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Search and Seizure - Police Searches on Public School Campuses in New Mexico - State v. Tywayne H.

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SEARCH AND SEIZURE—Police Searches on Public School Campuses in New Mexico— *State v. Tywayne H.*

I. INTRODUCTION

In *State v. Tywayne H.*[1] the New Mexico Court of Appeals held that the lowered standard of reasonable suspicion that the United States Supreme Court applied to school officials in *New Jersey v. T.L.O.*[2] would not apply to police officers invited onto a public school campus if the police officers conducted the search solely at their own discretion.[3] Thus, the court held that a police officer will be held to the standard of probable cause[4] for searches on public school campuses. Prior to *Tywayne H.*, New Mexico courts had not addressed the standard to which police would be held when searching students on public school campuses. However, New Mexico courts had already established a lowered standard for searches by public school officials[5] and applied the United States Supreme Court ruling that required school officials to have a reasonable suspicion rather than a probable cause in order to search students.[6] This note explores how the New Mexico Court of Appeals decided what standard of proof police must meet when conducting searches on public school grounds, and discusses the implications the *Tywayne H.* decision will have on such future searches. Part II sets out the facts in *Tywayne H.* Part III addresses federal and state cases on which the *Tywayne H.* court relied in making its decision. Part IV explains the *Tywayne H.* court's reasoning, which is analyzed in part V. Finally, part VI discusses the implications of the *Tywayne H.* ruling for New Mexico.

II. STATEMENT OF THE CASE

Tywayne and a friend attended a dance held in the Clovis High School gymnasium.[7] That night, two Clovis Police Department officers, in uniform, provided security for the dance. The dance started at approximately midnight, and all students were told to enter the gym through the front entrance where they would have their hands stamped. Students who left the gym were not permitted to return to the dance. Shortly after the dance began, two officers arrived to check on the officers already stationed at the school. At approximately 12:45 a.m., Tywayne and his friend entered the gymnasium through a side door. An officer asked a school coach who was present if students were allowed to enter through the side door, and the coach told the officer that students were not. The four police officers then entered the gym and surrounded Tywayne and his friend. An officer informed the

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1. 123 N.M. 42, 933 P.2d 251 (Ct. App. 1997), *cert. denied*, 123 N.M. 83, 934 P.2d 251 (1997).
2. 469 U.S. 325, 336 (1985).
3. *See Tywayne H.*, 123 N.M. at 45, 933 P.2d at 254.
4. "Probable cause is the existence of circumstances which would lead a reasonably prudent man to believe in the guilt of an arrested party. Mere suspicion or belief, unsupported by facts or circumstances, is insufficient." State v. Jones, 435 P.2d 317, 319 (Or. 1967).
5. *See* State v. Michael G., 106 N.M. 644, 646-48, 748 P.2d 17, 19-21 (Ct. App. 1987).
6. *See id.* (discussing and applying New Jersey v. T.L.O., 469 U.S. 325, 336 (1985)).
7. *See Tywayne H.*, 123 N.M. 42, 44, 993 P.2d 251, 253 (Ct. App. 1997). Unless otherwise noted, all facts in this section are taken from *Tywayne H.*, 123 N.M. at 44-45, 933 P.2d at 253-254.

other officers that Tywayne's friend smelled of alcohol. One officer smelled alcohol on Tywayne, and Tywayne admitted to drinking a beer while he was outside. The officers asked Tywayne and his friend to step outside. Once outside, the police conducted a pat-down search of Tywayne and his friend. During the search of Tywayne, an officer discovered that Tywayne carried a loaded semi-automatic weapon. Despite the fact that Tywayne had a weapon, the officers noted that the students fully cooperated at all times and did not show any violent tendencies during the encounter. There were no school authorities present during the pat-down search.

Following his arrest for possession of the semi-automatic weapon, Tywayne was required to appear at a delinquency hearing at the district court in Curry County. Prior to the hearing, Tywayne filed a motion to suppress the evidence of the seized semi-automatic weapon, arguing that the search was unlawful.[8] The district judge denied Tywayne's motion and adjudged Tywayne delinquent for unlawfully carrying a deadly weapon on school premises.[9] Tywayne appealed the denial of his motion to suppress. The court of appeals agreed that the search was unlawful and reversed the district court's decision.[10]

III. BACKGROUND

Students' rights are limited, but "[s]chool children do not shed their constitutional rights at the school house gate."[11] However, on numerous occasions the Supreme Court has ruled that students should not be afforded full constitutional protections.[12] "Although minors do receive the protections of the Constitution, the scope of their rights is limited when compared to adult rights."[13] According to the Supreme Court, three reasons justify the lowered standard: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing."[14]

In the late 1960s, the Supreme Court began limiting students' First, Fifth, Eighth, and Fourteenth Amendment rights.[15] The limits on those rights are not often disputed any more, but "limitations on students' Fourth Amendment rights have been brought to the forefront of controversy over the past few years."[16] The increased interest in students' Fourth Amendment rights, or the restraints thereon, is based on the escalating fear of drugs and violence on public school campuses.[17]

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8. *See id.* at 45, 933 P.2d at 254.
9. *See id.*
10. *See id.*
11. *Id.* (citing Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).
12. *See* Corin R. Stone, *The Fourth Amendment in Public Schools: An Overview*, 25 SEARCH & SEIZURE L. REP., 9 (1998).
13. *Id.*
14. *Id.* (quoting Belloti v. Baird, 443 U.S. 622, 634 (1979)).
15. *See Id.*
16. *Id.*
17. *See* JANET R. PRICE ET AL., THE RIGHTS OF STUDENTS: THE BASIC ACLU GUIDE TO A STUDENT'S RIGHTS 80 (3d ed. 1988).

The desire to protect students has inevitably led to a debate over the need to keep drugs and weapons out of schools versus a student's right to privacy.[18]

The Fourth Amendment guarantees that every person who has a reasonable expectation of privacy is entitled to be free from unreasonable governmental intrusions.[19] Before 1985, students' Fourth Amendment rights on public school campuses were governed either by the *in loco parentis* doctrine or a "reasonable suspicion" test.[20] In some jurisdictions, courts found that school officials were not bound by any Fourth Amendment restraints whatsoever because of the doctrine of *in loco parentis*.[21] According to the *in loco parentis* doctrine, "a parent may . . . delegate part of his parental authority, . . . to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge,. . . that of restraint and correction, as may be necessary . . . ."[22] Based on the doctrine of *in loco parentis*, courts have held that when a school official searches a student, the school official was acting in place of the parent rather than as a governmental official. Because the parent would not be exercising governmental authority, neither would the school.[23] Defects with the *in loco parentis* doctrine caused it to fall into disrepute with legal commentators and courts.[24]

In contrast to the *in loco parentis* doctrine, most courts applied a balancing test to public school searches.[25] Those courts held that school officials could constitutionally conduct a search of a student under their supervision if there was a "quantum of evidence somewhat short of that which [was] needed for the usual police search."[26] Typically, school officials were required to establish a reasonable suspicion in order to justify the search.[27] The goal of this balancing test was to "adequately protect the student from arbitrary searches and seizures and give the school officials enough leeway to fulfill their duties."[28]

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18. *See id.*

19. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995); Terry v. Ohio, 392 U.S. 1, 9 (1968).

20. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11(a) & (b), at 802-807 (3d ed. 1996).

21. *See id.* at 803. *See, e.g.*, R.C.M. v. State, 600 S.W.2d 552 (Tex. App. 1983). In addition to using *in loco parentis* to deprive students of Fourth Amendment rights, school officials asserted that the Fourth Amendment's probable cause requirement only applied to law enforcement officers and that school children only have a minimal expectation of privacy, which is not important enough to outweigh the government's interest in protecting school property and maintaining order and discipline. The United States Supreme Court rejected both of these arguments by determining that because school officials are public officials, they are subject to the Fourth Amendment. *See* New Jersey v. T.L.O., 469 U.S. 325, 336-37 (1985). Further, the Court found that although students have a lowered expectation of privacy, they do have an expectation of *some* privacy. *See* Stone, *supra* note 12, at 11.

22. LAFAVE, *supra* note 20, at 803.

23. *See* Mercer v. State, 450 S.W.2d 715, 717 (Tex. App. 1970).

24. *See, e.g.*, Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223, 236-37 (E.D. Tex. 1980). "While the doctrine of in loco parentis places the school teacher or employee in the role of a parent for some purposes, that doctrine cannot transcend constitutional rights." *Id.*

25. *See, e.g., id.*; M. v. Bd. of Educ. Bull-Chatham Community Unif. Sch. Dist., 429 F. Supp. 288, 292 (S.D. Ill. 1977).

26. LAFAVE, *supra* note 20, at 807.

27. *See id.*; *see also Jones*, 499 F. Supp. at 226 ("Some articuable facts which focus suspicion on specific students must be demonstrated before any school search can be carried out.").

28. LAFAVE, *supra*, note 20, at 808 (quoting New Jersey v. T.L.O., 469 U.S. 325 (1985)).

In 1985, the United States Supreme Court decided *New Jersey v. T.L.O.*,[29] which was the Court's first direct analysis of searches and seizures in public schools.[30] The Court both granted students rights and imposed limitations on those rights.[31] In *T.L.O.*, the Court expressly rejected the *in loco parentis* doctrine and adopted a standard similar to the "reasonable suspicion" standard that had been followed by the majority of courts.[32] *T.L.O.* involved two teenage girls who were smoking in a bathroom in violation of school rules. They were caught and taken to the school principal's office. T.L.O.'s friend admitted smoking cigarettes, but T.L.O. denied that she had done anything wrong.[33] The principal took T.L.O. into another office and searched her purse. During the course of his search, the principal found a small amount of marijuana and information that linked T.L.O. to marijuana dealing. T.L.O. claimed that the principal's search was illegal.[34] In addressing the case, the Supreme Court struggled to "strike the balance between the schoolchild's legitimate expectation of privacy and the school's equally legitimate need to maintain an environment in which learning [could] take place."[35] The Court held that school officials are acting as government officials when they conduct searches of students, but that school officials do not have to obtain a warrant before searching a student under their authority.[36] The Court also determined that school officials would not be held to the probable cause standard required of police officers, but rather to the lesser standard of "reasonableness, under all the circumstances, of the search."[37] The test to determine if a search is reasonable under all the circumstances requires a two part inquiry: first, whether the action was justified at its inception, and second, whether the search was reasonably related in scope to the circumstances which justified the interference in the first place.[38]

The Court explained that the reasonableness standard they created would aid teachers and administrators by allowing them to regulate their conduct according to reason and common sense without the burden of learning the intricacies of probable cause.[39] The reasonableness standard would also help students by insuring that their interest would be invaded no more than necessary to achieve the goal of preserving order in schools.[40] The Court's intent was to create a standard that would

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29. 469 U.S. 325 (1985).

30. *See* Stone, *supra* note 12, at 10.

31. *See id.* at 11.

32. *See T.L.O.*, 469 U.S. at 336-37 ("In carrying out searches and other disciplinary functions . . ., school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.").

33. *See id.* at 328.

34. *See id.* at 328-29.

35. *Id.* at 340.

36. *See id.*

37. *Id.* at 341.

38. *See id.* at 341-42 ("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. Such a search will be permissible in its scope when 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.") (footnotes omitted).

39. *See id.* at 343.

40. *See id.*

"neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren."[41] The holding in *T.L.O.* was limited to searches carried out by school officials acting on their own authority. The Court explicitly refused to express an opinion on the standard for assessing the legality of searches conducted by school officials with or on behalf of the police.[42]

In addition to *T.L.O.*, the Supreme Court recently examined students' privacy rights in the context of drug testing required for student athletes in *Vernonia School District 47J v. Acton*.[43] In *Acton*, a student and his parents refused to sign a consent form for the school to perform a drug test screening that it required for students participating in school sports programs.[44] After refusing to sign the form and being denied the right to participate, the student sued the school district alleging that the school's Student Athlete Drug Policy violated the Fourth and Fourteenth Amendments. In addressing the case, the Supreme Court articulated a three-part test for analyzing the reasonableness of a search.[45] First, a court must weigh the "nature of the privacy interest upon which the search . . . intrudes."[46] Second, a court considers "the character of the intrusion that is complained of."[47] And finally, the court looks at the "nature and immediacy of the governmental concern at issue . . . , and the efficacy of the means for meeting it."[48] The Court applied the three-part test and held that the school's policy was reasonable and therefore constitutional because student athletes had a decreased expectation of privacy, the drug search was relatively unobtrusive, and there was a severe need for the search.[49]

The New Mexico constitutional equivalent to the Fourth Amendment is Article II, section 10: searches and seizures, which states:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched or the persons or things to be seized, nor without a written showing of probable cause, supported by an oath or affirmation[50]

"The protections accorded under Article II, section 10 of the New Mexico Constitution against unreasonable searches and seizures are more extensive than those provided under the Fourth Amendment to the United States Constitution."[51]

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41. *Id.*
42. *See id.* at n.7.
43. 515 U.S. 646 (1995).
44. *See id.* at 651.
45. *See id.* at 654-64.
46. *Id.* at 654.
47. *Id.* at 658.
48. *Id.* at 660.
49. *See id.* at 664-65.
50. N.M. CONST. art. II § 10.
51. *In re* Shon, Daniel K., 125 N.M. 219, 222, 959 P.2d 553, 556 (Ct. App. 1998); *see also* Campos v. State, 117 N.M. 155, 158, 870 P.2d 117, 120 (1994) (noting that the state constitution imposes heightened probable cause requirement); State v. Attaway, 117 N.M. 141, 149-50, 870 P.2d 103, 111-112 (1994) (holding that the "knock and announce" requirement is implicit in state constitutional search and seizure provision); State v. Gutierrez, 116 N.M. 431, 446-47, 863 P.2d 1052, 1067-68 (1993) (holding federal "good faith" exception incompatible with provisions of state constitution); State v. Cordova, 109 N.M. 211, 217, 784 P.2d 30, 36 (1989)

New Mexico law on searches of students on public school campuses began with *Doe v. State*.[52] *Doe* involved a group of students who were smoking a pipe containing marijuana on campus. After being informed that the group had been smoking marijuana on campus, the vice-principal confronted Doe and made him surrender the pipe.[53] A court judged Doe a delinquent, and he appealed based on, inter alia, the claim that the search was illegal.

The New Mexico Court of Appeals determined that the Fourth Amendment applied to the situation because the "action by a public school official [was] 'state action', rendering the Fourth Amendment applicable through the Fourteenth."[54] In addition, the court noted that the Fourth Amendment only protects against *unreasonable* searches and seizures, and that "[t]he Fourth Amendment right of persons to be secure against unreasonable searches and seizures has been expressly applied to juvenile proceedings . . . ."[55] Although the court recognized that government officials are ordinarily held to a very high standard of reasonableness, the court adopted "the standard that school officials may conduct a search of a student's person if they have a reasonable suspicion that a crime is being or has been committed or they have reasonable cause to believe that the search is necessary in the name of maintaining school discipline."[56] To aid in the implementation of the new standard, the court identified factors to consider in determining whether there is reasonable cause to believe a search is necessary. The factors include the student's age, the student's history and record in the school, the prevalence of the problem in the school to which the search is addressed, the need to make the search without delay, and the probative value and reliability of the information used to justify the search.[57] The *Doe* court intended that the standard created "by balancing the privacy rights of students against the unique administrative responsibilities of the school officials"[58] would protect students from arbitrary searches and allow the school officials the latitude they need to conduct searches as part of their duties.[59] According to *Doe*, requiring school officials to meet the warrant requirement when conducting school searches would force the school to request the help of the police for even a trivial search.[60] The court mainly attributed the need for a lower standard to "[t]he realities of [the] school situation."[61]

(finding "totality of the circumstances" test for determining existence of probable cause for issuance of a search warrant incompatible with state constitutional safeguards).

52. 88 N.M. 347, 540 P.2d 827 (Ct. App. 1975). This case was one of a handful cited by the United States Supreme Court in *New Jersey v. T.L.O.* for the proposition that the lowered standard for school officials is based on the need to balance the needs of the school to control conduct and the student's right to privacy. *See T.L.O.*, 469 U.S. at 334 n. 11.

53. *See Doe*, 88 N.M. at 350, 540 P.2d at 830.

54. *Id.* at 351, 540 P.2d at 831.

55. *See id.*

56. *Id.* at 352, 540 P.2d at 832.

57. *See id.*

58. *Id.*

59. *See id.*

60. *See id.*

61. *Id.* The court also attributed the need for a lower standard to "common sense and the increasing weight of judicial decisions." *Id.* The realities the schools were facing included a need to maintain essential ordinary school discipline and the need to control crime, which was reaching epidemic proportions. *See id.*

Twelve years after its decision in *Doe*, the New Mexico Court of Appeals revisited the issue of searches on public school campuses in *State v. Michael G.*[62] In *Michael G.*, a student observed a fellow student selling marijuana and anonymously reported him to the school's swimming coach. The coach reported the student to the school's assistant principals. The principals confronted the student who was allegedly selling marijuana and searched his locker.[63] After finding two cigarettes that looked like marijuana, the principals called the police and had the cigarettes tested. The cigarettes tested positive for marijuana. Based on the finding of marijuana, the state petitioned to revoke the student's probation.[64] The student appealed, claiming that the marijuana was "the fruit of an unreasonable search that violated the fourth amendment to the United States Constitution and [Article II Section 10 of the New Mexico Constitution]."[65] In analyzing the student's claim, the court began by applying the *T.L.O.* rule that "[a] search of a student is justified in its inception if reasonable grounds exist to suspect that the search will uncover evidence of violations of law or school rules."[66] The court stated that the question it must answer was "whether, prior to the discovery of the marijuana, the assistant principals had reasonable grounds to suspect that [the student] was violating the law or school rules."[67] The student asserted that in order for the court to properly analyze the case according to *T.L.O.*, it must apply the factors established in *Doe*.[68] The State claimed that *T.L.O.* had "rejected the application of such stringent factors and, in so doing, rendered the *Doe* opinion ineffective."[69] The court took a middle ground between the two positions and found that:

> [T]he *Doe* factors cannot be mechanically applied to determine whether a school search was justified. Thus the absence of consideration of one or more of those factors will not automatically lead to a finding that reasonable grounds for the search did not exist. On the other hand, the *Doe* factors provide a useful guide in determining whether a school search was reasonable under the fourth amendment.[70]

After making this statement, the only factor that the court considered in analyzing the case was the probative value and reliability of the information used to justify the

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62. 106 N.M. 644, 748 P.2d 17 (Ct. App. 1987).
63. *See id.* at 645, 748 P.2d at 18.
64. *See id.*
65. *Id.*
66. *Id.* at 646, 748 P.2d at 19 (quoting New Jersey v. T.L.O, 469 U.S. 325 (1985)). The court noted that *T.L.O.* "did not address the question of whether students have a legitimate expectation of privacy in lockers, desks, or other school property provided for storage of their belongings." *Id.* After briefly analyzing other court cases addressing the issue, the court held that *T.L.O.*'s standard applied to searches of students and their lockers. *See id.*
67. *Id.*
68. *See id.* According to *Doe*, the factors a court should consider include the child's age and history of disciplinary problems; the prevalence and seriousness in the school of the problem at which the search is directed; the exigency to make the search without delay; and the probative value and reliability of the information used to justify the search. *See* Doe v. State, 88 N.M. 347, 352, 540 P.2d 827, 832 (Ct. App. 1975).
69. *Michael G.*, 106 N.M. at 646, 748 P.2d at 19. *T.L.O.* analyzed a New Jersey case in which the New Jersey Supreme Court had applied a reasonable grounds test that included the same factors as those set out in *Doe*. Although the United States Supreme Court in *T.L.O.* stated that the New Jersey test was not substantially different from its own, the Supreme Court did not apply the New Jersey court's factors, but instead applied a "totality of the circumstances" type of test. *See id.*
70. *Michael G.* 106 N.M. at 647, 748 P.2d at 20.

search.[71] Based on its analysis, the court found that there were reasonable grounds for the search, and therefore that there was not a violation of the Fourth Amendment of the United States Constitution or Article II section 10 of the New Mexico Constitution.[72]

IV. RATIONALE

The *Tywayne H.* court held that the police would not be held to the same lowered standard of reasonable suspicion that applied to school officials.[73] In reaching its decision, the court began by analyzing the Fourth Amendment rights of school children.[74] The court found that "all persons harboring a reasonable expectation of privacy are entitled to be free from unreasonable governmental intrusions."[75] Despite the State's argument that school children did not harbor a reasonable expectation of privacy and therefore the Fourth Amendment would not apply to them, the court noted that "school children do not shed their constitutional rights at the school house gate,"[76] and found that case law demonstrates that the Fourth Amendment applies to searches conducted in schools by public school officials.[77] Dismissing the State's argument that the search was a legitimate school search permitted by *T.L.O.*, the court determined that *T.L.O.*'s reason for lowering the standard for school authorities was based upon a need to balance the school's interest in discipline and order against the student's right to privacy.[78] It also found that the *T.L.O.* court limited its holding to school authorities acting alone and on their own authority.[79] Based on the fact that the only police contact with a school official in *Tywayne H.*'s case was an officer's question to the coach about whether the students could use the side door, and the fact that the coach's answer to the officers did not constitute an instruction to search the students, the court found that the search was not conducted by school authorities or at the request of school authorities, but rather completely at the police officers' discretion.[80] *Tywayne H.* concluded that the reasonable suspicion standard did not apply to police acting on their own discretion. Thus, the police required probable cause to search students.[81]

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71. *See id.* The court focused on the fact that the information that gave rise to the search was a student's specific statement that another student had tried to sell him marijuana. It noted that the student's statement was not based on mere rumor or belief but on an eyewitness account. The court then analogized the student's statement to that of a citizen-informant and found that because the student was an eyewitness to the crime, his statement as relayed to the principals provided reasonable grounds for the reasonable suspicion necessary for a school search. *See id.*

72. *See id.* at 648, 748 P.2d at 21.

73. *See Tywayne H.*, 123 N.M. at 45, 933 P.2d at 253.

74. *See id.*

75. *Id.* at 44, 933 P.2d at 253 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995); Terry v. Ohio, 392 U.S. 1, 9 (1968)).

76. *See Tywayne H.*, 123 N.M. at 44, 933 P.2d at 253 (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-656 (1995)); *see also* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).

77. *See Tywayne H.*, 123 N.M. at 44, 933 P.2d at 254.

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*; *see also*, Picha v. Wieglos, 410 F. Supp. 1214, 1221 (N.D. Ill. 1976) (stating that probable cause is required for a search which involves the police); F.P. v. State, 528 So.2d 1253, 1254-55 (Fla. Dist. Ct. App. 1988) (applying lowered standard of reasonable suspicion if the police are not involved).

The court supported its decision by applying the *Acton* three-prong test[82] to determine whether the facts in this case allowed a departure from the Fourth Amendment's probable cause standard.[83] Regarding the first prong of the test, the nature of the privacy interest upon which the search intrudes, the court found that "although . . . [a student's] reasonable expectation of privacy is lowered with respect to a search by school authorities, . . . it is not lowered with respect to a search by a uniformed police officer."[84] According to *Tywayne H.*, the court's reasoning was in accordance with *T.L.O.* because *T.L.O.* based the lowered standard of reasonable suspicion on the importance of preserving the informality of the student-teacher relationship and on the belief that school officials need flexibility in disciplinary measures in order to maintain security and order.[85] As to this prong, the court decided that based on the fact that a "school child's expectation of privacy vis-a-vis the State as police officer, even a police liaison officer, is not diminished simply because the child is at school,"[86] the proper standard for a police search was probable cause.

The *Tywayne H.* court decided that the second prong, the character of the intrusion, also showed that probable cause was the proper standard to apply in this case. It reasoned that "a pat-down search is a serious intrusion upon the sanctity of the person,"[87] and that "there is a sharp distinction between the purpose of a search by a school official and a search by a police officer."[88] *Tywayne H.* found that the purpose of a school authority's search is to maintain discipline and order, but the nature of a police search is to obtain evidence for a criminal prosecution.[89] Thus, the police search "involves a more substantial invasion of privacy than a search for other purposes,"[90] and should require probable cause.

In analyzing the final prong, the nature and immediacy of the search, the court determined that although ridding public school grounds of weapons is a substantial governmental interest, it is, at least to a degree, being addressed in that school authorities can search students using the lowered standard of reasonable suspicion.[91] Based on a student's "undiminished privacy interests . . . with respect to a police officer, combined with the character of the intrusive police search,"[92] the court found that the final prong required a probable cause standard.

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82. *See* Vernonia School District 47J v. Acton, 515 U.S. 646, 653-60 (1995). The test requires that the state's and the individual's conflicting interests be "examined in light of (1) the nature of the privacy interest upon which the search intrudes, (2) the character of the intrusion, (3) the nature and the immediacy of the search. *Id.*

83. *See Tywayne H.*, 123 N.M. at 46, 933 P.2d at 255.

84. *Id.*

85. *See id.*

86. *Id.* (quoting People v. Dilworth, 661 N.E.2d 310, 326 (Ill. 1996)).

87. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 17 (1968)).

88. *Id.*

89. *See id.*

90. *Id.* (quoting People v. Dilworth, 661 N.E.2d 310, 327 (Ill. 1996)); *see also Acton*, 515 U.S. at 658 n.2.

91. *See Tywayne H.*, 123 N.M. at 46, 933 P.2d at 255.

92. *Id.*

V. ANALYSIS

In *Tywayne H.*,[93] the New Mexico Court of Appeals correctly declined to extend *T.L.O's* holding to police officers acting on their own discretion.[94] The court's holding is consistent with the intent of both the New Mexico law on school searches and the intent behind the United States Supreme Court's ruling in *T.L.O.* In both the Supreme Court and New Mexico rulings, the intent was to balance the privacy interests of school children against the special needs of school officials to maintain discipline and protect students.[95] Allowing police acting on their own discretion to search students using the lowered standard would not promote the balancing goals enunciated in *T.L.O.* and *Doe*.

The *Tywayne H.* court correctly determined that school officials and police officers acting on their own initiative must meet different standards of suspicion before conducting a search of a student. The Court's most earnest articulation of the need for the different standards is shown in its quoting of Justice Powell's concurrence in *T.L.O.*:

> The special relationship between teacher and student . . . distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.[96]

Prior to *Tywayne H.*, no Supreme Court or New Mexico court cases had determined what standard police would be held to when searching students on public school campuses. A holding in *Tywayne H.* that would have extended the lowered standard of reasonable suspicion to police officers would have been unjustified by any prior case law or the discernable intent of *T.L.O.*, *Doe*, or *Michael G.*

The *Tywayne H.* court's fidelity to the intent behind prior cases strengthened, or at the very least protected, student's privacy rights. In answer to the State's claim "that school children do not have a reasonable expectation of privacy,"[97] the court clearly enunciated that *T.L.O.*, *Vernonia*, *Tinker*, *Doe*, and *Michael G.* support a finding that school children do have privacy expectations, even though the expectations are "lowered with respect to a search by school authorities."[98] Based on the weight of previous case law, it would have been erroneous for the court to agree with the State's contention concerning student's expectations of privacy.

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93. *See id.* at 42, 933 P.2d at 251.

94. *See id.* at 45, 933 P.2d at 254 (stating that *T.L.O.* had limited its application to school authorities acting on their own authority).

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

96. *Tywayne H.*, 123 N.M. at 46, 933 P.2d at 255 (quoting New Jersey v. T.L.O., 469 U.S. 325, 349-50 (1985)).

97. *Tywayne H.*, 123 N.M. at 45, 933 P.2d at 255.

98. *See id.* at 46, 933 P.2d at 256.

In analyzing whether the police search was justified as a *T.L.O.* search, the *Tywayne* court decided the issue by strictly following *T.L.O.*'s limited "application to school authorities acting alone and on their own authority."[99] The court did not define who qualifies as a "school authority," but in applying this standard, the court properly found that the discretionary police search did not fall within the requirements of school authorities acting alone and on their own authority.[100] Had the court found that police qualify as "a school authority," the door would have been opened for the police to circumvent the requirements of the Fourth Amendment's warrant and probable cause requirements whenever they conducted a search at a public school.

Although the court appeared to decide the issue based solely on the fact that the police were not school officials acting on their own authority, it supported its decision using the three-part test established in *Acton* to determine whether a departure from the Fourth Amendment standard of probable cause and a warrant was appropriate.[101] The court's application of the *Acton* three-part test implies that it could have found that the police search of Tywayne would not have been justified under either *T.L.O.* or *Acton*. Although the court applied the *Acton* test, it did so after it had already found that the police search violated *T.L.O.* The court never explicitly stated whether New Mexico courts should apply *Acton* in order to determine if departure from the probable cause standard is appropriate.

VI. IMPLICATIONS

Tywayne H. correctly determined the standard police will be held to for searches if they are acting solely at their own discretion, but it did not address three very important issues: (1) the standard police will be held to when they are acting at the behest of a school official; (2) whether police can direct school officials to institute a search of a student when the police officer does not have probable cause; and (3) to what standard a police liaison officer will be held while working at a public school.

The first question is what standard will apply when school officials request that the police conduct a search. It appears from *Tywayne H.* that the police would be held to the lowered standard of reasonable suspicion. In *Tywayne H.*, the court noted that although the school's coach had answered the police officer's question about whether students could enter the gym through a side door, he did not direct the officers to search the students.[102] Because the coach did not direct the police officers, the court found that the officers acted solely at their own discretion.[103] It

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99. *T.L.O.*, 469 U.S. at 341 n.7. Although *Tywayne H.* briefly explained *T.L.O*'s two-part test dealing with whether the school authority's action was justified at its inception and whether the search was reasonably related in scope to the circumstances that justified the interference, it did not explicitly apply *T.L.O*'s two-part test in reaching its decision.

100. *See Tywayne H.*, 123 N.M. at 45, 933 P.2d at 254("The only police contact with a school official was officer Mondragon's question to the coach concerning whether students were permitted to enter through the side door. The coach . . . gave no directive to the officers to search the students. During the pat down search . . . there were no school authorities present.").

101. *See Acton*, 515 U.S. at 653.

102. *See Tywayne H.*, 123 N.M. at 45, 933 P.2d at 254.

103. *See id.*

follows that if the coach had directed the police to search the students, then the court would have found that the police were not acting solely at their own discretion, but rather at the behest of a school official. The court explicitly reserved judgement as to what standard would apply in this situation.[104] However, the narrow holding that a police officer acting solely at his or her own discretion will not be held to the lowered reasonable suspicion standard indicates that if the officer was acting at the direction of a school official, the police officer would be held to the lowered reasonable suspicion standard.

It is likely that in the future a New Mexico court would hold a police officer to the lowered standard of reasonable suspicion because a school official had asked the officer to conduct the search. However, such a holding would be a mistake. If a New Mexico court is asked to address this question, it should hold the officer to the standard of probable cause. There are two reasons that the probable cause standard should apply to police officers who conduct searches in schools.

First, New Mexico applies a lowered search standard to school officials in order to balance the school officials' need to maintain order and discipline on the school grounds with the students' privacy rights.[105] This careful balancing is required because of the special relationship between school officials and students. Second, a school official should not be able to transfer the lowered search standard to a police officer simply because he or she requests that the police officer conduct the search.

If a school official has a reasonable suspicion that a student is breaking the law or violating a school rule, the official should conduct the search. However, if the official believes that he or she cannot safely conduct the search and instructs the police to search the student, the police officer should have to determine, based on the information the school officials give him and any other information he gains, that there is probable cause to search the student. Without probable cause or an exception to the probable cause standard, the police should not conduct a search. A police officer does not have the same relationship with a student that a school official does and should not be held to a lowered standard for a search just because it will occur on a school campus.

The next question that must be addressed is whether police can instruct school officials to conduct a search. *Tywayne H.* found that the police search was undertaken completely at the officer's discretion, and that "the search was not conducted by school authorities on their own initiative or even by school authorities with or at the direction of a law enforcement agency."[106] The court's discussion of the fact that the search was not with or at the direction of police implies that the police could direct a school official to search a student. The court explicitly stated that "[w]e, like the court in *T.L.O.*, need not decide the standard for searches by school authorities in conjunction with or at the behest of law enforcement agencies."[107]

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104. *See id.* at 46-47, 933 P.2d at 255-256.
105. *See id.* at 46, 933 P.2d at 255.
106. *Id.* at 45, 933 P.2d at 254.
107. *Id.* at 47, 933 P.2d at 256.

This unanswered question leaves an open door for police to abuse their ability to direct school officials to conduct a search. If police could direct school officials to conduct a search, it would be possible for them to circumvent the requirement that police officers have probable cause in order to conduct a search. For instance, a police officer on a public school campus who witnesses a student engaged in what he or she considers suspicious behavior could request that a school football coach search the student. The police officer lacks probable cause, no crime has been committed and there is no reason to believe that a crime is imminent. The officer only has a feeling. Would a school official be obliged to follow the officer's directions? The answer is unclear, but an official should be prohibited from following the police officer's instruction. Allowing police officers to direct school officials to search students could permit rampant abuse and allow circumvention of the probable cause requirement. In the future, New Mexico courts should determine that police cannot circumvent their probable cause requirement by requesting a school official to conduct a search.

The final question is to what standard a police liaison officer will be held in conducting a search on a public school campus. Police liaison officers are police officers who are assigned to schools. They have all of the duties, powers, and responsibilities of a regular police officer who patrols the streets. *Tywayne H.* does not explicitly address what standard applies to police liaison officers, but the court's opinion provides clues as to what standard the court may select in the future. The first clues are found in the cases that the court cites in support of its decision holding that police should conform to the probable cause standard. In reaching its decision, the court approvingly cited cases that require a probable cause standard for a search in which the police are involved.[108] In addition to citing cases that explicitly state that the lowered standard of suspicion applies only if there is no police involvement, the court cites an authority that indicates that the police will be held to the lowered standard of reasonable suspicion if they are only minimally involved.[109] These clues appear to indicate that in the future the court may allow the lowered standard to apply to police liaison officers if they are only minimally involved in a search. Additionally, the court uses the introductory signals "But cf." and "but see"[110] to introduce cases which support the proposition that police liaison officers will always be held to the lowered standard.[111] Using these introductory

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108. *See* Picha v. Wielgos, 410 F. Supp. 1214, 1221 (N.D. Ill. 1976) (holding probable cause required if police involved in school search); *see also* F.P. v. State, 528 So.2d 1253, 1254-55 (Fla. Dist. Ct. App. 1988) (probable cause required if police involved in school search); State v. Young, 216 S.E.2d 586, 594 (Ga. 1975) (holding minimal standard of suspicion for school authorities applies if search is "free of involvement by law enforcement personnel"); People v. Bowers, 356 N.Y.S.2d 432, 435 (Sup. Ct. 1974) (holding minimal standard of suspicion applies to school authorities if search is free of police involvement).

109. *See Tywayne H.*, 123 N.M. at 45, 933 P.2d at 254 (quoting LAFAVE, *supra* note 20, at 832) ("Lower courts have held or suggested that the usual probable cause test obtains if the police are involved in the search in a significant way.")

110. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 123 (Columbia Law Review et al., eds., 16th ed. 1996). "But see" indicates that the cited authority directly states or clearly supports a proposition contrary to the main proposition. It is used where "see" would be used for support. "But cf." is used when the cited authority supports a proposition analogous to the contrary of the main position.

111. *See* Carson v. Cook, 810 F.2d 188, 192-93 (8th Cir. 1987) (holding that a search by plain-clothes liaison officer in conjunction with vice-principal where officer's intrusion was minimal held to *T.L.O.* standard of

signals to introduce these cases implies that the court did not approve of cases which indicated that liaison officers should always be held to the lowered standard of reasonable suspicion.

The next clue can be found in the *Tywayne H.* court's *Acton* analysis. In addressing the second prong of *Acton* the court states "[w]e also believe that 'a school child's expectation of privacy vis-a-vis the State as police officer, even a police liaison officer, is not diminished simply because the child is at school."[112] The court does not state that a school child's expectation of privacy vis-a-vis the police liaison officer requires that the police liaison officer be held to the probable cause standard, but it implies that a school child retains the same expectation of privacy when dealing with a police liaison officer that the child has when she is dealing with any other police officer.

Although these hints may provide some insight into what the court may do, whatever light these clues may shed is clouded by the court's disclaimer explicitly stating that it was not providing an opinion as to the "standard for searches by school authorities in conjunction with or at the behest of law enforcement agencies."[113] When the question arises in the future, prudent policy dictates that the court find that police liaison officers will be held to the probable cause requirement. Although a police liaison officer would have a closer relationship with students than a regular police official, the fact remains that liaison officers are on-duty, full-time police officer's assigned to a school. They are not teachers. They are not school officials. They are police officers and they should be held to the probable cause standard.

VII. CONCLUSION

State of New Mexico v. Tywayne H. was New Mexico's first look at the standard to which police will be held when searching students on public school campuses. In its decision, the court clearly announced that police officers will be held to the probable cause standard when they are searching a student completely at their own discretion. The decision properly insured that only school officials would be able to conduct searches of students using the lowered reasonable suspicion standard. In the not too distant future, New Mexico will face further questions about whether to extend the reasonable suspicion standard to police acting as liaison officers or at the request of school officials. When faced with these questions, New Mexico courts should continue to act in ways that protect students' privacy rights and find that police cannot circumvent the Fourth Amendment or Article II section 10 of the New Mexico Constitution.

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reasonable suspicion); People v. Dilworth, 661 N.E. 2d at 317 (Ill. 1996) (search by police officer acting in capacity as liaison officer for public school governed by *T.L.O.*).

112. *Tywayne H.*, 123 N.M. at 46, 933 P.2d at 255 (quoting People v. Dilworth, 661 N.E. 2d 310, 326 (Nickels, J., dissenting)).

113. *See id.* at 47, 933 P.2d at 256.