

## **School Resource Officers, The Special Needs Doctrine, and *In Loco Parentis*: The Three Main Attacks on Students' Fourth Amendment Rights Within the Schoolhouse Gate**

**By: Mary Katharine Ludwig**

The Supreme Court, when it decided *Tinker v. Des Moines Independent Community School District*, asserted and affirmed the fact that a public school student does not shed his or her Constitutional rights at the schoolhouse gate.<sup>1</sup> Despite this declaration of the preservation of Constitutional Rights for public school students, in the years since *Tinker*, we have seen a shift away from Constitutional protections for students. The Fourth Amendment, in particular, is under fire. The Fourth Amendment protects citizens from unreasonable searches and seizures conducted by agents of the state.<sup>2</sup>

Public school students' Fourth Amendment rights are being attacked most aggressively in three main ways. Through the increased presence of law enforcement officials, primarily School Resource Officers (SROs) in schools, students are actually being disciplined by agents of the state, not the school, yet these SROs are failing to satisfy the higher probable cause standard required of law enforcement personnel for valid searches.<sup>3</sup> Next, the "special needs" doctrine, which provides a school greater latitude in performing searches, was liberalized and expanded considerably in *Vernonia* and *Earls*, and has since lost its meaning and therefore applies in all situations when schools wish to search their students, even random, suspicionless drug tests. Finally, the power of schools to act *in loco parentis* appears to be on the rise again, with the court being incredibly deferential to schools in allowing them to use their own discretion to search so as not to disturb the school's custodial authority and responsibility over public school

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<sup>1</sup> *Tinker v. Des Moines School District* 393 U.S. 503, 506

<sup>2</sup> US CONST. AMEND. IV.

<sup>3</sup> Price, Peter, *When is a Police Officer an Officer of the Law?* 99 JCRLC 541,559 (Spring 2009).

students. In order to stop the continued dissolution of Fourth Amendment protections against unreasonable searches and seizures inside the schoolhouse gate, the court must reign in schools on these fronts.

### **School Resource Officers: Agents of the School or the State?**

The issues surrounding the constitutionality and appropriateness of law enforcement presence within a public school is, out of the three issues discussed in this paper, the one that has been given the least amount of consideration by the courts and will be given the most amount of consideration by this paper.<sup>4</sup> The increased interdependency between public school officials and law enforcement officers, often serving as school resource officers (SROs), has had a significant impact on the manner in which schools discipline their students and has served to subject students to penalties from the juvenile or criminal justice systems, as opposed to the traditional repercussions imposed by the school alone.<sup>5</sup> Due to the fact that these SROs are actually agents of law enforcement and are being allowed to search students based only on a reasonable suspicion, and that as a result students often end up coming into contact with the juvenile or criminal court system, the court must require these officers satisfy the traditional probable cause requirement for all law enforcement searches in order to respect individual students' Fourth Amendment rights.<sup>6</sup>

For the first time, in *New Jersey v. T.L.O.*, the court addressed whether or not the Fourth Amendment was even implicated in individual searches that occurred within a public school. The court answered that it was so implicated, because the school official conducting the search was

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<sup>4</sup> Pinard, Michael, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities* 45 Ariz. L. Rev. 1067, 1069 (2003).

<sup>5</sup> *Id.* at 1070.

<sup>6</sup> Price, Peter, *When is a Police Officer an Officer of the Law?* 99 JCRLC 541,559 (Spring 2009).

actually an officer of the state, rejecting the notion that school officials were only acting *in loco parentis*.<sup>7</sup> The court in *T.L.O.* went on to hold that the general warrant and probable cause requirements were too rigid to be applied in public schools, and instead required only that the search be justified at its inception and reasonably related in its scope to the initial issue that warranted the search.<sup>8</sup> While *T.L.O.* did serve as the standard for searches performed by school officials, the Supreme Court itself acknowledged that their holding did not address a situation which would arise if the searches were done in conjunction with law enforcement officers.<sup>9</sup>

In the years following the *T.L.O.* decision, with an increase in violence by and against our students, public schools responded by implementing heightened security protocols, most of which were run in part or in whole by law enforcement officers.<sup>10</sup> Various liaison programs exist in order to facilitate agreements between public schools and law enforcement officers, resulting in law enforcement officers stationed within the school itself.<sup>11</sup> The most popular of these programs is the federal School Resource Officer (SRO) program, which is monitored by the Department of Justice's Office of Community Oriented Policing Services.<sup>12</sup> The OJJDP released a fact sheet on SROs, quoting the Omnibus Crime Control and Safe Streets Act, which defined the SRO as, "a career law enforcement officer, with sworn authority, deployed in

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<sup>7</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 336.

<sup>8</sup> *Id.* at 341, 342.

<sup>9</sup> Pinard, Michael *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities* 45 Ariz. L. Rev. 1067, 1074.

<sup>10</sup> *Id.* at 1075

<sup>11</sup> Girouard, Cathy, *OJJDP Fact Sheet: School Resource Officer Training Program*, at 1. US Department of Justice, Office of Juvenile Justice and Delinquency Prevention. Published March 2001 #05.

<sup>12</sup> Pinard, Michael *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities* 45 Ariz. L. Rev. 1067, 1078. A description of this office is available at: [www.cops.usoj.gov](http://www.cops.usoj.gov).

community-oriented policing, and assigned by the employing police department or agency to work in collaboration with school and community-based organizations.<sup>13</sup>”

Before determining how SROs should be viewed in the eyes of the court, it is first necessary to understand the consequences of officers’ searches of students. As a result of the increased presence of law enforcement officers and the widespread issue of school violence, many schools have developed zero tolerance policies which are enforced by the school resource officers and which result in an increased reporting to the local enforcement officers of individual student activities.<sup>14</sup> These zero tolerance policies increase the likelihood that students will suffer consequences from either juvenile or criminal court, as opposed to discipline from the school alone.<sup>15</sup> This phenomenon has become known as the “school to prison pipeline,” “reflecting recognition of the direct and dire consequences of increased surveillance and harsher punishments for minor disciplinary infractions in the public school system.<sup>16</sup>” Based on the serious consequences students face as a result of a search by an SRO, it violates students’ Fourth Amendment protections to allow these officers to act solely on *T.L.O.*’s reasonable suspicion standard alone.

After establishing that actions by SROs carry serious consequences for students, the next challenge is to assess whether it is appropriate for the court to consider these SROs to be agents of the school, or, as this paper argues, they must be seen as agents of the state, thus requiring the

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<sup>13</sup> Girouard, Cathy, *OJJDP Fact Sheet: School Resource Officer Training Program*, at 1. US Department of Justice, Office of Juvenile Justice and Delinquency Prevention. Published March 2001 #05.

<sup>14</sup> Pinard, Michael *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities* 45 Ariz. L. Rev. 1067, 1079; see: Susan Sandler, *Turning to Each Other, Not on Each Other; How School Communities Prevent Racism in School Discipline*. Available at: [www.arc.org/gripp/conference/papers/justice\\_matters.pdf](http://www.arc.org/gripp/conference/papers/justice_matters.pdf).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

heightened probable cause standard for school searches.<sup>17</sup> Proponents of SROs argue that officers are agents of the school and therefore any search they perform must only be justified at its inception and reasonable in its scope, according to *T.L.O.*<sup>18</sup> Moreover, SROs are required to undergo special training before being placed within a school to better prepare them to understand their role and responsibilities, as well as to prepare them for interacting with youth in a school setting.<sup>19</sup> From this, supporters of the program argue that these SROs are acting at the discretion and direction of school officials and therefore they are agents of the school, not the state.

However, the simple definition of an SRO itself clearly expresses the intent that these are trained law enforcement officers acting in a legal capacity, in that they are assigned by a local law enforcement agency, and often provide information or evidence to local law enforcement agencies regarding disruptions within schools.<sup>20</sup> Moreover, the presence of SROs means that students disciplined in schools are much more likely to, “face consequences in the criminal justice system as a result of the school actions.”<sup>21</sup> In these cases, SROs are agents of the state searching public school students based on far less than the traditional probable cause or warrant standard required of law enforcement officials, and therefore these searches violate the Fourth Amendment.

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<sup>17</sup> Pinard, Michael *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities* 45 Ariz. L. Rev. 1067, 1079

<sup>18</sup> Girouard, Cathy, *OJJDP Fact Sheet: School Resource Officer Training Program*, at 1. US Department of Justice, Office of Juvenile Justice and Delinquency Prevention. Published March 2001 #05.

<sup>19</sup> *Id.*

<sup>20</sup> *Hard Lessons: School Resource Officer Programs and School-Based Arrests in Three Connecticut Towns*, at 5. A report of the American Civil Liberties Union and the ACLU of Connecticut. November, 2008.

<sup>21</sup> Price, Peter, *When is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools* 99 J. Crim. L. & Criminology 541, 550. (Spring 2009).

The Supreme Court has offered no bright line test in determining whether SROs must be considered agents of the state or the school, and in fact, the court specifically left this question open in *T.L.O.*<sup>22</sup> Subsequently, lower courts have attempted to answer this question. Of considerable consideration is the SRO's role in the particular search and whether or not he acted alone or at the direction of a school official.<sup>23</sup> Courts also consider whether the SRO ultimately answers to the school or a law enforcement agency.<sup>24</sup>

In general, courts have categorized SROs as agents of the school, and have allowed them to partake in school searches so long as they have "reasonable suspicion" and have not required they meet the ordinary probable cause standard which all other law enforcement officers must meet. However, given that these searches often result in criminal or juvenile court involvement, and that these officers ultimately answer to the local law enforcement branch serves as solid evidence that these are not school officials and therefore should not be entitled to search students based only upon reasonable suspicion.<sup>25</sup>

If schools are going to adopt the "better safe than sorry" approach and allow school resource officers to handle individual searches and discipline of students, then courts must require these law enforcement officers to comply with the probable cause standard required of them under the Fourth Amendment. Requiring school resource officers and other law enforcement officials stationed within public schools to have probable cause before initiating or suggesting the school initiate a search could still protect the interest the school has in

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<sup>22</sup> Pinard, Michael *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities* 45 Ariz. L. Rev. 1067, 1074.

<sup>23</sup> *Id.* at 1082.

<sup>24</sup> *Id.*

<sup>25</sup> Price, Peter, *When is a Police Officer an Officer of the Law? : The Status of Police Officers in Schools* 99 J. Crim. L. & Criminology 541, 558. (Spring 2009).

maintaining a safe environment.<sup>26</sup> The SRO would still be allowed to protect the safety of the students present, all the while upholding individual students' Fourth Amendment rights.

### **The Special Needs Doctrine: After *Earls*, does *Every School* have Special Needs?**

The next threat to students' Fourth Amendment rights is born out of the Supreme Court's willingness to expand the notion of the special needs doctrine to the extent that it loses its substantive value and specifically allows schools to subject its students to random drug tests based on nothing more than a school's over arching objective to eliminate student drug use. The special needs doctrine, as applied to school searches, allows a law enforcement officer to engage in a suspicionless search, which are usually prohibited under the Fourth Amendment, when special needs make the warrant and probable-cause requirement impracticable and burdensome.<sup>27</sup> The special needs doctrine was mentioned in the context of public school searches for the first time in Justice Blackmun's concurrence in *New Jersey v. T.L.O.*, wherein he reinforced the court's recognition that the public interest of school safety is best served by lowering the probable cause requirement and believed school safety was one of the rare special needs that warranted greater flexibility for law enforcement.<sup>28</sup> After this introduction of the special needs doctrine in *T.L.O.*, there has been a progressive expansion of what constitutes special needs, all of which culminated in court-approved, suspicionless, random drug testing of students.

In *Vernonia School Dist. 47J v. Acton*, the Supreme Court did away with the individualized suspicion requirement for public school drug tests, stating that, "such 'special

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<sup>26</sup> *Id.* at 559.

<sup>27</sup> Penrose, Meg, *Shedding Rights, Shredding Rights: A Critical Examination of Student Privacy Rights and the "Special Needs" Doctrine After Earls*, 3 Nev. L. J. 411, 419. (Winter 2002/2003).

<sup>28</sup> *Id.* at 418.

needs' exist in the public school context...the school search approved in *T.L.O.*...was based on individualized suspicion of wrongdoing...however 'the Fourth Amendment imposes no irreducible requirement of such suspicion.'"<sup>29</sup> The court in *Vernonia* believed that the district's interest in drug testing its athletes was important and potentially compelling, given that the district had illustrated that this was, in fact, a "drug infested school," and that the popular student athletes were leading and encouraging the drug use.<sup>30</sup> The court believed that the athletes' expectation of privacy, which was lowered due to the fact that by participating in competitive sports they subjected themselves to a higher degree of scrutiny, had to yield in the face of the "special needs" the school had in putting an end to the rampant drug problem present at the school.<sup>31</sup>

In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, the court broadened a school's authority to engage in suspicionless, random drug tests by expanding the notion of the "special needs" doctrine to encompass all schools' general interest in preventing student drug use.<sup>32</sup> In fact, Justice Thomas stated in the court's opinion that, after *Earls*, any student who may, "reasonably serve the School District's important interest in detecting and preventing drug use," may fall under the special needs definition and be subject to random, suspicionless drug testing.<sup>33</sup> The key difference between *Vernonia* and *Earls* was that in *Earls*, the district showed neither a pressing drug problem at the school, nor that the students

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<sup>29</sup> *Vernonia School Dist. 47J v. Acton* 515 U.S. 646, 654.

<sup>30</sup> *Id.* at 661.

<sup>31</sup> *Id.* at 657.

<sup>32</sup> Penrose, Meg, *Shedding Rights, Shredding Rights: A Critical Examination of Student Privacy Rights and the "Special Needs" Doctrine After Earls*, 3 Nev. L. J. 411,438. (Winter 2002/2003).

<sup>33</sup> *Id.*

involved in extracurricular activities were leading the problem, yet the court still found that the school had a “special need” to drug test their students.<sup>34</sup>

The liberalization of the special needs doctrine in *Earls* ignores past policy decisions and justifications that have always been crucial in the eyes of the court for bypassing the Fourth Amendment probable cause and warrant requirements.<sup>35</sup> In providing very little support for, yet stating decidedly that, “special needs inhere in the public school context<sup>36</sup>,” all public school students stand exposed to suspicionless, random drug tests and stand to lose yet another portion of their Fourth Amendment rights against unreasonable searches and seizures.

***In Loco Parentis: Are Courts really treating school officials as agents of the state?***

In a similar vein, the final attack on the Fourth Amendment rights of public school students is the notion that schools, in exercising their right to search students, are acting *in loco parentis*, and therefore the fact that the students are under the control and authority of the school officials usurps any countervailing interest the student has in exercising his or her expectation of privacy. The doctrine of *in loco parentis*, which means, “in place of a parent,” originates from English common law and stands for the proposition that, when parents send their children to school, the school through its officials, assumes the duties the children are owed from their parents.<sup>37</sup> This principle was built upon the belief that minors lack some of the most fundamental rights when under the control and duty of their parents, including protection against unreasonable

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<sup>34</sup> *Id.* at 412.

<sup>35</sup> *Id.*

<sup>36</sup> *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* 536 U.S. 822, 829 (2002).

<sup>37</sup> DeMitchell, Todd, *The Duty to Protect: Blackstone’s Doctrine of In Loco Parentis: A lens for Viewing the Sexual Abuse of Students*, 18. B.Y.U. Education and Law Journal (2002).

search and seizure.<sup>38</sup> Traditionally, this doctrine implied that there was very little a court could do to limit the actions of the school and little the court could require by way of Constitutional protections, in that they were operating under the transferred right and power to control, structure, and guide the child as a parent it entitled to do.<sup>39</sup>

In *T.L.O.*, the court explicitly stated that a school was not only acting *in loco parentis*, but also that they were acting as agents of the state.<sup>40</sup> If school officials are also acting as agents of the state, accordingly the Fourth Amendment limits on search and seizure within a public school apply.<sup>41</sup> However, in recent cases related to suspicionless drug testing, the court has, albeit informally, considered school officials' actions within the parameters of this doctrine. In *Vernonia*, the court approved suspicionless, random drug testing for student athletes.<sup>42</sup> In 2002, the court approved a similar policy for suspicionless drug testing in *Earls*.<sup>43</sup> In these two cases, both the language used by the court and the ultimate outcomes illustrate that great deference was given to school officials and that it would take a great deal to overcome the presumption that the school was acting *in loco parentis* in order to implicate the Fourth Amendment.

The court in *Earls* drew upon the fact that the driving force behind its decision in *Vernonia* was, “the school’s custodial responsibility and authority.”<sup>44</sup> Despite the fact that neither opinion focuses explicitly in detail on the school acting *in loco parentis*, it is clear that

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<sup>38</sup> Proffitt Dupre, Anne, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 Geo. Wash.L. Rev. 49, 88. (1996).

<sup>39</sup> *Id.*

<sup>40</sup> Dayton, John; Anne Proffitt Dupre, *Searching for Guidance in Public School Search and Seizure Law: From T.L.O. to Redding.*, 248 Ed. Law Rep. 19, 27 (2009).

<sup>41</sup> *Id.*

<sup>42</sup> *Vernonia School Dist. 47J v. Acton* 515 U.S. 646

<sup>43</sup> *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* 536 U.S. 822

<sup>44</sup> LaCroix, Tony, *Student Drug Testing: The Blinding Appeal of In Loco Parentis and the Importance of State Protection of Student Privacy*, 2008 B.Y.U. Educ. & L.J. 251, 265. (2008).

what the court is describing is this very doctrine, “Central...is the fact that the subjects of the policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster... the most significant element in this case is that the policy was undertaken in furtherance of the government’s responsibilities, under a public school system, as a guardian and tutor of children entrusted to its care.”<sup>45</sup>

This language relied upon to warrant suspicionless and random drug testing did not imply that the court viewed the school officials as agents of the state. In fact, the language referring to the school’s “custodial responsibility,” implies the same kind of control that a parent, as a keeper or guardian, exerts over their child.<sup>46</sup> The court in *Vernonia* relies so heavily on the school’s *in loco parentis* duty over students that it is impossible to ignore the invigoration and rebirth that this case gives the doctrine.<sup>47</sup> These decisions in *Vernonia* and *Earls* set a dangerous precedent for students’ Fourth Amendment rights. If the court views schools as acting *in loco parentis* as opposed to as agents of the state, then even the most basic and fundamental protections against unreasonable search and seizure will be lost. The court in *T.L.O.* sought to preserve some Fourth Amendment protections for students by stating explicitly that school officials were agents of the state. The court, in *Vernonia* and *Earls*, in focusing on the schools’ role *in loco parentis* let go of these Fourth Amendment protections reserved for students in *T.L.O.* In fact, in the Supreme Court’s most recent decision regarding students’ Fourth Amendment rights, *Safford Unified School Dist. No. 1 v. Redding*, Justice Thomas was not far off in his dissenting opinion that the

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<sup>45</sup> *Vernonia School District 47J v. Acton* 515 U.S. 646 (1995) at 654

<sup>46</sup> Demitchell, Todd, *The Duty to Protect: Blackstone’s Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 B.Y.U. Educ. & L.J. 17, 25 (2002).

<sup>47</sup> *Id.* quoting: Lawrence F. Rossow & Jacqueline Stefkovich, *Vernonia School District v. Acton: Suspicionless Drug Testing*, 102 Educ. L. Rptr. 897, 907 (1995)

court officially return to the doctrine of *in loco parentis*.<sup>48</sup> In reality, this is precisely where the court is heading. Allowing schools to subject students to random, suspicionless drug testing, at times even over the objection of parents, is clearly the school, “acting in place of the parent.”

### **Conclusion**

Debate and confusion about how much Constitutional protection a public school student is entitled within the schoolyard is nothing new. In the years following *T.L.O.*, schools have slowly whittled away at what little Fourth Amendment protections students are afforded, and the courts have done very little to stop them. The recent influx of special resource officers within schools presents a serious problem, in that these law enforcement officers are able to search students based only on reasonable suspicion and not limited in ushering disciplinary issues into criminal or juvenile court. Strict objectives or limits must be placed on how these SROs may undertake their searches, or the courts must respond by requiring them to meet either the probable cause or warrant standard in order to uphold students’ Fourth Amendment protections. Also, the court’s expansion of the special needs doctrine now encompasses virtually any public school and their desire to work towards a drug free school. This shift allows schools to bypass valid steps put in place to protect students’ Fourth Amendment rights within public schools. Finally, the court’s focus on the school as custodian and guardian of students gives schools great deference in searching students under the policy of *in loco parentis* and limits the degree to which schools are viewed as agents of the state. This shift expands the power and discretion of the school greatly to act as it wishes, in place of the parent. In order to protect what Fourth Amendment rights students have left in public schools, the court must reign in and monitor the

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<sup>48</sup> *Safford Unified School Dist. No. 1 v. Redding*, 129 S.Ct. 2633, 2646

use of School Resource Officers in public schools, require an actual showing of special needs, and hold schools to the appropriate standards they must meet when acting as agents of the state, as opposed to acting *in loco parentis*. Only after the court fights back on these three fronts will students truly not shed their Fourth Amendment rights at the schoolhouse gate.