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The Constitutionality of Questioning Schoolchildren Without Parental Consent

While it would be inappropriate for The Rutherford Institute to provide you with legal advice under these circumstances, the Institute is pleased to provide you with the following information regarding your area of concern.

This brief addresses whether the United States Constitution forbids social service workers or school guidance counselors from questioning students at school without first obtaining parental consent.

Overview.

The United States Constitution has generally not been held to forbid social service or counseling interviews of students without parental consent. Although the Supreme Court has repeatedly upheld the affirmative right of parents to oversee and to direct the upbringing of their children,[1] most courts view as compelling the state?s interest in preventing child abuse and additionally deem such interviews as not only a reasonable means but also the least restrictive means of safeguarding that state interest. Consequently, when such an interview is conducted based on a school official?s professional judgment that there is reason to believe that the child may suffer from abuse, courts are unlikely to sustain a challenge to the interview regardless of the particular constitutional provision under which a claim is brought.

Four Constitutional Issues.

At a minimum, interviewing children at school without parental consent implicates four constitutional provisions: the Free Exercise Clause of the First Amendment;[2] the Fourth Amendment prohibition against ?unreasonable searches and seizures?;[3] the Fourteenth Amendment right to substantive due process;[4] and the Fourteenth Amendment right to procedural due process.[5] Because of the state?s compelling interest in preventing child abuse, and because of the relatively limited intrusion effected by an interview investigating child abuse, the courts are unlikely to sustain a claim brought under any one of these provisions. As a result, a policy or practice of questioning children in school without first obtaining parental consent will not likely be ruled constitutional.

The Context of Most Investigative Interviews.

As a preliminary matter, it may be instructive to note that questioning of the type at issue here most typically occurs during the context of investigations of child abuse and, in some jurisdictions, constitutes the customary starting point of such investigations.[6] While the United States Constitution affords children no substantive right to whatever protection such investigations may confer,[7] every state has enacted laws requiring certain classes of persons, often including school teachers, to make a report to the appropriate authorities ?if they *suspect* or have *reason to believe* that a child has been abused or neglected.?[8]

Persons covered by mandatory reporting laws are generally immune from a lawsuit, provided that such a report was made in good faith.[9] Furthermore, the social workers who then conduct the investigation are generally protected by qualified immunity from all constitutional violations, except those implicating clearly established law of which the investigator should have been aware.[10] As a consequence of this immunity and of the highly variable fact patterns of child abuse cases, which often cloud the legality of particular investigations, suits challenging these investigations most often conclude with summary judgment in favor of the defendants.[11]

The Free Exercise Clause of the First Amendment.

The Free Exercise Clause is rarely invoked in response to such interviews.[12] If invoked, however, Free Exercise claims are governed by rule stated by the United States Supreme Court in Employment Div., Dept. of Human Resources v. Smith.[13] There, the Court held that ?the right of free exercise does not relieve an individual of the obligation to comply with a ?valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).??[14] The Court did recognize an exception to this rule where the application of such a law ?involved not the Free Exercise Clause alone, but the Free Exercise in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children,?[15] Thus, in order to avoid dismissal of a suit challenging such in-school interviews, parents must state the Free Exercise claim in the form of a religious objection to the interview insofar as it substantially burdens their ability to direct the upbringing of their child.

Subject to such a claim, a law or policy permitting in-school questioning becomes subject to strict scrutiny, meaning that the law as applied to the child of religiously objecting parents may stand only if it is ?justified by a compelling interest that cannot be served by less restrictive means.?[16] Most courts accept that the states have a compelling interest in

preventing child abuse;[17] hence, the relevant question is whether ?less restrictive means? would suffice.

On this question, the courts generally agree that in-school interviews conducted without parental consent are the least restrictive means available to the state for preventing child abuse. The Minnesota Supreme Court found, for example, not only that the harm accruing to parents from such interviews is relatively ?minimal,? but also that such interviews constitute ?the fastest, most effective, and least intrusive means of assessing the validity of a report of abuse.?[18] A panel of the First Circuit similarly found that in-school interviews were reasonable and moreover that ?there is no way for the government to protect children without making inquiries that in many cases do turn out to be baseless.?[19] In a case where children were forcibly removed from their home by court order for interviews, a federal district court elaborated, in the context of a discussion of procedural due process, that:

> [T]he reliability of a child?s statements at an interview is of paramount importance. Unreliable or contaminated evidence resulting from the exercise of undue influence by the alleged abuse perpetrator will destroy the utility of the interview and prevent the defendant?s employees from ascertaining whether a child is in need of further care and protection. Consequently, in this case, it was infeasible and not advisable for [the social workers] to alert [the parents] of the allegations against [the father] prior to conducting the interview of [the child]. State officials could not guess what circumstances existed in the home, or whether [the mother] would assist in or deter [the social workers?] efforts to properly investigate the matter.
> . . . .
> While this court is cognizant of the natural trauma and concern that plaintiffs [i.e., the parents] experienced during the events surrounding and following [the child?s] removal from her home, the potential consequences of erroneously leaving or returning a child to an abusive situation are enormous.[20]

Countering this markedly deferential valuation of in-school questioning is the potential for its abuse, whether as a means of harassment or otherwise, although this is theoretically limited by the ?reasonableness? requirements of the state reporting laws, as well as of the Fourth Amendment, discussed below. Still, the potential for abuse remains problematic in light of such current weaknesses of the intervention system as vague statutory standards, disproportionate impact on minority and poor families, and instability of foster care.[21] In the current legal climate, however, rulings such as those cited here render a Free Exercise claim unlikely to prevail.

Fourth Amendment Prohibition Against Unreasonable Searches and Seizures.

The second constitutional provision implicated by in-school interviews is the Fourth Amendment prohibition against unreasonable searches and seizures. In general, the courts agree that in making a Fourth Amendment claim regarding a child abuse investigation, plaintiff parents do not have standing to sue on their own behalf, but may sue only in their capacity to represent their children.[22] In this context, the courts have held that taking protective custody of a child constitutes a ?seizure? under the Fourth Amendment,[23] although not all courts specify whether removing the child from classes in order to conduct an interview is equivalent to taking custody or merely constitutes a ?search.?

In articulating a standard to be applied to seizures in child abuse investigations, the courts vary. In a frequently cited opinion, a panel of the Seventh Circuit held that, prior to taking protective custody of a child, the Fourth Amendment requires probable cause in normal circumstances, but that in situations exhibiting ?immediate danger? social workers may exercise ?the power of police officers? for purposes of taking protective custody, so long as the seizure is followed by a probable cause hearing.[24] A federal district court in the Second Circuit recently held similarly, to the effect that caseworkers should be subject to the usual requirements regarding probable cause and warrants.[25] Here, the court reasoned that caseworkers would not be unduly burdened by having to familiarize themselves with these requirements because for them taking custody was a routine matter, and that New York state law already required ?reasonable cause? in emergencies and judicial authorization in non-emergencies.[26] A district court in the Tenth Circuit recently held somewhat differently, however, noting that ?probable cause? was dependent on context and concluding that courts ?must . . . look to the realities of the investigation process? so as to judge caseworkers leniently.[27]

Precisely how these standards for evaluating seizures would be applied to interviews conducted in school without parental consent, would depend on the particular fact pattern. Still, a few factors may give some general indication. For one, the above standards were developed in cases pertaining to taking protective custody of children, a measure that is typically more intrusive than conducting an interview, hence courts are likely to adjust their requirements accordingly. Moreover, as indicated above, courts are often deferential toward teachers and social workers based on their view of such questioning as the least restrictive means of preventing child abuse. Consequently, courts are unlikely to sustain a Fourth Amendment challenge on grounds of seizure unless the alleged grounds for

questioning the child without parental consent were clearly unreasonable as a matter of professional judgment.

Where courts treat in-school interviews as Fourth Amendment searches, as opposed to seizures, they typically apply the doctrine developed by the U.S. Supreme Court specifically for searches conducted within the school context. In this regard, the two governing cases are New Jersey v. T.L.O.[28] and Vernonia Sch. Dist. 47J v. Acton.[29] In T.L.O., the Court held that teachers act as arms of the state in conducting evidentiary searches and thus in upholding the state?s interest in preserving order within the schools;[30] that students do carry with them some legitimate expectation of privacy;[31] and, upon balancing these two factors, that ?the legality of a search of a student should depend on the reasonableness, under all the circumstances, of the search.?[32] Here, the Court concluded, an evidentiary search would be reasonable if both, first, it was ?justified at its inception? in terms of ?reasonable grounds? for believing that the search would yield evidence of a violation of either the law or the rules of the school; and second, the scope of the search was ?reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the students and the nature of the infraction.?[33]

In Vernonia, the Court extended this ?school searches? doctrine to uphold a school policy of suspicionless, random urinalysis drug testing of students who voluntarily participated in school athletic programs.[34] Here, the Court explained that the reasonableness of any specific class of searches depends on three factors: ?the nature of the privacy interest upon which the search . . . at issue intrudes;?[35] ?the character of the intrusion that is complained of;?[36] and ?the nature and immediacy of the governmental concern at issue . . . , and the efficacy of this means for meeting it.?[37] In upholding the drug testing policy, the Court repeatedly emphasized that students? privacy expectations were limited by the school?s ?custodial and tutelary? power as an authority acting ?*in loco parentis*.?[38] The Court additionally stressed that ?the search here is undertaken for prophylactic and distinctly *non*punitive purposes,?[39] as evidenced by the fact that an expressed purpose of the policy was to protect students,[40] as well as by the fact that the only ?penalty? levied following a positive test result was the imposition of the option of either drug rehabilitation or else suspension from school athletics.[41]

In applying this line of cases to in-school interviews conducted without parental consent, two preliminary points merit discussion. First, the purpose underlying such interviews may be distinguishable from both T.L.O. and Vernonia insofar as the lenient standards articulated by the Court were predicated on ?the substantial need of teachers and administrators for freedom to maintain order in the schools.?[42] That is, in conducting

an interview, the state?s purpose is not to preserve order within the school so much as to protect the child from possible abuse outside the school at the hands of the parents. Still, because courts generally recognize as compelling the state?s interest in preventing child abuse, such a distinction may be immaterial, particularly in light of the fact that the school might be said to act ?*in loco parentis*? in conducting such interviews.[43]

Second, owing to the ?prophylactic and *non*punitive? nature of these interviews, at least with respect to the child, a policy of interviewing students might more appropriately be compared to the drug testing policy in Vernonia than to the evidentiary searches in T.L.O.[44] At the same time, the intrusive nature of an in-school interview may be more akin to the individualized searches in T.L.O. than to the blanket searches in Vernonia, insofar as it singles out a particular student for questioning. Still, even if the ?reasonable cause? requirement of T.L.O. were to be imposed, the state reporting laws discussed above would already meet that standard.

Subsequent to Vernonia, two cases have dealt specifically with the Fourth Amendment as applied to in-school interviews. In one, a panel of the First Circuit affirmed summary judgment for the defendants when parents brought suit claiming that ?the Fourth Amendment was violated when school officials transported [one of their daughters] from one school to another to permit a [social worker] to talk with her [together with their other daughter].?[45] There, the court cited both T.L.O. and Vernonia and reasoned somewhat summarily,

> The Fourth Amendment . . . protects against *unreasonable* seizures. Nothing in the present facts made it unreasonable for the school, acting *in loco parentis*, to move one of the children from one school to another school in the vicinity, so that both children could be questioned together by a state official following upon a possible abuse report made by one of the teachers. The claim fails both on the merits and the qualified immunity grounds.[46]

In concluding its analysis, the court stressed the practical necessity of such interviews in preventing child abuse.[47]

The second relevant case is Picarella v. Terrizzi,[48] in which the federal district court rejected the parents? claim that such questioning was a *per se* violation of the Fourth Amendment requirement of reasonableness. The court first noted that the state reporting law required defendant to ?make a reasoned decision based on [his] own professional background as to whether there [was] ?reason to believe? that [the plaintiffs? daughter

was] the victim of child abuse.?[49] In this context, the court found that prohibiting a school employee who is suspicious but unsure of whether there is ?reason to believe? . . . [from asking] questions of the possible victim would be absurd in three ways:? first, the reporting law subjected school officials to criminal liability for failing to inquire; second, questioning was necessary to compensate for the fact that abused children are often afraid to report such abuse themselves; and third, holding otherwise would defeat the legislative purpose of preventing child abuse.[50]

The Picarella court also rejected the parents? further claim that such questioning violated the standard of reasonableness set forth in Vernonia: first, the child?s legitimate expectation of privacy was ?decreased due to the responsibility of the school as custodian and educator?; second, the character of the intrusion complained of was minimal, and any appearance to the contrary resulted from the child?s resistance, ?not [from] any conduct on the part of the school employees?; and third, ?[a]s to the nature and efficacy of the intrusion, there is no question of the state?s interest in preventing and/or punishing child abuse.?[51]

In both Picarella and Wojcik, then, the courts? Fourth Amendment analysis is characterized by substantial deference to the state?s compelling interest in preventing child abuse, as well as to the efficacy of questioning children at school without parental consent as a means of achieving that objective. This deference, combined with the relatively weak right of privacy enjoyed by children in the schools, renders it unlikely that a court would sustain a challenge to such questioning under the Fourth Amendment.

The Fourteenth Amendment Right to Substantive Due Process.

The third constitutional doctrine implicated by such questioning is Fourteenth Amendment substantive due process. Here, parents who challenge the constitutionality of child abuse investigations frequently invoke their ?fundamental? right to direct the upbringing and education of their children, a right whose constitutional history extends at least from Pierce v. Society of Sisters[52] (upholding right of parents to direct education of children), through, more recently, Santosky v. Kramer[53] (raising evidentiary standard to ?clear and convincing evidence? for termination of parental rights). Yet, in most if not all of these cases, the Court has qualified the parental right by recognizing the state?s interest in the child?s welfare.[54]

As indicated earlier, most lower courts carry these qualifications a step further and regard the state?s interest in preventing child abuse as compelling. Most lower courts also

disagree as to the standard to be applied in balancing state and parental interests. Among the proposed standards are: ?significant interference? with the parental right;[55] ?undue burden?;[56] and questions of ?intrinsic human rights,? degree, arbitrariness, and professional judgment.[57]

In practice, however, the theoretical differences among the various standards make little actual difference. In Picarella, for example, the court emphasized that federal courts must act deferentially toward the decisions of school officials not only out of respect for a ?traditional area of state and local concern,?[58] but also because ?over-expanding the notion of fundamental liberties protected by the Constitution compromises the value of and threatens the protection accorded those liberties.?[59] Thus, in addressing in-school interviews within the context of substantive due process, the court stated simply, ?With respect to the questioning of [the plaintiffs? daughter], the discussion above concerning the Fourth Amendment applies with equal force to this contention[, since the] same basic analysis of weighing interests applies to Fourth Amendment and due process claims.?[60] Given the current structuring of the respective interests of parent, state, and child, as discussed above, in combination with deference toward school officials, then, a substantive due process claim brought under any applicable standard is likely to fail.[61]

The Fourteenth Amendment Right to Procedural Due Process.

The fourth constitutional doctrine implicated by a policy of questioning students in school without parental consent is Fourteenth Amendment procedural due process. In the child abuse context, the courts are in strong agreement that the normal requirements due process may legitimately be circumvented in emergencies so long as notice and hearing are provided after the fact.[62] In the absence of emergency conditions, though, a parent might seek to impose on school officials the procedural requirement of obtaining parental consent before conducting such an interview. In seeking such protection, a plaintiff would have to demonstrate that: ?(a) there has been a deprivation of liberty or property in the constitutional sense; and (b) the procedures used by the state to effect this deprivation were constitutionally inadequate.?[63]

The first of these elements is immediately satisfied by the substantive due process right of parents to direct the upbringing and education of their children. As to the second of these elements, whether the given procedure is required is a matter determined by weighing the three factors articulated by the Court in Mathews v. Eldridge:

> First, the private interest that will be affected by the initial action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the

> probable value, if any, of additional or substitute procedural safeguards; and finally, the Government?s interest, including the function involved and the fiscal administrative burden that the additional or substitute procedural requirement would entail.[64]

As to the first factor, the private interest at stake is the parental right to direct the upbringing of children. Regarding the second factor, as indicated earlier, courts are likely to view parental consent as obviating the value of questioning children because of the power it gives parents to shield themselves from investigation either by pressuring the child or otherwise. And while courts have not directly addressed the accuracy of these interviews even when conducted without parental consent, they have, as earlier, spoken to the necessity of conducting such interviews regardless. As to the third factor, the earlier discussion also reflects the current view of the courts that questioning children is the least restrictive means of ensuring the government?s compelling interest in protecting children from abuse. In the context of this structuring of interests, a procedural due process claim is likely to fail.[65]

Conclusion.

Whether brought under procedural due process or another provision, a suit challenging the constitutionality of questioning children at school without parental consent is unlikely to prevail. In theory, the respective differences in the analysis of different constitutional provisions might alter the outcome, with, for example, First Amendment strict scrutiny perhaps favoring the parents more so than Fourth Amendment reasonableness. Despite these differences, the present structuring of state and parental interests, combined with a deference toward local school officials, predisposes courts to reject challenges regardless of the particular provision under which a claim is brought. Therefore, the courts will likely regard the questioning of children at school without parental consent, based on a school official?s professional judgment that there exist reasonable grounds to fear child abuse, as constitutional.

For More Information.

If you would like to order other educational materials, or need legal assistance, please contact The Rutherford Institute at P.O. Box 7482, Charlottesville, VA 22906-7482, (804) 978-3888, or visit our website at www.rutherford.org.

Endnotes

[1] For the most recent case, see Troxel v. Granville, 120 S. Ct. 2054 (2000) (holding Washington State?s statutory right of visitation for grandparents violative of parents? right to direct and control upbringing of their children), as well as the cases cited therein.

[2] U.S. CONST. AMEND. I.

[3] U.S. CONST. AMEND. IV.

[4] U.S. CONST. AMEND. XIV.

[5] Id.

[6] See e.g., J.B. v. Washington County,127 F.3d 919 (10th Cir. 1997), at 922, n.1 (allegations of in-home abuse ordinarily investigated by conducting an interview at child?s school).

[7] DeShaney v. Winnebago County Social Serv. Dept., 489 U.S. 189, 191 (1989).

[8] 2 Legal Rights of Children ?? 16.14-15, at 58-59 (Donald T. Kramer, ed., 2d ed. 1994).

[9] Id. ? 16.16, at 66-67.

[10] See e.g., Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 1999)(dismissal of civil rights suit against county social workers and police for wrongful removal of children from home reversed); Callahan v. Lancaster-Lebanon Intermediate Unit 13, 880 F. Supp. 319, 330-32 (E.D. Pa. 1994).

[11] See e.g., Callahan, supra.

[12] But see Newkirk v. East Lansing Public Sch., 1995 U.S. App. LEXIS 14817, at *2 (2d Cir. June 13,

1995) (unpublished opinion). Because this ruling is an unpublished decision, it does not have the effect that a published decision would have. Some courts have internal rules that forbid them from considering unpublished decisions when making their decisions.

[13] 494 U.S. 872 (1990).

[14] Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

[15] Id. at 891.

[16] Id. at 907 (Blackmun, J., dissenting); see also Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (?only those interests that are of the highest order and those not otherwise served can overbalance legitimate claims?).

[17] See e.g., J.B., 905 F. Supp. at 988; R.S. v. State, 459 N.W.2d 680, 689 (Minn. 1990).

[18] R.S., 459 N.W.2d at 690.

[19] Wojcik v. Town of North Smithfield, 76 F.3d 1, 3 (1st Cir. 1996).

[20] J.B., 905 F. Supp. at 986-87.

[21] See 2 Legal Rights of Children, ? 16.02, at 12.

[22] See e.g., Gardiner v. Incorporated Village of Endicott, 50 F.3d 151, 155 (2d Cir. 1995); Tenenbaum v. Williams, 862 F. Supp. 962, 974 (E.D.N.Y. 1994).

[23] See e.g., Tenenbaum, 862 F. Supp. at 973.

[24] Donald v. Polk County, 836 F.2d 376, 384 (7th Cir. 1988).

[25] Tenenbaum, 862 F. Supp. at 975.

[26] Id. at 975-75; see also Chayo v. Kaladjian, 844 F.Supp. 163, 169 (S.D.N.Y. 1994) (when taking emergency custody, ?reasonableness? requires only that caseworkers have ??reason to fear? that danger is imminent?).

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[27] J.B., 905 F. Supp. at 990.

[28] 469 U.S. 325 (1985).

[29] 515 U.S. 646 (1995).

[30] T.L.O., 469 U.S. at 336.

[31] Id. at 338.

[32] Id. at 337, 341.

[33] Id. at 342.

[34] 515 U.S. at 663.

[35] Id. at 654.

[36] Id. at 658.

[37] Id. at 660.

[38] Id. at 655, 656.

[39] Id. at 658, n.2.

[40] Id. at 649.

[41] Id. at 651.

[42] Vernonia, 515 U.S. at 653 (quoting T.L.O., 469 U.S. at 341).

[43] But cf. People v. Dilworth, 661 N.E.2d 310, 319 (Ill. 1996) (?The main reason the Supreme Court . . . lowered the fourth amendment standard applicable to searches of students at school was *to protect and maintain a proper educational environment for all students*, not because of any real or imagined ?special relationship? between students and teachers.?).

[44] Cf. People v. Pruitt, 662 N.E.2d 540, 547 (Ill. App. 1 Dist. 1996) (?each of the suspicionless, administrative searches upheld by the Supreme Court was conducted as part of a general regulatory scheme to ensure public safety, not as a criminal investigation to secure evidence of a crime.?)

[45] Wojcik v. Town of Smithfield, 76 F.3d 1, 3 (1st Cir. 1996).

[46] Id.

[47] Id.

[48] 893 F. Supp. 1292 (M.D. Pa. 1995).

[49] Id. at 1300.

[50] Id. at 1300.

[51] Id. at 1301.

[52] 268 U.S. 510, 534-35 (1925).

[53] 455 U.S. 747, 748 (1982).

[54] See e.g., Pierce, 268 U.S. at 534 (?No question is raised concerning the power of the state reasonably to regulate all schools [and] to require that all children of proper age attend some school.?); Santosky, 455 U.S. at 766 (holding that state has ?a *parens patriae* interest in preserving and promoting the welfare of the child?).

[55] Tenenbaum, 862 F. Supp. at 973.

[56] J.B., 905 F. Supp. at 988.

[57] In re Scott County Master Docket, 672 F. Supp. 1152, 1165-68 (D. Minn. 1987), aff?d, Myers v. Scott County, 868 F.2d 1017 (8th Cir. 1989). See also Wilkinson v. Balsam, 885 F. Supp. 651, 662 (D. Vt. 1995) (?[P]arents are always constitutionally entitled to be free of the state?s *arbitrary* interference in familial relationships. This is but an instance of a general principle of substantive due process.?).

[58] 893 F. Supp. at 1297.

[59] Id. at 1298.

[60] Id. at 1302 (citing Darryl H. v. Coler, 801 F.2d 893, 901-02 n.7 (7th Cir. 1986)).

[61] See also R.S., 459 N.W.2d at 689-90.

[62] See e.g., Chayo, 844 F. Supp. at 171.

[63] Callahan, 880 F. Supp. at 332 (quoting In re Scott County Master Docket, 672 F. Supp. at 1169).

[64] Callahan, 880 F. Supp. at 332 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1970)).

[65] See e.g., J.B., 905 F. Supp. at 986-87.