



NYCLU

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VIA FACSIMILE, EMAIL, AND U.S. MAIL

May 27, 2009

David Sholes
Superintendent of Schools
Red Creek Central School District
Administration Center
P.O. Box 190
Red Creek, NY, 13143

Re: April 9th Unlawful Searches of Students

Dear Mr. Sholes:

We write in reference to the events of April 9, 2009, involving students on a Williamson BOCES school bus at Red Creek High School. On that day, at least 18 high school students, many of them minors, were subjected to invasive, humiliating searches of their bodies and possessions. News reports indicated that the search was based on a tip—received as much as a week before—that four individual students had been in possession of prescription pills. As the Red Creek Central School District (“District”) has conceded, it did not have reasonable suspicion that any students searched on the bus were engaged in illegal activity on the day of the search. Yet every student on the bus was subjected to an invasive and degrading search, in violation of their rights under the U.S. and New York State Constitutions and the District’s own policy on student searches. While the issue of student drug abuse is a matter of serious concern, there are positive, pedagogical and preventative ways to address it without stripping students of their rights and their dignity.

The NYCLU has been in contact with several of the affected students and their parents, all of whom have expressed distress about the damage to their reputations, and their fear that this event could be repeated. Students were publicly humiliated both during and after the search. Some students are concerned that, as a result of the search, they have been branded in the community as wrongdoers or, worse, criminals. When the BOCES students were released back to the school following the incident, they were greeted with taunts of “strip search.” Some students have been criticized in the community for asserting their civil rights in response to this event.

We ask that the District take the following steps to protect students from violations of this type in the future:

- Publicly apologize to the students who were searched and to their parents. In doing so, the District must publicly acknowledge and correct the misconceptions regarding the circumstances of the searches, the innocence of the overwhelming majority of students involved, and the mistakes made by the District in conducting the search (which were acknowledged privately). This statement should be designed to reach Red Creek students, their parents, and the community at large.
- Revise the District's search policy and Memorandum of Understanding between the District and the New York State Police as discussed below.
- Schedule mandatory annual trainings for pedagogical and school safety staff as well as parents and students regarding student privacy rights and guidelines for searches and interrogations.

Facts

On April 9, students on the BOCES school bus were ordered by state police, upon threat of being handcuffed, to put their hands on the seat in front of them. They were then removed from the bus two at a time, many in mixed-gender pairs. They were escorted to the Red Creek High School principal's office by a uniformed state trooper. Students were directed by the trooper to turn over to him any contraband or illegal items they had in their possession. Students were told they could not call their parents¹, and were told by one school employee, "you don't have any rights."

Once in the principal's office, male and female students were searched in full view of each other. The male students were searched by Principal Noel Patterson with a state trooper looking on, while the female students were searched just a few feet away by a female school employee. As the District has conceded, each student was asked to remove her/his jacket, shoes and socks, and empty her/his pockets. Some students were "patted down," others were asked to lift shirts and undershirts, and one student was asked to remove an outer pair of pants. According to the District, each student was subjected to a "waistband search"², which, in some cases entailed turning down the waistband to reveal underwear, buttocks and pelvic area, in view of male and female school staff and the male state trooper. Backpacks, purses, and other containers were also searched.

The District concedes that the purpose of the searches was to locate tobacco and/or drugs that only a few individual students were suspected of ever having used on the bus, and that the

¹ This is in violation of the Red Creek School District's policy on student searches and interrogations, which is discussed at length on pages 3-4 of this letter; *See* Red Creek School District policy 7330, "Searches and Interrogations," p. 1 (2005).

² Letter to the NYCLU from Matthew Fletcher, 16 Apr. 2009.

District's suspicion was not specific to drug use taking place on the day of the search.³ At least one student faces a year's suspension and criminal charges as a result of the search.

Constitutional and Policy Standards for Search and Seizure

The Fourth Amendment to the United States Constitution protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” For searches by police, the Supreme Court has held that the appropriate level of suspicion is probable cause. In the school context, the Supreme Court determined in *New Jersey v. T.L.O.* that a search must be “reasonable” based on all the circumstances. Reasonableness in this context hinges on two factors:

- (1) whether there were “reasonable grounds for suspecting that the search would turn up evidence” of a crime or violation at its outset, and
- (2) whether the scope of the search was “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.”⁴

The New York State Constitution also protects against unreasonable search and seizure.⁵ Specifically, the Court of Appeals has held that “[h]igh school students are protected from unreasonable searches and seizures, even in the school, by employees of the State *whether they be police officers or school teachers*” (emphasis added).⁶ The Red Creek School District's own search and interrogation policy requires that school officials demonstrate reasonable suspicion in order to search a student.⁷

The invasive and humiliating searches of the BOCES students were not supported by reasonable grounds to believe that students were engaged in wrongdoing. Indeed the District has conceded that all but four of the students were searched for essentially being in the wrong place at the wrong time (i.e. the school bus). Thus, the April 9 search fails the first part of the Supreme Court's test for reasonableness.

The second part of the test asks whether the search was “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.”⁸ In this case, adolescents were forced to expose portions of their bodies in full view of students and adults of the opposite-sex. Short of an emergency, it is difficult to conceive of *any* situation where it would be reasonable to force students to remove, “lift,” or turn down any article of clothing to reveal intimate body parts. Further, the fact that students were searched in a small room in mixed gender pairs, with school employees and state troopers of both sexes present, makes this search more intrusive, more humiliating and less reasonable.

³ Superintendent's Press Release, available at <http://www.rccsd.org/news.cfm?story=31375>

⁴ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)

⁵ N.Y. Const. Art. I, § 12

⁶ *People v. Scott D.*, 34 N.Y.2d, 483, 485 (1974)

⁷ Red Creek School District policy 7330, “Searches and Interrogations,” p. 1 (2005).

⁸ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)

These searches of April 9 are not the only example of abusive searches at Reed Creek High School. Students report routine bag and locker searches and “sniffs” by police dogs. Amending the written policy to define the guidelines for student searches is essential to reduce the incidence of this type of search.

The District must take this opportunity to revise its policies to prohibit searches of students and their possessions unless there is individualized suspicion of wrongdoing. Individualized suspicion must be based on facts known to the official about the particular student that support a belief that a search will uncover evidence of a crime or violation. Currently, Policy 7330 identifies the legal standard for searches by school personnel as reasonable suspicion. It goes on, however, to incorrectly identify the criteria for determining whether reasonable suspicion exists. The factors listed, such as a student’s age and disciplinary record, are not measures of whether a search is reasonable at its inception, but rather are considerations of the reasonable *scope* of a search. The District must correct this definition and clarify that individualized suspicion is a basic requirement of a reasonable search.

Further, while the current policy endeavors to identify the legal standards for interrogations of students by school authorities and/or police and physical searches by school authorities, it completely fails to address the standard for a physical search of students by law enforcement. In revising the policy, the District must clarify that the standards of reasonableness and/or probable cause apply to both searches and interrogations conducted at the school.

More troubling, the District’s policy fails to contemplate a situation where law enforcement and school officials work together to investigate potential violations of school rules (possession of tobacco) and criminal laws (unlawful possession of controlled substances)—the exact situation that occurred on April 9. While it is presently unclear whether it was the school officials or the police who planned and initiated the April 9 search, both groups participated in it, and evidence obtained as a result was used for both disciplinary and law enforcement objectives. One student faced criminal charges based on evidence uncovered by a trooper during the search—a search that could never have met the probable cause standard required for law enforcement searches. Therefore, Policy 7330 must be revised to set forth guidelines for joint searches and interrogations by police and school officials. For searches that fall into this category, the District must require the highest degree of suspicion—probable cause—due to the likelihood that evidence obtained will be used in a criminal prosecution.⁹

Finally, the District should make one revision to the section of Policy 7330 entitled “Law Enforcement.” The policy states that the role of law enforcement in Red Creek schools is to “conduct an investigation of alleged criminal conduct on school premises or during a school-sponsored activity, or to *maintain the educational environment*” (emphasis added). The last phrase implies that the state police may be involved in the enforcement of school rules. While the designated School Resource Officer may develop relationships with students and should take an interest in the educational environment, school rules and disciplinary codes should be enforced by pedagogical employees only. The ultimate authority for maintaining the educational environment should be the principal of the school, not the state police.

⁹ See *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), holding that where a “special needs” search serves a law enforcement purpose, the highest standard of suspicion is required absent consent.

Memorandum of Understanding (“MOU”)

This incident also illustrated weaknesses of the MOU between the District and the state police. The MOU is intended to set up a legal relationship between a state and local entity. It is not intended as a policy guide or a complete explanation of the role of police in any District school. The District must use this opportunity to clarify and enhance the MOU, with the goal of creating a clear governance structure for police and school officials that protects student rights.

One key lesson of April 9 is that the proper relationship between police, teachers, administrators, and students is not always as clear cut in reality as it is on paper. There are serious legal and civil rights implications when law enforcement officials perform the role of school disciplinarians. Therefore, the NYCLU recommends the District revisit its MOU with the state police with the following considerations in mind. We urge that the MOU make clear that:

- The principal is the ultimate authority on matters of safety, discipline, and order at the school except in an emergency involving imminent threat to the health and safety of a child; police officers assigned to the school or called to the school for a specific reason must follow instructions from the principal and keep him/her informed of law enforcement activities at the school.
- Whenever the police collaborate with school employees on searches of students, the standard of suspicion must be probable cause.
- Whenever the police collaborate with school employees to interrogate or question students, they must respect students’ Fifth Amendment rights, inform them of their right to remain silent, and allow them to have a parent or guardian present during the interrogation.
- Educational records must be maintained in a way that is consistent with FERPA and other privacy statutes; any data sharing between police and school officials must comport with the requirements of FERPA.

Apologies

In light of the constitutional violations that took place on April 9 and the ordeal that students have had to suffer as a result—including serious damage to their reputations in the community—we ask that the District issue a public apology. The District must publicly acknowledge that the vast majority of the students on the bus were guilty of no wrongdoing; that the searches were illegal and that students’ constitutional rights were violated due to misunderstandings and ambiguous policy. The District should further urge respect for students’ right to object when – as on April 9 – their rights are violated.


Training

Finally, the NYCLU asks that the District take affirmative steps to train all employees who may be involved in student searches and/or interrogations on students’ rights on an annual basis, beginning with the 2009-2010 school year. According to the District, such a training has not occurred in at least five years—a time span in which virtually the entire administration of Red

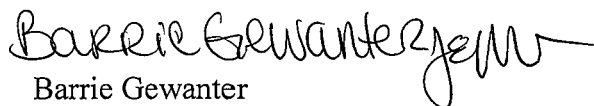
Creek High School has changed. The NYCLU is prepared to assist in this process by conducting workshops and/or providing relevant materials at no cost to the District. Please let us know if we can be of assistance.

The students of Red Creek High School deserve the District's full and prompt commitment to protecting their rights. We will follow up with you in two weeks. If you have questions before then, please contact Adriana Piñon or Johanna Miller at (212) 607-3300. Thank you for your consideration of these very serious matters.

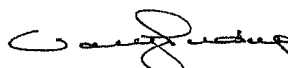
Sincerely,



Donna Lieberman
Executive Director



Barrie Gewanter
Central New York Chapter Director



Gary Pudup
Genesee Valley Chapter Director

CC: Dr. Matthew Fletcher, Counsel for Red Creek Central School District
James McCormick, New York State Police, via facsimile