IN THE SUPREME COURT OF OHIO
2016

State of Ohio,	:	Case No. 2016-0271
Plaintiff-Appellant,	:	On Appeal from the Franklin County Court
v.	:	of Appeals, Tenth Appellate District
Joshua Polk,	:	Court of Appeals
Defendant-Appellee.	:	Case No. 14AP-787

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STATEMENT OF FACTS

In order to assist the Court in its resolution of this matter Appellee Mr. Polk wishes to include facts in addition to those supplied in the briefs of Appellant and its *amici*.

This incident occurred February 5, 2013 at Whetstone High School in Columbus, Ohio. (R. 3 ("Indictment")); (R. 110 at 1 (*Decision and Entry Granting Motion of Defendant to Suppress as Filed June 5, 2014*, Horton, J.)); *State v. Polk*, 10th Dist. No. 14AP-787, 2016-Ohio-28, ¶ 2-3. Whetstone High School is a public high school and is part of the Columbus Public School system. *State v. Polk*, *supra*, ¶ 3. Appellee Polk was indicted by the Grand Jury of Franklin County, Ohio, on May 22, 2013 for a single count of illegal conveyance or possession of deadly weapon or dangerous ordnance into a school safety zone, a violation of R.C. 2923.122, a felony of the fifth degree (see R. 3). The defense filed a suppression motion (R. 79) which was heard by Judge Timothy Horton of the General Division of the Common Pleas Court for Franklin County, Ohio, on September 17, 2014 (see Hr'g Tr. at 3: 1).

The State filed a memorandum *contra* to the motion to suppress (R. 82). In it the government argued that the searches were permissible under *New Jersey v. T.L.O.* because the criteria necessary to justify searches initiated by school officials had been met (R. 82 at 3). It further contended that the searches here ought to be upheld because school officials should not be expected to familiarize themselves with the nuances of Fourth Amendment law. *Id.* It argued alternatively that even if school officials are, in the area of evidentiary searches, held to the same standard that applies to law enforcement officials, the subsequent search of the bag carried by Appellee was reasonable based upon the earlier recovery of the cartridges. *Id.* Lastly, the government claimed that even if the searches were unreasonable, because none of the officials

involved in this case acted in a reckless, wilful, or grossly negligent manner the exclusionary rule should not be applied (*Id.* at 5-7).

Significantly, throughout his memorandum *contra* the trial prosecutor accurately characterized the book bag found on the bus as "lost" (see e.g. R. 82 at 3 ("lost bag"); 7 ("lost backpack")). At page 3 of its memorandum *contra* the State mentioned "[c]ommon sense dictates that it is reasonable for a school bus driver to look through a *lost* backpack to determine who the bag belongs to . . ." (emphasis added). And at page 4 it intimated "[t]he search of the bag was conducted by a bus driver rather than a police officer on a *lost* item of property" (emphasis added) (note: the statements that the bus driver searched the book bag were erroneous; see Hr'g Tr. *passim*).

The prosecution called its only witness Mr. Robert Lindsey to testify. Lindsey never averred that he is a teacher, administrator, counselor, or coach, nor did he describe his duties as being consistent with those associated with such positions (see Hr'g Tr. *passim*). According to his testimony his primary (if not exclusive) duty is school security. Though not a police officer Lindsey agreed with the characterization of his title as "Safety and security officer at Whetstone High School" (*Id.* at 16: 24-25; 17: 1-3). The appeals decision accurately reported this. *State v. Polk*, *supra*, ¶ 3. Judge Horton's written decision did as well (see R. 113 at 1). Lindsey provided information regarding his responsibilities at the school. Describing these Lindsey indicated "[w]e do security checks" (Hr'g Tr. 5: 8), "[w]e check the buildings" (*id.* at 5: 9), "[w]e check kids" (*id.*), "[w]e check lockers, stuff like that" (*id.* at 5: 9-10). Later he said "[w]e do anything that has anything to do with safety and security, anything. We do fire drills. We ensure kids are safe. We search kids. We have to do all of that" (*Id.* at 5: 21-25). He indicated as well that "[w]e do search book bags. We do search lockers" (*Id.* at 8: 14-15).

Lindsey testified that a bus driver while performing a walk-thru of an empty bus to ensure that no one was asleep noticed a backpack/book bag located on one of the seats (*Id.* at 17: 14-20). The bus driver indicated to Lindsey that he had no idea what the book bag contained (*Id.* at 17: 14-25). Lindsey held the book bag momentarily but intimated nothing about the bag sounding or feeling as though it contained items associated with criminal activity (*Id.* at 6: 17). Lindsey admitted there was nothing suspicious about the book bag; moreover, he did not detect an odor of marijuana emanating from it (*Id.* at 18: 15-20; 21: 25; 22: 1-4). He also noted that the book bag was no different from other book bags carried by Whetstone High School students (*Id.* at 18: 21-25; 19: 1-3). Lindsey agreed that in his experience it is not at all unusual for students to leave book bags unattended around the school (*Id.* at 21: 12-18). For this reason Whetstone High School has a "lost and found" where an item whose owner cannot be identified is placed (*Id.* at 7: 21-25). Moreover, when the item's owner has been identified it is to be returned to the student (*Id.* at 8: 21-25). He stated there are approximately a thousand students at Whetstone High School and all of them "more or less" carry book bags (*Id.* at 19: 4-12). Lindsey estimated he searches on average between 15 and 20 unattended book bags a day (*Id.* at 19: 13-14, 17-22). He further testified that a school bus is a common place where students leave behind their backpacks (*Id.* at 21: 19-24). Despite Lindsey's authorization per school policy to search all unattended bags at Whetstone (*id.* at 43: 4-7), he agreed that an unattended bag does not necessarily pose a safety threat (*id.* at 45: 17-25) and in fact is no more dangerous than a bag carried by a student (*id.* at 46: 14-20, 22). Altering his position later, he added that based generally on events occurring in the United States he embraced a belief that an unattended backpack creates a safety risk (*Id.* at 47: 18-25; 50: 17-19). According to Lindsey, he searches all unattended bags whether or not individualized suspicion exits that the bag is involved in criminal activity (*Id.* at 23: 12-22;

24: 1-7). He referenced a protocol where searches are performed to identify to whom the item belongs as well for safety purposes (*Id.* at 8: 21-25). He also informed the trial court that he possesses the authority to search all lost book bags no matter the circumstances even when the identity of the bag's owner is known (*Id.* at 23: 12-25). Lindsey claimed he was authorized to search a student's backpack even if the student simply steps away from it and he (Lindsey) determines it is unattended (*Id.* at 49: 11-17). Again, according to Lindsey, this extends to items whose ownership is already known (*Id.* at 49: 18-19).

The lost bag found on the bus was subjected to two searches, as correctly noted in the State's main brief at page 1 (*accord*, Hr'g Tr. at 56-57). Unfortunately one of the State's *amici* incorrectly described this first search as well as the second which resulted in the recovery of the cartridges as but a single search. See Merit Brief of *Amici Curiae*, Ohio School Boards Association, et. al. at 9. During the initial search of the backpack the bus driver stood in front of Lindsey (*Id.* at 56: 7-11). Lindsey observed therein "[p]apers, notebooks . . . one binder . . . stuff like that . . . something with his name on it inside"(*Id.* at 56: 12-24; see also R. 110 at 2 ("initial inspection yielded 'seven or so' books and some papers")). Upon seeing an item with the name "Joshua Polk" the security officer recalled a rumor suggesting that Appellee Polk was associated with a gang (Hr'g Tr. at 9: 1-8; 22: 11-13). It was suggested in the State's merit brief that "Lindsey knew Polk to be a reputed gang member." But Lindsey's comments were more equivocal:

> Q: (by prosecutor): And were---you said you saw it was Mr. Polk's, were there any additional concerns to you to your knowledge because it was Mr. Polk?
>
> A: Well, to our knowledge it has been rumored that, you know, he *possibly* was—is in a gang *possibly*, so that was a concern.

(*Id.* at 9: 1-8 (emphasis added)). According to the record this was the extent of Lindsey's knowledge regarding Appellee's Polk purported gang involvement. Lindsey did not observe any cartridges in the backpack at that time (*Id.* at 6: 19-21). A second search of the bag took place in Principal Barrett's office. As a precaution (*id.* at 6: 19-21) Lindsey searched the bag a second time by dumping its contents out. Per the State's brief at 1, despite Lindsey at first testifying "that he notified the principal after discovering the bullets" he later corrected himself during questioning by Judge Horton that "he took the bag to the principal's office after seeing Polk's name and that he and the principal emptied the bag together" (see also Hr'g Tr. at 57: 2-7). He clarified that he would have searched the bag whether or not he associated the name "Joshua Polk" with a gang (*Id.* at 9: 9-14). Lindsey agreed he later "ransacked the book bag for its contents" after determining to whom it belonged (*Id.* at 20: 16-19).

Lindsey testified the cartridges created a security concern (*Id.* at 10: 8-9). Once Barrett was made aware of this the police officer assigned to the school was notified (*Id.* at 7: 1-3; 10: 10-13; 31: 20-23). Consulting a computer to find where Appellee Polk could be located in the building, Lindsey, Barrett, and Columbus Police Officer Sykes (school resource officer) approached the defendant sometime after the cartridges had been seized (*Id.* at 25: 9-16; 33: 17-22; 38: 18-22). However, Lindsey was uncertain when the three encountered Appellee Polk. Lindsey at first suggested 15 to 20 minutes lapsed from the bag-dumping to the encounter (*id.* at 25: 9-16) but later was unsure how much time had passed. He testified he was not 100 percent sure the confrontation even took place the same day (*id.* at 26: 11-16 [Q: Can you tell the court today with 100 percent certainty that you apprehended Mr. Polk that same day? A: No]; 26: 24-25; 27: 1; 30: 21-24). He did acknowledge on several occasions during his testimony he "wanted" to say that Joshua Polk was approached the same day (see e.g. *id.* at 26: 23; 30: 3-15).

Lindsey's uncertainty was acknowledged by the Court of Appeals. *State v. Polk*, *supra*, ¶ 4. When the three met Mr. Polk the CPD Officer, Mr. Sykes, "applied some type of hold" on him and ordered Lindsey to search the bag the defendant was carrying" (*Id.* at 11: 1-9, 13-14; 13: 11-13; 24: 18-21; 34: 22; 35: 2-5; 46: 5-9). This bag was described in the trial prosecutor's memorandum *contra* as "a small black bag" (R. 82 at 2) but Lindsey referred to it as "another bag" or "book bag" (Hr'g Tr. at 11: 11, 13; 58: 5-13). Lindsey testified that

> I unzipped it. Actually I pulled it away from him and took it over to the side. I unzipped it. I went through the front part. And then I looked through the side and that's where it was. It was in the side, I believe, from my—from my best memory.

(*Id.* at 11: 18-24). Lindsey found nothing in the "front part" of the bag but recovered a handgun secreted in the bag's "side part"(*Id.* at 11: 18-24; 12: 5-8; 13: 8-10).

The State presented no further witnesses and moved for the admission of Exhibit A, the firearm taken from the bag carried by Appellee Polk. It was admitted without objection (*Id.* at 60: 2-8). After being informed the defense did not intend to call any witnesses the court allowed both sides to submit argument (*Id.* at 60: 9-14).

Trial counsel for the State argued initially that warrants are unsuitable for the school environment (*Id.* at 60: 23-25). To support this proposition he cited *New Jersey v. T.L.O.* while suggesting that school officials should not have to acquaint themselves with the "legal implications of the Fourth Amendment"(Hr'g Tr. at 61: 2-5). He also posited that the warrant requirement for searches is diminished due to the government's interest in maintaining a safe learning environment (*Id.* at 61: 6-9). He then asserted that the discovery of the cartridges in the book bag provided reasonable suspicion for school authorities to search the bag Mr. Polk was carrying (*Id.* at 62: 10-20).

Judge Horton then interjected and questioned the trial prosecutor regarding the propriety of the second search because it appeared as though this more intrusive search was employed due to Lindsey's recollection of the rumor of Mr. Polk's possible gang involvement (*Id.* at 62: 21-25; 63: 1-16). The court expressed skepticism whether such a search of a lost book bag would have been performed if it had been identified as belonging to an honor student instead. Specifically the court observed

> And because that's what it sounds like took place. Empty bag, find out the identity of it. I guess my question is, if it was . . . [an] honor student, would the bag have been dumped? *And it doesn't sound like it would have.*

(*Id.* at 63: 17-22 (bracketed material and emphasis added)). The government's trial counsel replied that Lindsey testified he would have searched the lost bag regardless, though he agreed Mr. Polk's alleged gang involvement played a role in his decision to do so (*Id.* at 63: 23-25; 64: 1-14). The trial prosecutor reminded the court of Lindsey's reference to a policy that "essentially is if it's anyone's bag whether it was Joshua Polk's or not, that he would have searched any bag that he have dumped and looked through any of them" (*Id.* at 64: 1-4). Counsel then raised as justification for the search of the backpack left on the bus the general safety concerns of schools, especially gun violence (*Id.* at 64: 15-20). He also argued that the lowered expectation of privacy in schools legitimized the search of the bus book bag (*Id.* at 65). The government attorney also argued that since the actions of the school and police authorities were not wilful or "knowing" the application of the exclusionary rule would have no appreciable deterrent effect (*Id.* at 66: 11-18). He also mentioned that since Lindsey was not a police officer and had acted in good faith the court should not avail itself of the exclusionary rule (*Id.* at 66: 19-25; 67: 1-5). Trial counsel for the State never argued that the search of the bus backpack was justified under the theory of abandonment (R. 82 *passim*; Hr'g Tr. *passim*).

Mr. Polk's trial counsel in rebuttal reminded the court that a student's constitutional rights are not checked at the entrance to the public school (Hr'g Tr. at 68: 14-21). And counsel emphasized that even though the privacy expectations of students are reduced somewhat in a school environment, they are not non-existent (*Id.* at 68: 22-25; 69: 1-3). Counsel also questioned the credibility of Lindsey's remarks that Joshua Polk's rumored gang affiliation minimally influenced his decision to search the lost book bag, implying that this was in fact the primary reason the bag was searched (*Id.* at 69: 4-12). Counsel also challenged the admissibility of the firearm because it was obtained as a result of an unconstitutional earlier search ("fruit of the poisonous tree") (*Id.* at 69: 13-22). He also questioned the "safety" rationale for Lindsey's book bag search, arguing that "what's going on in America" is not an appropriate basis to justify the search (*Id.* at 69: 23-25; 70: 1-4). Counsel then argued that the exclusionary rule is applicable because the actions of school officials were reckless, negligent, and wilful, and for these reasons suppression would deter future violations of the search and seizure provisions of the federal constitution which may occur in a school setting (*Id.* at 70: 5-19). Mr. Polk's lawyer questioned whether the second search even took place the same day (at noted, at different points in his testimony Lindsey could not recall whether the hallway search occurred the same day as the earlier searches---see *id.* at 26: 11-16, 24-25; 27: 1; 28: 5-9; 30: 23-24; 32: 4-12; 33: 1-11), and if this is accurate Lindsey's claims that an emergency (*id.* at 10: 8-9) existed were unfounded (*Id.* at 71: 2-7).

On September 29, 2014 Judge Horton issued a written decision granting Mr. Polk's suppression motion (R. 110). After summarizing the facts the court then proceeded to analyze them in light of the relevant law (R. 110 at 2). Recognizing the legal standard for performing searches in schools is lower than in a public setting, the court discussed *New Jersey v. T.L.O.*:

> [d]etermining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception,' *Terry v. Ohio*, 392 U.S., at 20; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.' *Ibid.*
>
> Under ordinary circumstances, a search of a student . . . will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that that student has violated or is violating either the law or the rules of the school. Such 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.

(R. 110 at 3 (quoting *T.L.O.*, 469 U.S. 339, 342 (1985)). The court was troubled by Lindsey's decision to search the bus book bag a second time once he determined the owner's identity and that the bag contained no evident safety threats. Expressing these concerns the court focused on the gravamen of the case:

> [t]he question turns upon whether Officer Lindsey, upon learning that the book bag belonged to Defendant, was justified in conducting a more thorough search (i.e. a second search which involved dumping out the book bag) on the basis that Defendant had a reputation for gang activity and that Officer Lindsey had heard rumors of the same.

(R. 110 at 3). Balancing the lesser, though still viable, expectation of student privacy with that of the school administration's desire to promote safety, the court ruled that the search of Polk's lost book bag was unconstitutional because once Lindsey identified the bag's owner and determined that it was no threat to safety there was no objectively reasonable justification at that point to perform the second, more-intrusive search of it:

> [h]ere, it was reasonable for Officer Lindsey to conduct his initial search of the unattended book bag for not only safety and security purposes, but also to identify the book bag's owner. Having done so, his original purpose for the search was fulfilled. If the initial search had yielded discovery of the thirteen [*sic*] bullets, then the search that followed would have been reasonable in light of the circumstances. However, it was not until after Officer Lindsey learned of the owner of the book bag that he brought it to Principal Barrett where the contents were then further examined. In order to justify the second and more intrusive search given these

> particular facts (i.e. dumping out the entire contents of the book bag), Officer Lindsey must have had 'reasonable grounds' for suspecting that the search would turn up evidence that Defendant had violated or was violating either school rules or the law. While the standard for school searches is lower than that of probable cause, it requires more than 'vague, unsubstantiated reports.' *Commonwealth v. Cass*, 446 Pa. 66 at 75 (1995).
>
> If Officer Lindsey had dumped the entire contents of the bag in his initial search for safety purposes and/or to obtain the owners identity, then no violation would have occurred. *However, the second search was conducted solely based on the identity and reputation of the owner.* This does not equate to 'reasonable grounds' for suspecting the violation of school rules or the law. Indeed, the Court found numerous cases upholding searches of students where 'a school official had reliable information that a particular student had violated the law.' *Ibid.* Officer Lindsey offered no testimony indicating that he or another school official had personally observed the Defendant engaging in gang-related behavior, nor did he offer any *specific set of circumstances* that would have led a reasonably prudent person to believe that the Defendant posed a danger, imminent or otherwise. A reasonable suspicion is the 'sort of common sense conclusion about human behavior upon which practical people---including government officials---are entitled to rely, rather than an inchoate and unparticularized suspicion or hunch.' *T.L.O.* at 346. During his testimony, Officer Lindsey could offer no justification other than 'reputation' and 'rumor' for this second search. Because this Court finds that Officer Lindsey did not have reasonable grounds on which to conduct the second, more intrusive search, it need not address the second prong of the inquiry.

(R. 110 at 3-4 (emphasis added)). The trial court held that the Fourth Amendment exclusionary rule is applicable and the good faith exception to it does not. The court reasoned that since the state officials involved in this case were not acting in good faith pursuant to a warrant issued by a neutral and detached magistrate it would not be appropriate to invoke that exception under *United States v. Leon*, 468 U.S. 897, 922-23 (1984). It then granted the motion. The State appealed Judge Horton's decision to the Tenth Appellate District. During the briefing process the government raised a number of arguments it believed should result in the reversal of Judge Horton's decision. One argument it *did not* rely on to justify the bus book bag search was abandonment. Indeed, in its April 14, 2015 reply brief at page 6 filed with the Tenth District Court of Appeals it specifically repudiated that claim: "[a]lthough the State briefly mentioned

abandonment in its brief . . . *it is **not** relying on abandonment to justify the search. The point is **not** that Polk voluntarily abandoned the book bag*" (bold and italicized emphasis added).

The Tenth District in *State v. Polk*, *supra*, thoroughly reviewed and correctly refuted the arguments raised by the government. In the opinion's first section the court acknowledged that Lindsey's initial search of the book bag "to determine if it posed a danger, such as containing a dangerous device, and for determining to whom the bag belonged" "was reasonable and justifiable" (*id.* at ¶ 12). But because this search revealed the identity of the bag's owner, and the bag did not contain threatening items, the objective of this search had been effectuated. "[A]ll justifications for examining the bag's contents were fulfilled and no further justification existed to search the bag." *Id.* at ¶ 14. However, the appeals court questioned Lindsey's offered basis for conducting the second, more intrusive search by underscoring Judge Horton's credibility judgment of Lindsey. It will be recalled that Lindsey opined that he intended to search the bag a second time regardless of Mr. Polk's possible gang affiliation, yet according to Judge Horton's comments at the September, 2014 hearing and in his written decision he did not accept the truthfulness of these remarks. Deferring to credibility assessments by trial judges at motion hearings the *Polk* court stated

> [b]ut Lindsey did not empty the bag first. He testified he took the bag to the principal's office, recalling that rumors existed that Polk was involved in gang activity, and *then* emptied the contents of the bag. It was not an abuse of discretion for the trial court to conclude that Lindsey's testimony that he always intended to empty the bag was not credible. Only after he found out that the bag belonged to Polk and remembered rumors that Polk was affiliated with a gang did he empty the bag and perform a detailed inspection of its contents. *The trial court was well within its fact-finding discretion to conclude, based on the circumstances, the testimony and its ability to evaluate the officer's credibility, that the second search was based 'solely' on rumors of Polk's gang affiliation.*

Id. at ¶ 16 (emphasis added regarding last sentence). And because the defendant's possible connection to a gang fell short of the suspicion necessary for school searches per *T.L.O.* the

appeals court affirmed the trial court's suppression of evidence under the "fruit of the poisonous tree" doctrine. *Id.* at ¶ 19.

The lower court also overruled the government's arguments regarding the exclusionary rule. It found that the failure to impose such a rule to illegal searches involving school employees would promote the rise of a variant of the long-defunct silver platter doctrine. *State v. Polk*, *supra*, ¶ 21. The court also questioned whether civil remedies provided an adequate substitute for the application of the exclusionary rule for Fourth Amendment violations. Quoting from the United States Supreme Court decision *Elkins v. United States*, 364 U.S. 206, 220 (1960) the *Polk* court at ¶ 25 agreed that

> [t]he experience in California has been most illuminating. In 1955 the Supreme Court of that State resolutely turned its back on many years of precedent and adopted the exclusionary rule. *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905. 'We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. *** Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court.' 44 Cal.2d 434, at 445, 447, 282 P.2d 905, at 911-912, 913.

In the third section of its opinion the *Polk* court held that the good faith exception did not apply under the facts and circumstances of this case. *Id.* at ¶ 27-28. It did so primarily because "Ohio courts, including this court, have declined to apply the *Leon* good-faith exception in cases in which officers, conducting warrantless searches, relied on their own belief that they were acting in a reasonable manner." *Id.* at ¶ 28 citing *State v. Thomas*, 10th Dist. No. 14AP-185, 2015-Ohio-1778, ¶ 46, citing *State v. Forrest*, 10th Dist. No. 11AP-291, 2011-Ohio-6234, ¶ 17-18 (other citation omitted). It further expressed concern that "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would

be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police.'" *State v. Polk*, *supra*, quoting and citing *Beck v. Ohio*, 379 U.S. 89, 97 (1964) and *Henry v. United States*, 361 U.S. 98, 102 (1959).

One member of the appellate panel dissented and concurred in part. Judge Dorrian asserted that the trial court's analysis relative to the second search of the book bag was incorrect because it was incomplete. She suggested that the majority had mistakenly applied the *T.L.O* "reasonable-at-its-inception" test to both the initial and second searches of the bus book bag when it should have applied the "scope" test to the second search. *Id.* at ¶ 33-34. In other words, she believed there to be but a single search of the bus backpack, the second being merely a continuation of the first. She also disagreed that the applicability of the exclusionary rule to school searches had been settled by the United States Supreme Court. *State v. Polk*, *supra*, ¶ 37.

On May 18, 2016 this Court accepted the government's appeal.

Appellee's Response to Appellant's First Proposition of Law: The search of Appellee Polk's book bag was unconstitutional and all evidence obtained as a result thereof was properly suppressed per the rulings of the trial court and the Tenth District Court of Appeals.

The courts below correctly ruled that the unconstitutional search of Mr. Polk's lost book bag required the suppression of all evidence obtained as a result. Moreover, the trial court's decision was supported by competent, credible evidence.

A. Mr. Polk possessed a reasonable expectation of privacy in the book bag left on the bus.

As correctly determined below, despite the student's lowered privacy expectations in the school setting Mr. Polk retained a reasonable expectation of privacy in the lost bag which had been left on the bus and examined by Lindsey. "[I]t goes without saying that a 'diminished expectation of privacy' is not a *nonexistent* expectation of privacy." *Montana v. Moody*, 334

Mont. 517, 148 P.3d 662 (Mont. 2006), ¶ 41 (emphasis in original). This privacy expectation was well-articulated by the Eighth Circuit federal appeals court when it observed

> [p]ublic school students' privacy interests, however, are not nonexistent. We think it is clear that schoolchildren are entitled to some degree of privacy in the personal items they bring to school.
>
> As a general matter, 'the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view,' *United States v. Ross*, 456 U.S. 798, 822-23, 102 S. Ct. 2157, 72 L. Ed.2d 572 (1982), and public school students thus retain a protection against 'unreasonable' searches of their backpacks and purses by school officials. Schoolchildren have a legitimate need to bring items of personal property into their schools, which are their 'homes away from home' where they are required by compulsory attendance laws to spend a substantial portion of their waking hours. They 'at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming,' and they may also carry with them 'such nondisruptive yet personal items as photographs, letters, and diaries.' *T.L.O.*, 469 U.S. at 339, 105 S. Ct. 733. Unlike prisoners, who 'retain no expectations of privacy in their cells' after having been convicted and incarcerated, see *id.* at 338, 105 S. Ct. 733, public school students have traditionally been treated as presumptively responsible persons entitled to some modicum of privacy in their personal belongings, at least to the extent that recognition of such privacy interests does not unduly burden the maintenance of security and order in schools.

Doe ex. rel. Doe v. Little Rock School Dist., 380 F.3d 349, 353 (8th Cir. 2004); see also *Burnham v. West*, 681 F. Supp.1160, 1164 (E.D. Va. 1987) ("[t]here is no rational basis to exclude book bags from this zone of protection; certainly the *T.L.O.* Court suggested no distinction in this regard"), *order supplemented for other reasons*, 681 F. Supp. 1169 (E.D. Va. 1987). Invoking similar reasoning with respect to the student's personal belongings Justice William O'Neill in his former capacity as a member of the Eleventh District Court of Appeals aptly noted:

> [t]he contents of a student's book bag in all likelihood represent the most personal of all student belongings. Included within this ever-present repository would be letters which are never meant to be sent, diaries which are not intended to be read by anyone, photographs of long lost friends or pets, and any other unmistakable evidence of the particularly unique stages of growing up. The government simply has no right to proclaim that, contrary to the right of privacy guaranteed by the United States Constitution, these personal articles will be subject to observation and dissemination by the adult community at will. *It is hypocritical for a teacher to lecture on the grandeur of the United States Constitution in the morning and*

violate its basic tenants in the afternoon.

In re Adam, 120 Ohio App.3d 364, 375-76, 697 N.E.2d 1100 (1997) (emphasis added); see also *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 373 n. 3 (2009) (student "had a reasonable expectation of privacy covering the personal things she chose to carry in her backpack"); *In re Cody S.*, 121 Cal. App.4th 86, 91, 16 Cal. Rptr.3d 653 (2004) ("[s]tudents in public schools have a legitimate expectation of privacy in their persons and in the personal effects they bring to school" citing *New Jersey v. T.L.O.*, *supra*, at 339). Mr. Polk therefore possessed a reasonable expectation of privacy in the contents of the book bag he left on the bus. *State v. Polk*, *supra*, ¶ 13 ("Polk had a 'legitimate expectation of privacy' in his personal effects, including his book bag").

1. Mr. Polk's bus book bag was lost or mislaid, but not abandoned.

Abandonment is primarily a question of intent. "To demonstrate abandonment in the context of search and seizure, 'the government must establish by a preponderance of the evidence that the defendant's voluntary words or conduct would lead a reasonable person in the search officer's position to believe that the defendant relinquished his property interests in the item searched or seized.'" *State v. Dubose*, 164 Ohio App.3d 698, 2005-Ohio-6602, 843 N.E.2d 1222, ¶ 43 citing and quoting *United States v. Basinski*, 226 F.3d 829, 836 (7th Cir. 2000). The Attorney General in its *amicus* brief cites *State v. Gould*, 131 Ohio St.3d 179, 2012-Ohio-71, 963 N.E.2d 136 and *State v. Freeman*, 64 Ohio St.2d 291, 414 N.E.2d 1044 (1980) to support its abandonment argument, but those decisions are factually distinguishable and are therefore inapposite. In both cases the defendants manifested a factually clear, unmistakable intent to abandon property ultimately seized by the police. In *Gould* this Court noted that the defendant left a computer hard drive containing child pornography with his roommate brother, stole his

brother's truck and "left Toledo without taking any of his belongings from the apartment" (*id.* at ¶ 7). While gone from August, 2006 until his arrest by federal marshals in June, 2007 the defendant never "inquired about the hard drive or attempted to assert control over it or its location, he concealed his whereabouts, and he never knew the hard drive had been removed from his apartment when his brother sold his other belongings." *Id.* at ¶ 34. For at least four months the defendant never asserted control over the hard drive. *Id.* at ¶ 35. And in *State v. Freeman* abandonment was demonstrated when the "appellant tried to deceive the arresting officer into believing that he would cooperate, following which appellant suddenly dropped his luggage, exited through the swinging door and fled on foot from the scene of the arrest." *Id.* at 297-98. These actions, unlike those of Mr. Polk, objectively demonstrated that the *Gould* or *Freeman* defendants intended to repudiate any interest they may have had in the items at issue. By contrast, Mr. Polk left his book bag on the school bus such that it must be characterized as lost or mislaid property. Cf. *United States v. Garzon*, 119 F.3d 1446, 1452 (10th Cir. 1997) ("[e]very case in which we have found abandonment involved a situation where the defendant either (1) explicitly disclaimed an interest in the object, or (2) unambiguously engaged in physical conduct that constituted abandonment"). The government presented no evidence that he intentionally left the book bag on the bus, or that his act of losing the bag was the result of anything but inadvertence. "A passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have 'abandoned' it." *Rios v. United States*, 364 U.S. 253, 262 n. 6 (1960). Under such circumstances the citizen retains an expectation of privacy in property that he has mislaid or lost. See *Maine v. May*, 608 A.2d 772, 775 (Me. 1992) ("[g]iven that defendant did not intentionally discard his wallet but merely lost it, he did not at that time relinquish his expectation of privacy in it and thereby abandon it"); *Hawaii v. Ching*, 67 Haw.

107, 110, 678 P.2d 1088 (Haw. 1984) ("[p]roperty is lost through inadvertence, not intent. Although owners of lost property must expect some intrusion by finders, common sense dictates that they do not forfeit all expectations of privacy in their property as though they had intentionally abandoned it"); *Knight v. Virginia*, 61 Va. App. 297, 309 n. 5, 734 S.E.2d 716 (Va. App. 2012) ("an owner retains a reasonable expectation of privacy in lost or mislaid property"); *White v. Virginia*, 66 Va. App. 333, 359, 785 S.E.2d (Va. App. 2016) (same); *Morris v. Wyoming*, 908 P.2d 931, 935 (Wyo. 1995) ("Morris likewise had an expectation of privacy regarding his wallet. The record discloses that Morris did not abandon his expectation of privacy; rather the wallet was lost or mislaid"); *Wolf v. Georgia*, 291 Ga. App. 876, 879 n. 7, 663 S.E.2d 292 (2008) (expectation of privacy in lost property); *United States v. Nealis*, U.S. Dist. No. 14-CR-149-GKF, 2016 U.S. Dist. LEXIS 50233 at 10-11 (N.D. Okla. 2016) (unpublished) (same).

Moreover, that the bag was lost or mislaid had been previously agreed to by the trial prosecutor (see R. 82 at 3 ["lost bag"]; 4 ["lost item of property"]; 7 ["lost backpack"]; Hr'g Tr. 15:14 (book bag referred to as "lost") and 18: 22-23 (bag "left on the bus")). No evidence meeting the preponderance of the evidence standard (or even argument, for that matter) was presented by the Appellant-State at the suppression hearing suggesting Mr. Polk had abandoned the book bag (see Hr'g Tr. *passim*; R. 82 *passim*). Lindsey himself recognized that the book bag had not been abandoned when he testified it was common for students to leave their book bags and other personal property on buses and around the school, and when this occurs attempts are made to return the lost article to the student (Hr'g Tr. 7: 21-25; 8: 24-25; 21: 12-24; 22: 1-4) or have it placed in the school's "lost and found" if the object's owner cannot be identified (*id.* at 7: 23).

As noted the State before the Tenth Appellate District specifically rejected at page 6 of its April 14, 2015 reply brief any claim that Mr. Polk had abandoned the bus book bag. But in contrast the Attorney General in its brief at pages 5-6 raises for the first time on appeal the argument that the book bag search was justified under the previously-rejected theory that Mr. Polk had abandoned it on the school bus. Authority from this Court and other Ohio appellate districts firmly establishes that the failure to raise an issue below will cause its waiver before a reviewing court. "Having failed to raise this issue in the trial court, appellant has waived his right to raise it on appeal." *State v. Jackson*, 10th Dist. No. 06AP-1004, 2007-Ohio-2470, ¶ 10 citing *State ex. rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993) ("[a] party who fails to raise an argument in the court below waives his or her right to raise it" on appeal); *accord*, *Niskanan v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, ¶ 34 ("[h]owever, Giant Eagle has raised this argument for the first time in this court, and it is well settled that '[a] party who fails to raise an argument in the court below waives his or her right to raise it here'" [citation omitted]). For these reasons the abandonment claim must be discarded because it has been waived.

2. School Security Officer Lindsey's failure to terminate his search of the lost book bag once he determined the owner's identity and that it did not create a safety threat resulted in the subsequent unconstitutional second search which lacked reasonable grounds.

The courts below correctly held that Lindsey possessed authority to inspect the bus book bag in order to identify its owner and to determine that it did not create a safety threat. Invoking general principles applicable to government searchers who come upon lost property the *Polk* court held

> [i]n view of these two components, Polk's expectation of privacy in his bag was diminished both by the fact that he was on school property with differing norms and rules on search and seizure, and that he left the book bag on the bus, exposing it to search to determine ownership and ensure that it was not an intentionally planted

> dangerous package. *See, e.g., United States v. Wilson*, 984 F. Supp.2d 676, 683 (E.D. Ky. 2013) (explaining that law enforcement may look through lost and found containers to determine the owner and the owner's contact information as well as to protect the temporary custodian of the lost container from danger); *but cf. Tangredi v. New York City Dept. of Environmental Protection*, S.D.N.Y. No. 09 cv 7477 (VB) (Feb. 16, 2012) (finding the search of a bag left unattended in a women's locker room to be unreasonable and not justified by safety motivations).

State v. Polk, supra, ¶ 13. This comports with the law of other jurisdictions. See *Hawaii v. Ching, supra*, at 112 ("[w]hen lost property is turned in to the police, their paramount goal must be to ascertain its ownership and return it to the owner in substantially the same condition as it was received . . . [t]he police may also search lost property if necessary to safeguard the property, protect the police department from false claims, and protect the police from danger"); *Oregon v. Morton*, 110 Ore. App. 219, 221, 822 P.2d 148 (1991) ("[f]urthermore, in search of lost property for identification, a police officer has the right to search a closed container for purposes of identifying the owner of the property"); *accord, Washington v. Kealey*, 80 Wn. App. 162, 907 P.2d 319, 326 (Wash. App. 1995), *as amended on denial of reconsideration* (Feb. 26, 1996); *Montana v. Hamilton*, 314 Mont. 507, 67 P.3d 871 (Mont. 2003).

As well, "[t]he search of an item separated from its owner should be the least intrusive means necessary to identify the owner and secure the property." *United States v. Wilson*, 984 F. Supp.2d at 683 (citing with approval *Montana v. Hamilton, supra*, at 520); *accord, Hawaii v. Ching*, 678 P.2d at 1093. However, once these goals have been effectuated---and no objectively reasonable basis for furthering the search is extant---subsequent searches of the item are invalid. See e.g. *Wolf v. Georgia, supra*, at 879 (second search of lost wallet invalid because purposes of original search satisfied); *Oregon v. Pidcock*, 306 Ore. 335, 342, 759 P.2d 1092 (1988) ("[i]t is apparent that the trial court found that the sheriff's deputies had opened the briefcase, first to discover identification and, second, to find out whether it contained a bomb"; had the

examination of the envelopes inside the lost suitcase been performed "in search of contraband" defendant's Fourth Amendment rights would likely have been violated). It is important to note that the State (in its main brief) does not question the lower court's application of search and seizure principles to lost or mislaid property as discussed at ¶ 13 of *Polk*. Instead it seeks to justify the search on an entirely different basis.

a. Assuming *arguendo* the lawfulness of the school search scheme its identification and safety features (Hr'g Tr. 8: 24-25) had been satisfied during the initial search rendering the second search unlawful because it did not attend to "special needs."

Invoking the school's "special needs" policy the State equates the searches here to inventory searches because they involve administrative caretaking functions which serve vital government interests. See State's main brief at 12-13. Note, however, that this specific argument was not lodged in the trial court and has been waived. However, assuming *arguendo* the search of Mr. Polk's book bag under the policy parallels that of an inventory search the second bag search was unlawful because the reasons for it had already been satisfied during the initial examination: Lindsey had 1) identified the owner and 2) determined the book bag contained nothing of a threatening nature which were the twin objectives of the policy (see Hr'g Tr. 8: 21-25; R. 110 at 4); *State v. Polk*, *supra*, ¶ 14. Because Lindsey was able at the time of the initial search to determine the identity of the book bag's owner as well as its lack of a safety threat the administrative objectives of the school search procedure had been satisfied and the second, more-intrusive investigatory search was not warranted. See e.g. *Michigan v. Clifford*, 464 U.S. 287, 294 (1984) ("if, for example, the administrative search is justified by the immediate need to ensure against rekindling [of a fire], the scope of the search may be no broader than reasonably necessary to achieve its end") (bracketed material added). Lindsey's purpose in subjecting the bag to a second search was unrelated to fulfilling these "administrative caretaking functions" but

was designed instead to uncover "evidence that the Defendant had violated or was violating either school rules or the law" due to his possible gang affiliation (see R. 110 at 4). This revealed an investigatory purpose inconsistent with caretaking or "special needs" goals. See *Vermont v. Martin*, 183 Vt. 23, 955 A.2d 1144 (Vt. 2008), ¶ 30 ("[i]n short, this Court has permitted warrantless regulatory searches in circumstances evincing special needs, but only when explicit guidelines ensure that the searches are not a pretext for singling out individuals") (citation omitted). "Once the purposes of the inventory search have been met, a subsequent, purely investigatory search is improper." *United States v. Flores*, 122 F. Supp.2d 491, 495 (S.D.N.Y. 2000); *accord*, *United States v. Fofana*, 620 F. Supp.2d 857, 866 (S.D. Ohio 2009) ('[t]he Court merely holds that where, as here, the evidence demonstrates that the intrusiveness of a passenger's search was ramped-up based on a desire to detect evidence of ordinary wrongdoing, *after the presence of weapons and explosives had been ruled out*, the search can no longer be justified under the administrative search doctrine and suppression is appropriate") (emphasis added), *remanded for other reasons*, 666 F.3d 985 (6th Cir. 2012); *United States v. Khoury*, 901 F.2d 948, 959 (11th Cir. 1990) ("Simpkins' initial inspection of the notebook was necessary and proper to ensure that there was nothing of value hidden between the pages of the notebook. Having satisfied himself that the notebook contained no discrete items of value and having decided that the diary entries themselves would have intrinsic value to [the co-defendant] Kluver, Simpkins had satisfied the requisites of the inventory search and had no purpose other than investigation in further inspecting the notebook"). To comply with the federal and state constitutions an inventory search must be performed pursuant to lawful procedures "*and must not be a pretext for an evidentiary search.*" *State v. Leak*, 145 Ohio St.3d 165, 2016-Ohio-154, 47 N.E.3d 821, ¶ 30 (emphasis added). This Court in *Leak* found the officer's reasons for conducting

the search highly relevant when it concluded that it was indeed pretextual. See *id.* at ¶ 32 ("[t]his testimony undermines the premise that the car was impounded and searched without a warrant for reasons divorced from a criminal investigation; in fact, the testimony is indicative of a pretextual search. The officer was not looking for valuables to safeguard. He was looking for evidence to use against the occupant at his trial on the domestic violence charges"). "The Supreme Court has thus 'repeatedly emphasized the importance of keeping criminal investigatory motives from coloring administrative searches.'" *United States v. Huguenin*, 15 F.3d 547, 554 (6th Cir. 1998) quoting *United States v. $124, 570 in U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989). As well, inventory searches ought not be turned into "a purposeful and general means of discovering evidence of crime." *Florida v. Wells*, 495 U.S. 1, 4 (1990); see also *State v. Caponi*, 12 Ohio St.3d 302, 303, 466 N.E.2d 551 (1984) (inventory search unlawful because "the purpose of the search was to gather evidence and not to take an inventory"). A "special needs" search cannot be used as a pretext to conduct a general investigatory search. The "actual motivations" of the government searcher must be reviewed when an otherwise illegal search and seizure is justified under the rubric "special needs." *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (searcher's "actual motivations" matter when his "purpose is not to attend to the special needs or to the investigation for which the administrative inspection is justified"); *United States v. Carnes*, 309 F.3d 950, 960-61 (6th Cir. 2002). Despite Lindsey's claims that he intended to search the bag a second time regardless of ownership the trial court did not find his testimony credible (Hr'g Tr. 9: 1-14; 63: 17-22; R. 110 at 3-4). The trial court factually found that Lindsey had satisfied the ownership/safety goals during the first search (R. 110 at 3-4). This finding was supported by competent, credible evidence. It is axiomatic that the fact trier's judgments

regarding witness credibility are entitled to great deference. As summarized recently by this Court

> [w]hen considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

State v. Codeluppi, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7 quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *accord*, *Ace Bailing, Inc. v. Porterfield*, 19 Ohio St.2d 137, 138, 249 N.E.2d 892 (1969) (trier of fact "not required to accept the testimony of the sole witness simply because it was uncontradicted, unimpeached and unchallenged"). Judgments regarding witness credibility are subject to the abuse of discretion standard. *State v. Polk*, *supra*, ¶ 16. Moreover, the State's attempt at page 15 of its main brief to analogize *United States v. Edwards*, 415 U.S. 800, 803 (1974) and *Rawlings v. Kentucky*, 448 U.S. 98, 110 (1980) is a non-starter. In *Edwards* the incident search (along with its objectives) had not been satisfied contemporaneously with the arrest, whereas here the trial court made a factual finding that Lindsey's goals in determining bag ownership and safety *had been met with the initial search*, and (as noted) the court did not believe Lindsey when he claimed it was always his purpose to continue searching to further those objectives. *Rawlings* does not help the State's cause either but for different reasons: police there already had probable cause to arrest the petitioner for reasons independent of the incriminating items they found on his person prior to arrest (troublingly, the State's short summary of *Rawlings* appears to advocate the view rejected in *Smith v. Ohio*, 494 U.S. 541, 543 (1990) and other decisions where the High Court stated

"'justify[ing] the arrest by the search and at the same time . . . the search by the arrest,' just 'will not do'" (brackets in original) (citation omitted)). In contrast to *Rawlings*, Lindsey did not possess a lawful independent basis to search the lost book backpack after identification and safety goals were satisfied. The trial court determined that based on the evidence the second search was instead launched by Lindsey for investigatory purposes which, to be lawful, must be supported by the low *T.L.O.* standard of "reasonable grounds" (R. 110 at 4: "[i]n order to justify the second and more intrusive search given these particular facts (i.e. dumping out the entire contents of the book bag), Officer Lindsey must have had 'reasonable grounds' *for suspecting that the search would turn up evidence that the Defendant had violated or was violating either school rules or the law*") (emphasis added)). Cf. *United States v. Rabenberg*, 766 F.2d 355, 357 (8th Cir. 1985) (search of suitcase that "lawfully came into official custody" proper because it was performed under community caretaking function to determine identity of owner and safety and *not* to uncover evidence of crime). As noted, Lindsey's purpose in conducting the second, more intrusive search was "based 'solely' on rumors of Polk's gang affiliation" (*State v. Polk*, *supra*, ¶ 16) and had nothing to do with promoting the neutral criteria of lost property searches (or, as argued by the State, the "special needs" policy). Again, the court's findings here were supported by the evidence presented at the hearing.

The government has gone to great lengths to minimize Lindsey's goal in performing the second search as being grounded upon mere "subjective motivations." See State's main brief at 18-19. It also assumes the truthfulness of Lindsey's testimony that his discovery of the bag's owner had no bearing on him completing "the job." *Id.* at 18. Both assertions are incorrect. As noted, Lindsey's second search was investigatory because it was purposed to seek out fruits and instrumentalities that created a safety threat bottomed upon his belief that Mr. Polk was possibly

associated with a gang. And in assessing the believability of Lindsey's testimony the trial court specifically found him not credible when he claimed he would have continued searching the object regardless of who owned the bag despite him having already satisfied the identity/safety criteria during the first search. Lindsey was able to effectuate these goals because the first search was sufficiently detailed enough for him to do so. Recall during the first search Lindsey observed therein "[p]apers, notebooks . . . one binder . . . stuff like that . . . something with his name on it inside," but no cartridges (Hr'g Tr. 56: 12-24; see also R. 110 at 2 ("initial inspection yielded 'seven or so books' and some papers'"). To be lawful, the second bag search had to be supported by "reasonable grounds." *Polk*, ¶ 17. The State admirably concedes at page 21 of its main brief that one's possible associations is insufficient: "[r]eputation alone does not constitute reasonable suspicion, and this is perhaps no more true than at school." *Accord*, *G.M. v. Alabama*, 142 So.3d 823, 829 (Ala. 2013) ("[t]he search of G.M. by Principal Maddox, however well intentioned, was predicated solely upon G.M.'s association with E.M. and upon Maddox's speculations as to G.M.'s and E.M.'s possible gang affiliation and, therefore, was not based on reasonable suspicion or justified at its inception"); *United States v. Marcelino*, 736 F. Supp.2d 1343, 1350 (N.D. Ga. 2010) ("[a]s such, Agent Reagan's 'hunch' regarding the defendant's possible gang affiliation is simply not sufficient to support reasonable suspicion"); *United States v. Gilmore*, 945 F. Supp.2d 1211, 1219 (D. Colo. 2013) ("Lt. Gavito did not state any particularized facts that would lead a reasonable officer to believe that Defendant was a gang member . . ."). For these reasons the Tenth District's decision must be affirmed.

One observation before proceeding further: the State and its *amici* assume the trial and appeals courts recognized the soundness of the school search protocol when it analyzed whether Lindsey lawfully performed the two searches of the bag. See State's main brief at 11 ("[t]he trial

court, the Tenth District lead opinion, and Judge Dorrian all appeared to bless Whetstone's policy by finding that safety concerns justify emptying an unattended bag") and 39. However, a careful review of Judge Horton's ruling and the Tenth District's majority decision does not support this. Instead those courts evaluated Lindsey's searches by reviewing the law regarding lost or mislaid property and applied *T.L.O.* Embracing the trial court's decision the Tenth District correctly ruled that Lindsey could have dumped the bag to satisfy the identity/safety criteria for lost property, but neither of those courts held that such action would have been appropriate under the school search policy. Those decisions did not involve limning the correctness of the school's search policy (see R. 110 *passim*); *State v. Polk*, *supra*, ¶ 13. Perhaps this can be explained by the trial prosecutor's minimal (if not nonexistent) reliance on it during the hearing (see Hr'g Tr. 63: 23-25; 64: 1-4). In fact the State's trial counsel appeared to rely not on the policy to justify the search but other considerations (e.g. see Hr'g Tr. 64: 9-14 ["inherent danger in the bag"]). And in its trial court memorandum *contra* the State said nothing about the protocol but insisted instead that "the initial search of the bag was proper as it was conducted to obtain the identity of the lost item and occurred on school property where there are heightened considerations for safety" (R. 82 at 2-3).

b. That the purpose of Lindsey's second book bag search was to investigate whether the bag contained instrumentalities of wrongdoing associated with Mr. Polk's possible gang affiliation, that the results of that search were reported to Resource Officer Sykes, that Resource Officer Sykes directed the subsequent search of Mr. Polk's belongings carried on his person, and that the results of these searches eventuated in Mr. Polk's formal prosecution all demonstrate that the school search policy is designed to procure evidence for law enforcement purposes and therefore does not meet the "special needs" search criteria and is therefore unlawful.

It is well-established that the prosecution bears the "burden of proof, including the burden of going forward with evidence, on the issue of whether probable cause existed for the search or seizure" after the defendant has raised the grounds for his challenge regarding the validity of the

search and seizure. *State v. Withrow*, 11th Dist. No. 2011-A-0067, 2012-Ohio-4887, ¶ 37 quoting *Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988) (¶ 1 and ¶ 2 of the syllabus). As noted, it is questionable whether the government during the suppression hearing actually relied on the school search procedure to justify the search of the bus book bag. But because the State and *amici* briefs rely heavily on it before this Court the policy's legality will be addressed.

Lindsey's book bag searches cannot be justified under the school protocol because the latter does not comport with the "special needs" rubric and therefore violates the Fourth Amendment. The record below is meager as to the particulars regarding the Whetstone High School search policy. To be sure, Lindsey in general terms testified that the protocol allows him to "search book bags" (Hr'g Tr. 8: 13-14), to "search lockers" (*id.* at 8: 15), to "check lockers, stuff like that" (*id.* at 5: 10) and, perhaps, authorized him to do "security checks" (*id.* at 5: 8), to "check the buildings" (*id.* at 5: 9), and to "check kids" (*id.* at 5: 9). He did not differentiate the criteria necessary for a locker search as opposed to book bag search. The methods used to perform personal belonging searches appeared largely standardless. The means chosen for the search were up to the searcher's discretion. No requirement for recording or securing items removed from the pupil's personal belongings was ever testified to by Lindsey, and if such existed no evidence was offered that it was followed. There is no indication that this policy had been reduced to writing, and if it had it was never offered into the record by the State. Nor did Lindsey indicate that the policy served interests such as protecting property in school custody, or ensuring against frivolous claims of loss, stolen, or vandalized property (see State's main brief at 13). His comments about the policy were more conclusory than explanatory. Cf. *State v. Copeland*, 10th Dist. No. 98AP-1579, 1999 Ohio App. LEXIS 5375 at 10 (Nov. 16, 1999) ("bare conclusory assertion that an inventory search was done pursuant to police department policy is

not sufficient, standing alone, to meet the state's burden of proving that a warrantless search was reasonable because it fits within the inventory search exception to the warrant requirement"); accord, *State v. Wilcoxson*, 2nd Dist. No. 15928, 1997 Ohio App. LEXIS 3566 at 9-10 (July 25, 1997). It was difficult at times to discern whether his authority to search unattended backpacks was derived from his job responsibilities, the search procedure itself, or something else. At one point he claimed that whenever someone steps onto school property they are subject to search (see Hr'g Tr. 14: 5-9 ["[w]e are allowed to, school property, when you're on school property, we're allowed to search. I don't think we have the same legal things that other police officers have---"]). These procedures bestowed upon him unrestricted access to any and all unattended book bags, from the student who momentarily drops her book bag on the floor and walks to the drinking fountain across the hallway between classes to the field hockey player who left her book bag (and Lindsey knows to whom it belongs) on the locker room bench while she participates in a match (see Hr'g Tr. 49: 11-19). Per Lindsey these objects would be subject to search because they are "unattended." Nothing in the record indicates that students were notified that leaving unattended belongings anywhere on school property would subject those objects to suspicionless seizure and search, and that they would be subject to criminal prosecution if an illegal item was discovered inside an unattended book bag. It would seem that a school's faithful adherence to its "custodial and tutelary responsibilities" would necessitate such warnings to its students. Cf. *Ferguson v. City of Charleston*, 532 U.S. at 84-85 ("special needs" search protocol at state hospital illegal in part because state employees failed to inform patients of constitutional rights which may have effected their decision to submit urine samples). The policy, according to Lindsey, contemplates searches of unattended bags whether the owner is known or not (see Hr'g Tr. 23: 18-25; 45: 12-16) which draws into question whether identification of the owner is

actually one of its goals. The broad discretionary authority conferred upon Lindsey by the policy draws into question its constitutionality. Cf. *Tallman v. Dept. of Nat. Res.*, 421 Mich. 585, 638, 365 N.W.2d 724 (Mich. 1985) ("[d]ecisions of the United States Supreme Court indicate that significant factors that may legitimate warrantless regulatory searches include narrowly tailored authorization of time, place, and scope of inspections, restricted discretion of the administrative officers, and the property owner's imputed awareness of the inspection regulations and their scope").

That the policy's primary purpose is closely connected with that of general law enforcement was demonstrated by its operation and implementation in this case. In light of the actions taken by school personnel here, law enforcement are contacted when a suspicionless search uncovers fruits of wrongdoing that create a threat to safety, security and safety of course being the stated goals of the protocol. It is difficult to imagine that items targeted for policy searches are not illegal and would not subject their owner to criminal prosecution once the objects have been turned over to police and prosecutors. Lindsey indicated the policy allows him to search for items that create a threat to safety, but almost every object deemed a threat to safety is *a priori* also an object that is illegal, or illegal in the manner in which it is carried or possessed in a school setting. This demonstrates that the mission of generally ferreting out crime by searching for and handing over criminally-related objects to law enforcement authorities is advanced by these school search procedures. Indeed, no testimony or evidence relative to the policy was offered by the State suggesting that law enforcement officials are not contacted if a search uncovers the presence of contraband or other fruits of crime. Nor did the government indicate that if such items were found the matter would be handled exclusively through internal school disciplinary proceedings. Again, based on the record, the manner in which the goals of the

policy are furthered consists of searches being performed by school security who in turn deliver the fruits of the search to an officer who subsequently participates in the investigation. Therefore these search procedures promote school safety by involving both law enforcement and the criminal justice system as well. Because of this it does not lawfully enhance the "special needs" of Whetstone High School. Cf. *State v. Funk*, 177 Ohio App.3d 814, 2008-Ohio-4086, 896 N.E.2d 203, ¶ 18 (*Ferguson* precepts violated by hospital turning over urine sample to police for testing; "we do not agree that the hospital had [appellant's] consent to turn it over to law enforcement so that they could perform a chemical test for alcohol") (bracketed material added).

"Special needs" searches are conducted "without reference to the Fourth Amendment's warrant clause or probable cause requirement." *Roska v. Peterson*, 328 F.3d 1230, 1241 (10th Cir. 2003). "If a special need renders the warrant requirement impracticable, we then balance the nature of the privacy interest upon which the search intrudes and the degree of intrusion occasioned by the search against 'the nature and immediacy of the governmental concern at issue . . . and the efficacy of the means for meeting it.'" *Id.* at 1241 quoting *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660 (1995). Because "special needs" searches, as with administrative searches, forgo traditional Fourth Amendment requirements they should be construed strictly. "[A]n administrative search scheme invests the Government with the power to intrude into the privacy of ordinary citizens" and such "power carries with it a vast potential for abuse . . . courts must take care to ensure that an administrative search is not subverted into a general search for evidence of crime." *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998) discussing *United States v. Soyland*, 3 F.3d 1312, 1316 (9th Cir. 1993) (Kozinski, J., dissenting) and *United States v. Davis*, 482 F.2d 893, 909 (9th Cir. 1973). Such a search "cannot be used as a pretext for what is, in reality, a purely criminal investigation." *Ruttenberg v. Jones*, 283 Fed.

Appx. 121, 133 (4th Cir. 2008). "In the law of administrative searches, one principle emerges with unusual clarity and unanimous acceptance: the government may not use an administrative inspection scheme to search for criminal violations." *New York v. Burger*, 482 U.S. 691, 724 (1987) (Brennan, J., dissenting, citing, *inter alia*, *Michigan v. Clifford*, 464 U.S. at 292 and *Michigan v. Tyler*, 436 U.S. 499, 508 (1978)). And "[b]ecause law enforcement involvement always serves some broader social purpose, goal, or objective . . . virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment." *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001). Moreover, when the immediate goal of the policy is linked to those of law enforcement it is not necessary to conduct the aforementioned balancing test. *Id.* at 78; see also *id.* at 79 ("[t]he critical difference between those four drug-testing cases and this one, however, lies in the nature of the 'special need' asserted as justification for the warrantless searches. In each of those earlier cases, the 'special need' that was advanced as justification for the absence of warrant or individualized suspicion *was one divorced from the State's general interest in law enforcement*") (emphasis added).

The government is not correct when it claims that the search procedure is sound under the doctrine of "special needs." To be sure, the importation of the "special needs" doctrine to schools has resulted in students enjoying a lesser expectation of privacy with respect to their persons and belongings along with the application of the low threshold requiring that the school official possess only reasonable grounds for suspecting that the search will turn up evidence that the student has violated the law or school rules and that the search be reasonably related to the objectives of the search. See *Veronia Sch. Dist. 47J v. Acton*, *supra*, at 653; *New Jersey v.*

T.L.O., *supra*, 341-42. The government proposes that the "reasonable grounds" standard be lowered further even when the primary purpose of a school search policy is largely indistinguishable from general crime control investigations, which certainly describes the protocol in this case. Cf. *Indianapolis v. Edmond*, *supra*, at 43 ("[w]e are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends"). In the briefing the government attempts to draw parallels between the search procedures of Whetstone High School with those upheld in *Acton* and *Board of Ed. of Ind. Sch. Dist. No. 92 v. Pottawatomie Cty v. Earls*, 536 U.S. 822 (2002). But these attempts are ultimately unavailing.

In *Acton* and *Earls* the school policy of "searching" students by way of urine screen submittals was required only of those students who wished to participate in school athletics or other extracurricular activities. No suspicion of wrongdoing was necessary for the test to be administered. These procedures were not applicable to the rest of the student body. If a student did not wish to participate in these school activities she was not required to provide a urine sample. But unlike the search policy in the case *sub judice*, evidence of wrongdoing by way of a positive urine screen did not result in formal school disciplinary proceedings nor criminal prosecution. Indeed, the *Earls* and *Acton* protocols placed significant restrictions upon the dissemination of positive urine screen results. This was crucial to the High Court's ruling that the search procedures in *Acton* and *Earls* served the "special needs" of schools and were not designed to generally detect evidence of crime. In *Acton* the procedures strictly separated the drug testing policy from any criminal or delinquency-related consequences. This was borne out by the policy being "distinctly nonpunitive" (*Acton*, *supra*, at 658 n. 2) inasmuch as "[t]he results of the tests are disclosed only to a limited class of school personnel who have a need to know;

and they are not turned over to law enforcement authorities or used for any internal disciplinary function." *Id.* at 658. "The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties." *Ferguson*, 532 U.S. at 78. This underscores the Supreme Court's acknowledgement that "the identity of who uses the results of a search *does* bear on the seriousness of the privacy intrusion." Note, *Development in the Law: Policing*, "Chapter Two: Policing Students," 128 Harv. L. Rev. 1706, 1762 (2015) (emphasis in original); see also Kagan, *Reappraising T.L.O's "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & Educ. 291, 301 (2004) (drawing from *Ferguson*, author posits that general law enforcement objectives in a school search setting can be manifested by "close integration of law enforcement in effectuating the policy [which] increases the invasion of privacy" and "having public health and safety purposes in addition to law enforcement purposes are not sufficient to qualify a program as a 'special needs case'") (bracketed material added). And in *Earls* the High Court agreed the procedures there promoted "special needs" objectives because "[t]he School District's Policy is not in any way related to the conduct of criminal investigations . . ." (*Earls*, *supra*, at 829) and "test results are not turned over to any law enforcement authority. Nor do the test results lead to the imposition of discipline or have any academic consequences." *Id.* at 833; *accord*, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989). Explaining how the involvement of law enforcement can undermine the "special needs" doctrine Justice Kennedy concurring in judgment in *Ferguson* stated

> [n]one of our special needs precedent has sanctioned the routine inclusion of law enforcement, both in the design of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives. The special needs cases we have decided do not sustain the active use of law enforcement, including

> arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives. The traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purpose.

Ferguson, 532 U.S. at 88. Declaring a school search policy unlawful in large part due to its advancement of general law enforcement objectives the court in *Doe ex. rel. Doe v. Little Rock Sch. Dist.*, *supra*, held

> [a]nother relevant consideration is the purpose for which the fruits of the searches at issue are used. In *Veronia* and *Earls*, which involved drug testing of voluntary participants in competitive extracurricular activities, the results of the searches at issue were never disclosed to law enforcement authorities, and the most serious form of discipline that could possibly result from failing the tests was exclusion from relevant extracurricular activities. *See Earls*, 536 U.S. at 833; *Veronia*, 515 U.S. at 651. The Court in *Earls*, 536 U.S. at 834, found that 'the limited uses to which the test results are put' contributed significantly to a conclusion that the invasion of the students' privacy was insignificant. *In sharp contrast to these cases, the fruits of the searches at issue here are apparently regularly turned over to law enforcement officials and are used in criminal proceedings against students whose contraband is discovered. In fact, Ms. Doe was convicted of a misdemeanor as a result of the search of her purse. Because the LRSD's searches can lead directly to the imposition of punitive criminal sanctions, the character of the intrusions is qualitatively more severe than that in Veronia and Earls. Rather than acting in loco parentis, with the goal of promoting the students' welfare, the government officials conducting the searches are in large part playing a law enforcement role with the goal of ferretting out crime and collecting evidence to be used against students.*

Doe ex. rel. Doe v. Little Rock Sch. Dist., 380 F.3d at 355 (emphasis added); see also *Hough v. Shakopee Sch. Dist.*, 608 F. Supp.2d 1087, 1104-05 (D. Minn. 2009) (school's search protocol violated Fourth Amendment in part because of its "policy of turning contraband over to the police [which] increases the intrusiveness of the challenged searches") (bracketed material added); *Ferguson*, 532 U.S. at 72 ("[u]nder the latter protocol, the police were to be notified without delay and the patient promptly arrested"). As well, because the search policy requires for its implementation the participation of police officials school security employees like Lindsey "have, in effect, become agents of law enforcement authorities." *Id.* at 88 (Kennedy, J.,

concurring in judgment); (cf. Hr'g Tr. 29: 10-16; 31: 24-25; 32: 1-3; 34: 18-25; 35: 1-7; 38: 23-25; 39: 1-8 [police intervention component of search policy manifested by actions taken]). This scheme is far different from the scenario presented in *T.L.O.* See *T.L.O.*, *supra*, at 349-50 (Powell, J., concurring: differentiating school goals of maintaining order from those of general law enforcement Justice Powell found crucial "[t]he special relationship between *teacher* and student also distinguishes the setting within which schoolchildren operate") (emphasis added). "Under these circumstances, while the policy may well have served legitimate needs unrelated to law enforcement, it had as well a penal character with a greater connection to law enforcement than other searches sustained under our special needs rationale." *Ferguson*, *supra*, at 88. Therefore exceptions to the reasonable grounds requirement in the search procedures approved by the High Court in *Acton* and *Earls* are understandably quite limited. See *New Mexico v. Gage R.*, 149 N.M. 14, 18, 243 P.3d 453 (N.M. App. 2010); see also *Freeman v. Fallin*, 422 F. Supp.2d 53, 63 n. 8 (D.D.C. 2006) ("a constitutional authorization to conduct a search (whether through warrant or 'special need') exists so long as the scope or rationale of that search remains materially unchanged. *Because the scope and rationale for the searches conducted in this case changed through the infusion of a law enforcement purpose, so too did the limitations placed upon the government by the Fourth Amendment*") (emphasis added).

Blurring the lines further between the purported generalized safety goals of this public high school search policy and general interest in law enforcement is 20 U.S.C. § 7961(h)(1) (former 20 U.S.C. § 7151(h)(1) (2003)), "Gun-free requirements," which states in pertinent part that "[n]o funds shall be made available under any title of this Act [20 U.S.C. §§ 6301 et. seq.] to any local educational agency *unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school*

served by such agency." See 20 U.S.C. § 7961(h)(1) (emphasis added). Per the record, it is apparent the goals of these search procedures are designed to implement and comply with 20 U.S.C. § 7961, especially when considered in light of Lindsey's reference to the correlation between the need for such a policy and school safety threats such as those which have occurred in other parts of the United States (Hr'g Tr. 15: 16-20), and the fact that Mr. Polk was charged in common pleas court. Parenthetically the Auditor of State's "Single Audit" for the Columbus City School District for the Year Ended June 30, 2013 verifies that the Columbus City School District did indeed receive funding from the federal government. See Report at pages 1-2 at http://ohioauditor.gov/auditsearch/. . ./Columbus_City_School_13-Franklin.p (last visited 9/5/2016).

To be sure, the search policy's ultimate goal may very well be to promote school safety. However, as illustrated by the case facts, the immediate goal is general crime detection. This was made manifest by the close coordination of school security personnel and other school officials working in tandem with law enforcement officials (even to the extent of law enforcement assuming primary responsibility for the investigation, see Hr'g Tr. 29, 31, 32, 34, 35, 38-39) and prosecuting offenders in the criminal justice system. For these reasons the policy ran afoul of the Fourth Amendment and is not valid. See *Doe ex. rel. Doe v. Little Rock School District*, *supra*; *Iowa v. Kern*, 831 N.W.2d 149, 171 (Iowa 2013) (in parole search context, the search failed to fit the special-needs rubric in part because "the search was significantly entangled with a larger law enforcement operation and primarily served general law enforcement goals").

(1) Lindsey's second back pack search was unlawful because it did not attend to the "special needs" of the school but instead constituted an investigatory search to promote general law enforcement goals.

The State and its *amici* argue that the government searcher's purpose does not matter through its reference to non-special needs decisions such as *Whren v. United States*, 517 U.S. 806, 814 (1996) ("Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent") and other circumstances---such as vehicular checkpoints---where, according to the prosecution, *only* the "programmatic purpose" (and not that of the individual government official) is subject to review (see *Indianapolis v. Edmond*, 531 U.S. 32, 45-46 (2000)). For these reasons the government has dismissed as a justification for the second (investigatory) search of the book bag premised on Lindsey's (unreasonable) suspicions that Mr. Polk was possibly associated with a gang. But in the context of special needs searches the Supreme Court of the United States has ruled that the searcher's purpose *is* relevant. As discussed *supra*, the policy's existence and terms were not sufficiently established by the prosecution at the hearing, but even the minimal information presented there demonstrated that it did not comport with the doctrine of "special needs." Lindsey's purpose is relevant because, as noted, the "special needs" rationale cannot be invoked to circumvent Fourth Amendment requirements. In *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) the High Court included public schools within the loci where an official's purpose for performing the search must be considered:

> [t]wo 'limited exception[s]' to this rule are our special-needs and administrative search cases, where 'actual motivations' do matter." *United States v. Knights*, 534 U.S. 112, 122, 122 S. Ct. 587, 151 L. Ed.2d 497 (2001) (internal quotation marks omitted). A judicial warrant and probable cause are not needed where the search or seizure is justified by 'special needs, beyond the normal need for law enforcement,' such as the need to deter drug use in schools, *Veronia School Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S. Ct. 2386, 132 L. Ed.2d 564 (1995) (internal quotation marks omitted), or the need to ensure that railroad employees engaged in train operations are not under the influence of drugs or alcohol, *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989); and where the search or seizure is in execution of an administrative warrant authorizing, for example, an inspection of fire-damaged premises to determine the cause, *Michigan v. Clifford*, 464

> U.S. 287, 294, 104 S. Ct. 641, 78 L. Ed.2d 477 (1984) (plurality opinion), or an inspection of residential premises to ensure compliance with a housing code, *Camara v. Municipal Court and County of San Francisco*, 387 U.S. 523, 535-538, 87 S. Ct. 1727, 18 L. Ed.2d 930 (1967). *But those exceptions do not apply where the officer's purpose is not to attend to the special needs or to the investigation for which the administrative inspection is justified.* See *Whren*, *supra*, at 811-812, 116 S. Ct. 1769, 135 L. Ed.2d 89.

Id. (emphasis added); *accord*, *United States v. Knights*, 534 U.S. at 122 ("[w]ith the *limited exception* of some special needs and administrative search cases, see *Indianapolis v. Edmond*, [citation omitted], 'we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers' [citation omitted]") (emphasis added). The government has analogized the bus bag search to that of an inventory search, but to be lawful the search must not be pretextual but instead fulfill a "function other than an investigatory function." *State v. Klorer*, 6th Dist. No. WD-13-083, 2014-Ohio-3989, ¶ 11 citing *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976). Lindsey denied that the second search's purpose was grounded on Mr. Polk's alleged gang affiliation. As noted previously, the trial court did not accept as truthful this testimony and factually found that this to be the *sole* basis for the search. *But because of the unlawful search policy*, Lindsey's actions were not performed to attend special needs but rather were performed for general investigatory purposes. Cf. *State v. Leak*, 145 Ohio St.3d at ¶ 31-33 (lack of lawful vehicle impoundment procedures indicated that officer's purpose in searching vehicle was investigatory). The failure of this second, investigatory search to be supported by "reasonable grounds" rendered it unconstitutional. See *T.L.O.. supra.*

Appellee's Response to Appellant's Second Proposition of Law: The exclusionary rule is intended to exclude evidence obtained by public officials in violation of the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 14 of the Ohio Constitution. For this reason it does apply to unreasonable searches conducted by Ohio public-school employees.

The trial court correctly invoked the Fourth Amendment exclusionary rule, and the Tenth Appellate District correctly affirmed the former's decision doing so, as a sanction for the unlawful search conducted by Lindsey when he ransacked Mr. Polk's book bag. Lindsey's duties of performing intrusive searches which encroach upon students' privacy expectations with respect to their persons and belongings generally parallel those of a law enforcement official. This was underscored by the fruits of his search being provided to Officer Sykes and the resulting criminal prosecution in this case. As well, the Whetstone search policy Lindsey claimed to follow had as its primary purpose the general enforcement of the laws. The State and *amici* have argued that the policy enhances school safety, but criminal investigations occurring in school tend to promote safety and security to the same degree as such investigations in the community at large. The methods used by Lindsey in implementing the policy underline the closely-coordinated investigative efforts between police and the school security department and other school officials. Again, it is clear that Lindsey's role at the school bears little resemblance to educating or counseling children but rather involves him performing intrusive searches of students, their personal belongings, and other zones of privacy such as lockers, responsibilities not unlike those of traditional law enforcement. According to his testimony these were not duties practiced every now and then but instead appear to be ones he consistently exercised on a daily basis. His understanding of his search powers as reflected in the record indicate that he routinely and unlawfully violates the privacy interests of students (and others) at Whetstone (see Hr'g Tr. 14: 5-9).

A. The exclusionary rule has been applied to unreasonable searches conducted by public school officials.

Citing no authority the government at page 22 of its main brief broadly states that "the exclusionary rule does not apply to searches conducted by public-school employees." A review of decisions from throughout the United States indicates otherwise. See e.g. *State v. Polk*, *supra*, ¶ 22 (cases cited therein); *In re Fisher*, 8th Dist. No. 35375, 1977 Ohio App. LEXIS 7380 (Feb. 17, 1977) (citing with approval *New York v. Scott D.*, 358 N.Y.S.2d 403, 405 (N.Y. 1974)). The State contends that since some of these cases (and others) contain brief exclusionary rule discussions their precedential value is quite limited. This type of analysis is unhelpful. The bottom line is that courts *have applied* the exclusionary rule because they, like the Ohio Tenth District, found it a necessary sanction for an illegal school search. As highlighted by these decisions, the application of the exclusionary rule to public school searches evidences that its benefits outweighs its costs.

B. United States Supreme Court decisions refusing to apply the exclusionary rule are distinguishable from the facts and circumstances of the search in this case and are therefore not applicable.

At the outset it is important to point out that many of the decisions cited by the government in support of its argument for the inapplicability of the exclusionary rule involve non-criminal proceedings. This demonstrates that *where* the evidence is intended to be offered, and for *what purpose*, weighs heavily on the question of its applicability. For example, the government cites to *United States v. Calandra*, 414 U.S. 338, 347 (1974) and *United States v. Janis*, 428 U.S. 433, 446 (1976) to argue that the "prime purpose, if not the sole one, is to deter unlawful police conduct." However, context is key: "[w]e have held that the nature of the proceeding is the *most important factor* in determining whether the exclusionary rule should apply." *United States v. Payne*, 181 F.3d 781, 788 (6th Cir. 1999) (emphasis added) citing *Wolf v. Commissioner*, 13 F.3d 189, 194 (6th Cir. 1993). The Court's *Calandra* deterrence reasoning was

influenced by the type of proceeding at issue. *Calandra* addressed the question of the exclusionary rule's applicability at the *grand jury* stage, not the trial stage. *Id.* at 349. Noting the heightened deterrence value of the exclusionary rule at the trial stage the Court observed "standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search [citations omitted]. *This standing rule is premised on the recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in a criminal sanction on the victim of the search.*" *Id.* at 348 (bracketed material and emphasis added). *Janis* addressed the issue whether the exclusionary rule should apply at a federal civil tax proceeding and held that it did not. *Id.* at 459. Crucial to the holding there was the fact that the evidence-procuring agency (the state) and the prosecuting agency (the federal government) were different sovereigns, and for this reason the rule did not apply. See *id.* at 456 ("[t]he seminal cases that apply the exclusionary rule to a civil proceeding involve 'intrasovereign' violations"). Underscoring the holding in *Calandra* that the rule's greatest deterrence applies in criminal trials the Court recognized "the existing deterrence affected by the denial of use of the evidence by either sovereign in the criminal trials with which the searching officer is concerned" (*id.* at 458), and evidentiary exclusion under these circumstances was not necessary since the civil tax proceeding "fell outside the offending officer's zone of interest." *Id.* The Court has precluded the rule's use to other proceedings. See e.g. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deportation proceedings); *Pennsylvania v. Scott*, 524 U.S. 357 (1998) (parole/probation revocation hearings); *Stone v. Powell*, 428 U.S. 465 (1976) (habeas corpus).

C. The exclusionary rule was correctly employed in this matter.

In contrast to the aforementioned decisions the exclusionary rule was applicable to this case. Several reasons support this. First, Mr. Polk faced formal prosecution at a trial where the State intended to offer incriminating yet illegally-obtained evidence against him. This was not a school disciplinary hearing or some other non-criminal proceeding. As noted in *Calandra* the deterrence effect of the exclusionary rule is at its highest when the citizen is confronted with the possibility of a criminal sanction made more likely by the introduction of evidence gathered as a result of the unlawful conduct of the government official. *Pennsylvania v. Scott*, 524 U.S. at 364 ("application of the rule in the criminal trial context . . . provides significant deterrence of unconstitutional searches") (ellipses marks added). "Criminal proceedings are, of course, the realm in which the exclusionary rule is strongest." *United States v. Payne*, 181 F.3d at 788; *accord*, *Massachusetts v. Olsen*, 405 Mass. 491, 494, 541 N.E.2d 1003 (Mass. 1989) ("[t]hus, it is at a criminal trial that the exclusionary rule's 'remedial objectives are . . . most efficaciously served'" citing *Calandra*, *supra*, at 348). Second, Lindsey's "zone of primary interest" in the investigation requires that the rule be applied. As the government repeatedly notes Lindsey was not a police officer, but this does not end the inquiry as to the rule's applicability. The rule's lodestar as explained by the United States Supreme Court is that "[t]he rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236-37 (2011) (other citations omitted). The rule's employment has been extended to government actors other than police in criminal or quasi-criminal proceedings. These actors include fire investigators (*Michigan v. Clifford*, 464 U.S. 287, 298-99 (1984) and *Michigan v. Tyler*, 436 U.S. 499, 511-12 (1978)), OSHA inspectors (*Savina Home Indus. v. Sec'y Labor*, 594 F.2d 1358, 1362-63 (10th Cir. 1979), *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1070-71(11th Cir. 1982), *Trinity Indus. v. OSHRC*, 16 F.3d 1455, 1462 (6th Cir. 1994), *Pike v.*

Gallagher, 829 F. Supp. 1254, 1266 (D.N.M. 1993)), airport luggage screeners (*United States v. McCarty*, 648 F.3d 820, 836 (9th Cir. 2011), *United States v. Fofana*, 620 F. Supp.2d at 866, *United States v. $124, 570*, 873 F.2d 1240, 1243-44 (9th Cir. 1989)), building inspectors (*New York v. Northrop*, 99 Misc.2d 1083, 420 N.Y.S.2d 846 (1979), *New York v. Muttontown Acres LLC*, 37 Misc.3d 1202(A) at 11-12, 964 N.Y.S.3d 61 (2012) (unpublished)), and of course public school employees (*L.A.W. v. Nevada*, 348 P.3d 1005, 1010 (Nev. 2015), *In re J.N.Y.*, 931 A.2d 685, ¶ 10-11 (Pa. Super. 2007), *In re Lisa G.*, 125 Cal. App.4th 801 (Cal. App. 2004)). Even in *United States v. Leon*, 468 U.S. at 923, one of the four instances where the "good faith exception" will not apply and exclusionary deterrence remains high involves investigatory misconduct emanating not from police officers but rather by "the issuing magistrate [who] wholly abandon[s] his judicial role" (bracketed material added). In answering the "zone of interest" inquiry attention must be directed to Lindsey's specific role at the school, his duties, and perhaps most importantly his interaction with law enforcement officials and the criminal justice system. "As a general matter, it is fair to say that our processes of criminal justice are best understood if viewed as they actually are: as a system of interlocking stages and agencies, rather than discrete bits and pieces." 1 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 1.8(e) at 310 (2004 ed.) (footnoted citation omitted). Highlighting the present-day interdependence of school officials and law enforcement authorities one commentator observed

> in the school context courts have virtually ignored the deepening interdependence and interconnectedness between school officials and law enforcement authorities, which has led to broader reporting requirements by school officials to law enforcement authorities. However, given these developments, the relational dynamics between law enforcement authorities and school officials have shifted to such an extent that it is no longer possible to distinguish clearly between the law enforcement and public school contexts. Indeed, the increased placement of law enforcement officers---or other officers under the direct control of law enforcement authorities---in public schools, along with the broader reporting requirements imposed upon school officials, has in many ways melded the criminal justice system with school

disciplinary processes, at least in those schools that have implemented these measures. Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 Ariz. L. Rev. 1067, 1096-97 (2003). This construct (but in a different context) was recognized by the High Court in *Pennsylvania v. Scott*, *supra*. Acknowledging the employment of the rule of exclusion when the government actor's duties require him to perform police-like functions (such as searches to uncover evidence of wrongdoing) the Court said

> [m]oreover, although in some instances parole officers may act like police officers and seek to uncover evidence of illegal activity, they (like police officers) are undoubtedly aware that any unconstitutionally seized evidence that could lead to an indictment could be suppressed in a criminal trial. In this case, assuming that the search violated respondent's Fourth Amendment rights, the evidence could have been inadmissible at trial if respondent had been criminally prosecuted.

Scott, *supra*, at 368-69. The Sixth United States Circuit Court of Appeals aligned its reasoning in *United States v. Payne*, 181 F.3d at 788 with *Scott* when it suppressed evidence offered in a criminal trial that had been obtained by a parole officer. Noting the parole officer's overlapping "zones of interest" of both parolee rehabilitation and general crime investigation the *Payne* court held

> [a]nother consideration is whether the proceeding falls within the 'zone of primary interest' of the government officials who committed the violation. *See id.* In this case, the search was conducted primarily by parole officers, whose zone of interest is distinct from, but overlaps with, an interest in enforcing the drug laws. Although the parole officer is interested in the parolee's rehabilitation, the officer is also charged with monitoring the compliance with various restrictions, including restrictions of the use of drugs. As in this case, parole officers often work closely with the police.

Id. at 788. The record reflects that Lindsey's primary duties required him to perform intrusive searches of students and their personal belongings. Lindsey's own testimony revealed that his responsibilities involved him routinely invading areas where pupils maintain a reasonable privacy expectation, and if done so pursuant to "the policy", without suspicion. As noted, the

unconstitutional school search policy as practiced in this case strongly suggests the cross-fertilization of school safety goals with those of general crime investigation and enforcement. But even generally speaking school safety goals were enhanced by Lindsey's searches for fruits of illegality, which if discovered were in turn passed on to law enforcement authorities who then spearheaded the investigation resulting in formal prosecution of the target. This demonstrates that Lindsey's "zone of primary interest" was very much designed to ferret out crime in order to promote safety, which of course is virtually indistinguishable from that of the police. Cf. *Scott*, *supra*; *Payne*, *supra*. This is further supported by the fact that the only witness who testified in the criminal proceeding below was Mr. Lindsey (see Hr'g Tr. *passim*). Under such circumstances the exclusion of evidence unlawfully seized by the school official would deter him and others similarly situated from engaging in such conduct in the future. Third, much like the Tenth District in *Polk*, *supra*, ¶ 21, the court in *Payne* recognized the risk of abuse if evidence obtained unlawfully by non-police government actors and delivered to law enforcement officials were admitted in a criminal trial: "[e]xempting evidence illegally obtained by a parole officer from the exclusionary rule would greatly increase the temptation to use the parole officer's broad authority to circumvent the Fourth Amendment." *Payne*, 181 F.3d at 788. Crucially, "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). If the exclusionary rule is not applicable to school officials such as Lindsey the risk is great the rule will be circumvented through the expedient of law enforcement officials relying on illegal investigative searches conducted by the former. At pages 30-32 of its main brief the State strives to minimize the similarities between such a milieu and the evils associated with the silver platter doctrine by largely ignoring the

import of the Court's holding in *Elkins v. United States*, 364 U.S. 206, 208 n. 2 (1960). However, these palpable similarities were highlighted by the Tenth District in *Polk* when it observed

> [p]ublic school employees are state actors for the purposes of the Fourth Amendment when they discover evidence and deliver it to the police or prosecutorial authorities so that their students may be prosecuted. *T.L.O.* at 334-35. If the evidence they collect in violation of the Fourth Amendment were able to be used when turned over to law enforcement, school employees would have little incentive to respect students' rights, and worse, law enforcement would have an incentive to use school employees as Fourth Amendment immune agents to conduct illegal student searches in schools.
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> ***
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> As more and more schools (like Whetstone) enjoy the security of on-site police officers, it is not hard to envision the potential for evidence collected by school personnel to be taken by police free of the threat of exclusion in order to convict students. We understand that contemporary educational environments have been drastically affected by the proliferation of school shootings. Yet, we cannot, even under those circumstances, revive a long defunct and thoroughly denounced practice that violates the Constitution, so as to fashion a remedy that fails Constitutional sanction.

Polk, *supra*, ¶ 21. The court of appeals' reasoning comports with that of *In Interest of L.* In that case the Wisconsin court criticized *Georgia v. Young*, 234 Ga. 488, 216 S.E.2d 586 (Ga. 1975) (approved by the State in its main brief at 26) because of the latter's failure to appreciate how the Fourth Amendment can be undermined when school officials who deliver unlawfully-obtained evidence to law enforcement officers for prosecution are insulated from the exclusionary rule:

> [s]earches by teachers would fall within the second category and so would not be subject to the exclusionary rule. This classification does not adequately account, however, for evidence seized by a teacher and turned over to law enforcement agents. Once the evidence comes into the possession of law enforcement officers and is used in court proceedings against the liberty interests of the person searched, the exclusionary rule must be available to deter prosecutions based on unlawful searches. Without such exclusions, school personnel and other government employees would become the same sort of bypass around the amendment's protections that the Court meant to close by extending the exclusionary rule to state court proceedings in *Mapp v. Ohio*, *supra*.

In Interest of L., 90 Wis.2d 585, 592 n. 1, 280 N.W.2d 343 (Wis. App. 1979). Two decisions from Ohio courts have cited *In Interest of L.* as authority, though not to this particular passage.

See *In the Matter of Michael C. Ely*, 7th Dist. No. 05 JE 50, 2005-Ohio-7063, ¶ 12 and *In re M.H.*, 129 Ohio Misc.2d 5, 814 N.E.2d 1264 (2003), ¶ 14. Fourth, much has been made by the State regarding the "custodial and tutelary" responsibilities borne by public schools as justification for eliminating the exclusionary rule from illegal searches conducted by officials like Lindsey. Appellee submits that the employment of the rule is actually more compelling in the public school setting. See *Gordon J. v. Santa Anna Unified School Dist.*, 162 Cal. App.3d at 542 ("[i]t is no less offensive to the Constitution to permit introduction of unlawfully obtained evidence in a juvenile or criminal prosecution simply because the site of its improper acquisition happened to be a high school campus. Arguably, it is more so"). Concurring and dissenting in part in *T.L.O.* Justice Stevens stated that

> [s]chools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly. The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that 'our society attaches serious consequences to a violation of constitutional right,' and that this is a principle of 'liberty and justice for all.'

New Jersey v. T.L.O., 469 U.S. at 373-74; see also *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943) ("[t]hat [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes") (bracketed material added); *West Virginia v. Joseph T.*, 175 W. Va. 598, 609-10, 336 S.E.2d 728 (W. Va. 1985) (McGraw, J., dissenting). One commentator correctly remarked that "[i]f schools do not honor students' constitutional rights, schools cannot effectively teach students about those rights." Nance, *Random, Suspicionless Searches of Students' Belongings: A Legal, Empirical, and Normative Analysis*, 84 Colo. L. Rev. 367, 398 (2013). There are high

social costs for admitting evidence seized in an unconstitutional search of a student or his belongings. These costs include confusion caused by the incongruity between the ideals of the Constitution and their application in the "real world," between how Constitutional violations are supposed to be addressed and how in practice they actually are. In such an environment the student leaves school with a diminished appreciation of the Constitution and a grave misunderstanding regarding its relevance and utility. Fifth, civil remedies are an inadequate alternative. "It is well-settled that school officials possess a qualified good faith immunity with respect to acts performed within the course of their duties." *Bellnier v. Lund*, 438 F. Supp. 47, 54 (N.D.N.Y. 1977) citing *Wood v. Strickland*, 420 U.S. 308 (1975). Qualified immunity protections for state actors have been significantly expanded. See, e.g. *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987) (requiring that the unlawfulness of the government action be apparent when undertaken, in order for qualified immunity to be denied); *Pearson v. Callahan*, 555 U.S. 223 (2009) (reviewing courts permitted to bypass violation step and turn directly to qualified immunity inquiry); see also Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 Harv. J. L. & Pub. Pol'y 119, 127 (2003) ("five decades of post-*Weeks* 'freedom' from the inhibiting effect of federal exclusionary rule failed to produce any meaningful alternative to the exclusionary rule in any jurisdiction"). Moreover, the State's arguments at the suppression hearing would foreclose even a civil damage award for an illegal school setting search because, according to it, public school officials and safety officers should be exempt from having even a rudimentary understanding of the search and seizure provisions of the Constitution (see Hr'g Tr. 61: 2-5 ["We don't need every school official or administrator or safety officer having to learn legal implications of the Fourth Amendment"]). For all these reasons the exclusionary rule was correctly applied.

Appellee's Response to Appellant's Third Proposition of Law: The "good faith exception" to the exclusionary rule does not apply when the official conducting the search is alone responsible for assuming it is reasonable and conforms to governing law when in fact it is neither.

It is important to yet again point out that the trial and appellate courts *did not* determine that the school search policy "was a reasonable means of achieving a legitimate school purpose" (page 39 of State's brief). As well, the State again makes assertions inconsistent with the trial record: at page 38 of its brief the government avers that "Lindsey *also* relied on the school's search policy" (emphasis in original) during the second search. This of course does not comport with Judge Horton's factual finding that this search was conducted *solely* on Lindsey's belief that Appellee was possibly associated with a gang. The government's good faith argument rests uneasily on its belief in the lawfulness of the school search policy. Due to its interdependence and connection to general law enforcement goals the school policy described in the record represents an attempt to promote unlawful, suspicionless investigatory searches at Whetstone. *Ferguson*, *supra*; *Doe v. Little Rock*, *supra*. In a similar context (an unconstitutional inventory search), this Court in *State v. Leak*, *supra*, held recently that the absence of a lawful policy for the impoundment of vehicles after the driver has been arrested proved fatal to the prosecution's argument that the search's fruits should be shielded from the exclusionary rule. *Id.* at ¶ 29 ("testimony about the police procedure for conducting the inventory is insufficient to establish the reasonableness of the search under the Fourth Amendment if *the impoundment of the vehicle is not lawful*") (emphasis added) and ¶ 37 ("[t]he fact that the arresting officer used established police procedure to conduct the inventory search does not overcome the unlawfulness of the impoundment in the first place. *This is precisely the type of governmental intrusion the Fourth Amendment seeks to prohibit*") (emphasis added). Assuming, without agreeing, the second search was conducted pursuant to the policy, the evidence should be excluded under *Leak* because the

school search procedure is unlawful. The absence of a lawful "special needs" policy defeats the claim that the good faith exception should apply because, according to *Ashcroft* and *Edmond*, Lindsey's search was therefore motivated by general crime enforcement considerations which, to comply with the Fourth Amendment, had to be supported by "reasonable grounds," the standard announced in *T.L.O.* As the State agrees at 21 of its brief, the gang rumor did not satisfy that standard. However, Lindsey's search *was not* performed per the policy but rather, as factually determined by Judge Horton's evaluation of Lindsey's credibility, solely for the unreasonable basis regarding Mr. Polk's possible gang affiliation. All of the bases raised for this illegal search (unlawful search policy; or search policy lawful but objectives satisfied; or lost or mislaid property search whose objectives were satisfied) resulted in Lindsey performing an investigatory search for fruits of Appellee's gang association which had to satisfy the *T.L.O* "reasonable ground" standard. This required him alone to assess whether the facts gave rise to "reasonable grounds." He was solely responsible for erroneously determining that the gang rumor constituted a sufficient basis for dumping out the bag's contents. The good faith exception is not intended to avoid the government searcher's improper evaluation of suspicion. See *State v. Thomas*, 10th Dist. No. 14AP-185, 2015-Ohio-1778, ¶ 46 ("Ohio courts, including this court, have declined to apply the *Leon* good-faith exception in cases in which the officers, conducting warrantless searches, relied on their own belief that they were acting in a reasonable manner, as opposed to relying upon another's representation" [citations omitted); *United States v. Herrera*, 444 F.3d 1238, 1249 (10th Cir. 2006) (no good faith when, to justify the administrative search, the officer relied on his own incorrect belief that defendant's truck was subject to random inspection).

CONCLUSION

The decision of the Court of Appeals must therefore be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was sent by regular U.S. mail or served electronically to the following on the 14th day of September, 2016:

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LexisNexis

20 USCS § 7961

Current through PL 114-219, approved 7/29/16

United States Code Service - Titles 1 through 54 > *TITLE 20. EDUCATION* > *CHAPTER 70. STRENGTHENING AND IMPROVEMENT OF ELEMENTARY AND SECONDARY SCHOOLS* > *GENERAL PROVISIONS* > *UNIFORM PROVISIONS* > *GUN POSSESSION*

§ 7961. Gun-free requirements

(a) Short title. This subpart [this section] may be cited as the "Gun-Free Schools Act".

(b) Requirements.

(1) In general. Each State receiving Federal funds under any title of this Act [*20 USCS §§ 6301* et seq.] shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing.

(2) Construction. Nothing in this subpart [this section] shall be construed to prevent a State from allowing a local educational agency that has expelled a student from such a student's regular school setting from providing educational services to such student in an alternative setting.

(3) Definition. For the purpose of this section, the term "firearm" has the same meaning given such term in *section 921(a) of title 18, United States Code*.

(c) Special rule. The provisions of this section shall be construed in a manner consistent with the Individuals with Disabilities Education Act [*20 USCS §§ 1400* et seq.].

(d) Report to State. Each local educational agency requesting assistance from the State educational agency that is to be provided from funds made available to the State under any title of this Act [*20 USCS §§ 6301* et seq.] shall provide to the State, in the application requesting such assistance--

(1) an assurance that such local educational agency is in compliance with the State law required by subsection (b); and

(2) a description of the circumstances surrounding any expulsions imposed under the State law required by subsection (b), including--

(A) the name of the school concerned;

(B) the number of students expelled from such school; and

(C) the type of firearms concerned.

(e) Reporting. Each State shall report the information described in subsection (d) to the Secretary on an annual basis.

(f) Definition. For the purpose of subsection (d), the term "school" means any setting that is under the control and supervision of the local educational agency for the purpose of student activities approved and authorized by the local educational agency.

(g) Exception. Nothing in this section shall apply to a firearm that is lawfully stored inside a locked vehicle on school property, or if it is for activities approved and authorized by the local educational agency and the local educational agency adopts appropriate safeguards to ensure student safety.

(h) Policy regarding criminal justice system referral.

(1) In general. No funds shall be made available under any title of this Act [*20 USCS §§ 6301* et seq.] to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school served by such agency.

(2) Definition. For the purpose of this subsection, the term "school" has the same meaning given to such term by *section 921(a) of title 18, United States Code*.

History

(April 11, 1965,*P.L. 89-10*, Title IX, Part F, Subpart 4, § 8561 [Part E, Subpart 4, § 9551] [Title IV, Part A, Subpart 3, § 4141], as added Jan. 8, 2002, *P.L. 107-110*, Title IV, § 401, *115 Stat. 1762*; Dec. 10, 2015, *P.L. 114-95*, Title IV, § 4001(a)(2), Title VIII, § 8001(a)(8), (b)(1), *129 Stat. 1966*, 2089.)

Annotations

Notes

Explanatory notes:

This section formerly appeared as *20 USCS § 7151*.

Effective date of section:

This section took effect on January 8, 2002, subject to certain exceptions, pursuant to § 5 of Act Jan. 8, 2002, *P.L. 107-110*, which appears as *20 USCS § 6301* note.

Redesignation:

This section, enacted as § 4141 of Subpart 3 of Part A of Title IV of Act April 11, 1965, *P.L. 89-10*, was redesignated § 9551 of Subpart 4 of Part E of Title IX of such Act by § 4001(a)(2) of Act Dec. 10, 2015, *P.L. 114-95*. Section 9551 of Subpart 4 of Part E of Title IX of such Act April 11, 1965, *P.L. 89-10* was further redesignated § 8561 of Subpart 4 of Part F of Title IX of such Act by § 8001(a)(8) of Act Dec. 10, 2015, *P.L. 114-95*.

Case Notes