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THE QUESTION OF REASONABLENESS IN MASSACHUSETTS PUBLIC SCHOOL SEARCHES

*“The Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’ That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.”*¹

I. INTRODUCTION

On May 26, 2000, a seventh grade middle school student shot and killed his teacher with a gun the student brought to school.² Violence and drug use among teens in public schools is increasing at an alarming rate, and public school officials are concerned for the safety of both their students and the entire school community.³ Due to recent incidents of school violence, school officials need to act quickly to defuse potentially volatile situations with students before they explode.⁴ Since the safety of the entire school community is at risk, public school officials should not be required to obtain a warrant before searching a student’s locker for contraband.⁵

Massachusetts courts have not explicitly addressed whether Article 14 of the Massachusetts Declaration of Rights (“Art. 14”) requires a higher standard than the Fourth Amendment of the United States Constitution

¹ Katz v. United States, 389 U.S. 347, 350 (1967).

² The Associated Press, Mounting Evidence, (May 29, 2000) available at [ABCNews.go.com:http://more.abcnews.go.com/sections/us/DailNews/fla_shooting000529.html](http://more.abcnews.go.com/sections/us/DailNews/fla_shooting000529.html) (reporting teacher shot by student in school).

³ HONORABLE JOSEPH A. GRASSO, JR. & HONORABLE CHRISTINE M. MCEVOY, *SUPPRESSION MATTERS UNDER MASSACHUSETTS LAW*. § 17 AT 273 (1999) (stating educating students and not criminal investigation primary purpose of public school teachers).

⁴ See *Commonwealth v. Snyder*, 413 Mass. 521, 528, 597 N.E.2d 1363, 1367 (1992) (acknowledging imminent threat of marijuana spreading through school if officials did not search and seize it).

⁵ See *infra*, notes 48, 49 and accompanying text.

(“Fourth Amendment”) for what constitutes reasonable suspicion for student searches in public schools.⁶ The current ambiguity in Massachusetts’ law renders it difficult to determine what constitutes “reasonableness” for searches conducted by school officials in the Massachusetts public school system.⁷

This note will attempt to determine the “reasonableness” standard for public school locker searches under Art. 14. Part II will discuss the history of public school searches and seizures under Federal Law.⁸ Part II will also examine the Supreme Court’s decision in *New Jersey v. T.L.O.*,⁹ since Massachusetts follows *T.L.O.* with respect to Fourth Amendment searches and seizures in public schools.¹⁰ In addition, Part II will discuss the “probable cause” and “reasonable suspicion” standards under Federal Law by comparing searches conducted by school officials in conjunction with police with those conducted solely by school officials.¹¹ Part III will discuss the Massachusetts standard for search and seizure in public schools, and the resulting question of whether Art. 14 requires a higher level of reasonable suspicion than the level provided under *T.L.O.* and the Fourth Amendment.¹² Finally, in order to determine what the Massachusetts standard of “reasonableness” should be under Art. 14, Part IV will analyze the Federal and Massachusetts standards for searches conducted solely by school officials and those conducted by school officials in conjunction with police officers.¹³

II. HISTORY OF SEARCH AND SEIZURE IN PUBLIC SCHOOLS

Until forty years ago, searches and seizures in public schools were not an issue of concern for lawmakers since teachers in public schools disciplined students under the *loco parentis* doctrine.¹⁴ This doctrine considered teachers as private individuals rather than governmental actors,

⁶ See *infra*, notes 111-112 and accompanying text.

⁷ See *infra*, note 113 and accompanying text.

⁸ See *infra*, notes 14-50 and accompanying text.

⁹ 469 U.S. 321 (1985).

¹⁰ See *infra*, notes 51-75 and accompanying text.

¹¹ See *infra*, notes 76-87 and accompanying text.

¹² See *infra*, notes 88-130, and accompanying text.

¹³ See *infra*, notes 131-150, and accompanying text.

¹⁴ See Jacqueline A. Stefkovich et. al. *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, 1999 BYU EDUC. & L.J. 25, 26-27 (1999) (stating *loco parentis* means school teachers stand in place of parents in disciplining students).

affording teachers the same rights to search a locker as parents had to search their own child's closet.¹⁵ Consequently, "by classifying school searches as falling under the *loco parentis* theory, the courts were able to side step the question of applicability of the Fourth Amendment."¹⁶

For a defendant to invoke Fourth Amendment protection against an unlawful search and seizure, the defendant must show that government action existed, and the defendant had an expectation of privacy.¹⁷ In 1985, the Supreme Court marked the end of the *loco parentis* doctrine in *T.L.O.*, holding public school teachers were state actors.¹⁸ Therefore, under *T.L.O.*, public school officials were subject to the Fourth Amendment protection against unreasonable searches and seizures provision through the Fourteenth Amendment.¹⁹

T.L.O. established the standard of "reasonable suspicion" for public school searches conducted by public school officials.²⁰ The history of public school searches conducted in conjunction with law enforcement officials has yielded the different search standard of "probable cause."²¹ For purposes of the Fourth Amendment, probable cause means that there is reason to believe that a crime has been committed and that the evidence of the crime will be found in the place to be searched.²²

¹⁵ See M. Teresa Harris, *New Jersey v. T.L.O.: New Standard for Review or New Label?*, 9 AM. J. TRIAL ADVOC. 157, 163-64 (1985) (discussing under *loco parentis* teachers enjoy same rights and privileges in matters of discipline, and safety as parents).

¹⁶ Stefkovich, *supra* note 14, at 27.

¹⁷ Grasso & McEvoy *supra*, note 3, § 3.2, at 42. (stating U.S. Supreme Court conflated standing into expectation of privacy).

¹⁸ See *T.L.O.*, 469 U.S. at 334 (holding public school officials represent state and not surrogates for parents).

¹⁹ See *id.*; *Elkins v. United States*, 364 U.S. 206, 213 (1960) (holding Fourteenth Amendment prohibits unreasonable searches and seizures by state officers); *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 637 (1943) (holding Fourteenth Amendment protects citizens against state agencies including Board of Education).

²⁰ See *T.L.O.*, 469 U.S. at 341.

²¹ See *id.* at 341 n. 7.

²² See *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (officer possessed requisite probable cause to search defendant because officer made valid arrest); see also *Commonwealth v. Upton*, 394 Mass. 363, 370, 476 N.E.2d 548 (1985). "A substantial basis for concluding that any of the articles described in the warrant are probably in the place to be searched." *Id.*

A. The Federal Standard

The Fourth Amendment does not prohibit all searches and seizures; rather, it prohibits *unreasonable* searches.²³ The Fourth Amendment, “the right of people to be secure in their person, houses, papers, and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause, supported by an oath or affirmation particularly describing the person or thing to be seized.”²⁴

In the concurring opinion in *Katz v. United States*,²⁵ Justice Harlan set out a twofold requirement for ascertaining when government action constitutes a search under the Fourth Amendment.²⁶ First, “a person must have exhibited an actual expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.”²⁷ Under Justice Harlan’s twofold requirement, home searches fall under the Fourth Amendment because people have an expectation of privacy in their homes, and society recognizes that expectation as reasonable.²⁸ Conversely, individuals do not have a reasonable expectation of privacy for “objects, activities or statements that [they expose] to the ‘plain view’ of

²³ See U.S. CONST. amend. IV.

²⁴ U.S. CONST. amend. IV (stating Fourth Amendment protects only those students in public schools, not those in private school).

²⁵ 389 U.S. 347 (1967).

²⁶ *Id.* at 361 (Harlan, J., concurring). In *Katz*, the court found the petitioner guilty of transmitting wagering information by telephone to several major cities in the United States. *Id.* at 348. The FBI had attached an electronic listening device to a public pay phone used by the petitioner. *Id.* The Court reversed the conviction, holding that the petitioner had an expectation to privacy and therefore the tapping of the public telephone constituted a search under the Fourth Amendment which requires a warrant. *Id.* at 353. The Court reasoned that the Fourth Amendment does not protect an individual who knowingly exposes himself to the public. *Id.* at 351. The Court further reasoned that when a person intentionally seeks to preserve privacy in an area accessible to the public that person may be protected under the Fourth Amendment. *Id.* at 351-52. The Court held that since the government agents did not secure a warrant before the wire tapping, the government agents violated the petitioner’s rights under the Fourth Amendment. *Katz* 389 U.S. at 359. See also *e.g.*, *California v. Greenwood*, 486 U.S. 35 (1988) (finding expectation of privacy with respect to garbage unreasonable when placed in public area for pickup); *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) (finding no expectation to privacy in determining whether a particular substance constitutes illegal drugs); *Smith v. Maryland*, 442 U.S. 735, 739-42 (1979) (stating that individual has no expectation of privacy in numbers dialed on his or her telephone).

²⁷ *Katz*, 399 U.S. at 361; see also *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) (stating when Fourth Amendment yields no answer for search and seizure courts must balance reasonableness with governmental interests).

²⁸ See *Katz*, 399 U.S. at 361.

outsiders because no intention to keep them to [themselves] has been exhibited."²⁹

The Fourth Amendment, made applicable to the states under the Fourteenth Amendment, guarantees that the level of governmental intrusion into privacy by means of a search must be reasonable.³⁰ Reasonableness is the "ultimate measure of the constitutionality of a governmental search."³¹ Generally, the reasonableness requirement prohibits the government from conducting a search without individualized suspicion, a warrant, or probable cause."³² However government searches and seizures in the absence of a warrant, probable cause or individualized suspicion may be permissible under a "special needs" exception.³³ In such cases it is "necessary to balance the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."³⁴

The special needs doctrine has its origins in *T.L.O.* where the Court addressed the proper standard for assessing the legality of searches conducted by public school officials.³⁵ In a concurring opinion, Justice Blackman stated, "only those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing interests for that of the framers."³⁶

The Court's decisions in both *Skinner v. Railway Labor Executives Association*³⁷ and *National Treasury Employees Union v. Von Raab*³⁸ fur-

²⁹ *See id.*

³⁰ *See* U.S. CONST. amend. IV; *see also* *Furgeson v. The City of Charleston, South Carolina*, 186 F.3d 469, 476 (4th Cir. 1997).

³¹ *See* *Vernonia School Dist 47J. v. Acton*, 515 U.S. 646, 652 (1995) (addressing drug testing in high schools under special needs doctrine).

³² *See* *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (holding search unreasonable under special needs doctrine).

³³ *See* *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (determining whether special needs satisfied warrantless search).

³⁴ *Id.* at 656-66.

³⁵ *T.L.O.*, 469 U.S. at 341

³⁶ *Id.* at 351.

³⁷ 489 U.S. 602 (1989). In *Skinner*, the railway labor organizations filed suit to enjoin regulations promulgated by the Federal Railroad Administration governing drug and alcohol testing of railroad employees. *Id.* at 608-09.

³⁸ 489 U.S. 656 (1989). At issue in *Von Raab* was whether the policy of requiring urinalysis tests from all employee applicants for transfer or promotion by the United States

ther developed the special needs doctrine. In *Skinner*, the Court held that “[t]he government’s interest in regulating the conduct of railroad employees to ensure safety. . . ‘like wise presents ‘special needs’ beyond the normal law enforcement that may justify departures from the usual warrant and probable cause requirements.’”³⁹ Additionally, the *Von Raab* Court held the United States Customs Service conducted drug tests which were compliant with the United States Constitution, applying a two step analysis for the special needs doctrine: “Where the Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”⁴⁰

In its analysis under the special needs balancing test, the Court in *Von Raab* found that imposing a warrant requirement for drug testing Customs employees “would provide little or nothing in the way of additional protection of personal privacy.”⁴¹ Ultimately, the *Von Raab* court held that the government’s “compelling interest in safeguarding our borders and the public safety outweigh the privacy expectation of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs that require the incumbent to carry a firearm.”⁴²

The Court in *Vernonia* concluded that special needs exist in the public school context where obtaining a warrant is impractical.⁴³ The

Customs Services was constitutional. *Id.* at 660-62.

³⁹ *Skinner*, 489 U.S. at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. at 873-74 (1987)).

⁴⁰ *Von Raab* 489 U.S. at 665-66.

⁴¹ *Id.* at 667.

⁴² *Id.* at 677 (holding compelling government interests justified urine screening in absence of probable cause or any individualized suspicion of drug use). The Court also examined the public interest component of the balancing test and noted that the smuggling of narcotics has become a national crisis. *Id.* at 668. Further, the Court noted that United States Customs officers are the country’s “first line of defense of one of the greatest problems affecting the health and welfare of the population.” *Id.* at 668. The Court balanced the public interest in addressing the drug problem against the Customs employee’s expectation to privacy and held that the customs employees have a “diminished expectation to privacy” with respect to urine testing. *Id.* at 672.

⁴³ 515 U.S. 646 (1995) (holding student privacy interests diminished because students voluntarily participated in the athletic programs). In *Vernonia*, school officials noticed a steady increase in drug use among high school students and determined that the athletes were the leaders of the drug culture. *Id.* at 648-49. As a result, the school district adopted a Student Athlete Drug Policy that authorized random drug testing of students who participated in school athletic programs. *Id.* at 649-51. The purpose of the policy was “to

Court held that a school policy which subjects student athletes to random drug tests was reasonable because it found clear evidence that drugs in public schools is a crisis, and that deterring student drug use is an important governmental concern.⁴⁴ Finally, in *Chandler*, the Court held that while a valid search must be based on "individualized suspicion of wrongdoing," suspicionless drug testing, not accompanied by individualized suspicion of wrongdoing, can also comport with the Fourth Amendment.⁴⁵ However, unlike *Vernonia*, *Von Raab*, and *Skinner* where evidence existed of a "concrete danger," the search in *Chandler* provided no evidence of a "concrete danger."⁴⁶ The Court in *Chandler* held that the search did not fall under the special needs doctrine and thus violated the Fourth Amendment because a "concrete danger" must exist to justify a warrantless search and seizure.⁴⁷

The government interest in student safety is likely to be jeopardized when a warrant or probable cause is required in certain situations; namely, searching school lockers.⁴⁸ The Supreme Court has recognized the legality of searches and seizures in special needs cases where reasonable suspicions exist, but have not amounted to probable cause.⁴⁹ When considering special needs, courts consider three factors: (1) whether the search required a warrant; (2) whether the search is conducted on a lower standard than probable cause such as reasonable suspicion; and (3) whether the reasonable suspicion is individualized.⁵⁰

prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs." *Id.* at 650.

⁴⁴ *See id.* at 664-65.

⁴⁵ *Chandler*, 520 U.S. at 318. At issue in *Chandler* was a statute which required all candidates for certain state offices to be tested for illegal drug use through a urinalysis. *Id.* at 309.

⁴⁶ *See id.* at 321-22.

⁴⁷ *Id.*

⁴⁸ *See Grasso & McEvoy supra*, n. 3 § 17-1, at 273; *T.L.O.*, 469 U.S. at 340 (requiring teacher to obtain warrant before searching student interferes with informal disciplinary procedures in public schools), *Vernonia*, 515 U.S. at 651 (affirming prior *T.L.O.* holding requiring neither warrant nor probable cause to search student in the public school context).

⁴⁹ *See T.L.O.*, 469 U.S. at 339. *See e.g.*, *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (holding pat down of outer clothing to discover weapons used in assault reasonable when suspect threatens personal safety of police officer); *United States v. Brignoni-Ponce*, 442 U.S. 873, 871 (1975) (holding officer who reasonably suspects vehicle contains illegal alien attempting to enter country may stop the car); *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979) (holding minimum threshold of reasonable suspicion).

⁵⁰ *See Grasso & McEvoy supra* n. 3 § 17-1, at 274.

B. New Jersey v. T.L.O.: The Reasonable Suspicion Standard

1. Facts

In *T.L.O.*, a public school teacher discovered the defendant and the defendant's friend smoking cigarettes in the school bathroom in violation of school policy.⁵¹ The teacher escorted the two students to the assistant vice principal's office where the assistant vice principal asked the defendant if she had been smoking.⁵² After the defendant denied smoking and claimed she was a non-smoker, the assistant vice principal demanded to search her purse.⁵³

Upon opening the defendant's purse, the assistant vice principal found not only cigarettes, but also cigarette rolling paper, which is commonly used in conjunction with marijuana.⁵⁴ In addition to the papers, the assistant vice principal subsequently found marijuana, a pipe, a substantial amount of money, plastic bags, two note cards listing names of students that owed her money, and two letters implicating her as a marijuana dealer.⁵⁵ After the search, the assistant principal then notified the police and the defendant's mother.⁵⁶ At the police station, the defendant admitted to selling marijuana in school, and as a result, the state brought delinquency charges against her.⁵⁷

At trial, the defendant moved to suppress the evidence confiscated in the search, arguing the search violated her Fourth Amendment rights.⁵⁸ The defendant also moved to suppress her confession, claiming it was the product of an unlawful search.⁵⁹ The juvenile court denied the defendant's motion to suppress and sentenced her to one year of probation.⁶⁰ On appeal, the Appeals Court affirmed the juvenile court's finding that the search was reasonable under the Fourth Amendment.⁶¹ However, the Ap-

⁵¹ *T.L.O.*, 469 U.S. at 325.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *T.L.O.*, 469 U.S. at 328.

⁵⁷ *Id.*

⁵⁸ *Id.* at 329.

⁵⁹ *Id.*

⁶⁰ *T.L.O.*, 469 U.S. at 330

⁶¹ *Id.* at 330.

peals Court vacated the adjudication of delinquency and remanded the case for a determination of whether the defendant had “voluntarily and knowingly waived her Fifth Amendment rights before confessing.”⁶²

The defendant appealed to the New Jersey Supreme Court which reversed the lower courts’ holdings that the search of her purse was reasonable, and instead found that the Fourth Amendment applies to searches conducted by public school officials.⁶³

The Supreme Court granted the state’s petition for certiorari.⁶⁴ The Supreme Court ordered re-argument of the case to decide the broader question of what limits the Fourth Amendment places on the activities of school authorities.⁶⁵ The Supreme Court ultimately held the search did not violate the defendant’s Fourth Amendment right to a warrant or probable cause because it fell within the “special needs” exception.⁶⁶

2. The *T.L.O.* Standard

The Court held that school officials in *T.L.O.* possessed reasonable suspicion to search the defendant’s purse and therefore did not violate her Fourth Amendment rights.⁶⁷ The Court used a twofold inquiry in determining “reasonableness.”⁶⁸ First, “whether the action was justified at its inception,” and second whether the search was “reasonably justified in scope to the circumstances which justified the interference in the first place.”⁶⁹ The Court ruled that the search of a public school student is “justified at its inception” if it is based on the reasonable suspicion that the evidence will show the student’s action violated of either school rules or the law.⁷⁰

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 331.

⁶⁵ *T.L.O.*, 469 U.S. at 332.

⁶⁶ *See id.* at 330

⁶⁷ *See id.* at 341. “The legality of the search of a student should depend simply on the reasonableness, under all circumstances of the search.” *Id.*

⁶⁸ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (deciding reasonableness of exterior pat down by officer searching suspect in relationship to suspect’s safety)).

⁶⁹ *Id.* (stating two fold inquiry in determining reasonableness).

⁷⁰ *See T.L.O.*, 469 U.S. at 341-42. “Such a search will be permissible in its scope when the measure 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.” *Id.* at 342.

Furthermore, the Court stated that the reasonable suspicion standard affords public school students fewer protections than the probable cause standard.⁷¹ It balanced the rights of the students against the safety of the public school officials and the need for quick and appropriate administration of discipline.⁷² The Court held that such a "standard will neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of school children."⁷³ The Court reasoned that under the reasonable suspicion standard, the invasion of students' interests would not exceed that which is necessary to achieve safety and order in public schools.⁷⁴ Thus, *T.L.O.* sets the standard for searches conducted by school officials merely at reasonable suspicion.⁷⁵

C. Searches by Public School Officials in Conjunction with Law Enforcement

Although *T.L.O.* set forth the reasonable suspicion standard for searches in public school by school officials, it did not address the standard for searches conducted in conjunction with law enforcement officers.⁷⁶ In *Picha v. Wieglos*,⁷⁷ a District Court case decided prior to *T.L.O.* the court examined the issue of police working in conjunction with school officials and concluded that when police are involved before the search, and are significantly part of it, the search must pass muster under a probable cause standard.⁷⁸

⁷¹ See *id.* at 339. (stating warrant requirement of Fourth Amendment unsuitable for public school environment).

⁷² See *T.L.O.*, 469 U.S. at 341. "The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.*

⁷³ *Id.* at 342-343.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *T.L.O.*, 469 U.S. at 342 n.7 (noting probable cause standard for searches conducted by public school officials in conjunction with police officers).

⁷⁷ 410 F. Supp. 1214 (N.D. Ill. 1976).

⁷⁸ See *Picha*, 410 F. Supp. at 1219-1221. In *Picha*, the defendant school principal received a phone call that led him to believe the plaintiff and two of her friends possessed illegal drugs. *Id.* at 1216. The defendant was advised to call the police and when the police arrived, the three girls were searched by the school nurse and psychologist. *Id.* The searchers found no drugs. *Id.* The plaintiff subsequently brought suit on the basis that the

In *Cason v. Cook*,⁷⁹ the circuit court noted that although the principal was accompanied by a law enforcement official during a search, the search was not at the behest of the law enforcement official.⁸⁰ Since police involvement in the search was minimal, the court subjected the search to the *T.L.O.* standard rather than the higher probable cause standard.⁸¹

In *Tarter v. Raybuck*,⁸² the court found the police involvement in a search to be marginal where school officials summoned the police officers to the scene in order to remove students, but not to aid the teachers in the search.⁸³ The circuit court noted that the officers' "presence does not suggest that a standard other than reasonable cause ought to be adopted."⁸⁴

The Federal Court standard for searches by public school officials in conjunction with law enforcement officials is unclear. The Supreme Court chose not to address the issue in *T.L.O.*, but acknowledged *Picha* as the rule, holding probable cause as the standard applicable to searches involving the police.⁸⁵ However, the *Picha* standard is clearly not applicable where law enforcement officers are not substantially involved in the

incident violated her civil rights. *Id.*

⁷⁹ 810 F.2d 188 (8th Cir. 1987).

⁸⁰ See *Cook*, 810 F.2d at 190. Plaintiff student approached defendant vice principal, Cook, and reported that her locker had been broken into and several items were missing. *Id.* at 189. Several other students claimed that their lockers were broken into. *Id.* An undercover police officer assigned to the high school stood with the defendant while students made reports. *Id.* at 190. The defendant and police officer investigated the alleged thefts by interviewing several students. *Id.* The investigation revealed the plaintiff was spotted in the locker room at about the time of the alleged thefts. *Id.* at 190. The defendant vice principal searched the plaintiff's purse and one of the reported items was in the plaintiff's purse. *Cook*, 810 F.2d at 190. Subsequently, the police officer conducted a pat down search of the plaintiff. *Id.* After the search of the purse, and the pat down, the defendant principal searched the student's locker. *Id.* When the locker search was completed, the principal took the students to his office for questioning. *Id.* The undercover police officer did not participate in either the search of the locker or the questioning of the students. *Id.*

⁸¹ See *Cook*, 810 F.2d at 192 (holding search to probable cause standard even though police involved).

⁸² 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1984).

⁸³ See *id.* at 983. In *Tarter*, school officials were investigating the possibility of drug use and drug sales on school grounds. *Id.* at 979. The school official questioned several students with no results and proceeded to summon the police and have the students removed. *Id.* at 979, 983. When the plaintiff refused to answer questions and further refused to remove his pants for a search, the school officials requested to assistance of the police. *Id.* at 983.

⁸⁴ *Id.* at 983 (holding reasonable suspicion standard when police do not participate in search).

⁸⁵ Compare, *Picha*, 410 F. Supp. at 1219-1221 (standard) with *T.L.O.*, 469 U.S. at 342-343 (standard).

search.⁸⁶

III. THE MASSACHUSETTS STANDARD FOR SEARCH AND SEIZURE IN PUBLIC SCHOOLS

To invoke the protection of Art. 14, a defendant must show that the “search and seizure involved government action, that he was present or had a substantial possessory interest in the place searched or the item seized, and that he had a reasonable expectation of privacy in the place searched.”⁸⁷ The language of the Art. 14 is very similar to the text of the Fourth Amendment, whereas they both provide protection for unreasonable searches and seizures.⁸⁸

A. *The Fourth Amendment Standard in Massachusetts: Commonwealth v. Carey*

The Supreme Judicial Court of Massachusetts (SJC) considered the same issue in *Commonwealth v. Carey*⁸⁹ as the Supreme Court did in *T.L.O.*⁹⁰ In *Carey*, the court observed that although *T.L.O.* addressed the standard for searches in public school, it did not specifically address the

⁸⁶ See *Tarter*, 742 F.2d at 983.

⁸⁷ Grasso & McEvoy *supra*, note 3, § 3-2, at 42 (stating expectation to privacy, standing, governmental interest necessary to invoke art. 14 Declaration of Rights argument). See MASS CONST. of 1780, art. XI. “Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his house, his papers, and all of his possessions. All warrants, therefore, are contrary to this right, if cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant out to be issued but in cases, and with formalities proscribed by the laws” *Id.*

⁸⁸ See U.S. CONST. amend. IV; MASS CONST. of 1780. XIV.

⁸⁹ 407 Mass. 528, 534 N.E.2d 1199 (1990).

⁹⁰ See *id.* at 531, 554 N.E.2d at 1201. In *Carey*, the defendant was a senior at Woburn High School who reportedly brought a gun to school in response to an altercation that occurred the previous week. See *id.* at 529, 554 N.E.2d. at 1200. Two students reported to their industrial shop teacher that the defendant had shown them the gun. See *id.* The teacher quickly conveyed the information to the assistant principle who told the principal and house master. See *id.* The three administrators decided to seek out the defendant, and if no evidence of a gun was found, to search his locker. See *id.* at 530, 554 N.E.2d at 1201. Due to the gravity of the situation, the administrators contacted the police. See *Carey*, 407 Mass. at 530, 554 N.E.2d at 1201. After a brief period of questioning, the school official searched the defendant’s locker and found a 22-caliber pistol in his locker. See *id.*

issue of a student's expectation of privacy in locker searches.⁹¹ The SJC decided *Carey* solely on Fourth Amendment grounds, holding that any expectation of privacy a student might have with respect to a locker search by school administrators is unreasonable.⁹²

In reaching its holding, the SJC stated public school officials are governmental actors whose conduct falls within the Fourth Amendment.⁹³ The court noted the Fourth Amendment also protects persons from governmental intrusions only to the extent there is a legitimate expectation of privacy.⁹⁴ Therefore, according to the SJC, the defendant had no expectation of privacy in that case, and the search of his locker was reasonable both at its inception and in scope.⁹⁵

B. The Article 14 Standard: Commonwealth v. Snyder

The SJC decided *Carey* based solely on *T.L.O.*, and the Fourth Amendment.⁹⁶ Two years later in *Snyder*,⁹⁷ the SJC was confronted with whether Art. 14 imposed the same standard as the Fourth Amendment for searches and seizures in public schools.⁹⁸

⁹¹ See *id.* (stating student shares joint custody of locker with school administrators). The Court in *T.L.O.* found the standard for searches conducted by school officials to be reasonable suspicion. See *T.L.O.*, 489 U.S. at 342-343.

⁹² See *Carey*, 407 Mass. at 531, 554 N.E.2d. at 1202 (stating students share joint custody of locker with school administration who has right to access); see also *Commonwealth v. Morrison*, 429 Mass. 511, 513-514, 710 N.E.2d. 584, 586-587 (1999) (holding under certain circumstances society unwilling to accept expectation to privacy as reasonable); but see *Commonwealth v. Snyder*, 413 Mass. 521, 526, 597 N.E.2d 1363, 1365 (1992) (holding students have reasonable expectation to privacy in locker); but see *Grasso & McEvoy supra*, note 3 §17-2(b), at 276. "Barring some express understanding to the contrary, students have a reasonable and protected expectation to privacy in their school lockers." *Id.*

⁹³ See *Carey*, 407 Mass. at 531, 554 N.E.2d. at 1201. To test whether a person had expectation to privacy is first to determine whether the person had a subjective expectation to privacy, and second "whether society is willing to recognize that expectation as reasonable." See *id.* (quoting *Commonwealth v. Panetti*, 406 Mass. 230, 231, 547 N.E.2d 46, 47 (1989)).

⁹⁴ See *Carey*, 407 Mass. at 531, 554 N.E.2d at 1202.

⁹⁵ See *id.* at 536, 554 N.E.2d at 1204. The *Carey* court used the *T.L.O.* test to determine the constitutionality of the search conducted by the school officials. See *id.*

⁹⁶ See *id.*

⁹⁷ 413 Mass. 521, 597 N.E.2d 1363 (1992).

⁹⁸ See *id.* at 528, 597 N.E.2d at 1367 (identifying search and seizure under art. 14 as primary issue in case).

In *Snyder*, a faculty member told the school's principal and vice principal that he was approached by a student who reported that the defendant had attempted to sell her marijuana.⁹⁹ The faculty member also told the administrators that the student disclosed to him that the defendant was hiding the marijuana in a videocassette holder in his bag.¹⁰⁰ The school administrators left the office and found the defendant in the student center but did not see his book bag.¹⁰¹ Realizing the student center was too crowded, the school officials elected to wait until the defendant was in class and then proceeded to search his locker.¹⁰² Once the defendant was in class, the public school officials searched his locker and found the book bag, the videocassette container, and three bags of marijuana.¹⁰³

Upon discovering the marijuana, the principal summoned the defendant to his office where he admitted that the book bag, videocassette container, and marijuana belonged to him.¹⁰⁴ The principal notified the student's mother and the police, who subsequently arrested and questioned the defendant.¹⁰⁵

The defendant waived his right to a jury trial, and the Pittsfield Superior Court found the defendant guilty of illegal possession, and possession with intent to distribute a class "D" substance.¹⁰⁶ The trial judge stayed the execution of the sentence pending the defendant's appeal to the SJC.¹⁰⁷

The SJC in *Snyder* affirmed the lower court, holding the school principal had probable cause to search the student's locker, and was not required to give the student his *Miranda* warnings prior to questioning.¹⁰⁸ Unlike *Carey*, the *Snyder* considered the constitutionality of search and seizure by school officials under Art. 14 as opposed to the Fourth Amendment.¹⁰⁹ In deciding whether the search was constitutionally rea-

⁹⁹ *Id.* at 523, 597 N.E.2d at 1364.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Snyder*, 413 Mass. at 523-524, 597 N.E.2d at 1365-66.

¹⁰³ *Id.*

¹⁰⁴ *Id.* The defendant also admitted there had been four bags of marijuana, not three, and he had sold one of them for twenty-five dollars. *Id.*

¹⁰⁵ *Id.* At the police station, the defendant signed a rights waiver and gave a written statement. *Id.* The defendant also admitted he had an accomplice who was tried, convicted, and sentenced. *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *Id.* at 525, 597 N.E.2d at 1365-66.

¹⁰⁸ *See id.* at 528, 531, 597 N.E.2d at 1368, 1369.

¹⁰⁹ *See Snyder*, 413 Mass. at 529, N.E.2d at 1368. The court in *Carey* held the stu-

sonable, the SJC determined that Art. 14 imposed no higher standard than probable cause.¹¹⁰ However, the SJC did not explicitly decide whether Art. 14 requires a more strict standard of “reasonableness” than the Fourth Amendment.¹¹¹

In arriving at its holding, the SJC in *Snyder* first addressed the issue of the defendant’s expectation of privacy.¹¹² The SJC found that the student handbook stated, “each student has the right not to have his locker subjected to unreasonable searches.”¹¹³ Consequently, the Court found that defendant had a reasonable expectation of privacy in his locker.¹¹⁴ Since the defendant had an expectation of privacy, the SJC considered whether the search by the state actor (the teacher) infringed on his reasonable expectations.¹¹⁵

The holding in *Snyder* was in accord with the Supreme Court ruling that no search warrant is required for school searches conducted by public school officials.¹¹⁶ The SJC held that “there may be a question as to a particular search, whether a school employee had a constitutionally adequate basis to conduct the search and there may be a question about the scope of the search, but the absence of a search warrant will not be a disputable factor.”¹¹⁷

In its reasoning, the SJC stated that in most instances a public school official needs to act swiftly, and the imminence of marijuana being distributed through out the school is enough for the faculty member to conduct a warrantless search.¹¹⁸ However, the SJC noted that when a pub-

dent had no expectation to privacy and the search of his locker was reasonable both at inception and in scope. *Id.*

¹¹⁰ See *id.* (holding school officials had probable cause when searching defendant’s locker); *Commonwealth v. Upton*, 394 Mass 363, 370, 476 N.E.2d 548, 554 (1985) (stating “cause” in art 14 Declaration of Rights means “probable cause”). *But see Commonwealth v. Hor*, 1999 WL 674443 (Mass.Super. 1999) (stating not settled explicitly whether art 14 of Declaration of Rights imposes stricter standard of reasonableness).

¹¹¹ See *Hor*, 1999 WL 674443; *Snyder*, 413 Mass at 529, 597 N.E. 2d at 1367.

¹¹² See *Snyder*, 413 Mass. 526, 597 N.E.2d at 1366.

¹¹³ *Id.*

¹¹⁴ See *id.* The court in *Carey* stated public school students do not have an expectation of privacy to their lockers because the lockers are considered community property and because the public school officials have access to the lockers. See *Carey*, 407 Mass. at 531, 554 N.E.2d, at 1202.

¹¹⁵ See *Snyder*, 413 Mass. at 526-527, 597 N.E.2d at 1367.

¹¹⁶ See *id.* at 528, 597 N.E.2d at 1367.

¹¹⁷ *Id.*

¹¹⁸ See *id.* at 528 n.7, 597 N.E.2d 1366 at 1368 n.7.

lic school official is acting as an agent of the police, a warrant is required to conduct a search and seizure of the contraband.¹¹⁹

C. *The Aftermath of the Carey and Snyder Decisions*

Both *Carey* and *Snyder* address the issue of searches and seizures in the Massachusetts elementary and secondary schools, and both hold that public school teachers are state actors.¹²⁰ The SJC in *Commonwealth v. Neilson*¹²¹ held that when State campus police entered an individual's dorm room without a warrant, they did so in violation of the defendant's Fourth Amendment rights.¹²² *Neilson* demonstrates the SJC's reluctance to extend the reasonable suspicion standard past public secondary and elementary schools.¹²³ "In college searches, where police are involved and the evidence obtained is to be used in a criminal proceeding, courts generally require probable cause and a warrant absent express consent or exigent circumstances."¹²⁴

The law regarding police involvement in student searches is distinct in some respects. If the circumstances dictate a situation of urgency, then it is clear that exigent circumstances, as an exception to the probable cause standard, will allow the police officer to conduct a search.¹²⁵ If a school employee acts explicitly under the guidance of a law enforcement officer, then it is likely that the probable cause standard applies to the stu-

¹¹⁹ See *id.* at 528, 597 N.E.2d 1366.

¹²⁰ See Grasso & McEvoy, *supra*, note 3 § 17-2(b), at 276.

¹²¹ 423 Mass. 75, 666 N.E.2d. 984 (1996) (holding Fourth Amendment violation occurred when campus police conducted warrantless search of defendant's dorm room). At the time of his arrest, the defendant in *Neilson* was a student at Fitchburg State College. See *id.* at 76, 666 N.E.2d. at 985.

¹²² See *id.* at 80, 666 N.E.2d at 984. Like any other student, the defendant signed a residence contract which stated "[r]esidence life staff members will enter student rooms to inspect for hazards to health or personal safety." *Id.* It was suspected that the defendant had a cat in his room and a notice was posted alerting the students that there would be a door to door check for any school violations. *Id.* While searching the defendant's room, who was not present at the time, the officials noticed a light glowing from the closet. *Id.* The official opened the closet door and found two large marijuana plants sitting in the closet and subsequently notified the campus police. See *Neilson*, 423 Mass. at 76, 666 N.E.2d. at 985.

¹²³ See Grasso & McEvoy, *supra*, note 3 § 17-2(b), at 276-277.

¹²⁴ *Neilson*, 423 Mass. at 78, 666 N.E.2d at 985.

¹²⁵ See *Carey*, 407 Mass. at 534, 554 N.E.2d at 1202 (stating exigent circumstances support probable cause standard).

dent search conducted by the school official.¹²⁶ Yet, in the context of a search conducted in a college dormitory by law enforcement officials, the courts will also apply a probable cause standard.¹²⁷ The court's unwillingness to apply a reasonable suspicion standard to colleges demonstrates the outer limits to which *T.L.O.* applies.¹²⁸

IV. POLICY

It has become increasingly important for school officials to act quickly and decisively in searching and seizing contraband.¹²⁹ As a result, Courts must balance the privacy interest afforded to public school students, either by the Fourth Amendment or Art. 14, with the need to maintain order and discipline in public schools.¹³⁰ Therefore, Massachusetts should explicitly adopt the reasonable suspicion standard set forth in *T.L.O.* because it will allow school officials to act quickly and without a warrant while affording students protection from unreasonable searches.¹³¹

The SJC's unwillingness to establish the Art. 14 standard with regard to public school searches leaves the law unsettled as to whether Art. 14 imposes a stricter standard than the Fourth Amendment.¹³² If Art. 14 creates a lower standard of reasonable suspicion so that the school administrator needs less cause to conduct the search than the Federal Standard set forth in *T.L.O.*, the student may become subject to an unreasonable search.¹³³ Alternatively, if Art. 14 creates a higher standard, making it more difficult for the school administrator to conduct a search, then the governmental interest of safety for the students and school community at

¹²⁶ See *Snyder*, 413 Mass. at 528, 597 N.E.2d at 1367 (holding search for drugs or guns by school official acting explicitly for police requires probable cause standard).

¹²⁷ See *Neilson*, 423 Mass. at 77-78, 666 N.E.2d at 986.

¹²⁸ See *id.* (holding when evidence obtained by police without probable cause violates Fourth Amendment).

¹²⁹ See *supra* note 4 and accompanying text (stating imminent threat of marijuana spreading on school grounds poses danger to students).

¹³⁰ See *supra* notes 68-70, 112, 114 and accompanying text (discussing balancing expectation rights of students with governmental interest for safety).

¹³¹ See *supra* notes 68-70 and accompanying text (stating students protected from unreasonable search and seizure under reasonable suspicion standard).

¹³² See *supra* note 110 and accompanying text (stating not settled explicitly whether art 14 of Declaration of Rights imposes stricter standard of reasonableness).

¹³³ See *supra* notes 68-70, 112, 114 and accompanying text (discussing balance of expectation rights of students with governmental interest for safety).

large may be placed in jeopardy.¹³⁴ Thus, the best resolution is for Art. 14 to be in explicit accord with the *T.L.O.* standard with respect to student searches.¹³⁵

It is also unclear whether a public school student in Massachusetts has an expectation of privacy in his or her locker or book bag.¹³⁶ Since the expectation of privacy is a necessary component to arguing that either an individual's Art. 14 or Fourth Amendment Rights have been violated, the courts should determine what expectation to privacy a student possesses in public schools.¹³⁷ A public school student subjected to a locker search conducted by school officials will always be able to argue that the search was unreasonable under Art. 14 of Rights since the SJC has not explicitly determined the Art. 14 standard.¹³⁸ As such, the expectation of privacy for a student in Massachusetts should be in explicit accord with *Snyder*, rather than *Carey*, since *Snyder* affords students protection from unreasonable searches.¹³⁹

The policy behind school officials conducting school searches requires a definitive test, since courts appear reluctant to review the matter in full.¹⁴⁰ It is well settled under both Massachusetts and Federal law, that when a school official conducts a search solely at the behest of law enforcement officers, the probable cause standard applies.¹⁴¹ When a law enforcement officer is simply on the margin of the search conducted by the public school official, the *T.L.O.* reasonable suspicion standard applies.¹⁴² There are also situations where school officials conduct searches based on information or exigent circumstances in conjunction with the law en-

¹³⁴ See *supra* notes 68-70, 112, 114 and accompanying text (discussing balance of expectation rights of students with governmental interest for safety).

¹³⁵ See *supra* notes 68-70, 112, 114 and accompanying text (discussing balance of expectation rights of students with governmental interest for safety).

¹³⁶ See *supra* note 92 and accompanying text (contrasting holdings of *Snyder* and *Carey*).

¹³⁷ See *supra* note 91 and accompanying text (stating reasonable standard for public schools under Fourth Amendment).

¹³⁸ See *supra* note 92 and accompanying text (showing conflict of holdings between *Snyder* and *Carey*).

¹³⁹ See *supra* note 91, 94 and accompanying text (drawing comparison between expectation to privacy with no expectation to privacy in public school).

¹⁴⁰ See *supra* note 72, 76, 77, 81, 124, 125 and accompanying text (stating police involvement usually requires probable cause standard for search).

¹⁴¹ See *supra* note 72, 76, 77, 81, 124, 125 and accompanying text (stating police involvement usually requires probable cause standard for search).

¹⁴² See *supra* note 81, 124 and accompanying text (stating marginal police involvement renders search standard of reasonable suspicion).

forcement officers who are neither directly involved nor on the margin.¹⁴³ The Supreme Court was reluctant to directly address the issue of searches conducted in conjunction with law enforcement officers in *T.L.O.*¹⁴⁴ This suggests that courts are unsettled as to the standard for searches conducted in conjunction with law enforcement officials where the law enforcement officer's presence and involvement is neither direct nor on the margin.¹⁴⁵

With the reality that students are bringing drugs and weapons into public schools, the Massachusetts courts should adopt the reasonable suspicion standard for all school searches conducted by public school officials in conjunction with law enforcement officers.¹⁴⁶ This standard protects students from unreasonable searches, and allows law enforcement officers such as security guards and school police officers to protect both the students and the school community.¹⁴⁷

V. CONCLUSION

Federal law clearly provides that school officials acting alone must have reasonable suspicion before searching a student's locker or book bag. The standard regarding school searches conducted in concert with law enforcement is also clear in several areas. For instance, if a police officer is merely a marginal bystander to the search, then the search is subjected to review under a reasonable suspicion standard. On the other hand, if school officials conducting a search are acting as agents for the police, or the police initiate the search, then the probable cause standard applies. However, it is unclear which of the two standards apply when a police officer is present but neither marginal to the search nor directly involved in the search.

Massachusetts law has followed the Supreme Court decision in *T.L.O.* with respect to unassisted searches by school officials in elementary and secondary schools. However Massachusetts' courts have not explicitly determined whether Art. 14 imposes a higher standard of reasonableness than the Fourth Amendment. Therefore, until the SJC provides the

¹⁴³ See *supra* note 111, and accompanying text (stating school officials had probable cause when searching defendant's locker).

¹⁴⁴ See *supra* note 77-78 and accompanying text (stating police involvement usually requires standard of probable cause).

¹⁴⁵ See *supra* note 77-78 and accompanying text (stating police involvement usually requires standard of probable cause).

¹⁴⁶ See *supra* notes 68-70, 112, 114 and accompanying text (discussing balancing expectation rights of students with governmental interest for safety).

¹⁴⁷ See *supra* note 68-70, and accompanying text (stating students protected from unreasonable search and seizure under reasonable suspicion standard).

law consistently in the case of school searches, the troublesome ambiguity will continue.

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