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KNOW YOUR RIGHTS. EXERCISE YOUR RIGHTS. DEFEND YOUR RIGHTS: Parents' Rights to Protect Their Children from TSA Patdowns

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Americans do not shed their right to privacy or other constitutional rights merely by entering an airport in order to board a plane. Certainly, no American should be subjected to a virtual strip search or excessive groping of the body, or have their underage children touched intimately by strangers as a matter of course in boarding an airplane when there is no suspicion of wrongdoing.

Unfortunately, in both word and deed, the Transportation Security Administration (TSA) operates as if members of the public—and their children—have no rights and no defense against the agency and its employees even if an agent assaults them, wrongfully detains them, or fabricates criminal charges against them.¹ The TSA's indifference to the rights and well-being of the travelling public is having a particularly negative impact on the most vulnerable among us: our children.

In August of 2018, a Texas family asked The Rutherford Institute² to intervene after one of their children suffered emotional trauma in the course of a TSA screening that included a pat-down of the young girl's body. News reports detail other incidents of unreasonable TSA searches of children that have caused needless emotional distress to both the children and their parents.³

Although the TSA website asserts that there are “modified screening procedures” for children,⁴ there is no description of what the “modified” procedures are. Additionally, children 13 years or older are treated no differently from adults even though they are still at a sensitive age or may have special needs that make them particularly sensitive to the physical contact a pat-down search entails.

Protecting the safety of air travelers should not require sacrificing the emotional well-being of children. Airline security measures should also take account for the rights of children and their

¹ *Pellegrino v. U.S. Transportation Security Admin.*, 896 F.3d 207, 232 (3rd Cir. 2018) (Ambro, J., dissenting), *rehearing granted*.

² The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened and infringed.

³ Frederik Kunkle, “TSA defends pat-down of Texas boy; countless others crept out,” *The Washington Post* (March 28, 2017), https://www.washingtonpost.com/news/tripping/wp/2017/03/28/tsa-defends-pat-down-of-texas-boy-countless-others-crept-out/?utm_term=.82d6f2a130d8.

⁴ Transportation Security Administration, “Traveling with Children,” <https://www.tsa.gov/travel/special-procedures/traveling-children>.

parents. Unfortunately, the TSA has failed to take steps to adopt security measures that account for the rights of children and their parents. Indeed, the TSA has asserted it may disregard societal norms and requirements of the law when screening airline passengers. Yet the TSA's mission to "[p]rotect the nation's transportation systems to ensure freedom of movement for people and commerce"⁵ must not be pursued at the expense of and without regard to the physical and emotional well-being of those whom TSA security measures are supposed to protect.

TSA Incidents Involving Children

In August 2018, The Rutherford Institute was contacted by the McAdams family regarding a disturbing incident involving TSA screening at Reagan National Airport before boarding a flight to their home in Texas.⁶ According to the McAdams' report, their 13-year old daughter was ordered by TSA agents to submit to a pat-down search even though the daughter and her parents asked that she be allowed to be screened using the scanner. There was nothing to indicate to TSA agents that enhanced examination of the daughter was required. On previous trips, the girl's mother had been allowed to accompany her and her younger sister through TSA body scanners without any problem or incident.

Surveillance video obtained through a Freedom of Information Act request showed that the daughter was taken away from the area where her parents were and subjected to a full-body pat-down lasting over two minutes. The pat-down was no different from those that adults would be subjected to: the TSA agent ran her hands over the entirety of the girl's body, including extremely sensitive areas on her legs and chest. All of this was done despite objections by the girl's parents, who made it clear to the agents that she had not experienced this kind of physical contact with a stranger and feared it could have a negative psychological impact upon her.

Unfortunately, the McAdams' fears were realized as the daughter was reduced to tears by the pat-down. The sight of a young family member being subjected to the probing and examination of highly sensitive areas of her body, as well as the grief and humiliation she suffered, caused great emotional distress to the rest of the McAdams family.

Daniel McAdams, the father, voiced strong objections to the separation and treatment of his daughter, which resulted in a TSA agent accusing him of interfering with the screening process and summoning law enforcement to the scene. Daniel also sought out the on-site TSA supervisor and advised him of his daughter's mistreatment and the forced separation of his family, only to be told that 13-year-olds are subject to full body pat-downs if they refuse to be scanned.

This is far from the only time the TSA's treatment of children during the screening process has been reported for being unreasonable and harmful:

- A 13-year old boy with sensory processing disorder (SPD) was subjected to a thorough head-to-toe pat-down search at Dallas/Fort Worth International Airport

⁵ <https://www.tsa.gov/about/tsa-mission>.

⁶ "Rutherford Institute Files FOIA Request Seeking Details About Egregious TSA Search, Pat Down of 13-Year-Old Girl at Reagan National Airport," The Rutherford Institute (Sept. 6, 2018), https://www.rutherford.org/publications_resources/on_the_front_lines/rutherford_institute_files_foia_request_seeking_details_about_egregious_tsa_search_pat_down_of_13_year_old_girl_at_reagan_national_airport.

that his mother captured on video and that sparked outrage nationally.⁷ The search included the TSA officer rubbing his hands across the boy's buttocks and across his upper legs numerous times. As stated by the boy's mother, the pat-down was excessive because they "went over his sensitive areas, a little more than necessary, especially given that he wasn't wearing bulky clothes or anything like that."⁸ The pat-down was conducted even though the boy had passed through the scanner without any alert and despite the mother advising TSA screeners that her son has SPD and would be particularly sensitive to touching by another, particularly a stranger;

- A syndicated writer described his observations of a young boy being patted down by a TSA agent as "molestation" that would normally be reported to authorities. "Inappropriate contact with a child, inside or outside his clothing, is a criminal act. But, in this case, the proper authorities were the ones feeling up the kid and the father had already protested the frisking—although, like all of us, he probably understood that no matter how vociferously he objected to this bit of state-sanctioned criminality it wasn't going to change anything." As the TSA agent began patting down the child's crotch, he told the father that this was necessary because of the possibility that the boy was smuggling drugs.⁹

Children Are Emotionally Vulnerable to Pat-Downs

The use of pat-downs on children, even those aged 13 and above, is a matter of great concern given the emotional impact this kind of touching has upon them. A TSA pat-down unquestionably intrudes on parts of the body, such as the genitals, buttocks, upper legs and chest, that are extremely private¹⁰ and which parents teach children to be "out of bounds" for strangers.

Studies show that encroaching on a child's privacy in this way creates great stress and damage to his or her self-esteem.¹¹ Particularly among adolescents, the patent intrusiveness of this kind of search makes it embarrassing, frightening and humiliating.¹² Research also shows that this kind of intrusive search can severely traumatize children, causing "years of anxiety, depression, loss of concentration, sleep disturbances, difficulty performing in school, phobic reactions, and lasting emotional scars."¹³

⁷ "Outraged mom says TSA treated family 'like dogs' during son's pat-down," *CBS News* (March 28, 2017), <https://www.cbsnews.com/news/tsa-pat-down-outrage-mom-posts-facebook-video-speaks-out-dallas/>.

⁸ Ashley Welch, "After boy's controversial TSA pat-down, a look at SPD," *CBS News* (March 29, 2017), <https://www.cbsnews.com/news/boys-controversial-tsa-pat-down-spd-sensory-processing-disorder/>.

⁹ David Harsanyi, "Dear TSA, Please Stop Molesting Kids At The Airport," *The Federalist* (Nov. 19, 2018), <http://thefederalist.com/2018/11/19/dear-tsa-please-stop-molesting-kids-at-the-airport/>.

¹⁰ Bruce Henderson, "After intimate pat-down, she wonders how much privacy we must give up to fly safely," *The Charlotte Observer* (Aug. 23, 2017), <https://www.charlotteobserver.com/news/local/article168840732.html> (noting that TSA confirms pat-down protocol involves touching of breasts, groin and buttocks).

¹¹ William A. Rae, "Common Adolescent-Parent Problems," in *Handbook of Clinical Child Psychology* 555, 561 (C. Eugene Walker & Michael C. Roberts eds., 2d ed. 1992) (noting the importance of confidentiality when working with adolescents); F. Philip Rice & Kim Gale Dolgin, *The Adolescent: Development, Relationships and Culture* 173 (10th ed. 2002) (noting the negative impact of stress upon self-esteem and adolescent development).

¹² *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374-75 (2009).

¹³ Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 520-21 (2005).

These risks of harm are heightened when the child has special needs.

For example, children with SPD (which affects 1 in 20 children) have a hypersensitivity to touch,¹⁴ so the likelihood of a TSA pat-down becoming a psychologically disturbing event is high. TSA was made aware of these concerns in comments submitted during its rulemaking process for passenger screening and the use of Advanced Imaging Technology.¹⁵ The only response to these concerns was that the TSA would have a “modified pat-down procedure” for children.¹⁶ But nothing in the information TSA provides to the public describes that “modified procedure.” In fact, TSA’s website states that there are “[m]odified screening procedures are in place *to reduce the likelihood of a pat-down,*”¹⁷ indicating that the actual pat-down method for children has not been changed in order to minimize the intrusion of the child’s privacy.

Moreover, no allowances whatsoever are made for children 13-years or older despite the fact that these adolescent children remain vulnerable to unwanted touching of their bodies.

Parental Rights

A pat-down of a child affects not only the child, but also the child’s parent. During the TSA screening rule-making process, it was pointed out that “the separation of the child from their parent for screening results in distress for both the parent and child.”¹⁸ Parents uniformly express upset and outrage at having to watch their child undergo a groping of their bodies by a stranger,¹⁹ often in public.²⁰ Daniel McAdams described the August pat-down of his daughter at Reagan National Airport as akin to watching his child be molested.²¹ Even non-parents express revulsion at having to watch a child, even one over the 13-year-old threshold, subjected to the TSA’s pat-down.²²

The distress to both parents and child was increased in the McAdams case by the fact that neither parent was immediately with the daughter when the pat-down was conducted. Surveillance video shows that the daughter was taken to a separate part of the screening area for the pat-down

¹⁴ Ashley Welch, “After boy’s controversial TSA pat-down, a look at SPD,” CBS News (March 29, 2017), <https://www.cbsnews.com/news/boys-controversial-tsa-pat-down-spd-sensory-processing-disorder/>.

¹⁵ Passenger Screening Using Advanced Imaging Technology, 81 Fed. Reg. 11364, 11384 (March 3, 2016) (“It was the concern of an individual commenter that an enhanced pat-down of a child can be detrimental to the child’s understanding of the appropriateness of an adult touching them. . . . Several individuals, a non-profit organization, and an advocacy group expressed concern for children that must undergo touching during pat-downs.”)

¹⁶ Passenger Screening Using Advanced Imaging Technology, 81 Fed. Reg. 11364, 11385 (March 3, 2016).

¹⁷ Transportation Security Administration, “Traveling with Children: Screening your Child,” <https://www.tsa.gov/travel/special-procedures/traveling-children>; *see also* Transportation Security Administration, “Frequently Asked Questions: Will children receive a pat-down screening?,” <https://www.tsa.gov/travel/frequently-asked-questions> (“TSA has modified screening procedures for children 12 and under that reduce the likelihood of pat-down screening.”).

¹⁸ Passenger Screening Using Advanced Imaging Technology, 81 Fed. Reg. 11364, 11384 (March 3, 2016).

¹⁹ Ashley Welch, “After boy’s controversial TSA pat-down, a look at SPD,” CBS News (March 29, 2017), <https://www.cbsnews.com/news/boys-controversial-tsa-pat-down-spd-sensory-processing-disorder/>.

²⁰ David Harsanyi, “Dear TSA, Please Stop Molesting Kids At The Airport,” *The Federalist* (Nov. 19, 2018), <http://thefederalist.com/2018/11/19/dear-tsa-please-stop-molesting-kids-at-the-airport/>.

²¹ Daniel McAdams, “My Daughter Molested by TSA; Me Nearly Arrested for Objecting,” *LewRockwell.com* (Aug. 20, 2018), <https://www.lewrockwell.com/lrc-blog/my-daughter-molested-me-nearly-arrested/>.

²² Frederik Kunkle, “TSA defends pat-down of Texas boy; countless others creeped out,” *The Washington Post* (March 28, 2017), https://www.washingtonpost.com/news/tripping/wp/2017/03/28/tsa-defends-pat-down-of-texas-boy-countless-others-creeped-out/?utm_term=.82d6f2a130d8.

while Mr. McAdams underwent his own pat-down and Mrs. McAdams was attending to her other children.

While this may have been in technical compliance with TSA guidelines that children “will not be separated from their parent/guardian,”²³ protecting the emotional well-being of both the child and the parent requires more than just assuring that they are in the same screening area. A parent needs to be close by their children to provide the comfort and assurance the child needs when being physically examined by a stranger.

TSA protocol should require that a parent be in the immediate presence of their child when that child is subjected to a pat-down during screening to mitigate the emotional distress to both.

It is settled law that a parent has a fundamental constitutional right to protect the physical and emotional welfare of his or her children. As stated by the Supreme Court, “[i]t is plain beyond the need for multiple citations that a natural parent’s desire for and right to the companionship, care, custody and management of his or her children is an interest far more precious than any property right.”²⁴

Parents do not forfeit that right when they choose to travel by air with their children. In order to protect their children during a pat-down, parents must be immediately physically present to offer support and reassurance.

Reforms to TSA Procedures

Current TSA protocols fail to protect the rights of both parents and children during the screening process. It is essential that TSA change its procedures to provide that protection by:

- Making effective changes to the methods utilized for conducting pat-down screening of children that limit the physical touching of children by TSA agents to that which is absolutely necessary under the particular circumstances presented;
- Extend the modified screening procedures applicable to children to all minors;
- Make public the particulars of the modified pat-down procedures so that parents can fully inform their children what to expect during the screening process before they arrive at the security checkpoint; and
- Assure that a parent is immediately, physically present with a child during a pat-down search so that the parent can provide the reassurance and comfort a child needs during this intrusive procedure.

The safety of the travelling public need not require that children be screened in a manner that does not protect their emotional safety. Common-sense changes can be made that do not compromise airline security while respecting the Fourth Amendment rights of travelers of all

²³ Transportation Security Administration, “Traveling with Children: Screening your Child,” <https://www.tsa.gov/travel/special-procedures/traveling-children>.

²⁴ *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982).

ages to bodily integrity and the assurance that security protocols as a consequence of air travel need not be a traumatizing experience for parents and their young charges.

Conclusion

All individuals have a Fourth Amendment right to bodily integrity. Individuals do not shed their constitutional rights merely by entering an airport or boarding a plane.

Parents have a fundamental right to the care, custody and control of their children. As such, parents and legal guardians have a right to stand guard over underaged children and protect them from any attempts by government officials, including agents of the Transportation Security Administration, to separate minors from their parents in order to subject children to unwarranted, overtly intimate treatment at the hands of strangers during airport screenings.

When accompanying their children through TSA airport security screening, parents have the following rights:

- To determine whether their child will or will not opt-out of scanners that TSA agents direct the child to enter (opting out of a scanner screening may result in a pat-down);
- To be advised of the reason their child is being subjected to any enhanced security screening, such as pat-down searches;
- To know what TSA agents intend to do during any enhanced security screening of their child, including how any pat-down will be conducted;
- To speak with their child before they are subjected to a pat-down or other enhanced security measures and let the child know what to expect and offer reassurance;
- To alert TSA agents to any physical or emotional condition of the child that makes the child more vulnerable to harm as a result of the enhanced security screening;
- To request that any pat-down search of their child be conducted in a private area out of public view;
- To be present with their child during a pat-down search or other enhanced security screening in order to provide comfort and support for their child.

The Rutherford Institute stands ready to defend your rights if they are violated by the government.

Should you have further questions or need legal assistance in exercising your constitutional rights, please contact the Legal Department at legal@rutherford.org.

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