

# Review of Recent Juvenile Cases (2010)

by  
The Honorable Pat Garza  
Associate Judge  
386th District Court  
San Antonio, Texas

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## **Dog sniff of student's property in class room while students asked to wait outside was considered constitutional.[In the Matter of D.H.](10-2-2)**

**On March 5, 2010, the Austin Court of Appeals held that, considering the low level of intrusion on student's limited privacy rights and the evidence about the drug problem at the school, the seizure of student's backpacks, to be sniffed by drug dogs, effectively addressed the problem of student drug use and served the important governmental interest in protecting the students' safety and health**

¶ 10-2-2. **In the Matter of D.H.**, No. 03-07-00426-CV, --- S.W.3d ----, 2010 WL 744117 (Tex.App.-Austin, 3/5/10).

**Facts:** In October 2006, officers from the Austin Police Department arrived at Reagan High School to conduct a canine search of the school. FN1 D.H., who was sixteen at the time, was a student at the school. Assistant Principal Mike Perez led the officers through the school, allowing the dog to sniff several classrooms on each floor of each building. For every inspection, Perez entered the classroom and informed the teacher of the sweep. The students were then instructed to leave their property in the classroom and wait in the hall, and the police entered and allowed the dog to sniff the items left in the room. The students were not allowed to refuse the instructions or to take their items with them. When the officers searched D.H.'s classroom, the dog reacted to her backpack. The officers called D.H. into the classroom, read D.H. her rights, and searched her bag, where they found a small bag of marijuana.

On appeal, D.H. contends that (1) her backpack was seized for Fourth Amendment purposes when she was required to leave it behind in her classroom while she went into the hallway as instructed, and (2) because neither the school nor the officers had reason to believe she was engaged in criminal activity or in violation of school rules, they lacked reasonable suspicion to seize her bag. For those reasons, she argues that the seizure of her backpack was a violation of her constitutional rights and that the marijuana, as the fruit of an improper seizure, should have been suppressed. See *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (holding that evidence obtained by improper search or seizure is inadmissible).

**Held:** Affirmed

**Opinion:** D.H. does not contend that the dog's inspection of her bag was a search for Fourth Amendment purposes. Instead, she argues that requiring her to leave her backpack in the classroom while she left the room was an unconstitutional seizure of her property and that she otherwise would have carried it on her person, where the dog would not have been permitted to sniff it under *Horton v. Goose Creek Independent School District*, 690 F.2d 470, 479 (5th Cir.1982). FN2 We need not decide whether a seizure of D.H.'s property occurred, however, because assuming a seizure occurred, see *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) (seizure occurs if there is "meaningful interference" with individual's possessory interests in property), the school's actions were reasonable and thus constitutionally permissible under the standards applied in a public-school setting.

Keeping in mind that the Supreme Court has expressly refused to impose a requirement of "individualized reasonable suspicion of wrongdoing" on schools' attempts to prevent student drug use, *Earls*, 536 U.S. at 837, 122 S.Ct. 2559, we will consider the privacy interest that was impaired by the seizure of D.H.'s backpack, the nature of the intrusion on that interest, and the nature of the government's concerns and the efficacy of the seizure in addressing them. *Id.* at 830, 832, 834, 122 S.Ct. 2559.

We turn first to the privacy interest that was impaired by the alleged seizure. See *id.* at 830, 122 S.Ct. 2559. Students have a lessened expectation of privacy under the Fourth Amendment. *Id.*; see *Morse*, 551 U.S. at 396-97, 127 S.Ct. 2618 (stating that students' constitutional rights must be considered in light of public-school setting and are not automatically coextensive with those of adults in other settings). "Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults." *Earls*, 536 U.S. at 831, 122 S.Ct. 2559. We "cannot disregard the schools' custodial and tutelary responsibility for children," and must view the school environment as a "backdrop for the analysis of the privacy interest at stake and the reasonableness of" the school's decisions. *Id.* at 830, 122 S.Ct. 2559 (quoting *Acton*, 515 U.S. at 656, 115 S.Ct. 2386). D.H. certainly had a legitimate privacy interest in the contents of her backpack. See *T.L.O.*, 469 U.S. at 337-38, 105 S.Ct. 733. However, considering that D.H.'s backpack was not opened, nor were its contents examined, until after the dog alerted on it, and bearing in mind the control and supervision that school authorities must properly exercise in their roles as guardians and tutors of their students, see *Earls*, 536 U.S. at 830, 122 S.Ct. 2559, we hold that restricting D.H.'s ability to take her backpack with her implicated a relatively minor privacy interest.

We next consider the nature of the alleged infringement on her privacy interests. On the day in question, before the police officers and drug dog entered the classroom, Perez went in, spoke to the teacher, and asked the students to step into the hallway. The students waited outside the classroom while the canine inspection took place, and there was no risk that another student might steal anything from or rummage through D.H.'s bag. The students themselves were not sniffed and they were not in the room while the dog sniffed their belongings. Only Perez, the dog, and the two officers were present when the dog alerted on D.H.'s backpack. Thus, D.H. was not exposed to embarrassment or scrutiny by her classmates while the inspection was taking place. She was not required to open her bag in front of anyone until after the dog alerted, and then the contents of the bag were only seen by Perez and the police officers. Given the method employed in conducting the canine inspection and the minimally intrusive nature of the inspection, we hold that the invasion of D.H.'s privacy was not significant. See *id.* at 834, 122 S.Ct. 2559.

Finally, we must weigh the invasion of D.H.'s rights against "the nature and immediacy of the government's concerns and the efficacy" of the seizure in meeting those concerns, keeping in mind the context in which the seizure took place. See *id.* There is an important "governmental concern in preventing drug use by schoolchildren," and the drug problem seems to be worsening. *Id.* The Supreme Court has held that "detering drug use by schoolchildren is an important—indeed, perhaps compelling—interest," *Morse*, 551 U.S. at 407, 127 S.Ct. 2618 (quoting *Acton*, 515 U.S. at 661, 115 S.Ct. 2386), and characterized it as a "nationwide drug epidemic [that] makes the war against drugs a pressing concern in every school," *Earls*, 536 U.S. at 834, 122 S.Ct. 2559.

Assistant Principal Perez testified that he and the other administrators knew there was a drug problem at the school and that "students have reported and we have found that there is enough Marijuana being sold, used or kids coming back from lunch under the influence that it is something we are always on the lookout for." He said that student drug use can lead to belligerent behavior or dangerous physical reactions, saying, "It becomes a serious safety issue for us at that point and the drug question becomes secondary, because we have to deal with the student's safety first." Perez testified that the school has written policies prohibiting drug possession on school grounds: the school district's code of conduct, which states that drugs are not permitted on school property; and the campus handbook, which reiterates the district's policy and specifies that marijuana is not permitted. Students are given the handbook at the beginning of the year and are instructed to bring it to their parents, who are asked to review the handbook, sign the back page, and return the signed page to the school. Considering the low level of intrusion on D.H.'s limited privacy rights and the evidence about the drug problem at Reagan High, we hold that the seizure effectively addressed the problem of student drug use and served the important governmental interest in protecting the students' safety and health. See *id.* at 834-88, 122 S.Ct. 2559.

**Conclusion:** D.H. brought her backpack into a public school, where she was required to temporarily surrender its possession and leave it in the classroom to be sniffed by a dog. Given D.H.'s reduced expectation of privacy, the low level

of intrusion involved in the dog's inspection of the airspace surrounding her backpack, the limited information gathered, Reagan High's interest in combating drug abuse, and its tutelary and custodial responsibilities for its students, we hold that the detention of her backpack was reasonable and thus constitutionally permissible. See *Jacobsen*, 466 U.S. at 125-26, 104 S.Ct. 1652.FN3 We overrule D.H.'s issues and affirm the trial court's judgment.

FN1. There was conflicting testimony related to whether the school requested the search or the police asked to field test or train a drug dog. Although Assistant Principal Mike Perez testified that the arrival of the canine unit was unexpected, he also testified that the school principal had told the police that he would not object to the school being used for training purposes. Whether the canine inspection was initiated by the school or the police officers does not impact our analysis.

FN2. Horton held that allowing a dog to sniff student lockers located in a school's public hallways and automobiles parked in the school's parking lot did not constitute a search under the Fourth Amendment. *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 477 (5th Cir.1982).

FN3. See also *Louisiana v. Barrett*, 683 So.2d 331, 338 (La.Ct.App.1996) (school required students to empty pockets onto desk and leave classroom to allow drug dog to sniff belongings; "Taking into account the decreased expectation of privacy defendant had as a student, the relative unobtrusiveness of the search, and the severity of the need met by the search, we conclude the type of search conducted in this case (wherein defendant was asked to empty his pockets and leave the room) is reasonable and hence constitutional."); *Smith v. Norfolk City Sch. Bd.*, 46 Va. Cir. 238, 244-45, 261 (Va.Cir.Ct.1998) (students were required to leave belongings in classroom to be sniffed by drug dog; "Balancing Condon's lessened privacy interests and the minimal intrusion upon them against the strong governmental concerns with drugs and guns, this Court concludes that Condon's rights were not violated by the brief seizure of his belongings.").