); cf. *Lindsey* v. *Caddo Parish Sch. B.*, 954 So. 2d 272 (La. Ct. App. 2007) (folded-down waistband). Moreover, in another group of cases, the district defendants prevailed based on qualified immunity, concluding that the plaintiff students' rights were not clearly settled. See, for example, *Beard* v. *Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005); *Thomas* v. *Roberts*, 323 F.3d 950 (11th Cir. 2003); *Jenkins* v. *Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997); and *Lamb* v. *Holmes*, 162 S.W.3d 902 (Ky. 2005).

9. For the most recent relevant visit, see Perry A. Zirkel, "Stripping Students of Their Rights," *Phi Delta Kappan*, February 1993, pp. 498-501. For other related visits, see, for example, idem, "Drug Test Passes Court Test," *Phi Delta Kappan*, October 1995, pp. 187-88; idem, "Another Search for Student Rights," *Phi Delta Kappan*, May 1994, pp. 728-30; idem, "Searching and Researching," *Phi Delta Kappan*, December 1989, pp. 330-32; and idem, "Drug Testing Brings Fallout in Tippecanoe," *Phi Delta Kappan*, October 1988, pp. 171-72.

10. See, for example, *Shuman* v. *Penn Manor Sch. Dist.*, 422 F.3d 141 (3d Cir. 2005); and *Wofford* v. *Evans*, 390 F.3d 318 (4th Cir. 2004).

11. See, for example, *Burreson* v. *Barneveld Sch. Dist.*, 434 F. Supp. 2d 588 (W.D. Wis. 2006); *Bravo* v. *Hsu*, 404 F. Supp. 2d 1195 (C.D. Cal. 2005); and *M.W.* v. *Madison County Bd. of Educ.*, 262 F. Supp. 2d 737 (E.D. Ky. 2003).

12. See, for example, *Gray* v. *Bostic*, 458 F.3d 1295 (11th Cir. 2006). ◀