Defending Students Who Have Been Stopped, Searched, or Interrogated at School

A GUIDE FOR YOUTH DEFENDERS

THE GAULT CENTER
Defenders of Youth Rights

School-based arrests have long made up a substantial number of cases in the juvenile legal system. As a result, youth defenders often represent clients who have been seized, searched, or interrogated on school grounds. This guide provides a general overview of the law governing school seizures, searches, and interrogations and practice tips for challenging evidence obtained in violation of students' rights. Because caselaw varies from state to state and some state constitutions provide broader protections than the federal Constitution, it is critical that defenders also research the law in their jurisdiction to understand the full scope of issues at play.

CRIMINALIZING STUDENTS

Law enforcement presence in public schools traces back to efforts to limit desegregation and suppress social movements opposing systemic racism.[1] Police presence in schools increased in direct response to student participation in the Civil Rights Movement and white opposition to school desegregation.[2]

The 1990s saw a new era of federal funding to increase police in schools in response to sensationalized and false narratives about an impending wave of youth violence.[3] This sensationalism resulted in school districts across the country adopting "zero tolerance" approaches to school discipline and led to a dramatic rise in school suspensions and expulsions over the following two and a half decades.[4] During this time, school officials began to rely on law enforcement to manage student misbehavior typical of adolescence, leading to an increase in referrals to juvenile court for behavior that, in the past, would have resulted in nothing more than a trip to the principal's office.

In line with the origins of policing in schools, Black and Latino/a students have been disproportionately impacted by what youth advocates call the school-to-prison pipeline. Numerous studies demonstrate this criminalization of adolescent behavior disproportionately affects Black and Latino/a students, who are more likely to be excluded from school, arrested, and referred to juvenile court than other students, even though they do not commit more offenses at school.[5]

During the 2017-2018 school year, approximately 290,600 students were referred to law enforcement agencies or arrested.[6] Black students, who made up 15 percent of total public school enrollment, accounted for 28.7 percent of all students referred to law enforcement and 31.6 percent of student arrests at school or school-related activities.[7]

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1 *See* Advancement Project & All. for Educ. Justice, We Came to Learn: A Call to Action for Police-Free Schools 17-20 (2019).
2 *See* Kristin Henning, The Rage of Innocence: How America Criminalizes Black Youth 126-28 (2021).
3 *Id.* at 130. The Violent Crime Control and Law Enforcement Act of 1994 created the Office of Community Oriented Policing Services (COPS).
4 The Gun Free Schools Act of 1994 required local educational agencies to expel, for at least one year, students who brought firearms to school, though it allowed for modifications to be made on a case-by-case basis. *See* 20 U.S.C. § 7151 (2005). States have greatly expanded the list of offenses subjected to zero-tolerance policies to include offenses like drug possession, possession of weapons other than firearms, and other school-based offenses.
5 *See, e.g.*, Ryan King & Marc Schindler, *reconsidering police in schools*, Contexts (Nov. 27, 2021) *available at* https://contexts.org/articles/reconsidering-police-in-schools/; Education Week, *Policing America's Schools: An Education Week Analysis* (2017), https://www.edweek.org/which-students-are-arrested-most-in-school-u-s-data-by-school#/overview.
6 U.S. Dep't of Educ. Office of Civil Rights, 2017-18 Civil Rights Data Collection (2021). This is the most recent data. However, the Office of Civil Rights received approval in December 2020 to again require all local educational agencies in the country to report data for the 2020-21 school year. U.S. Dep't of Educ., Civil Rights Data Collection (CRDC), https://www2.ed.gov/about/offices/list/ocr/data.html (last visited Aug. 2, 2022).
7 U.S. Dep't of Educ. Office of Civil Rights, 2017-18 Civil Rights Data Collection, *supra* note 6.

These disparities persist for Black students in suspensions and expulsions among preschoolers and K-12 transfers to alternative schools.[8] Students with disabilities represented 13.2 percent of total student enrollment but 20.5 percent of one or more in-school suspensions and 24.5 percent of one or more out-of-school suspensions.[9]

Aggregated federal data fails to capture racial disparities for Latino/a students.[10] However, localized data paints a stark picture. For example, in Texas, Latino/a students are two times more likely to miss class for disciplinary reasons, and the state's largest school district, Houston, reported Latino/a students missed 21,118 days of school for disciplinary reasons in one year compared to just 1,119 for their white peers.[11] In New York City, one in five Latino boys are suspended before they enter high school and Latino/a students are 1.7 times more likely than their white peers to be suspended.[12]

Collaborations between school districts and police result in a carceral setting in schools with mostly Black students. Public schools "with high percentages of Black students and students from low-income families" are more likely to have "tough security measures like metal detectors, random 'contraband' sweeps, security guards, and security cameras, even when controlling for the level of serious misconduct in schools or violence in school neighborhoods."[13]

Policing in schools results in harm to students. Students have reported increased anxiety stemming from constant surveillance and fear of police brutality.[14] Moreover, racially disparate policing practices affect how youth perceive themselves: "Black youth are made to believe their behaviors are criminal and unalterable; and White students are treated as if those same behaviors are fleeting and normal for their age."[15] Recent studies in New York, Texas, and California show increased police presence correlated with decreased educational outcomes such as test scores, graduation rates, and college enrollment.[16]

Increased policing also comes at a steep financial price. Over the past two decades, states have invested more than two billion dollars to insert school resource officers (SROs) into schools.[17] Youth crime rates have steadily declined since the 1990s,[18] but the criminalization of adolescent behavior continues at alarming rates nonetheless.

SCHOOL-SPECIFIC OFFENSES

In 2014, the U.S. Department of Education issued guidelines providing that the role of SROs should focus on "school safety" and "addressing and preventing serious, real, and immediate threats to the physical safety of the school and its community."[19] Subsequent recommendations reiterated not involving SROs in non-criminal

8 *Id.* at 7-8, 21.
9 *Id.* at 19. Black students with disabilities accounted for 2.3% of total student enrollment but received 6.2% of one or more in-school suspensions and 8.8% of one or more out-of-school suspensions.
10 Latino/a students who make up 27.2% of enrollment account for 25.7% of referrals to law enforcement and 26.4% of school arrests. *Id.* at 21.
11 Briana Conner, *Black and Hispanic students more likely to be suspended than white students, data shows*, ABC13 (Aug. 12, 2021), available at https://abc13.com/houston-schools-students-suspension/10946065/. Black students missed 23,699 days of class that same year. Also, Black students make up a quarter of the students but are seven times more likely to be suspended than white students.
12 Matthew Shirrell, et al., The Effects of Student-Teacher Ethnoracial Matching on Exclusionary Discipline for Asian American, Black, and Latinx Students: Evidence from New York City 3 (2021) (internal citations omitted).
13 Amir Whitaker et al., *Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students* 7 (Emily Greytak et al., 2019).
14 Henning, *supra* note 2, at 140.
15 *Id.*
16 *Id.* at 141.
17 Lisa Thurau, *Two Billion Dollars Later: States Begin to Regulate School Resource Officers in the Nation's Schools, A Survey of State Laws*, Strategies for Youth, 4 (2019).
18 The largest drops in violent crime rate and weapons offenses over the past 30 years have been among youth. Jeffrey A. Butts, *Youth Still Leading Violent Crime Drop: 1988-2018*, JohnJayREC — The Research and Evaluation Center at John Jay College of Criminal Justice, City University of New York (2019).
19 U.S. Dep't of Educ., Guiding Principles: A Resource Guide for Improving School Climate and Discipline 10 (2014).

matters or minor school misbehavior.[20] In 2018, 41 percent of SROs reported that "enforcing laws" was their primary role on school campuses.[21] Moreover, many states and locales have codified offenses that criminalize adolescent misbehavior in the school context, including disrupting class or school assemblies, disrespecting teachers, and loitering or being on school grounds after hours or without permission.[22] Criminalizing these types of conduct is tantamount to criminalizing adolescence and has little impact on school safety.

Common delinquency charges stemming from school referrals include disturbing the peace, disorderly conduct, and harassment. Students are regularly arrested for engaging in typical school misconduct such as fighting or yelling at a classmate, cursing, being loud, graffitiing, or arguing in the hallway when they should be in class.[23]

RELIANCE ON LOCAL POLICE OFFICERS & SCHOOL RESOURCE OFFICERS

Many school districts have full-time certified law enforcement officers, commonly referred to as SROs,[24] and many jurisdictions have broadened the range of youth behavior that schools are required to report to police departments.[25] This has resulted in a substantial increase in the number of police in schools and in the number of officers who become involved with school-based incidents or use arrests to turn youthful behaviors into legal system involvement.

In 1975, only one percent of schools reported having police officers onsite,[26] and by the late 1970s, there were fewer than 100 officers in public schools.[27] By 1997, the Bureau of Justice Statistics reported approximately 12,300 SROs who were employed by local law enforcement agencies across the United States.[28] In 1999, the mass shooting at Columbine High School — the deadliest school shooting at the time — led to increased calls for more school police officers.[29] Similar investments in school policing have happened at the federal, state, and local levels following mass shootings at Sandy Hook Elementary in 2012, Marjory Stoneman Douglas High School in 2018, and many more.[30] These tragedies fueled proposals to increase law enforcement in schools, deploy state troopers, and even arm teachers.[31]

There are ongoing debates about whether more police in schools actually deter these horrific events.[32] But, as studies show, more police in schools means more arrests. Schools with SROs have 3.5 times more arrests than

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20 *See, e.g.*, Press Release, U.S. Dep't of Justice & U.S. Dep't of Educ., Safe School-Based Enforcement Through Collaboration, Understanding, and Respect (SECURe) State and Local Policy Rubric 9 (May 27, 2018); Press Release, U.S. Dep't of Justice, Press Release No. 16-1024, Obama Administration Releases Resources for Schools, Colleges to Ensure Appropriate Use of School Resource Officers and Campus Police (Sept. 8, 2016).

21 Henning, *supra* note 2, at 134 (citation omitted).

22 *Id.* citing Amanda Ripley, *How American Outlawed Adolescence*, The Atlantic, (2016), https://www.theatlantic.com/magazine/archive/2016/11/how-america-outlawed-adolescence/501149.

23 *Id.* at 135.

24 For ease of reference, we will use the term SRO broadly to refer to all law enforcement officers assigned to a school or set of schools.

25 Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 Ariz. L. Rev. 1067, 1079-80 (2003).

26 Whitaker, et al., *supra* note 13, at 8.

27 Jason Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 Wash. L. Rev. 919, 946 (2016), *available at* https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1782&context=facultypub.

28 *Id.*

29 *See* Advancement Project, *supra* note 1, at 22.

30 *Id.*

31 *Id.* These proposals overlook the effects of more police on students of color, particularly Black students. *See* Caitlin Gibson & Clyde McGrady, *The prospect of more police at schools is no comfort for Black parents*, Wash. Post (June 3, 2022), https://www.washingtonpost.com/lifestyle/2022/06/03/uvalde-shooting-black-parents.

32 *Compare* Fed. Comm'n on Sch. Safety, Final Report of the Federal Commission on School Safety 101 (2018), ("The school personnel best position to respond to acts of violence are those with specialized training such as school resource officers") *to* Advancement Project, Police in Schools Are Not the Answer to School Shootings (2018), https://advancementproject.org/resources/police-schools-not-answer-school-shootings *and* Josh Marcus, *School police didn't stop Parkland or Uvalde shootings, and often discriminate against students*, Independent (Aug. 25, 2022), https://www.independent.co.uk/news/world/americas/sro-biden-speech-uvalde-parkland-shooting-b2152478.html ("Researcher analyzing school shooting between 1999 and 2018 found that the presence of SROs on campus makes no observable difference in stopping the severity of a given shooting").

schools without police presence.[33] The latest available data from the U.S. Department of Education reported 25,152 sworn law enforcement officers in public schools.[34] Approximately 1.6 million students attend a school with a sworn police officer on the premises, but no school counselor.[35] The prioritization of police over counselors occurs more often in schools systems that primarily serve Black and Latino/a youth than those that serve predominantly white students.[36]

In 2015-2016, 54.1 percent of schools that served predominately Black students had at least one law enforcement officer on campus, in contrast to just 32.5 percent for schools serving predominantly white students.[37] Increased surveillance for Black and Latino/a students results in higher arrest rates. In the 2015-2016 school year, Black students were arrested at three times the rate of white students, Latino/a students at 1.3 times the rate of white students, and Pacific Islander/Native Hawaiian and Native American students at two times the rate of white students.[38] A recent study of police in California public schools provided stronger evidence that increased SROs in schools resulted in increased exclusion from school, particularly for Black and Latino/a students.[39]

SROs are typically assigned to schools through various arrangements:

- Some school districts enter into agreements with the local law enforcement agency to provide SROs (sometimes called "liaison officers") to a school or set of schools.[40]
- Some districts participate in the federal School Resource Officer program, administered by the U.S. Department of Justice's Office of Community-Oriented Policing Services. These SROs typically follow the "TRIAD" model of serving as teacher, counselor, and law enforcement officer.[41] While the amount of time spent on each of these roles varies greatly among districts and officers, the primary function of SROs is to support law enforcement goals.[42]
- Some districts, particularly large urban districts, have their own police departments, which provide full-time, in-house officers who are employed directly by the school district rather than the local law enforcement agency and who have all the powers of local law enforcement with jurisdiction limited to the school.[43]

The role of SROs, scope of their powers, and philosophy vary from district to district and school to school. Thus, defenders must look at memoranda of understanding and policies in their districts to determine the official relationship and responsibilities SROs play. This can significantly impact the legal analysis of school-based searches, seizures, and questioning.

33 Whitaker, et al., *supra* note 13, at 24.
34 *See* U.S. Dep't of Educ. Office for Civil Rights, Civil Rights Data Collection, 2015-16 School Support Staff Estimations. The 2017-2018 data only includes information on counselors for school support staff.
35 Thurau, *supra* note 17, at 7.
36 Whitaker, et al., *supra* note 13, at 24.
37 *See* Henning, *supra* note 2, at 132.
38 Whitaker, et al., *supra* note 13, at 24.
39 Scott Crosse, et al., Investigator-Initiated Research: The Comprehensive School Safety Initiative Study of Police in Schools 9 (2022).
40 Pinard, *supra* note 25, at 1068, 1083.
41 *See* Peter Finn et al., Case Studies of 19 School Resource Officer (SRO) Programs (2005).
42 *See* Pinard, *supra* note 25, at 1077-78. *See also* Finn, *supra* note 41 (In case studies of 19 sites, SROs reported big differences in the amount of time spent teaching and mentoring versus law enforcement. In one district, for example, SROs made more arrests per officer than regular patrol officers, while the SRO in another district made no arrests in an entire school year.).
43 *See* Pinard, *supra* note 25, at 1083.

OVERVIEW OF SCHOOL SEARCH & SEIZURE LAW

The U.S. Constitution prohibits "unreasonable" and warrantless searches and seizures.[44] One exception to the warrant requirement is school-based searches and seizures. However, searches and seizures still need to meet a "reasonableness" requirement. In *New Jersey v. T.L.O.*, the U.S. Supreme Court held that the Fourth Amendment prohibition against unreasonable searches and seizures applies to searches at public schools and school-related functions.[45] As the Supreme Court has repeatedly reasoned, "students do not shed their constitutional rights . . . at the schoolhouse gate."[46] The Fourth Amendment acts as a restraint on all governmental action and is not limited to searches and seizures performed by law enforcement officers.[47] The Court has soundly rejected the notion that schools should be treated as substitute parents, finding "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."[48] Although *T.L.O.* did not reach the issue of whether the exclusionary rule applies to the fruits of unlawful searches or seizures conducted by school authorities,[49] lower courts have applied the exclusionary rule in such cases.[50]

SEIZURES & THE FOURTH AMENDMENT IN SCHOOLS

While caselaw in individual states may use different terminology, under the U.S. Constitution, there are two kinds of seizures:

Investigative Stops, also known as *Terry Stops*, are brief, state-initiated encounters that are permissible only if law enforcement has *reasonable articulable suspicion* that a person is currently or has recently been engaged in criminal activity and it is necessary to stop that person to investigate. A hunch is not sufficient; there must be specific facts the official can point to that justifies the suspicion *before* the stop can occur. The stop should be brief and last no longer than is necessary to assess the situation and either terminate the seizure or make an arrest.

Arrests are any seizure that exceeds an investigative stop in scope — either in duration or the quality of the restrictiveness — "so as to implicate the full protections of the Fourth Amendment." Arrests under the Fourth Amendment do not necessarily require being taken to the police station and formally booked. They simply must be more restrictive than what is required to assess the situation.

While school officials and police officers are free to have mutually consenting interactions with students without impinging on the Fourth Amendment, if the interaction comes with an air of authority that forces the young person to submit to the interaction, a seizure has occurred.[51] Police officers, as agents of the state, have been regularly required to follow the same Fourth Amendment protocols on school campuses that they are required to follow off school grounds.[52] In comparison, school officials have a more relaxed standard. While both school officials and police can subject a student to a seizure, the Supreme Court recognized that school officials are charged with

44 U.S. Const. amend. IV.
45 469 U.S. 325, 333 (1985). For a more in-depth discussion of school searches, *see* Pinard, *supra* note 25; *see also* Josh Kagan, *Reappraising TLO's "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & Educ. 291 (2004).
46 *T.L.O.*, 469 U.S. at 348 (internal citations omitted) (J. Powell, concurring).
47 *T.L.O.*, 469 U.S. at 335.
48 *Id.* at 336-37.
49 *Id.* at 333, n.3.
50 *See, e.g., People In Interest of C.C.-S*, 503 P.3d 152 (Colo. Ct. App. 2021); *State v. Williams*, 521 S.W.3d 689, 708 (E.D. Mo. 2017); *R.S.M. v. State*, 911 So.2d 283 (Fla. App. 2005); *State v. Pablo R.*, 137 P.3d 1198 (N.M. App. 2006); *In the Interest of Dumas*, 515 A.2d 984 (Pa. Super. Ct. 1986); *In re William G.*, 709 P.2d 1287, 1298 n.17 (1985).
51 *See California v. Hodari D.*, 499 U.S. 621 (1991) (finding that submission to authority is a hallmark when the Fourth Amendment is implicated.).
52 *See, e.g., In the Interest of L.E.*, 589 S.W.3d 593, 601 (Mo. Ct. App. 2019) (holding school safety officer's search of backpack intruded on student's privacy interest); *Rabinovitz v. City of Los Angeles*, 287 F. Supp. 3d 933, 962 (C.D. Cal. 2018) (holding officer's interview of a 14-year-old in principal's office was an unreasonable seizure); *Piazzola v. Watkins*, 316 F. Supp. 624, 626-27 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971) (holding police officers did not have probable cause for warrantless search of dormitory rooms).

maintaining discipline and a healthy school environment, which is different from law enforcement.[53] However, when a school official is acting under the direction of law enforcement, courts have found that the official is essentially acting as an agent of the officer.[54]

Courts must balance "the child's interest in privacy" against "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."[55] This reasonableness examines (1) whether the action was justified at its inception and (2) whether the search as actually conducted was reasonably related in scope to the circumstances justifying the intrusion in the first place.[56]

In *J.D.B. v. North Carolina*, the U.S. Supreme Court adopted what amounts to a "reasonable child standard" when considering whether a youth felt free to leave police questioning.[57] A uniformed officer removed 13-year-old J.D.B. from his classroom and took him to a closed-door conference room.[58] There, police and school officials questioned him for at least 30 minutes and did not tell him he was free to leave the room.[59] The Court reasoned that a child's age "would have affected how a reasonable person" in that position "would perceive his or her freedom to leave" and a "reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[60]

While *J.D.B.* focused on the Fifth Amendment custody determination, state courts have expanded the reasonable child standard to Fourth Amendment contexts as well.[61]

Increasingly, state and federal courts are also recognizing that the race of an individual may inform how they experience — and thus how the court should consider — interactions with authorities under the Fourth Amendment. Race is "not irrelevant" in whether a person feels free to leave when confronted by authorities.[62] Historically, running away from police or avoiding encounters with them has been used by courts as potential grounds for reasonable articulable suspicion. However, some research shows that people's fear of the way police perceive them can cause anxiety and psychological stress during police encounters. Physical manifestations of this stress can result in fidgeting, pacing, increased blinking, shifting weight, and rolling shoulders — also known as stereotype threat.[63] Police misinterpret these behaviors as grounds for suspicion or indicators of "pre-attack."[64] Recently, courts have started to acknowledge the reality that Black people may have legitimate fear of police encounters wholly unrelated to guilt or innocence.[65]

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53 *See generally New Jersey v. T.L.O.* While *New Jersey v. T.L.O* does not expressly address the seizure of a student, the rationale it provides for creating a different standard for searches by school officials has generally been extended to the seizure analysis under the Fourth Amendment. *See generally*, *Dickerson v. Samson*, 2020 WL 7042831, at *5-6 (Cal. App. 2020) (specifically applying *T.L.O.* to a seizure context within the school); *In Interest of Doe*, 887 P.2d 645 (Haw. 1994); *People v. Kline*, 824 N.E. 2d. 295 (Ill. App. 2005); *Wingate v. State*, 269 Ga. 21 (Ga. 2014); *J.A.R. v. State*, 689 So.2d 1242 (FL. App. 1997).

54 *See, e.g., T.S.H. v. Green*, 996 F.3d 915, 919 (8th Cir. 2021) (finding coach at summer camp was acting as agent of police); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 614 (1989) ("the [Fourth] Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government").

55 *T.L.O.*, 469 U.S. at 339.

56 *Id.* at 341.

57 564 U.S. 261 (2011).

58 *Id.* at 265.

59 *Id.* at 266.

60 *Id.* at 271-72 (quoting *Stansbury v. California*, 511 U.S. 318, 325 (1994)).

61 *See, e.g., Commonwealth v. Evelyn,* 485 Mass. 691, 699 (Ma. 2020) ("a child's age, when known to the officer or objectively apparent to a reasonable officer, is relevant to the question of seizure."); *In re J.G.*, 228 Cal.App.4th 402, 411 (Cal. App. 4th 2014) ("we recognize the strength of the argument that *J.D.B.*'s holding should be extended to Fourth Amendment custody determinations.").

62 *US. v. Smith*, 794 F.3d 681, 687 (7th Cir. 2015) (but finding a seizure occurred without delving into race under these facts.).

63 Henning, *supra* note 2, at 141.

64 Kimberly Barsamian Kahn, et al., *Misinterpreting Danger? Stereotype Threat, Pre-attack Indicators, and Police-Citizen Interactions*, 33 J. Police & Crim. Psych. 45–54 (2018).

65 *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Ma. 2017) (finding that data showing "[B]lack males in Boston are disproportionately and repeatedly targeted for [police] encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus."); *Miles v. United States*, 181 A.3d 633, 641 (D.C. 2018) (acknowledging that the "fear of police brutality … [and] the proliferation of visually documented police shootings of African-Americans that has generated the Black Lives Matter protests suggests" that flight from police officers can be motivated by things other than consciousness of guilt).

Interactions with police or even just witnessing police stops have lasting impacts on youth. For example, Black youth are "made to believe their teenage behaviors are criminal and unalterable" and may "feel devalued by unfair disciplinary practices," which increases the likelihood that they withdraw or become delinquent.[66] More generally, students in heavily policed schools are "less likely to be engaged and more likely to drop out."[67]

Similarly, with respect to youth in schools, the racial disparities in school discipline, and the wide array of social media and news reports showing police and school resource officers violently assaulting Black and Latino/a youth, defenders should look to raise issues of race when it comes to whether clients consent to stops or questioning, whether they would feel free to walk away from authorities, or how they reasonably interpret their obligations to comply with state officials. Given what we know about racialized policing, a Black youth, for example, is much more likely to believe they have been seized. Furthermore, Black youth may not feel free to leave because they are afraid of being harmed by the police.[68]

Who Seized the Student?	What Kind of Seizure Was It?	What's the Required Justification?
Police Officer	Investigatory stop	Reasonable articulable suspicion
	Frisk	Reasonable articulable suspicion to believe armed and dangerous
	Arrest	Probable cause
School Official working alone	Any kind of seizure	Reasonable suspicion
School Official working in concert with law enforcement	Investigatory stop	Reasonable articulable suspicion
	Arrest	Probable cause
SRO working as law enforcement	Investigatory stop	Reasonable articulable suspicion
	Arrest	Probable cause
SRO enforcing a school rule or policy without a law enforcement goal	Any kind of seizure	Reasonable suspicion

66 *See, e.g.*, Dylan Jackson, et al., *Unpacking Racial/Ethnic Disparities in Emotional Distress Among Adolescents During Witnessed Police Stops*, 69 J. Adolescent Health 248-54 (2021); Victor J. St. John, et al., Reducing Adverse Police Contact Would Heal Wounds for Children and Their Communities (2022).
67 Henning, *supra* note 2, at 141.
68 Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 Am. U. L. Rev. 1513 (2018).

SEARCHES & THE FOURTH AMENDMENT IN SCHOOLS

Typically, the Constitution considers the searches of private individuals, their possessions, and their homes as one of the most intrusive invasions into personal autonomy. "Ordinarily, a search — even one that may permissibly be carried out without a warrant — must be based upon 'probable cause' to believe that a violation of the law has occurred."[69] However, school officials, while state actors, are assumed to have goals and responsibilities other than law enforcement, which "requires some modification of the level of suspicion of illicit activity needed to justify a search."[70] Therefore, "*under ordinary circumstances*, a search of a student by a teacher or other school official" needs only to be "reasonable."[71]

Given the different standards for searches in schools, youth defenders should ask two questions:

- Who initiated and/or performed the search?
- What standard is required to justify that search?

The person who initiates the search — *i.e.*, the person who decides it is necessary and appropriate — may not necessarily be the same person who physically conducts the search. If a mix of school officials and law enforcement initiate the search, youth defenders should always argue that the law enforcement standard applies.

Person Initiating or Conducting the Search	Standard that Applies
Police Officers acting alone	**Probable Cause** Courts are more likely to require probable cause when: • an outside police officer conducts the search or the police officer is ultimately responsible to a law enforcement agency, • the purpose of the search is to uncover criminal activity, and • the officer, not the school officials, has initiated the search.[72]

69 *T.L.O.*, 469 U.S. at 340.
70 *Id.*
71 *Id.* (emphasis added). It is important to note that some arrangements between schools and police departments require that SROs and school officials report any behavior they believe to be criminal directly to the police department. Where just agreements do not provide any discretion, the school may arguably, have an inherent law enforcement responsibility that undermines the reasoning in T.L.O.
72 Pinard, *supra* note 25 at n.68. *See, e.g.*, *State v. Powell*, 406 P.3d 111 (Or. App. 2017) (holding officer's search did not fall under any exceptions to warrant requirement); *Wingate v. State*, 764 S.E.2d 833 (Ga. 2014) (applying a police officer standard to an SRO who justified the search as incident to a valid arrest, which the court ruled it was not.); *State v. Meneese*, 174 Wash. 2d 937, 944 (Wa. 2012); *State v. Tywayne H.*, 933 P.2d 251 (N.M. Ct. App. 1997) (applying probable cause standard where two police officers providing security at school dance initiated a search and had only minimal contact with school officials); *In Interest of* Angelia D.B., 564 N.W.2d 682, 687 (Wis. 1997); Patman v. State, 537 S.E.2d 118, 120 (Ga. 2000).

Person Initiating or Conducting the Search	Standard that Applies
School Officials acting alone	**Reasonable Suspicion** • The lower "reasonable suspicion" standard strikes the balance between the student's legitimate expectation of privacy and the school's interest in maintaining a safe and effective learning environment.[73] • "The reasonableness standard should ensure that the interests of students will be invaded no more than is necessary" to preserve school order.[74]
SRO acting alone	**Reasonable Suspicion** • Most jurisdictions find that reasonable suspicion is required based on a finding that a police officer acting as an SRO is more closely connected to the school than the police department.[75] • A few courts have found that where the goal of the search is enforcing a law or assessing legal culpability, rather than maintaining order and discipline, the SRO may be held to a police officer standard.[76] • Some courts have considered who employs the officer, who the officer reports to, and the officer's assigned duties.[77] • Some courts have distinguished between school police officers employed by the school district (which require reasonable suspicion) and those employed by an outside police department and assigned to the schools (which require probable cause).[78]

73 *T.L.O.*, 469 U.S. at 340-41.

74 Id. at 343.

75 *See generally* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2025 (2019). *See also K.W.P. v. Kansas City Public Schools*, 931 F.3d 813, 822 (8th Cir. 2019) (holding reasonableness standard governs law enforcement searches that school officials initiate); *In re K.J.*, 227 Cal. Rptr. 3d 380, 387 (Cal. Ct. App. 2018); *T.S.*, 863 N.E.2d at 371; *In re William V.*, 111 Cal.App.4th 1464, 1469-1471 (2003). *But see State v. Scott*, 630 S.E.2d 563 (Ga. 2006) (school resource officer is considered a law enforcement officer, not a school official, for 4th Amendment purposes).

76 *See e.g.*, *E.W. v. Dolgos*, 884 F.3d 172, 184 (4th Cir. 2018) (holding SRO to reasonable officer standard); *Wingate v. State*, 764 S.E.2d 833 (Ga. 2014) (applying a police officer standard to an SRO who justified the search as incident to a valid arrest, which the court ruled it was not.); *Gray ex rel. Alexander v. Bostic*, 720 F.3d 887, 892 (11th Cir. 2013) (holding law enforcement officer acting as SRO who handcuffs a compliant nine-year-old child for purely punitive purposes has unreasonably seized the child); *State v. Meneese*, 174 Wash.2d 937, 943 (Wa. 2012) ("The principal was not a law enforcement officer. His job did not concern the discovery and prevention of crime. His ... primary duty was maintaining order and discipline in the school. [The SRO in this case] is a law enforcement officer. [His] job does concern the discovery and prevention of crime, and he has no authority to discipline students. He is a uniformed police officer who responds to, and addresses, incidents occurring on school grounds.") (internal citations omitted).

77 *See, e.g.*, *In re K.J.*, 227 Cal. Rptr. 3d 380, 387 (Cal. Ct. App. 2018) ("For purposes of Fourth Amendment analysis, 'school officials,' include police officers assigned to high school as resource officers"); *M.D. v. State*, 65 So.3d 563, 566 (Fla. Ct. App. 2011) (applying reasonable suspicion standard to school resource officer because SRO is employed by the school district); *T.S. v. State*, 863 N.E.2d 362 (Ind. App. 2007) (applying reasonable suspicion standard to police officer employed by school); *In re Steven A.*, 764 N.Y.S.2d 99 (N.Y. App. Div. 2003) (applying reasonable suspicion standard for civilian employed of police department assigned exclusively to school security); *State v. Tywayne H.*, 933 P.2d 251 (N.M. Ct. App. 1997) (applying probable cause standard to law enforcement officers employed by police department and stationed at school dance who acted on their own discretion); *In re J.F.M.*, 607 S.E.2d 304, 307 (N.C. App. 2005) (reasonable suspicion standard applies to situations in which SRO, acting in conjunction with school officials, detains a student on school premises); *Patman v. State*, 537 S.E.2d 118, 120 (Ga. 2000) (applied probable cause standard to police officer working on special assignment in school); *State v. Serna*, 860 P.2d 1320, 1323-25 (Ariz. 1993) (applying reasonable suspicion standard to public high school security personnel employed by the school and considered agents of the principal). *See generally* Pinard, *supra* note 25.

78 *In re K.J.*, 227 Cal. Rptr. 3d 380, 387 (Cal. Ct. App. 2018) ("For purposes of Fourth Amendment analysis, 'school officials,' include police officers assigned to high school as resource officers"); *M.D. v. State*, 65 So.3d 563, 566 (Fla. Ct. App. 2011) (applying reasonable suspicion standard to school resource officer because SRO is employed by the school district); *T.S. v. State*, 863 N.E.2d 362 (Ind. App. 2007) (applying reasonable suspicion standard to police officer employed by school); In re Steven A., 764 N.Y.S.2d 99 (N.Y. App. Div. 2003) (applying reasonable suspicion standard for civilian employed of police department assigned exclusively to school security).

Person Initiating or Conducting the Search	Standard that Applies
School Officials acting in concert with law enforcement	*Jurisdictions vary* **Reasonable Suspicion is typically required when:** • the school mainly controls the search[79] or law enforcement involvement is minimal,[80] • school officials initiate the investigation and law enforcement officers search a student at the request or direction of school officials,[81] • school officials perform searches based on information from, or in the presence of, law enforcement officers.[82] **Probable Cause is required:** • when the individual being searched is not a student[83] • if the officer is not acting under the school's direction[84] • in a few jurisdictions, for all searches performed by law enforcement officers, regardless of who initiated the search,[85] • when a school official is acting at the direction of law enforcement.[86]

79 *See, e.g.*, *State v. Williams*, 521 S.W.3d 689 (Mo. Ct. App. 2017) (finding search of student by school safety employee in presence of SRO lacked reasonable, individualized suspicion); *State v. A.J.C.*, 326 P.3d 1194 (Or. 2014) (upholding principal's search of student's backpack); *State v. N.G.B.*, 806 So. 2d. 567, 568 (Fla. Dist. Ct. App. 2002) (holding that reasonable suspicion applied to school resource officer's search even though the officer was "not a school official" and was employed by a law enforcement agency because a teacher initiated the investigation and asked officer to help search a student for drugs).

80 *See, e.g.*, *Kissinger v. Fort Wayne Cty. Schools*, 293 F. Supp. 3d 796, 806-07 (N.D. Ind. 2018) (upholding warrantless search of student's car located off campus by school officials in presence of SRO); *A.M. v. Holmes*, 830 F.3d 1123, 1131-32, 1157-62 (10th Cir. 2016) (concluding school official's search of student in presence of SRO was reasonable); *In re D.D.*, 554 S.E.2d. 346, 352-353 (N.C. Ct. App. 2001).

81 *See, e.g.*, *T.S.H. v. Green*, 996 F.3d 915, 920-21 (8th Cir. 2021) (citation omitted) (upholding reasonableness standard for school-initiated search where both school officials and law enforcement involved); *In re K.J.*, 18 Cal. App. 5th 1123, 1131 (Cal. Ct. App. 2018) (upholding reasonable suspicion standard where SRO conducted a search at direction of vice principal).

82 *See, e.g.*, *Ziegler v. Martin County School District*, 831 F.3d 1309 (11th Cir. 2019) (upholding reasonable suspicion standard for school official's administration of breathalyzer testing of students in the presence of SRO); *State v. Williams*, 521 S.W.3d 689 (Mo. Ct. App. 2017) (applying reasonable suspicion standard to school official's search in the presence of SRO); *Decossas v. St. Tammany Parish School Bd.*, 2017 WL 3971248, at *17 (E.D. La. 2017) (upholding reasonableness standard for search by school official in presence of law enforcement).

83 *Comm. v. Villagran*, 477 Mass. 711, 719 (Mass. 2017) (finding officer lacked probable cause to search backpack); *State v. Powell*, 288 Ore. App. 660 (Or. 2017) (holding school safety exception does not allow officers to conduct warrantless search of any individual who happens to be near a school during an incident that threatens students and staff). *But see State v. Vang*, 960 N.W.3d 434, 436 (Wis. Ct. App. 2021) (concluding *T.L.O.* standard applies equally to students and non-students).

84 *See, e.g.*, *Thomas v. Barze*, 57 F. Supp. 3d 1040, 1068 (D. Minn. 2014) ("where the idea and execution of the interview was entirely directed by the law enforcement officer rather than the school official, traditional Fourth Amendment principles, rather than the relaxed standards of *TLO*, apply"); *R.D.S. v. State*, 245 S.W.3d 356, 368 (Tenn. 2008) ("Law enforcement must generally satisfy the higher probable cause standard in order to conduct a search"); *Reynolds v. City of Anchorage*, 379 F.3d 358, 373 (6th Cir. 2004) (citing *In re F.P.*, 528 So.2d 1253, 1254 (Fl. Dist. Ct. App. 1988) (exception to probable cause requirement "does not apply when the search is carried out at the behest of the police"); *In re Thomas B.D.*, 486 S.E.2d 498, 500, 504-06 (1997) (*T.L.O.* standard inapplicable because police were acting on their own authority and not as agents of school).

85 *See, e.g.*, *State v. K.L.M.*, 628 S.E.2d 651, 653 (Ga. 2006) (applying probable cause standard to police officer even though search initiated by school official); *A.J.M. v. State*, 617 So.2d 1137, 1138 (Fla. App. 1993) (applying probable cause standard to school resource officer, paid by sheriff's office, who conducted search at request of principal). *But see State v. N.G.B.*, 806 So.2d at 569 (Fla. App. 2002) (disagreeing with *A.J.M. v. State*).

86 *In the Interest of T.A.G.*, 663 S.E.2d 392, 395 (Ga. Ct. App. 2008); (affirming assistant principal acted as agent or instrument of police in *Miranda* context); *State v. Heirtzler*, 789 A.2d 634, 640-41 (N.H. 2001) ("If school officials agree to take on the mantle of criminal investigation and enforcement, however, they assume an understanding of constitutional criminal law equal to that of a law enforcement officer.").

A TWO-PRONG TEST TO DETERMINE "REASONABLE SUSPICION" FOR A SCHOOL SEARCH

While school officials may have a lower standard of justification to infringe upon a student's right to be free of unreasonable searches, the Constitution still requires that it at least be reasonable. The Supreme Court has articulated a two-pronged test for deciding whether the official's actions were, in fact, reasonable.[87]

1. Was the Search Justified at Its Inception?

The first prong of the test is whether, when the search started, there were reasonable grounds for the school official to suspect "that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[88] However, what constitutes *reasonable grounds* depends on the individual facts of each case.

87 *T.L.O.*, 469 U.S. at 341.
88 *Id.* at 342.

Factors found to constitute reasonable grounds:	Factors found <u>not</u> to constitute reasonable grounds:
• A *reliable* anonymous tip[89] • A school official witnessing an act or overhearing a conversation[90] • A reliable tip from another student[91] • Student's physical indications of being under the influence of alcohol or drugs[92] • Student's past record of the same behavior[93] • Commonsense conclusions about individual behavior, when based on more than a hunch[94]	• A hunch[95] • A tip from an unreliable source[96] • "Furtive gestures" or noncooperation[97] • Student's status as a rule breaker[98] • Association with wrongdoers[99]

As this chart shows, a search is justified at inception only where there is individualized suspicion that the search will yield evidence of the suspected violation.[100] However, the Supreme Court has twice held that random drug testing of students *who choose to participate in extracurricular activities*, without individualized suspicion, is constitutional.[101]

89 *See, e.g., In re K.J.*, 18 Cal. App. 5th 1123,1134 (Cal. Ct. App. 2018) (holding search was reasonable where anonymous tip came from another student who provided additional information when contacted); *M.D. v. State*, 65 So.3d 563, 565 (Fla. Dist. Ct. 2011) (upholding reasonable grounds where anonymous tipster said student brought gun to school 3 months prior); *Martens*, 620 F. Supp. at 32 (school officials had reasonable suspicion to search a student after an anonymous tip from a parent claiming her daughter had purchased marijuana from the student); *McKinnon*, 558 P.2d at 785 (school officials had reasonable grounds to search a student based on an anonymous tip called into the police department). *But see In re A.T.H.*, 106 S.W.3d 338, 343-45 (Tex. App. 2003) (school security officer's pat-down search of student was not justified at its inception because an anonymous tipster provided the location and physical description of the student, but no knowledge of concealed criminal activity).

90 *See, e.g., In the Interest of J.M.*, 588 S.W.3d 612, 618 (Mo. Ct. App. 2019) ("J.M. was searched based on his behavior which established a reasonable basis to believe he was involved in illicit activity"); *In the Interest of K.L.*, 217 So.3d 628, 632 (La. Ct. App. 2017) (school official observed hand-to-hand transaction between students); *In re Michael R.*, 662 N.W.2d 632, 636 (Neb. App. 2003) (school officials had reasonable suspicion to search based on, *inter alia*, fact that security officer overheard youth telling another student that he had some "big bags," which officer knew was slang term for marijuana.

91 *See, e.g., In the Matter of I.O.*, 612 S.W.3d 637, 645 (Tx. Ct. App. 2020); (tip from unidentified but known student was reliable); *G.C. v. State*, 207 So.3d 366 (Fla. Dist. App. 2016) (first search was reasonable based on report from two students identifying G.C.); *In re Victor R.*, 123 A.D.3d 458, 458 (N.Y. App. 2014) ("threatened student provided first-hand information that met the standard of reasonable suspicion applicable to school searches); *In re L.A.*, 21 P.3d 952, 959 (Kan. 2001) (school officials had reasonable suspicion to search student after a tip from Crime Stoppers organization based on information from a student). *But see Redding v. Safford Sch. Dist. #1*, 531 F.3d 1071, 1082-83 (9th Cir. 2008) (noting that "we do not treat all informant tips as equal in their reliability" and "we are most suspicious of those self-exculpatory tips that might unload potential punishment on a third party), *aff'd in part, rev'd in part*, 129 S.Ct. 2633 (2009).

92 *See, e.g., In re S.M.C.*, 338 S.W.3d 161 (Tex. App. 2011) (holding search was reasonable given school administrator's experience with students who were high); *Commonwealth v. J.B.*, 719 A.2d 1058, 1062 (Pa. Sup. Ct. 1998) (school police officer had reasonable grounds to search student who was staggering in the halls with his eyes closed and speech slurred).

93 *See, e.g., State v. Lindsey*, 881 N.W.2d 411, 426 (Iowa 2016) (noting student had history of drug abuse and firearm violations); *State v. Baccino*, 282 A.2d 869, 872 (Del. Super. Ct. 1971) (school official had reasonable suspicion to search student's coat for contraband because the student was reluctant to relinquish the coat, was out of class illegally, and was known to the school official to have used drugs in the past).

94 *See, e.g., State v. Lindsey*, 881 N.W.2d 411, 426 (Iowa 2016) (holding school officials were relying on common-sense conclusion based on Lindsey's behavior); *People v. D*ilworth, 661 N.E.2d 310, 321 (Ill. 1996) (police liaison officer had reasonable suspicion when he searched student's flashlight, after observing student meeting with another student who teachers had overheard talking about selling and bringing drugs to school).

95 *See T.L.O.*, 469 U.S. at 345-46. *See also T.L.B. v. State*, 271 So.3d 1038, 1041 (Fla. Dist. Ct. App. 2019) (finding unlawful search was only based on officer's hunch); *In re G.M. v. State*, 142 So.3d 823, 828 (Ala. 2013) (disallowing searches "based solely on a student's association with a known wrongdoer or general speculation as to the student's possible gang affiliation").

96 *See, e.g., People in Interest of C.C.-S.*, 503 P.3d 152, 159 (Colo. Ct. App. 2021) (holding anonymous, "stale" tip to school hotline was insufficient to create reasonable suspicion); *Fewless v. Board of Educ. of Wayland Union Schools*, 208 F. Supp. 2d 806, 819-820 (W.D. Mich. 2002) (strip search of student for drugs was not justified at its inception when based on information from students with highly questionable credibility given their potential ill motives as they were serving detention for bullying the accused student).

97 *See, e.g., Commonwealth v. Evelyn*, 152 N.E.3d 108, 125-26 (Mass. 2020) (holding nervous or evasive behavior in addition to flight are not necessarily probative of consciousness of guilt); *In re William G.*, 709 P.2d 1287, 1297 (Cal. 1985) (student's "furtive gestures" to hide his calculator case, standing alone, did not provide reasonable grounds for school official to search student's calculator case).

98 *See, e.g., State v. Williams*, 521 S.W.3d 689, 698 (Mo. Ct. App. 2017) (student's tardiness is not enough to establish reasonable suspicion); Commonwealth *v. Damian D.*, 752 N.E.2d 679, 683 (Mass. 2001) (search of student known for skipping classes was unlawful at inception when there was no evidence tying truancy to a reasonable belief that the student possessed contraband).

99 *See, e.g., In re G.M. v. State*, 142 So.3d 823, 828 (Ala. 2013) (disallowing searches "based solely on a student's association with a known wrongdoer or general speculation as to the student's possible gang affiliation").

100 *See e.g., T.L.O.*, 469 U.S. at 345-46.

101 *See Board of Education of Independent School Dist. No. 92 Pottawatomie County v. Earls*, 536 U.S. 822, 837- 38(2002) (policy requiring all students who participated in competitive extracurricular activities to submit to drug testing was a reasonable means of furthering the school district's important interest in preventing and deterring drug use); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (school's random drug testing policy for athletes did not violate Fourth Amendment given the decreased expectation of privacy for students and student athletes, the relative unobtrusiveness of the search, and the severity of the need to deter drug use by schoolchildren).

Specifically, the Court noted that searches in the school context may still be reasonable without individualized suspicion when:

1. Privacy interests are minimal; and

2. An important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion.[102]

To evaluate whether suspicion-less searches are justified at inception per the *T.L.O.* framework, courts will consider "(1) the nature of the privacy interest allegedly compromised, (2) the character of the intrusion imposed, and (3) the nature and immediacy of the government's concerns and the efficacy of the [p]olicy in meeting them."[103] For example, the U.S. Supreme Court upheld a student drug-testing policy for students participating in extracurricular activities. Under this suspicion-less search analysis, the Court first decided the students had a diminished expectation of privacy compared to the general student body by voluntarily subjecting themselves to extracurricular activities that impose a greater degree of regulation.[104] Second, the Court found that the invasion of privacy was "not significant" because the test results were kept confidential, not disclosed to law enforcement, and only used to determine eligibility for extracurricular activities.[105] Finally, the Court recognized the school provided sufficient evidence of student drug use to justify the need for a drug-testing policy.[106]

2. Was the Search Permissible in Scope?

The second prong of *T.L.O.*'s analysis of whether a school official's search was reasonable centers on the scope. "[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."[107] Even if the school has an important interest in conducting the search that is justified at the search's inception, the court must weigh the intrusiveness of the subsequent search against that interest.[108]

- Generally, less intrusive searches, such as pat-down frisks, are more likely to be found permissible in scope, while more intrusive searches, like strip searches, are more likely to be found impermissible.[109] As the U.S. Supreme Court recognized, strip searches can be "embarrassing, frightening, and humiliating . . . the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts."[110]

- Moreover, where the severity of the suspected infraction is minimal, highly intrusive searches will not be tolerated.[111]

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102 *Earls*, 536 U.S. at 829-30; *Acton*, 515 U.S. at 661. *See also Friedenberg v. Sch. Bd. of Palm Beach Cty*, 911 F.3d 1064 (11th Cir. 2018); *Ogletree v. Cleveland State University*, 2022 WL 3581569 (N.D.Ohio 2022); *Kittle-Aikeley v. Strong*, 844 F.3d 727 (8th Cir. 2016).
103 *Earls*, 536 U.S. at 830-38. *See also Chandler v. Miller*, 520 U.S. 305 (1997) (striking down suspicion-less drug-testing law).
104 *Earls*, 536 U.S. at 830-31.
105 *Id.* at 833-34.
106 *Id.* at 835-36.
107 *T.L.O.*, 469 U.S. at 342.
108 *See, e.g., Acton*, 515 U.S. at 665; *Earls*, 536 U.S. at 830.
109 *See, e.g., Safford Unified School District #1 v. Redding*, 557 U.S. 364, 377 (2009) (finding that, while an assistant principal had reasonable grounds to suspect that a 13-year-old girl was distributing painkillers, that did not justify a strip search); *Woods v. Rio Rancho Public Schools*, 2019 WL 251734, at *4 (D.N.M. 2019) (upholding pat-down frisk of two middle-school girls); *D.H. v. Clayton County Sch. Dist.*, 830 F.3d 1306, 1317 (11th Cir. 2016) (finding strip search of 12-year-old boy in front of peers was unconstitutionally excessive in scope); *A.M. v. Holmes*, 830 F.3d 1123, 1161-62 (10th Cir. 2016) (finding search was not excessively intrusive "even though it involved more than one layer of clothing").
110 *Safford*, 557 U.S. at 374-75, 376.
111 *Id.*

The Court provided three scenarios where a school official might have suspicion to justify a strip search:

1) Where there is evidence of a general practice of students at the school hiding contraband in their underwear.
2) When other students suggest to a school official that a particular student is hiding contraband in their underwear.
3) When an earlier search of another student's underwear yielded contraband.[112]

The severity of the suspected contraband or evidence matters in the assessment of whether the scope of the search is permissible:

- **Stolen Money:** The governmental interest in recovering stolen money is low, requiring that searches for money be minimally intrusive. For instance, strip searches seeking stolen money are often found unconstitutional, while pat-down searches have been upheld.[113]
- **Drugs:** Courts have consistently found a legitimate governmental interest in keeping drugs out of school.[114] However, some courts have required that there be evidence of a drug problem for schools to be justified in group searches for drugs.[115]
- **Weapons:** Similar to drugs, weapons are a more serious societal problem that schools can take measures to guard against.[116] As such, school use of a metal detector at entry points, while constitutionally a search, can be justified for safety.

Balancing the Intrusiveness of a Search Against a Student's Privacy Interest

While students may have an expectation of privacy in the following areas, that interest must be weighed against the school's interest in conducting the search to promote safety and minimize disruption.

112 *Id.* at 376.
113 *See, e.g., Littell v. Houston Ind. Sch. Dist.*, 894 F.3d 616, 624 (5th Cir. 2018) (suspicion-less strip search of 22 preteen girls to find missing $50 was unconstitutional); *Highhouse v. Wayne Highlands Sch. Dist.*, 205 F. Supp. 3d 639, 648 (M.D. Pa. 2016) (strip search of student to find missing $250 was unconstitutional); *Thomas*, 261 F.3d at 1168 (in an effort to find $26 taken from classroom, strip search of classroom students was impermissible in scope, while pat-down search of outside student was permissible in scope).
114 *See, e.g., Earls*, 536 U.S. at 834 (school does not need evidence of pervasive drug problem within school, and instead the epidemic of drug use in society at large is enough to justify schools in preemptive action to curb drug abuse.); *Acton*, 515 U.S. at 662-665 (school had rampant drug problem that was led by student athletes and caused sports injuries); *Greenleaf*, 2000 WL 863217 (searches of students' lockers were reasonable because of school's interest in addressing the apparent drug problem).
115 *See, e.g., T.R. v. Lamar Cty Bd. of Educ.*, 25 F.4th 877 (11th Cir. 2022) (finding strip search was unreasonable in scope and officials did not have a reason to suspect drugs presented a danger or were concealed in T.R.'s underwear); *Doe v. Little Rock School Dist.*, 380 F.3d at 356 (random classroom search of students' belongings was unconstitutional because students had greater privacy interest and school had no evidence of school-wide drug or weapon problem to justify random classroom search policy).
116 *See, e.g., In the Interest of J.M.*, 588 S.W.3d 612, 620 (Mo. Ct. App. 2019) ("the search of a student is reasonable and justified, especially given the significant—potentially tragic—threat a weapon poses to the safety of a school's children and teachers"); *State v. Polk*, 78 N.E.3d 834, 843 (Ohio 2017) (articulating "compelling interest in ensuring that unattended book bags do not contain dangerous items"); *State v. Lindsey*, 881 N.W.2d 411 (Iowa 2016) ("The concern of safety in public schools being threatened by weapons is immediate").

Type of Search	Privacy Interest/Reasonable in Scope
Lockers	*T.L.O.* expressly declined to address whether students had a legitimate expectation of privacy in lockers, desks, or other spaces they use.[117] Jurisdictions are divided about locker searches. Some courts have held that students have a reasonable expectation of privacy in their lockers[118] and others have held that lockers are the property of the school.[119]
Drug Testing	The U.S. Supreme Court has held that policies requiring students who participate in extracurricular activities to submit to drug testing is a reasonable means for the school district's important interest in preventing and deterring drug use among students.[120] Some courts have held that drug tests are minimally intrusive searches which do not represent a significant invasion of students' privacy, especially for student athletes.[121] However, some states hold that without a showing of a specific need or suspicion, drug testing is unconstitutional.[122]
Strip Searches	The U.S. Supreme Court has found that "both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities."[123]
Pat-Down & Pocket Searches	While courts recognize that students' privacy interests are high in searches of their person,[124] courts may hold such searches to be overly intrusive if they do not satisfy the *T.L.O.* reasonableness inquiry.[125]
Bags, Purses, or Personal Belongings	Courts have generally held searches of bags and personal belongings require reasonable suspicion.[126] However, case law has not clearly addressed students' privacy interests in bags and personal belongings stored in lockers.[127]

117 *T.L.O.* 469 U.S. at 337 n. 5.

118 *See, e.g., Jackson v. Shikellamy Sch. Dist.*, No. 2267 C.D. 2015, 2016 WL 6080862, at *3 (Pa. Commw. Ct. Oct. 18, 2016) (finding locker search improper where district policy required students be notified and given an opportunity to be present); *In the Matter of L.A.W.*, 348 P.3d 1005 (Nev. 2015) (finding locker search unconstitutional despite student's behavior contract permitting random locker searches); *State v. Jones*, 666 N.W.2d 142, 147-48 (Iowa 2003) (finding that any locker search needs to be justified under Fourth Amendment, regardless of policies or local statutes).

119 *See, e.g., State v. Ruiz*, 2021 WL 3207322, at *2 (Ariz. Ct. App. 2021) (holding students did not have legitimate expectation of privacy in lockers); *In re S.M.C.*, 338 S.W.3d 161 (Tex. App. 2011) (a student does not have a legitimate expectation of privacy in their locker when the school code of conduct states that the lockers are the property of the school district). *See also* NYC Chancellor's Regulations A-432 (students have no reasonable expectation of privacy in lockers, desks, and other school storage places); Conn. Gen. Stat. Ann. § 54-33n (West 2011) (search of locker or other property owned by the schools is allowed under reasonableness inquiry).

120 *See Acton*, 515 U.S. at 648 (1995) (upholding random drug testing of all student athletes); *Earls*, 536 U.S. at 837 (2002) (upholding mandatory drug test of all students participating in extracurricular activities).

121 *See Earls*, 536 U.S. at 834; *Acton*, 515 U.S. at 660; *Kittle-Aikeley v. Strong*, 844 F.3d 726 (8th Cir. 2016) (upholding college's suspicion-less drug testing policy where students engaged in programs posing significant safety risk to others).

122 *See, e.g., Assoc. of Ind. Schs. Of Greater Washington v. D.C.*, 311 F.Supp.3d 262 (D.D.C. 2018) (striking down random, suspicion-less drug testing policy); *Cummerlander v. Patriot Prep. Academy Inc.*, 86 F. Supp. 3d 808, 819 (S.D. Ohio 2015) (drug testing was unconstitutional where not based on reasonable investigation); *Theodore v. Delaware Valley* School Dist., 836 A.2d 76 (Pa. 2003).

123 Safford Unified Sch. *Dist.*, 129 S.Ct. at 2641.

124 *See, e.g., T.L.O.*, 469 U.S. at 337.

125 *See, e.g., Commonwealth v. Villagran*, 81 N.E.3d 310 (Mass. 2017) (officer did not have reasonable suspicion for pat-frisk); State v. Williams, 521 S.W.3d 689 (Mo. Ct. App. 2017) (striking down pat-down search policy for tardy students).

126 *See, e.g., State v. Lindsey*, 881 N.W.2d 411 (Iowa 2016) (upholding search of student's equipment bag and interior bag); *Kissinger v. Cmty. Schs.*, 293 F. Supp. 3d 796, 809 (N.D. Ind. 2018) (upholding search of student's car that was parked off campus); *In re Kavon P.*, No. 2499, 2016 WL 3031711, at *5 (Md. Ct. Spec. App. May 27, 2016) (assistant principal's search of bag required reasonable suspicion); *Doe v. Little Rock School Dist.*, 380 F.3d 349, 352-53 (8th Cir. 2004) (blanket search practices authorizing suspicion-less searches of all students' belongings violated the Fourth Amendment where students had a legitimate privacy interest and there was no evidence to justify schools' random classroom search policy).

127 *See, e.g., Greenleaf*, 2000 WL 863217 (students' expectation of privacy in lockers not clearly established; manner in which search of lockers, backpacks, and containers were conducted found reasonable especially in light of school's interest in preventing drug abuse); *In re Patrick Y.*, 746 A.2d at 414 (students had no reasonable expectation of privacy in lockers, so reasonable suspicion or probable cause were not required for locker searches; court declined to address search of book-bag within locker); In re Adam, 697 N.E.2d 1100, 1107 (Ohio Ct. App. 1997) (although recognizing that "a student does not lose his expectation of privacy in a coat or book bag merely because the student places these objects in his locker," finding that search of bag in locker was reasonable when there was knowledge and admission that student was smoking cigarettes and odor of marijuana).

Type of Search	Privacy Interest/Reasonable in Scope
Cell Phones	Typically, police must obtain a warrant to search a cell phone's data absent exigent circumstances.[128] However, courts have found this protection does not apply to school searches under *T.L.O.*'s less restrictive framework.[129]
Drug-Sniffing Dogs	The privacy interest involved is determined by the object being sniffed. For example, dog sniffs of lockers and cars are generally found less intrusive than dog sniffs of persons.[130]
Metal Detectors	Courts have held metal detectors to be minimally intrusive.[131]

In the end, each case is very fact-specific. Considerations include:

- the nature of the incident,
- the age and sex of the student,
- the steps taken to confirm an allegation before resorting to a search, and
- whether there were reasonable grounds for suspicion.[132]

STUDENTS & CONSENT UNDER THE FOURTH AMENDMENT

The state often claims that a student consented to being stopped or searched. Consent, however, must be given voluntarily, which is determined by the totality of circumstances.[133] It cannot be established by merely showing "acquiescence to a claim of lawful authority."[134] A student's consent is measured by an objective reasonableness standard: *What would the reasonable person have understood by the exchange between them and the officer?*[135] When interacting with someone who the officer or school official knows is not an adult — *i.e.* someone who is a student at the school — reasonableness must be viewed from the perspective of a young person of similar age and ability.[136] Additionally, if the initial seizure is unlawful, then any subsequent consent to search is not valid.[137]

128 *Riley v. California*, 134 S. Ct. 2473 (2014).
129 *E.g., Simpson v. Tri-Valley Cmty. Unit Sch. Dist. No. 3*, 470 F. Supp. 3d 863, 871 (C.D. Ill. 2020) (finding principal's search of student's camera roll was constitutional); *Jackson v. McCurry*, 303 F. Supp. 3d 1367, 1378 (M.D. Ga. 2017) ("a school official's search of a student's cell phone on school property and during the school day first within the framework announced in *T.L.O.*"); *Jackson v. McCurry*, 762 Fed. Appx. 919 (11th Cir. 2019) (upholding assistant principal's warrantless search of texts on student's cell phone to investigate violation of anti-bullying policies); *DeCossas v. St. Tammany Parish School B*d., 2017 WL 3438347 at *9 (E.D. La. 2017).
130 *See, e.g., Herrera v. Santa Fe Public Schs.*, 41 F. Supp. 3d 1027, 1161 (D.N.M. 2014) (random, suspicion-less dog sniff search was unreasonable) (citing *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1266-68 (9th Cir. 1999); *State v. Doe*, No. 41220, 2014 WL 1713796, at *3 (Id. Ct. App. 2014) (dog sniff of students' vehicles was constitutional); Cass, 709 A.2d at 357 ("Case law makes clear that a canine sniff is not a search under the 4th Amendment" and use of dogs to sniff lockers and searches of lockers flagged by the dogs were constitutional because of "the limited expectation of privacy" in setting where school officials had access to lockers) (emphasis added).
131 *See, e.g., State v. Williams*, 521 S.W.3d 689, 703 (Mo. Ct. App. 2017) ("Searches using metal detectors and dogs are minimally intrusive, and provide an effective means for producing the individualized suspicion necessary for more intrusive searches"); *Doe v. Little Rock School Dist.*, No. LR-C-99-386, 1999 WL 33945744 (E.D. Ark. Aug. 26, 1999) (finding the intrusion involved in a school metal detector search was not greater than necessary to satisfy governmental interest in security underlying need for search and that its purpose is administrative, not law enforcement); *In re S.S.*, 680 A.2d 1172, 1176 (Pa. Super. Ct. 1996) (same).
132 *See, e.g., Cornfield v. Consolidated High School Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993) (strip search of special education student believed to be "crotching" drugs was reasonable because of student's past history with drugs and school officials used least invasive methods given the circumstances).
133 *Schneckloth v. Bustamonte*, 412 U.S. 218, 223, 226 (1973).
134 *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).
135 *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).
136 *J.D.B.*, 564 U.S. at 274 ("So long as the child's age was known to the officer. . . or would have been objectively apparent to any reasonable officer").
137 *Florida v. Royer*, 460 U.S. 491, 501 (1983).

Because youth are developmentally different than adults, they make decisions and assess information in ways different from adults. For example, youth are more likely to comply with authority than adults[138] and are less likely to appreciate the future consequence of their decisions.[139] Additionally, the mere fact that youth are in a school setting where failure to appropriately respond to requests from authority can result in disciplinary action, the "choice" to comply or walk away is necessarily less feasible.[140]

Adolescence and race converge in the context of consent. Youth are "more deferential to adults, have less experience with and knowledge about their legal rights, and have less cognitive capacity to identify and weigh the advantages and disadvantages of allowing the police to search."[141] For Black youth, "[t]he open hostility, fear, and distrust that exist between the police and black youth creates a psychological atmosphere that significantly undermines the voluntariness of consent."[142] Defenders must consider the age and race of their clients when evaluating the voluntariness of their consent.

OVERVIEW OF SCHOOL INTERROGATIONS LAW

With the rise of police in schools, students are frequently referred to courts on the basis of statements made to principals, school officials, SROs, or other law enforcement officers. In determining the admissibility of statements obtained through interrogations of youth, courts will look at a number of factors to determine whether *Miranda* applies and whether the statements were made voluntarily.[143]

1. When Does Miranda Apply to a School Interrogation?

Under *Miranda v. Arizona*, incriminating statements made during custodial interrogations are inadmissible unless police first advise the person they are questioning that they have the right to remain silent, right to consult with counsel and to have counsel present during the interrogation, and the right to have an attorney provided if they cannot afford one.[144] The Supreme Court acknowledges that a child's age informs the *Miranda* analysis.[145] Note, however, that statements suppressed because of *Miranda* violations can still be used to impeach young people who testify at trial.

138 Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333 (2003).
139 Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28 (2009).
140 *J.D.B.*, 564 U.S. at 276 ("A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position")
141 Henning, *supra* note 68 at 1536.
142 *Id.* at 1537. *See also Commonwealth v. Evelyn*, 120 (2020) ("the troubling past and present of policing and race are likely to inform how African-Americans and members of other racial minorities interpret police encounters"); *U.S. v. Washington*, 490 F.3d 765, 768-69 (9th Cir. 2017) (holding that recent well-publicized incidents in which police shot African-Americans were relevant to whether African-American man had been seized).
143 For an in-depth discussion of youth interrogations, *see* Kristin Henning & Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 Ariz. St. L.J. 883 (2020); Naomi Goldstein et al., *Waving Good-bye to Waiver: A Developmental Argument Against Youths' Waiver of* Miranda *Rights*, 21 N.Y.U.J. Leg. & Pub. Pol'y 1 (2018); Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 Cornell J.L. & Pub. Pol'y 395 (2013).
144 384 U.S. 436, 467-471 (1966).
145 *J.D.B.*, 564 U.S. at 264. Note, however, that statements suppressed because of *Miranda* violations can still be used to impeach young people who testify at trial. *Harris v. New York*, 401 U.S. 222, 226 (1971); *Oregon v. Hass*, 420 U.S. 714, 722-724 (1975).

Did the Scenario Constitute a Custodial Interrogation?

Miranda applies only in situations involving custodial interrogations. In 2011, the Supreme Court clarified that age must be considered in the *Miranda* custody analysis, recognizing "that children are 'most susceptible to influence' and 'outside pressures.'"[146] Acknowledging the differences between children and adults, the court noted that it would be "nonsensical" to ignore a child's age[147] and essentially created a reasonable child standard. *J.D.B. v. North Carolina* held that "so long as the child's age was known . . . at the time of . . . questioning, or would have been objectively apparent . . . its inclusion in the custody analysis is consistent with the objective nature of that test."[148] When the questioning occurs in a school setting — a place in which youth are not free to come and go as they please and may be disciplined for not following instructions from authority — this context is particularly relevant to the custody and interrogation analyses.[149] "The effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned."[150]

Thus, if, given the circumstances surrounding the interaction, a reasonable person would not have felt free to terminate the direct questioning by police and leave, the person is in "custody" for *Miranda* purposes.[151] For youth, courts consider whether a reasonable person of that child's age and circumstances would feel free to end the interaction and walk away.[152] Police questioning rises to the level of an interrogation when police question someone directly or engage in non-questioning actions they knew, or should have known, were reasonably likely to elicit an incriminating response from the suspect.[153] Again, age must inform what would be reasonably likely to elicit an incriminating response.[154]

DEFINITIONS

Custody:
If a reasonable person would not feel free to leave, then the police have placed the individual in custody for Fifth Amendment purposes. For young people, courts consider whether a reasonable person of that child's age and circumstance would feel free to end the discussion and walk away.

Interrogation:
Interrogation occurs whenever police question someone directly or engage in non-questioning actions they knew, or should have known, were reasonably likely to elicit an incriminating response from the suspect. Again, age should inform what would be reasonably likely to elicit an incriminating response.

146 *Id.* at 275.
147 *Id.*
148 *Id.* at 277.
149 *See, e.g., id.* at 270-71; *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).
150 *J.D.B.*, 564 U.S. at 276.
151 *See Thompson v. Keohane*, 516 U.S. 99, 112 (1995). In *Miranda*, the Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. In its post-*Miranda* decisions, the Court has also established the *Miranda* custody test as whether the suspect has been placed under "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).
152 *J.D.B.*, 564 U.S. at 271-72 ("a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go").
153 *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).
154 While *J.D.B. v. North Carolina* did not expressly reach this age analysis with regard to interrogation because all sides conceded expressed questioning had occurred in that case, the analysis of age informing what is reasonable is difficult to dispute when defining interrogation as well. Courts have interpreted *J.D.B.* as applicable to interrogation analysis as well. *E.g., In re S.W.*, 124 A.3d 89, 104 (D.C. 2015) (emphasizing youth's status as child); *Murdock v. Dorethy*, 846 F.3d 203 (7th Cir. 2017); *Edmonds v. Oktibbeha Cty, Miss.*, 675 F.3d 911 (5th Cir. 2012); *People v. Barrios*, 433 P.3d 1218 (Colo. 2019).

Some factors for defenders to consider are:

- the number of adults present,
- the number of uniformed officers present,
- location of the interrogation (e.g., closed door, no windows, small room, etc.),
- presence of handcuffs,
- length of interrogation,
- tone of voice,
- presence of any weapons, and
- school disciplinary procedures that require students to obey school officials.

Race compounds the effects of adolescence, which is critical to evaluating a custodial interrogation.[155] Black and Latino/a youth can experience more difficulty resisting police pressure. The history of racialized policing and the youths' experiences or knowledge of pervasive police brutality[156] suggest the importance of a "reasonable Black child" or "reasonable Latino/a child" standard for determining custody.[157] Defenders can argue that the history of racialized policing and pervasive examples of police brutality in the news and youths' own experiences means a "reasonable Black child" or "reasonable Latino/a child" would experience a police encounter as custodial.[158]

Additionally, studies show implicit racial bias may cause officers to view Black and Latino/a youth as older and more culpable than white peers of the same age.[159] One study showed officers overestimating the age of Black youth accused of a felony by almost five years and Latino/a youth by more than two years, while simultaneously *underestimating* the age of similarly accused white youth by one year.[160] These studies have crucial implications for *Miranda* waivers:

> When officers perceive youth of color as older and guiltier, they may be more likely to assume those youth are familiar with the *Miranda* rights. This assumption would then impact the care and precision with which the officer read the rights, whether they added an additional explanation, if that additional explanation tended to minimize the importance of the rights, and whether they asked if the youth had any questions. If the officer perceives the child as more culpable, they may be subconsciously more motivated to secure a *Miranda* wavier from that child. Even when an officer knows a child's age before administering *Miranda*, implicit racial bias may still cause the officer to think of the child as older, guiltier, and more experienced even after they are told the child's real age.[161]

155 Henning & Omer, *supra* note 143 at 901 ("The race of a child will have as much impact on the voluntariness of their waver as does their age.").
156 *See* Brendesha M. Tynes et al., *Race-Related Traumatic Events Online and Mental Health Among Adolescents of Color*, 65 J. Adolescent Health 371 (2019).
157 Henning, *supra* note 68. Christy E. Lopez, *The Reasonable Latinx: A Response to Professor Henning's The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 68 Am. Univ. L. Rev. 255 (2019).
158 *Id.*
159 Henning & Omer, *supra* note 143 at 910 (citation omitted).
160 *Id.* (emphasis added) (citing Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psych. 526, 533-34 (2014)).
161 *Id.* at 911.

Who Interrogated the Student?

The identity of the person questioning the youth and their ultimate role matters to the analysis of whether the young person's Fifth Amendment rights are implicated in a school setting.

Who Interrogated the Student?	Does *Miranda* Apply?
School Personnel (teacher, principal, nurse, janitor, or any other non-law enforcement employee)	**No.** Generally, school personnel acting alone may question a student without *Miranda* because these officials are primarily responsible for education and discipline, not law enforcement.[162]
Police Officer	**Yes.** *Miranda* warnings apply whenever a police officer interrogates a student and the scenario constitutes a custodial interrogation.[163]
SRO	**Varies by jurisdiction.** In most jurisdictions, SROs are treated as law enforcement officials and *Miranda* warnings apply when an SRO interrogates a student and the scenario constitutes a custodial interrogation.[164] In jurisdictions that claim SROs are not law enforcement, defenders should argue that anyone who is authorized to carry a weapon, make arrests, and generally act as law enforcement qualifies, regardless of what agreement the school and local government have worked out. Local agreements do not supersede the U.S. Constitution.
School Personnel working in conjunction with Law Enforcement	**It depends.** When a school administrator acts in conjunction with an officer to question a student, courts will generally look at the following factors: • Is the school administrator acting as an agent of law enforcement? • Does the situation constitute a custodial interrogation? ***Miranda* generally applies if:** • School administrator acts in coordination with law enforcement and it is a custodial interrogation,[165] or • Law enforcement controlled or directed the interrogation or played a significant role in it, and the youth is not free to leave.[166] ***Miranda* generally does not apply if:** • School administrator alone controlled the interrogation and the purpose was not primarily law enforcement.[167]

162 *See, e.g., People v. Jose A.*, 33 N.E.3d 1137 (Ill. App. Ct. 2018) (school personnel who do not have law enforcement duties are not required to give *Miranda* warning before questioning students); *D.Z. v. State*, 100 N.E.3d 246 (Ind. 2018); *A.W. v. State*, 510 S.W.3d 811 (Ark. App. 2017); *State v. Moses*, 327 P.3d 1052 (Kan. Ct. App. 2014). *But see State v. Antonio T.*, 352 P.3d 1172 (N.M. 2015) (holding statements elicited by school official in presence of law enforcement cannot be used against the child in delinquency proceedings).

163 *E.g.*, J.D.B., 564 U.S. at 271.

164 *See, e.g., In the Matter of D.A.H.*, 857 S.E.2d 771, 782 (N.C. App. Ct. 2021) (presence of SRO, even if SRO stays silent, creates coercive environment "such that a reasonable student would readily believe they are not free to go"); *B.A. v. State*, 100 N.E.3d 225, 229-34 (Ind. 2018) ("consistent police presence" even if police does not question student creates "considerable coercive pressure); *N.C. v. Comm.*, 396 S.W.3d 852, 854-62 (Ky. 2013); *State v. Antonio T.*, 352 P.3d 1172, 1179-80 (N.M.2015) (SRO's "mere presence during questioning of [student] converted the school disciplinary interrogation into a criminal investigatory detention").

165 *Id.*

166 *In re L.G.*, 82 N.E.3d 52 (Ohio App. Ct. 2017 (*Miranda* warnings required where school's Executive Director of Safety and Security's questioning of the student was for law enforcement purposes not school investigation); *In re Welfare of G.S.P.*, 610 N.W.2d 651 (Minn. Ct. App. 2000) (finding custodial interrogation existed where assistant principal and school liaison officer worked together to question a student; the two went together to the students' class to take him to the office and the assistant principal told the student he needed to answer the questions and explained that he would turn the interrogation over to the officer once he had asked some questions himself).

167 *People v. Jose A.*, 33 N.E.3d 1137 (Ill. App. Ct. 2018) (school personnel who do not have law enforcement duties are not required to give *Miranda* warning before questioning students); *D.Z. v. State*, 100 N.E.3d 246 (Ind. 2018); *A.W. v. State*, 510 S.W.3d 811 (Ark. App. 2017); *State v. Moses*, 327 P.3d 1052

2. If the Student Received & Waived Miranda Rights, Was the Waiver Voluntary, Knowing, & Intelligent?

If the person questioning the youth was required to have provided *Miranda* warnings and did not, this violates the Fifth Amendment and all subsequent statements should be suppressed.[168] If the state claims a student was given their *Miranda* rights and waived them, the courts will look at whether the alleged waiver was voluntary, knowing, and intelligent.[169] Due to their still-developing cognitive capacities, youth are at a higher risk of not giving an "intelligent and knowing" *Miranda* waiver.[170]

Developmental differences in youth may impede their ability to fully understand the implications of waiving their right to silence or the right to an attorney when being interrogated by police.[171] Youth lack future orientation and may fail to consider the consequences of waiving their rights. The Supreme Court has also pointed to the developmental differences between adolescents and adults, noting in *Roper v. Simmons* that youth are "more vulnerable or susceptible to … outside pressures."[172] In fact, numerous Supreme Court cases have affirmed the importance of considering a young person's youth and maturity level in assessing the voluntariness of any incriminating statement.[173] The Court makes clear in these opinions that youth are no match for the training and sophistication of law enforcement in interrogation.

To determine whether a young person's waiver was voluntary, knowing, and intelligent, the majority of jurisdictions use a "totality of the circumstances" test, which includes evaluating the following factors:[174]

- The context of the questioning, including the relationship between the youth and the questioner;
- The young person's age, experience, education, background, and intelligence; and
- Whether the youth has the capacity to understand:
    - the warnings given,
    - the nature of their Fifth Amendment rights, and
    - the consequences of waiving those rights.

Defenders must consider race when using this test to evaluate the voluntary, knowing, and intelligent nature of a youth's *Miranda* waiver. Black and Latino/a youth may experience an additional challenge in making a knowing, voluntary, and intelligent waiver due to the cognitive overload caused by "stereotype threat response," *i.e.* the fear that they are being racially stereotyped as guilty during police encounters. People who experience

(Kan. Ct. App. 2014). *But see M.H. v. State*, 851 So.2d 233 (Fla. App. 2003) (finding that mere presence of SRO does not amount to custodial interrogation requiring *Miranda* warnings where seventh grader was taken by SRO to school official's office and school official interrogated student in front of SRO, who asked only one question); *In Interest of J.C.*, 591 So.2d 315, 316 (Fla. App. 1991) (situation in which assistant principal questioned student in front of SRO and SRO "could have asked a question or two" does not constitute custodial interrogation as SRO involvement was *de minimis*); *J.D. v. Com.*, 591 S.E.2d 721, 725 (Va. App. 2004) (where SRO is present but silent during questioning of student by associate principal, *Miranda* warnings not required because SRO did not direct questioning and the student was not in custody when questioned).

168 *Miranda*, 384 U.S. at 444, 475.

169 *Id.*

170 Jodi Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29 Law & Hum. Behav. 723 (2005).

171 Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333 (2003).

172 543 U.S. 551, 569 (2004).

173 *See Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (suppressing confession by 14-year-old and noting that "he cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights…and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself."); *In re Gault*, 387 U.S. 1, 55 (1967) (stating that the "greatest care must be taken to assure that the admission [of an adolescent] was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair").

174 *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (holding that respondent's request to speak with his probation officer did not constitute a per se invocation of his Fifth Amendment rights but acknowledging that in a particular case, the youth's age and experience may indicate that such a request invoke the right to remain silent). *See also* Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, Wis. L. Rev. 431 (2006) (noting that 35 states and District of Columbia apply the totality of circumstances test).

stereotype threat often become hyper-aware of their body language, eye contact, word choice, and more in an attempt to counteract this stereotype.[175]

Stereotype threat can reduce one's ability to control their emotions, thoughts, and behaviors while also depleting cognitive capacities in ways that compromise an individual's ability to resist pressure to confess in interrogations.[176] The anxiety and cognitive overload associated with stereotype threat depletes the energy the individual needs to make a knowing and voluntary decision and creates a sense of hopelessness, leaving them to believe that it would be futile to refuse to answer the interrogation.[177] Defenders should consider this anxiety and cognitive overload for Black and Latino/a youth when arguing that waiver in the interrogation context was not knowing, voluntary, and intelligent.

All of this is relevant to the assessment of whether a young person's failure to remain silent and proceed without the assistance of a lawyer was an active and contemplative decision to give up their rights and that such a decision involved an appreciation for the dangers, making the waiver knowing, intelligent, and voluntary.

Interested Adult Rule

Some jurisdictions also use what is known as an "interested adult" rule to help inform whether the waiver was valid. Jurisdictions vary somewhat in the specific requirements, but generally, according to this rule, determinations of whether a young person may be deemed to have voluntarily waived the privilege against self-incrimination includes consideration of whether they had the opportunity to consult privately with and have present at interrogation a parent, guardian, or other adult who is interested in the youth's welfare.[178] The majority of states consider the absence or presence of an interested adult as a factor in the totality of circumstances test, rather than dispositive of voluntariness.[179]

Youth defenders should evaluate whether the presence of an interested (albeit well-meaning) adult was detrimental to youth in the interrogation setting. Nascent research indicates that most parents are ill-prepared to effectively advise their children during interrogation.[180] An increasing number of states have recognized that youth should have access to counsel prior to the interrogation.[181]

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175 Kimberly Barsamian Kahn, et al., *Misinterpreting Danger? Stereotype Threat, Pre-attack Indicators, and Police-Citizen Interactions*, 33 J. Police & Crim. Psych. 45-54 (2018).

176 *See* Deborah Davis and J. Guillermo Villalobos, *Interrogation and the Minority Suspect: Pathways to True and False Confession,* Advances in Psychology and Law VOL. 1, New York: Springer, (2016); Deborah Davis and Richard Leo, *Interrogation-Related Regulatory Decline: Ego Depletion, Failures of Self-Regulation, and the Decision to Confess*, 18 J. Psycho., Pub. Policy, and Law, 673–704 (2012).

177 Cynthia J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects Are at Risk of Confessing Falsely,* 17 Psych., Pub. Police, & Law 562, 574-576 (2011).

178 *See, e.g.*, *Comm. v. Smith*, 28 N.E.3d 385, (Mass. 2015); *In re N.M.*, 141 A.3d 539, 544 (Pa. Super. 2016); *State v. Pablo*, 100 N.E.3d 1068, 1073 (Ohio Ct. App. 2017); *In re E.W.*, 114 A.3d 112, 115-16 (Vt. 2015).

179 *See, e.g.*, *Comm. v. Stanley S.*, 177 N.E.3d 926 (Mass. App. Ct. 2021); *In re C.M.R.*, 98 N.E.3d 296 (Ohio 2018); *People v. Edwards*, 75 N.E.3d 282 (Ill. App. Ct. 2017); *In re B.T.*, 82 A.3d 431 (Pa. Super. Ct. 2013).

180 *See e.g.*, Todd C. Warner & Hayley M.D. Cleary, *Parents' interrogation knowledge and situational decision-making in hypothetical juvenile interrogations*, Psych., Pub. Pol'y, & L. 78 (2022) (study of geographically diverse sample of parents shows they are poorly situated to play protective role in youth interrogations); Todd C. Warner & Hayley M.D. Cleary, *Parents' knowledge and attitudes about youths' interrogation rights*, 23 Psych., Crime & L. 777-793 (2017) (showing that on average, parents answered fewer than half of questions about youth interrogation tactics correctly).

181 *See* Caitlin Noelle August, *Juveniles in the Interrogation Room: Defense Attorneys as a Protective Factor* (2020).

3. Was the Statement Voluntary Under Fourteenth Amendment Due Process?

While voluntariness is a consideration in the analysis of whether *Miranda* rights were validly waived, whether the young person voluntarily made the statement itself is a separate and distinct constitutional analysis. Statements are inadmissible under the Due Process Clause of the Fourteenth Amendment when they are involuntarily made as the result of some coercive state action.[182] Even if a court finds that *Miranda* did not apply or that *Miranda* rights were properly waived, the statement itself may still be the result of coercive state action and thus involuntary as a matter of due process. Defenders should make a voluntariness claim both independent of, and in conjunction with, any claims that *Miranda* was violated.

It is important to note that when a court rules a statement inadmissible on *Miranda* grounds, the state may still use the statement for impeachment purposes if the youth testifies at trial.[183] When the statement is found to be involuntary under the Due Process Clause, however, that statement cannot be used for any purpose, because it is inherently unreliable.[184]

Under the Due Process Clause, whether a statement is involuntary comes down to "whether a defendant's will was overborne," given circumstances surrounding the statement.[185] State action is required for a statement to be involuntary under the Due Process Clause. Spontaneous confessions, even if they are due to a client's mental condition or some other vulnerability, may only be suppressed if a state actor did something to induce the statement.[186] Police officers are easily classified as state actors. Teachers, principals, and SROs — just as in the *Miranda* and Fourth Amendment analyses — may or may not be, depending on the facts. As a result, there is nearly always a colorable motion to argue that whoever did the questioning was a state actor.

Key points relevant to the voluntariness of a statement under the Due Process analysis:

- Under the Constitution, and in a majority of states, the prosecution bears the burden of proving the statement was voluntary by a preponderance of the evidence. Note that a minority of states require proof beyond a reasonable doubt under state law.[187]
- For an incriminating statement to be considered involuntary, there must be a causal link between coercive state action and the statement.[188]
- The question of voluntariness is assessed based on the "totality of circumstances."[189] This is a recognition that the personal characteristics of a suspect may render them particularly vulnerable to coercive actions by the state.

182 *See Sims v. Georgia,* 389 U.S. 404 (1967); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Colorado v. Connelly*, 479 U.S. 157, 163 (1986).
183 *Harris v. New York*, 401 U.S. 222 (1971).
184 *Rogers v. Richmond*, 365 U.S. 534, 540–41 (1961) (reasoning that exclusion for involuntariness is "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charges against an accused out of his own mouth."); *Lisenba v. California*, 314 U.S. 219 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.").
185 *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 223, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).
186 *Colorado v. Connelly*, 479 U.S. 157 (1986) (holding that while the defendant's mental condition is a factor to be considered, police coercion is necessary to find that a confession was involuntary within the meaning of the Due Process Clause).
187 *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (preponderance of the evidence standard applies under federal law). *See also State v. Lawrence*, 920 A.2d 236, 251 (Conn. 2007) (noting that majority of states, like Connecticut, follow the preponderance of evidence standard). State cases requiring proof beyond a reasonable doubt include *Burton v. State*, 292 N.E.2d 790 (Ind. 1973); *Harrison v. State*, 285 So.2d 899, 890 (Miss.1973); *State v. Yough*, 231 A.2d 598 (N.J. 1967); *Commonwealth v. Jackson*, 731 N.E.2d 1066, 1070 (Mass. 2000).
188 *Connolly*, 479 U.S. at 167.
189 *Boulden v. Holman*, 394 U.S. 478, 480 (1969).

While overt physical and mental tactics by state officials can render a statement involuntary, more subtle approaches, such as taking advantage of a person's individual vulnerability factors, can also overbear someone's will to resist making a statement. Such individual vulnerabilities contributing to the totality of the circumstances include:

- Age;[190]
- Mental illness or condition;[191]
- Developmental disability;[192]
- Limited intellect;[193]
- Limited education;[194]
- Illiteracy;[195]
- Prior experience with law enforcement;[196] and
- Injury.[197]

WHAT HAPPENS WHEN A STUDENT IS SEIZED, SEARCHED, OR INTERROGATED AT A PRIVATE OR CHARTER SCHOOL?

Private schools, even those that receive significant public funding or those that are subject to public regulation, are generally not considered state actors for the purposes of Fourth and Fifth Amendment analyses. The U.S. Supreme Court has held that even a private school receiving 90 percent of its budget from state funding was not considered a state actor because the school operated independently.[198] Most recently, the Court held that a private actor could qualify as a state actor in a few limited circumstances:

- When the private entity performs a traditional, exclusive public function,
- When the government compels the private entity to take a particular action, or
- When the government acts jointly with the private entity.[199]

Defenders should inquire into whether students had notice from school policies or the school handbook regarding types of searches, scope of the search to the behavior, and the student's expectation of privacy. Courts have also found a lower standard of scrutiny for private schools compared to public schools for searches and interrogations.[200] However, state actors such as police officers will still need a warrant for searches whether it is initiated by the officer or requested by private school officials.[201]

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190 *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948) (reversing the admissibility of the confession of a 15-year-old based on the young age of the defendant, the duration and time of the interrogation, and the exclusion of parents and counsel). *See also Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (holding that confession of a 14-year-old boy who was isolated from any "friendly adults" was involuntary because someone of his age would not have an understanding of the consequences of the questions asked him or how to protect his own interests or assert his constitutional rights); *U.S. v. Morales*, 233 F. Supp. 160, 167-8 (D. Mont. 1964) (holding statement made by a 16-year-old defendant was involuntary and inadmissible in a juvenile delinquency case, and noting that the Supreme Court has "referred repeatedly to the fact that youth and inexperience must be considered in determining whether any confession is voluntary"). *See also Roper v. Simmons*, 543 U.S. 551, 569 (2005) (court distinguished youth from adults based on, among other things, finding that youth are more susceptible to negative influences and outside pressures and youth are "more susceptible to psychological damage").

191 *Colorado v. Connelly*, 479 U.S. at 165 (distinguishing *Blackburn v. Alabama*, 361 U.S. 199, 206-8 (1960), in which police knew of the defendant's history of mental problems and exploited this by confining him to a crowded small room for an eight- to nine-hour interrogation).

192 *See Connelly*, 479 U.S. at 165. *See also U.S. v. Preston*, 751 F.3d 1008 (9th Cir. 2014); *State v. Chester*, 252 So.3d 896 (La. 2018); *Waterman v. State*, 255 So.3d 980 (Fla. Dist. Ct. App. 2018).

193 *See Culombe v. Connecticut*, 367 U.S. 568 (1961) (statements by man with mental age of nine were not voluntary); *Sims v. Georgia*, 389 U.S. 404.

194 *See Fikes v. Alabama*, 352 U.S. 191 (1957).

195 *See Culombe v. Connecticut*, 367 U.S. 568 (1961).

196 *See Yarborough v. Alvarado*, 541 U.S. 652, 667-68 (2003).

197 *See Mincey v. Arizona*, 437 U.S. 385, 401 (1978) (statements made while individual was seriously and painfully wounded were involuntary).

198 *Rendell-Baker v. Kohn*, 457 U.S. 830, 832, 838 (1982).

199 *Manhattan Cmty. Access Corp. v. Hallelck*, 139 S. Ct. 1921 (2019).

200 *See Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003) (holding private school student had reasonable expectation of privacy to be free from searches or seizures by government officials such as a county casework or police officer).

201 *Id.*

Charter schools are publicly funded education providers; however, they generally operate more similarly to a private school. Courts are still grappling with the question of whether charter schools are state actors.[202] Defenders should review local jurisprudence to see if charter schools are considered state actors for other purposes. SROs at charter schools may still be subject to higher scrutiny under Fourth and Fifth Amendment jurisprudence if they can be classified as law enforcement. Defenders should consider the authority of the SROs, how they are paid, and their specific title. Additionally, because each charter school creates its own policies, defenders should review local charter school student handbooks.

CONCLUSION

There is a growing movement to disrupt the school-to-prison pipeline through community organizing, policy and legislative efforts, and alternative restorative justice practices.[203] Defenders play a vital role in combatting policies and practices that funnel children — particularly Black and Latino/a children — into the juvenile legal system. Using the U.S. Constitution to uphold the rights of youth and challenge the actions of school officials is instrumental in holding these actors accountable and deterring them from using the legal system as a means of school discipline. As youth, families, and advocacy organizations engage in policy efforts to change law and policy, youth defenders must fight in their role as zealous legal advocates.

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202 *See, e.g., K.H. v. Antioch Unified Sch. Dist.*, 2019 WL 2744721 (N.D. Cal. 2019) (finding plausible allegation of unreasonable seizure of student by charter school officials); *Voices for Int'l Bus & Educ., Inc. v. NLRB*, 905 F.3d 770, 776 (5th Cir. 2018) (holding charter schools are more similar to private organizations because of their autonomy and freedom); *Cummerlander v. Patriot Prepatory Academy Inc.*, 86 F. Supp. 3d 808 (S.D. Ohio 2015); *S.J. v. Perspectives Charter Sch.*, 685 F. Supp. 2d 847 (N.D. Ill. 2010); *Caviness v. Horizon Cmty. Learning Ctr. Inc.*, 590 F.3d 806 (9th Cir. 2010) (holding charter school is not a state actor for purposes of § 1983 claim); *Namba Classical Acad. v. Goesling*, 447 Fed. Appx. 776,778 (9th Cir. 2011) (holding charter school was a state entity and could not bring a claim against the state itself); *Greater Heights Acad. v. Zelman*, 522 F.3d 678, 680 (6th Cir. 2008) (holding charter school was state actor for Fourteenth Amendment claim); *Scaggs v. New York Dep't of Education*, 2007 WL 1456221 (E.D.N.Y. 2007) (holding charter schools operate more similar to traditional public schools for purposes of § 1983 claim to address nature and quality of education).

203 *See generally* Gupta-Kagan, *supra* note 75, at 2047-64. *See also* South King Cty. Discipline Coalition, https://www.skcdisciplinecoalition.com/skcdc (last visited Aug. 31, 2022); Trevor Fronius, et al., Restorative Justice in U.S. Schools: A Research Review 20-21 (2016); Catherine H. Augustine, et al., Restorative Practices Help Reduce Student Suspensions 3 (2018).

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