9. SURVEILLANCE AND PATROLLING SCHOOLS

9.1. Human Surveillance.

It goes without saying that school officials are permitted, indeed are expected, to closely supervise and monitor the activities of schoolchildren at all times while students are on school grounds or are otherwise subject to the care and supervision of the school district. With very few exceptions, school officials are authorized to enter any room or area within the school building or on school grounds to observe or "surveil" students. Obviously, however, for the reasons discussed in more detail below, a school official should not enter a locker room or shower area used by students who are not of the same gender, and a school official should not open the door of an occupied toilet or shower stall unless there are reasonable grounds to believe that the stall is *not* being used not for its intended purpose, but rather is being used to conceal illegal activities, or unless there is reason to believe that a student is in distress and in need of immediate medical attention.

The act of observing students, or using other senses such as smell or hearing to monitor student activities, generally does not constitute a "search" within the meaning of the Fourth Amendment. This would be true even in the case where the presence of the observing official is not immediately apparent, or is even purposely concealed, provided that students do not have a reasonable expectation of privacy in the place and at the time they are being watched. Surveillance and monitoring, in other words, need not be limited to roving patrols of corridors, classrooms, and places where students congregate. It is also permissible in most instances to make observations from concealed, stationary locations, such as from behind two-way mirrors.

Thus, for example, a school official could look out a window (and even use binoculars or other vision-enhancing devices) to observe students who are congregating in places outside the school building to smoke or consume drugs or alcohol. Similarly, school officials can sit in parked vehicles to observe student activities. By the same token, school officials walking in the school parking lot are free to look though car windows to observe students sitting in parked vehicles who are smoking or are consuming drugs or alcohol, without in any way running afoul of the Fourth Amendment, provided officials do not enter these parked vehicles. (The act of opening a window or door would constitute a "search" under the Fourth Amendment.)

In State v. Saez, 139 N.J. 279 (1995), the New Jersey Supreme Court held that it was unreasonable and thus impermissible for police officers to peer through the crack in a basement wall to observe the criminal activities taking place in the adjoining house,

notwithstanding that the police had been invited to use the basement to make these observations. This recent case is sometimes cited for the proposition that police may not set up a "duck blind" to conduct surveillance of activities occurring inside a home, since the drug traffickers in that case were said to enjoy a reasonable expectation of privacy while they were in their own basement.

That case reflects the importance that courts place on protecting the sanctity of a home. The same protections and expectations of privacy simply do not exist in the context of the school house. In Stern v. New Haven Comm. Sch., 529 F.Supp. 31 (E.D. Mich. 1981), the court held that a public high school student was not subjected to an unconstitutional search when a school official observed him through a two-way mirror in the boys' restroom. The student was observed buying marijuana from another student, and the incident was ultimately reported to the police. The student sued the school district for civil damages under 42 U.S.C. § 1983. The court dismissed the student's civil rights claim, ruling that Fourth Amendment rights must yield to the extent that they interfere with the school administration's fundamental duty to operate the school as an educational institution. The court in that case ultimately concluded that when the student's privacy interests are weighed against the school's duty to maintain order and discipline, the use of a two-way mirror in a boys' restroom did not violate the Fourth Amendment.

Even so, school officials in New Jersey should be cautious before conducting a surveillance of students in restrooms or locker rooms, since it is by no means clear that New Jersey courts would conclude that students have no expectation of privacy as against surveillance in these areas, and especially in a toilet, urinal, or shower area.

Recently, a New Jersey court for the first time addressed the issue of what degree of privacy is due an individual in a public restroom. In State v. Boynton, 297 N.J. Super. 382 (App. Div. 1997), the police were searching for a fugitive in a bar that they knew he frequented. After failing to locate the fugitive in the main part of the bar, an officer opened an unlocked single-occupancy public restroom and interrupted the sought-after fugitive in the middle of a drug sale involving another person.

The court in Boynton ultimately ruled that the entry into the unlocked public restroom was lawful, so that the officer was rightfully present when he observed controlled dangerous substances in "plain view." "The officer," the court reasoned, "did not have to avert his eyes in the presence of the illegal activity that was taking place in front of him." 297 N.J. Super. at 394.

In reaching its conclusion, the court undertook a careful review of privacy law in other jurisdictions. While acknowledging that it is axiomatic that individuals are due some degree of privacy in a public restroom, the court held that any such right of privacy is not absolute. 297 N.J. Super. at 388. In deciding whether an individual possesses a reasonable expectation of privacy sufficient to trigger constitutional protection under the Fourth Amendment, courts must take into account factual considerations, such as the layout of the restroom, the area in the restroom where the activity takes places, and, to some degree, the method of surveillance employed by the police.

The court noted, for example, that a distinction must be drawn between restroom stalls and restroom "common areas" (i.e., sinks). Individuals performing illegal activities in the common area of a public restroom, the court found, cannot possess a reasonable expectation of privacy. 297 N.J. Super. at 389.

While the use of a stall in a public restroom (or, presumably, the use of a shower curtain) affords a greater degree of privacy, again, this right of privacy is not absolute. The court noted that the general rule in other jurisdictions seems to be that when a stall is equipped with a door, individuals in the stall are accorded a reasonable expectation of privacy "unless they are engaged in illegal activity that is apparent to the casual observer who is rightfully in a common area of the restroom." Id. The court cited as an example an Illinois case where a police officer heard two voices coming from a single stall. In those circumstances, it was not unlawful for the officer to look into the stall through the gap between the door and the door frame. See People v. Morgan, 200 Ill. App.3d 956, 146 Ill. Dec. 561, 558 N.E.2d 524, appeal den., 133 Ill.2d 567, 149 Ill. Dec. 331, 561 N.E.2d 701 (1990). The court in Boynton also cited to cases which held that bathroom stalls that are not equipped with doors do not provide the same reasonable expectation of privacy. 297 N.J. Super. at 389.

Notably, the Boynton court carefully analyzed a Washington state decision, State v. Berber, 48 Wash. App. 583, 740 P.2d 863 (1987). In doing so, the court emphasized the relevance of whether the method of surveillance used by authorities, if unchecked by constitutional considerations, would diminish the amount of privacy and freedom afforded citizens to an extent that is inconsistent with a free and open society. The court thus drew a clear distinction between the act of entering a public restroom, on the one hand, and the act of conducting *clandestine* surveillance on the other hand. 297 N.J. Super. at 391. Although the facts in Boynton did not involve any such clandestine surveillance, the court implied, if only in dicta, that such activity by police might easily intrude upon a citizen's reasonable expectation of privacy.

School officials should also consider that the New Jersey Legislature recently enacted a statute that flatly prohibits schools from conducting strip searches of students. P.L. 1997, c. 242 (N.J.S.A. 18A:37-61.) The new statute, which took effect on September 5, 1997, seems to reflect a legislative judgment, one likely to be heeded by the courts, that school officials have no business watching students disrobe. It is interesting to note, however, that the United States Supreme Court recently concluded in Vernonia Sch. Dist. 47J v. Acton, 115 S.Ct. 2386 (1995), that student athletes enjoy a reduced expectation of privacy. "School sports," the Court reasoned, "are not for the bashful," and "public school locker rooms ... are not notable for the privacy they afford." 115 S.Ct. at 2392, 2393.

In any event, before establishing a concealed surveillance site in any portion of a restroom or locker room, school officials should be prepared to document why that procedure is absolutely necessary, pointing, for example, to recent incidents where those very locations were used to commit drug violations or to commit assaults against other students. In addition, the surveillance should be done in a way that minimizes privacy intrusions to the greatest extent possible consistent with the reason for resorting to surveillance in the first place.

It bears repeating, finally, that school officials would be free to enter and "patrol" those locations, provided that this form of monitoring and supervision was conducted by school employees of the appropriate gender for a bona fide purpose.

9.2. Cameras and Electronic Monitoring.

As a general proposition, school officials are permitted under the Fourth Amendment to deploy security cameras to observe any place or activity that could be monitored or patrolled by a person. Once security monitors are deployed, however, the better practice is to provide notice by placing signs clearly warning all persons that the area is subject to surveillance by video camera. The principal purpose in deploying these cameras, after all, is to deter unlawful activity and disruptive behavior, not to catch students in the act so that they can be suspended, expelled, or prosecuted.

Cameras generally should not be deployed in lavatories or locker rooms, or at least in portions thereof where they would be likely to record students who are undressed or who are performing normal excretory functions. (See discussion in the preceding subsection concerning State v. Boynton, 297 N.J. Super. 382 (App. Div. 1997), and the possible impact of the new law that prohibits strip searches.) If cameras are to be deployed in such locations, school authorities should be prepared to document the reasons that necessitate this significant privacy intrusion (i.e., a recent spate of drug

offenses or assaults committed at these locations). But see the above-quoted portions of Vernonia Sch. Dist. 47J v. Acton, wherein the United States Supreme Court noted, at least in dicta, that locker rooms are not notable for the privacy they afford, and that "there is an element of communal undress inherent in athletic participation." 115 S.Ct. at 2392, 2393 (citation to authority and quotation marks omitted). In addition, precautions must be taken to ensure that students in these circumstances are observed only by designated security personnel or school officials of the same gender.

It should be noted that N.J.S.A. 2A:4A-61b generally prohibits juveniles under the age of fourteen from being photographed for criminal investigation purposes, unless the juvenile or parent/guardian consents, or unless permission is granted by a court. This statute applies only to photographs taken for criminal identification purposes (i.e., "mug shots" to be used in a photo array or "line up"). This statute does not prevent schools from deploying cameras or from keeping a photograph or videotape record of students who were observed by a security camera.

Finally, it is important to note that under New Jersey's electronic surveillance laws, N.J.S.A. 2A:156A-1, et seq., it is generally unlawful to use electronic or mechanical devices to record, monitor or amplify private conversations, that is, conversations or any "oral communication" that the participants would reasonably expect to be private. See N.J.S.A. 2A:156A-2b. Accordingly, security monitoring devices should be limited to conducting a *visual* surveillance, rather than an aural one. If sound monitors are for any reason to be deployed for security purposes in hallways or classrooms, warning notices must be clearly and conspicuously posted so that all persons in these areas know that these devices are present and operational. Under no circumstances should school officials use listening devices or sound-enhancing devices to surreptitiously listen in on conversations of students who are suspected of engaging in unlawful activity. In fact, it is a crime to do so, N.J.S.A. 2A:156A-3, and persons who violate the Wiretap Act are also subject to punitive damages in a civil lawsuit. N.J.S.A. 2A:156A-24b.