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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 22, 1996

The Honorable Johnny Mack Brown
Sheriff, Greenville County
4 McGee Street
Greenville, South Carolina 29601

Re: Informal Opinion

Dear Sheriff Brown:

You note that, quite often, your office has "received requests from school officials to conduct searches for narcotics in public schools using our drug dog." You state that "[v]ery often, such searches result in the discovery of drugs in student lockers or in students' personal possession." Specifically, you ask:

> School officials request that law enforcement officers enter public school with trained drug dog to "sniff out" narcotics stored in student lockers and/or in the students' personal possession. What is the latest case law and ruling?
>
> During such a search, the drug dog "alerts" to a student's locker. A search by school officials reveals marijuana in the locker. As this search did not involve a warrant, can the student be charged with possession?
>
> Are the public schools obligated to inform/warn students that their lockers may be "sniffed" by a law enforcement drug dog and subsequently searched by school officials, if the drug dog "alerts"?
>
> Are students and school officials considered to have joint possession of public school lockers? If so, can school officials

Request Ltr.

consent to a search by law enforcement officers when a drug dog "alerts" to a locker?

LAW / ANALYSIS

Prior Opinions

As you indicate, this Office has issued several opinions regarding the use of canines as a drug detection device. See, Op. Atty. Gen., October 16, 1989 (No. 89-115); August 28, 1984; August 25, 1983; June 25, 1981; March 1, 1979; January 23, 1979. In the 1989 opinion, we stated that a "court could reasonably conclude that the use of sniff dogs" in connection with a roadblock was reasonable. The 1984 opinion dealt with the use of drug-detecting canines at the Department of Youth Services. There, we analogized the situation more to the circumstances of a prison, noting that "[t]he need to search for contraband in a prison setting has been repeatedly recognized as a rational response by prisoner officials to security problems surrounding the smuggling and possession of contraband." In the 1983 opinion, we generally surveyed the case law in this area, concluding that

> ... the trend appears to be to require at least a reasonable suspicion on the part of law enforcement officers that illegal activity is taking place, and that illegal substances are at a particular location, for the subsequent use of dogs in detecting the contraband to be upheld, either as a prerequisite to a search or a basis for a search warrant.

The March 1, 1979 opinion dealt with the question as to what showing a police officer must make to establish the reliability of a drug dog in order to obtain a search warrant when "the sole probable cause is based on the dog's detection ability." In that opinion, we stated that the general case law indicated

> that where the dog reacts in the manner in which it was trained -- thereby signifying that the dog detects marijuana, e.g. coming to the 'alert' position, biting, scratching, barking, or other such signal, and where there is other evidence to indicate the reliability of the dog -- the magistrate would be justified in finding probable cause.

The other two referenced opinions have dealt specifically with the use of drug dogs in schools. In the June 25, 1981 opinion, we relied upon Doe v. Renfrow, 475 F.Supp.

1012 (N.D. Ind., 1979), affd in pt., remanded in pt., 631 F.2d 91, (7th Cir. 1980) cert. den. 451 U.S. 1022, (1981), which had found no Fourth Amendment problems with a warrantless, noncriminal schoolroom drug search, conducted by school administrators with the assistance of police and a drug detecting dog and consisting of a thorough search of clothing of any student to whom the dog alerted. We emphasized that Doe had stressed that the school officials were not seeking evidence to be used in a criminal prosecution, but instead were concerned with eliminating the drug problem in the school. This being the case, Doe held that the "alert" by the dog gave the officials reasonable cause to believe that a particular student was concealing narcotics and thus subject to search. The circumstances whereby the dog merely went up and down the classroom aisles "sniffing" the air was determined by the Doe Court not to be a "search" for Fourth Amendment purposes, but rather was a justified action taken in accordance with the school's role in loco parentis. Our opinion quoted the following passage from Doe:

> [t]his Court now finds that in a public school setting, school officials clothed with the responsibilities of caring for the entire student population may rely on general information to justify the use of canines to detect narcotics. What level of information is necessary must be determined on a case by case basis, however, this Court holds the lesser standard of a 'reasonable cause to believe' applicable in such a determination. School officials fulfilling their state empowered duties will not be held to the same standards as law enforcement officials when determining if the use of canines is necessary to detect drugs within the schools. This lesser standard applies only when the purpose of the dog's use is to fulfill the school's duty to provide a safe, ordered and healthy educational environment, 475 F.Supp. 1012 at 1021.

The January 23, 1979 opinion addressed the issue of whether high school officials could use police "sniff" dogs to make periodic checks of student lockers for drugs. There, we referenced a number of cases which concluded that students had no reasonable expectation of privacy in a student locker because, normally, school officials also had access to the locker and, thus, the principal could consent to a search thereof. People v. Overton, 283 N.Y.S.2d 22, 229 N.E.2d 596 (1967), adhered to on reh. 301 N.Y.S.2d 479, 249 N.E.2d 366; Re Donaldson, 269 Cal. App.2d 509, 75 Cal. Reptr. 220 (1969); State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969). Out of precaution, we advised, however, if school officials had access to student lockers, that before dogs were brought into the school, students should be notified that, henceforth, their lockers were subject to being sniffed by trained dogs.

We also concluded in the opinion that "the mere sniffing of the air by trained dogs is not [a] prohibited search within the meaning of the Fourth Amendment." Moreover, regardless of whether the dog's actions technically constituted a "search", such a policy was reasonable within the parameters of the Fourth Amendment. Quoting People v. Overton, which stressed the doctrine of in loco parentis, we stated:

> [t]he school authorities have an obligation to maintain discipline over the students. It is recognized that, when large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment, in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards.
>
> It is in the high school years particularly that parents are justifiably concerned that their children not become accustomed to antisocial behavior such as the use of illegal drugs. [Quoting People v. Overton, supra, 229 N.E. at 597.]

Thus, our previous opinions have concluded that, within the guidelines referenced, the use of canines in the schools to detect drugs present in student lockers or on their person was constitutionally permissible.

You have now asked us to update the law since these opinions were written. Since that time, the seminal United States Supreme Court decisions of United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) and New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) were decided. One case, Place, addressed canine sniffs generally, but not in the school setting. The other, T.L.O., dealt with searches in schools, but did not involve canine sniffs. In Place, the Court addressed the validity of a "canine sniff" of luggage validly detained by law enforcement officers who reasonably believed that such luggage contained narcotics. The Court held that Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) authorized the officers "to detain the luggage briefly to investigate the circumstances that aroused his suspicion ... ." With respect to the use of the drug dog to "sniff" the contents of the luggage, the Court reasoned that a "canine sniff was not a "search" under the Fourth Amendment. Stated the Court,

> [i]n these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited

> both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here -- exposure of respondents luggage, which was located in a public place, to a trained canine -- did not constitute a "search" within the meaning of the Fourth Amendment.

77 L.Ed.2d at 121. While the Court in Place went on to determine that, in the circumstances of that case, the detention of the luggage was for an unreasonable period of time, the case has been generally held to stand for the proposition that canine sniffs do not constitute a "search" for purposes of the Fourth Amendment. A number of federal circuit courts, including the Fourth Circuit, have so held. U.S. v. Jeffus, 22 F.3d 554 (4th Cir. 1994); U.S. v. Harvey, 961 F.2d 1361 (8th Cir. 1992); U.S. v. Lingenfelter, 997 F.2d 632 (9th Cir. 1993); U.S. v. Friend, 50 F.3d 548 (8th Cir. 1995).

The other landmark United States Supreme Court decision, New Jersey v. T.L.O., supra, addressed the issue of the "legality of searches conducted by public school officials ... ." In T.L.O., a student was suspected of violating school rules concerning smoking. Pursuant to that well-founded suspicion, the student's purse was searched by school officials, and a number of items implicating the student in drug dealing were found.

The Supreme Court found that the Fourth Amendment applied to this situation. Notwithstanding Fourth Amendment applicability, the real question, noted the Court, was "the standards governing such searches." In that vein, the Court concluded that "school children may find it necessary to carry with them a variety of legitimate, contraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds." Counterbalancing that interest, however, was the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." 105 S.Ct. at 741. Taking cognizance of the fact that "[t]he school setting also requires some modification of the level of suspicion of illicit activity to justify a search ...", the Court held:

> [w]e join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is

> violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a two fold inquiry: first, one must consider "whether the ... action was justified at its inception," Terry v. Ohio, 392 U.S. at 20, 88 S.Ct. at 1879; second, one must determine whether the search as actually conducted "was reasonably related in scope to circumstances which justified the interference in the first place." ibid. Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

105 S.Ct. at 742-743. (emphasis added).

As noted above, the Court in T.L.O., did not address your situation or the applicable standard in the context of a "canine sniff". Moreover, the T.L.O. Court was careful to recognize that it was not addressing any Fourth Amendment applicability or analysis with respect to "lockers, desks or other school property provided for the storage of school supplies." Id. at 740, n. 5, citing other court decisions in this context. See, Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981) [school had assumed joint control of the locker and thus could inspect it]; People v. Overton, supra [school administrators had power to consent to search student locker]; State v. Engerud, 94 N.J. 331, 463 A.2d 934, 943 (1983) [student had expectation of privacy in his locker]. Finally, TLO specifically noted that the particular search involved in that case was initiated by school officials rather than law enforcement officers. Id. at 743, n. 7. ["We here consider only searches carried out by school authorities acting alone and on their own authority."]

Turning now to your specific questions, I must stress that there has not been a great deal of case law regarding the use of drug sniff dogs in the public schools since our earlier opinions were rendered. The leading federal case in this area is Horton v. Goose Creek Ind. Sch. Dist., 690 F.2d 470 (5th Cir. 1982). There, in an effort to deal in good faith with the serious drug and alcohol problem in the school, a school district decided to subject students, their lockers and automobiles to the exploratory sniffing of dogs trained

to detect certain contraband. The Court characterized the issue as one of "whether dog sniffing is a search in terms of whether the sniffing offends reasonable expectations of privacy ...". 690 F.2d at 476.

With respect to the lockers and automobiles, the Court held that the use of "sniff" dogs outside the lockers and automobiles indeed did not constitute a "search". Concluded the Court,

> [t]he sniffs occurred while the objects were unattended and positioned in public view. Had the principal of the school wandered past the lockers and smelled the pungent aroma of marijuana wafting through the corridors, it would be difficult to contend that a search had occurred. ... [T]he use of the dog's nose to ferret out the scent from inanimate objects from public places is not treated any differently. We hold accordingly that the sniffs of the lockers and cars did not constitute a search and therefore we make no inquiry into the reasonableness of the sniffing of the lockers and automobiles.

690 F.2d at 477. (emphasis added). Thus, the Fourth Amendment was simply not implicated where canines were used to sniff student lockers. If a dog "alerted" to a particular locker, the school searched it without consent of the student and such was found by the Horton court to be constitutional.

On the other hand, the Court deemed the use of drug dogs to sniff students themselves as presenting "an entirely different problem." Noting that the Seventh Circuit in the Renfrow case, supra, discussed above, was the "only circuit to have held that canine sniffs of school children do not constitute a search,"[1] the Court distinguished Renfrow,

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[1] The Court cited with approval Jones v. Latexo Ind. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980). There, the Court had held that the use of a trained canine to "walk up and down the aisles in the [classroom] ... sniffing each child in turn before departing ..." constituted a "search" under the Fourth Amendment. Accordingly, Jones found that there must be the application of a balancing test "between the competing interests of public need for the search on one hand, and the individual's right to personal security on the other." Therefore, there must be a determination of reasonableness "in each case ... on an ad hoc basis." The Court's analysis in Jones led to the conclusion that "[s]ome articulable facts which focus suspicion on specific students must be demonstrated." 499 F.Supp. at 236.

observing that, there, no evidence was presented that the dogs touched the students. However, in Horton the dogs "put their noses right up against the children's bodies." Analogizing this situation to the pat-down by the police officer in Terry v. Ohio, the Court reasoned that where canine sniffs of students such as was present in this case was involved, a search had occurred and, thus, there must constitute "the existence of facts giving the official reasonable particularized suspicions as a predicate for a search." 690 F.2d at 481. The Court went on to observe that it intimated no opinion whatever as to the standards to be applied "when a school official acts at the request of police, calls in the police before searching, or turns over the fruits of his search to the police." Said the Court, "[i]n that situation, when there is some component of law enforcement activity in the school official's actions, the considerations may be critically different." Id. at n. 19. Moreover, the Horton case left open the question of whether conclusions with respect to the sniff of student's persons would be different, if done by the dogs from a greater distance. 690 F.2d at 479. ["We need not decide today whether the use of dogs to sniff people in some other manner, e.g., at some distance, is a search."]

Another case, in a somewhat different context, Romo v. Champion, 46 F.3d 1013 (10th Cir. 1995), is helpful for purposes of its analysis. Romo involved a police roadblock, set up outside a prison facility. A visitor to the prison was stopped, required to turn off the ignition of her car and both her vehicle and her person were sniffed for drugs by a canine. The woman contended that the canine sniff violated her Fourth Amendment rights.

The Tenth Circuit disagreed. The Court noted that, in certain instances, the requirement of probable cause to search was not necessary. Citing cases such as New Jersey v. T.L.O., supra, the Court recognized:

> [g]overnment officials do not need probable cause to conduct a search, however, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351, 105 S.Ct. 733, 747, 83 L.Ed.2d 720 (1985) (Blackmon, J. concurring)). In the presence of such special governmental needs, "it is necessary to balance the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." National Treasury Employees Union v.

> Von Raab, 489 U.S. 656, 665-66, 109 S.Ct. 1384, 1390-91, 103 L.Ed.2d 685 (1989); see also Skinner v. Railway Labor Executive's Assn., 489 U.S. 602, 619, 109 S.Ct. 1402, 1414, 103 L.Ed.2d 639 (1989) (where search is justified by special needs, a reviewing court must "balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.")

46 F.3d at 1017. Thus, the Court in Romo evaluated the constitutionality of a "special needs" search in the context of "the more general requirement of reasonableness."

Applying that test, the Romo Court found that "[t]here can be little doubt that the search conducted by defendants in this case was executed pursuant to special needs independent of traditional criminal law enforcement." Here, the purpose of the search "was to intercept narcotics that prison visitors were attempting to take to inmates."

The Court noted that, while prison visitors did retain an expectation of privacy, by necessity, such expectation was diminished by virtue of the prison setting. Moreover, the government maintained a "paramount interest in [a prison's] institutional security." Thirdly, prison officials must "be afforded wide-ranging discretion in adopting policies designed to preserve institutional security."

Based upon application of the test used in Romo, the Court concluded that "each element of the procedure comported with the Fourth Amendment's requirement of reasonableness." The "sniff" of the vehicle was clearly not a "search" within the meaning of the Fourth Amendment, concluded the Court.

With respect to the dog's sniff of the plaintiffs' bodies, the Court acknowledged that such "was clearly more intrusive sniff of the vehicle ... ." Nevertheless, the Court deemed that it

> ... was reasonable in light of all the relevant circumstances. Again, plaintiffs' expectations in privacy were reduced because they were visiting a prison, and a dog's sniff of the area surrounding one's body is not terribly intrusive. To the extent that the dog's nose physically touched Misty Gardner, that contact was purely incidental. Such a brief unintentional touch cannot make an otherwise reasonable search unconstitutional. In sum, while elements of the defendant's conduct at the roadblock clearly infringed on plaintiffs'

> privacy interests, that intrusion was outweighed by the significant governmental interests at stake.

46 F.3d at 1018. Thus, the Tenth Circuit treated the "sniff" of the visitor to a prison differently than the Fifth Circuit in Horton had dealt with the use of canines in close proximity to students.

At least one commentator has questioned the distinction made by Horton and other courts[2] between canine sniffs of inanimate objects, such as lockers and automobiles, and people. See, Kenneth L. Pollack, "Stretching The Terry Doctrine to the Search for Evidence of Crime: Canine Sniffs, State Constitutions and the Reasonable Suspicion Standard," 47 Vand. Law Rev. 803, 805, n. 105. There the author states the following:

> [w]hile similar logic [U.S. v. Place analysis with respect to inanimate objects] could apply to the sniffs of students, the court [in Horton] believed this circumstance presented an entirely separate problem ... Why this assertion should be true is unclear. The police and dogs were as lawfully situated when they sniffed the lockers and a person's odor is as plainly apparent in the area around him and his lockers smell is around it. Yet, the Court recognized that the cost to individual privacy and dignity is greater whether dog sniffs a person than his unattended locker or car. ... Thus, the court classified this activity as a search in order to place some constitutional restrictions on the use of dogs to sniff people.

With respect to the plaintiffs' argument that individualized suspicion was required, the Court rejected that argument, concluding that reasonableness was the applicable constitutional standard. The Court noted that cases, such as T.L.O., "did not hold that

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[2] Horton is not the only court which has made this distinction. In Renfrow, Justice Brennan dissented from the denial of the writ of certiorari on the basis that regardless of the validity of the use of dogs to sniff for drugs in a student's locker, such was unreasonable in the context of the student's themselves. Justice Brennan noted that cases upholding canine sniffs "involved the sniffing of inanimate and unattended objects rather than persons." 69 L.Ed.2d at 397, n. 4. See also, Commonwealth v. Martin, 626 A.2d 559 (Pa. 1993) [Court distinguishes between canine sniffs of objects and persons for purposes of constitutional analysis; deems such a search of a person much more intrusive and thus requires probable cause].

individualized suspicion was an essential element to a constitutional search .... "T.L.O., 469 U.S. at 342 n. 8, 105 S.Ct. at 743 N. 8. ("We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities.")]. Having weighed the government's interest in preventing narcotics from being smuggled into prison against the intrusion upon plaintiffs' privacy, the Romo Court deemed the use of canine sniffs reasonable and, thus, constitutionally valid.

In the Interest of F.B., 658 A.2d 1378 (Pa. 1995) also provides useful insight into this issue. There, students at a Philadelphia High School were forbidden from bringing weapons or drugs onto school property. To enforce the policy, the school employed police officers to conduct in-house metal detector scans and bag searches. The school posted signs on the front door and throughout the school notifying students of the search. Upon entering the building, students were led into the gymnasium where each student was required to empty his pockets, and surrender his jacket and all bags. While those belongings were searched, the student was required to be scanned by a metal detector. If no drugs or weapons were found, the student was sent on his way. Pursuant to this policy, a student was found carrying a weapon, and was charged. He alleged the search violated his rights pursuant to the Fourth Amendment as well as the Pennsylvania Constitution.

The Pennsylvania appellate court rejected the argument. Citing New Jersey v. T.L.O., supra, the Court noted that T.L.O. established a two-part test to assess the reasonableness of any school search.

> First it must be determined whether the action was justified at its inception. ... Second, it must be determined whether the search, as conducted, was reasonably related in scope to the circumstances that justified the interference in the first place.

The juvenile argued that T.L.O. required individualized suspicion and did not allow "searching the entire student population." However, the Court in F.B. noted that T.L.O. "did not decide whether individualized suspicion is an essential element of the reasonableness standard that it adopted for searches by school authorities." However, concluded the Court,

> ... we must balance the school's compelling interest in promoting an environment which is safe and conducive to learning against the school's privacy interest. As a New York court recognized, "[i]f schools cannot operate in a violence-free atmosphere, then education will suffer, as a result

> ultimately threatens the well-being of everyone." People v. Dukes, 151 Misc.2d 295, 300, 580 N.Y.S.2d 850, 853 (1992). We find that the school's interest in ensuring security for its students far outweighs the juvenile's privacy interest. In addition, the trial court found, and we agree, that, in light of the school's efforts to make students and parents aware of their search policy, "the [juvenile]'s expectation of privacy was greatly reduced by the notice he received prior to the search." .... Therefore, under these circumstances, we believe that the juvenile's privacy interest is minimal.

658 A.2d at 1382. Moreover, the Court emphasized that the student searches were not random, but uniformly administered.

> Specifically, the officers who conducted the student searches followed a uniform procedure as they searched each student, i.e., after each student's personal belongings were searched, the student was scanned by a metal detector. This uniformity served to safeguard the students from the discretion of those conducting the search ... .
>
> Here, the trial court applied the reasonableness factors set forth in T.L.O. and found that the search was justified at its inception because of the high rate of violence in the Philadelphia public schools. Further, the court found that it was reasonable to search all students prior to entering the school because there is no way to know which students are carrying weapons. Therefore, the trial court concluded, and we agree, that the search of the juvenile satisfied the T.L.O. test for reasonableness.

Id.[3]

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[3] In Commonwealth v. Cass, 666 A.2d 313 (Pa. 1995), the same Court interpreted the Pennsylvania Constitution as requiring reasonable suspicion to use canines to sniff student lockers. The Court not only distinguished U.S. v. Place, supra, but the F.B. case as well. Cass emphasized that the school in the F.B. case "had a policy prohibiting weapons on school grounds ..." and that "[s]tudents and parents were notified of this

(continued...)

Likewise, in People v. Dukes, supra, cited by the Court in F.B., the Court upheld as valid and constitutional a school board policy which periodically subjected every student to metal detector scanning upon entering school. The scanning occurred in the school's main lobby. Signs announcing a search for weapons were posted outside and students were told at the beginning of the school year that searches would take place, but were not informed as to the exact dates. The student was asked to place any bags and parcels on the table and remove all metal objects from his pockets. Then, the student was scanned from head to toe. Students were scanned by officers of the same sex.

The defendant Dukes, pursuant to the policy was discovered with a switchblade knife. She was arrested and charged with criminal possession of a weapon, Fourth Degree. She moved to suppress the knife, contending her Fourth Amendment rights were violated.

The Court upheld the school's policy. The Court concluded:

> [t]urning to the governmental interest involved here, it is beyond peradventure that safety in our schools, and concomitantly, preservation of an atmosphere conducive to education, are of vital importance. ... If schools cannot operate in a violence-free atmosphere, then education will suffer, a result which ultimately threatens the well-being of everyone.
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> In sum, I find that the metal detector search in this case satisfies the balancing test and is reasonable. The switchblade knife recovered from Ms. Dukes' bag during the search is thus admissible at trial. While the tension between personal rights

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[3](...continued)
policy throughout the school year and searches of students were conducted on a regular basis. Signs were posted throughout the school notifying the students of these searches." This according to the Cass court had given the students in F.B. a greatly reduced expectation of privacy. Moreover, Cass distinguished F.B. on the basis that the procedure was uniform and was "regularly conducted." 666 A.2d at 319, n. 10. Finally, Cass noted that the school had only "vague reports that students were using drugs and dealing drugs." The Court was struck by the fact that "[t]he record was devoid of evidence of particular incidents of drug use or drug dealing." 466 A.2d at 316. Thus, it appears to the Cass Court that the elements of notice, regularity and uniformity were important to uphold canine sniffs generally. Of course, Cass did not involve sniffs of students' persons.

> and urgent social policies often presents hard choices for the courts ... this decision was made easier by the compelling need for security in our schools. In my opinion, the governmental interest underlying this type of search is equal to if not greater than the interest justifying the airport and courthouse searches.

Id. at 853.

CONCLUSION

My analysis of the foregoing case law and authorities reveals the following conclusions as related to your specific questions:

1. With respect to student lockers, the law is reasonably clear that the use of canines by school officials does not constitute a "search" under the Fourth Amendment. Therefore, I agree with the analysis of the earlier opinions of this Office that students generally have no expectation of privacy in the locker, particularly, where school officials also possess access thereto. The case of Horton v. Goose Creek Ind. School Dist., referenced above, as well as the subsequent United States Supreme Court decision, U.S. v. Place, along with other federal decisions, recognize that in the context of the use of statistically reliable canines to sniff inanimate objects such as student lockers, is not a "search" under the Fourth Amendment. Therefore, if a dog, which can be shown to be statistically reliable, "alerts" to the student locker, the case law stands for the principle that school officials possess the necessary cause to then search the student's locker. If illegal substances are found inside, such can be used in any criminal or disciplinary action against the student.

While no case has absolutely required school officials to inform students that their lockers may be subsequently "sniffed" by canines, virtually every case upholding such use emphasized that such notice was given. Thus, the advice rendered in our earlier opinions -- that such notice be given -- is supported by the case law and is a prudent approach.

2. The issue of using canines in connection with sniffing students without individualized reasonable suspicion is somewhat more difficult. Even though U.S. v. Place concludes that a canine sniff is not a "search" for purposes of the Fourth Amendment, the Supreme Court has never so held in the context of the use of canines to sniff students or persons. In fact, in our 1989 opinion, referenced above, we noted that "(i)t is extremely important to recognize that the Place holding does not validate the use

of drug detection dogs in all circumstances." Op. October 16, 1989, supra at 3, quoting LaFave, Search and Seizure, Vol. 1, Sec. 2.2 (f), p. 373.

My judgment is that a court would analyze the issue much as did the courts in Romo v. Champion, Interest of F.B. and People v. Dukes. It is my opinion that the school setting is one where "'special needs, beyond the normal need for law enforcement make the warrant and probable-cause requirement impracticable.'" Thus, a court would likely balance the individual's privacy expectations against the State's interest in keeping drugs out of our schools, in favor of the latter. In other words, if the Court deems the particular use of canines to be reasonable in that situation, it will uphold such use, much as the Court did in Romo in the context of the danger of visitors to a prison taking drugs inside.

Examined in that light, while students clearly possess some expectation of privacy in their persons, the Supreme Court in T.L.O. clearly recognized that the school setting was different from others and thus that a student's privacy expectation was considerably diminished. Secondly, the State's interest in keeping drugs out of our schools is paramount to the student's diminished expectations of privacy. Third, our courts have consistently recognized that school officials have wide discretion in designing policies to maintain discipline and order in the schools.

In summary, it is my opinion, based upon this analysis, that the use by school officials of canines in the schools--even where the canine sniffs are used to determine whether students have drugs on their persons--is reasonable, and thus valid under the Fourth Amendment and the South carolina Constitution.[4] Where the school can show specifically (based upon specific facts) that there exists a serious drug problem on its campus and that a canine program would be effective in detecting such drugs, in my judgment, the use of canines to detect drugs on students' persons could be upheld as valid without a showing of individualized suspicion. If the school formulates reasonable guidelines for carrying out a canine policy, much as the schools in the F.B. and Dukes cases did with respect to drugs and weapons detection, if such policy is uniform in scope and application, i.e. does not arbitrarily select or single out students, and if such policy

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[4] There is nothing to suggest that our Supreme Court would reach a different conclusion under Art. I, Sec. 10 of the South Carolina Constitution. See State v. Sullivan, 281 S.C. 522, 316 S.E.2d 404 (1984) [Art. I, Sec. 10 is "corresponding" provision.]; State v. Sachs, 264 S.C. 541, 555, 216 S.E.2d 501 (1975) [the State Constitutional provision is "identical in language"]; State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974) [provisions are "practically identical"].

gives notice to students that all students will be subject to such a detection program, a court would likely deem such program constitutional.

Because there is case law to the contrary, however, I must advise that my conclusion is not free from doubt. As I have attempted to point out, there are cases which have drawn a sharp distinction between use of canines to sniff students' lockers and the use of drug dogs to sniff individual students. Again, the issue is fact-specific and a court's analysis will depend upon what is reasonable under the particular circumstances. Federal and State courts appear to have reacted most negatively where the drug dog touches or comes very near the individual student and there is no reasonable suspicion that the student has drugs on his or her person. On the other hand, the Horton Court suggests that its conclusion striking down the sniff of students without reasonable suspicions might have been different if done from a greater distance. Likewise, Cass suggests that its conclusion might have been more favorable if there had been specific facts of drug dealing in the school, if students had been given notice of the canine policy, and if the policy were uniform in nature.

Thus, a court is most likely to uphold the use of canines to detect drugs on students' persons where the school makes a finding, based on specific facts, of drug problems in the school; carries the policy out in the halls at entrances or exits or in common areas (at some distance from a particular student); where there is clear notice given that students will be subject to canine sniffs; and if the policy is carried out uniformly. Clearly, there is sufficient case law supporting the use of canines (and metal detectors) by school officials to detect drugs or weapons on the person of students, such that school officials would be acting in good faith in doing so.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an