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Dennis D. Parker
New York Law School

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DENNIS D. PARKER

Discipline in Schools After *Safford Unified School District #1 v. Redding*

ABOUT THE AUTHOR: Dennis D. Parker is the Director of the ACLU Racial Justice Program. He teaches at New York Law School and at Columbia University School Law Institute. Mr. Parker is a graduate of Middlebury College and Harvard Law School.

I. INTRODUCTION

At the close of the October Term, 2008, many children's rights advocates apprehensively awaited the United States Supreme Court's decision in *Safford Unified School District #1 v. Redding*, a case examining the constitutionality of the strip search of a thirteen-year-old middle school student in the course of an investigation of an alleged violation of school policy regulating the use of prescription and non-prescription drugs.¹ That advocates were apprehensive was not surprising. Over the decades, a series of Supreme Court decisions had progressively restricted the rights of students,² culminating in the Court's 2007 decision in *Morse v. Frederick*.³ *Morse*, known as the "Bong Hits for Jesus" case, granted school administrators an extremely wide degree of discretion in limiting the free speech rights of students in order to implement policies aimed at reducing student use of illegal drugs.⁴ Although it had long been the case that "the constitutional rights of students in public school[s] are not automatically coextensive with the rights of adults in other settings,"⁵ the fear among advocates was that the *Redding* decision would effectively negate the privacy rights of students in favor of granting school administrators virtually unchecked discretion in implementing policies aimed at reducing drugs in schools.

This article will first consider the facts and the holding of *Redding*. It will then turn to questions regarding the peculiarities of broader school disciplinary policies as they relate to students in disciplinary alternative schools. The article will then examine arguments why the holding in *Redding* counsels a wholesale re-examination of the way that discipline is maintained for students with disciplinary problems. Finally, the article will contend that the re-examination must be approached with an eye toward creating disciplinary structures that would assure the safety of all students while creating an educational environment that would benefit those students needing assistance.

II. THE FACTS AND HOLDING OF REDDING

The facts of *Redding* relevant to this discussion are relatively straightforward. Savannah Redding, a thirteen-year-old middle school student, was called into the assistant principal's office.⁶ She was asked whether she was the owner of a day planner

1. 129 S. Ct. 2633, 2637 (2009).

2. *See, e.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (holding that requiring random urinalysis as a precondition of participation in interscholastic athletics did not violate the constitutional right to be free from unreasonable searches); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding that suspending a student from school for two days for making a sexually suggestive speech at a school assembly was reasonable and not in violation of the student's First Amendment rights); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that search of a student's purse in an investigation of smoking in a school lavatory was reasonable).

3. 551 U.S. 393 (2007).

4. *Id.* at 396–402.

5. *Bethel Sch. Dist.*, 478 U.S. at 682 (citing *T.L.O.*, 469 U.S. at 340–42).

6. *Redding*, 129 S. Ct. at 2638.

that contained a number of contraband items, including knives and a cigarette.⁷ She was shown four prescription-strength ibuprofen and one over-the-counter naproxen used for pain and inflammation, the possession of which violated school policy.⁸ Redding said that the day planner was hers and that she had lent it to a friend, but that she knew nothing about either the contraband contents of the day planner or about the drugs.⁹ The friend, to whom she had lent the day planner and in whose pocket the pills had been found, stated that she received the drugs from Savannah.¹⁰ Based upon that statement, the assistant principal searched Redding's backpack, found nothing, and sent Redding to the nurse's office where she was instructed to remove all of her clothing except for her bra and underpants.¹¹ She was then asked to pull her bra out and shake it and to pull out the elastic of her underpants.¹² This search yielded nothing and Redding's mother filed suit against the school district.¹³

The majority found that the search of the backpack was permissible, but concluded that the strip search was not based on a careful consideration of all of the facts.¹⁴ The majority balanced the interest of the school to create and maintain a drug-free environment with Redding's right to be free from an unreasonable search.¹⁵ The accusation by the other student that Redding had supplied the pills coupled with the fact that Redding had been suspected of an earlier incident involving alcohol were found to provide a sufficient basis to justify a search of Redding's outer clothing and backpack.¹⁶ Applying the standard established in *New Jersey v. T.L.O.*¹⁷ governing the legality of a school search, the Court found that although some level of search was acceptable, the subsequent strip search was improper.¹⁸ The standard prescribes that "a 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."¹⁹ The *Redding* majority applied this standard in a way that made clear that they did not regard themselves as a rubber stamp of the school administration. The Court clearly accepted Redding's account that the procedure was "embarrassing, frightening and humiliating,"

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 2641.

15. *Id.* at 2642.

16. *Id.* at 2641.

17. *T.L.O.*, 469 U.S. at 341.

18. *Redding*, 129 S. Ct. at 2642–43.

19. *T.L.O.*, 469 U.S. at 342.

citing an amicus curiae brief submitted by the National Association of Social Workers, that highlighted the particular vulnerability of adolescents and the possibility of “serious emotional damage” that might result from strip searches.²⁰

The Court measured the reasonableness of the search against its harsh psychological consequences. In finding the search unreasonable, the Court considered a number of factors including: 1) that the specific drugs for which the search was conducted were common painkillers and that there was no indication that they were being passed around on a large scale; 2) that there was no evidence that Redding was hiding pills in her underwear or that she would be likely to hide non-dangerous drugs there; and 3) that the school officials failed to consider relevant factors before undertaking the search, such as when the pills were allegedly exchanged.²¹

The Court held that the defendants were shielded from liability by qualified immunity due to the absence of clearly established law regarding strip searches in schools.²² Despite this conclusion, advocates were cheered by the majority’s recognition that a balancing between the interests of school administrators and the privacy interests of individual students required the application of a test that measured the reasonableness and intrusiveness of the search.

Not everyone was pleased with the conclusion that Savannah Redding’s privacy rights were more compelling than the school’s right to determine how it would enforce anti-drug policy. In his dissent, Justice Thomas bewailed the result and stated that the decision undermined the authority of the school and improperly injected courts into decision-making processes in which they did not belong.²³ In fact, Justice Thomas stated that the soundest course would have been to apply the doctrine of *in loco parentis* under which a parent’s authority to establish and enforce rules would be transferred wholesale to teachers and administrators.²⁴ He recognized this policy would grant “almost complete discretion to establish and enforce the rules they believed were necessary to maintain control over their classrooms.”²⁵

Justice Thomas’s explicitly stated desire to return to the disciplinary policies of the nineteenth century and earlier may appear extreme. However, his dissent appears to be driven by a core belief that granting school authorities’ unfettered discretion is necessary for establishing a safe and secure learning environment. This belief appears

20. *Redding*, 129 S. Ct. at 2641–42. The reaction of the individual justices of the court to the question of the intrusiveness of the search itself was interesting. Justice Stevens, joined by Justice Ginsburg, dissented from the majority opinion’s decision regarding immunity because they believed that the search was so outrageous that the school officials should have been on notice that it offended the constitutional rights of the student. *Id.* at 2644, 2646. Justice Thomas, in contrast, makes no mention of the effect of such a search on a child but instead would have found the search proper as long as it was objectively reasonable to believe that the area searched could have concealed the objects of the search, raising the question of whether Justice Thomas would be willing to draw the line at a cavity search. *Id.* at 2646–47.

21. *Id.* at 2642.

22. *Id.* at 2644.

23. *Id.* at 2646 (Thomas, J., dissenting).

24. *Id.*

25. *Id.* at 2655 (citing 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 205 (1873)).

to be reflected at least in part by courts that have struggled to balance the interest of the State in providing a safe environment conducive to education against assuring the constitutional rights of individual students.²⁶ Under this formulation, the balance of constitutional rights and school safety become a zero sum game where the efforts to assure one are done at the expense of the other.

III. APPLICATION OF REDDING TO CHILDREN IN THE SCHOOL-TO-PRISON PIPELINE

Redding was a Fourth Amendment case involving a particularly humiliating strip search of a thirteen year old who had no disciplinary record. It would be a mistake to regard this case as a wholesale reconsideration of the Supreme Court's jurisprudence relating to court review of educational disciplinary policies. Still, the *Redding* majority elected not to provide unbridled discretion to school authorities in the name of establishing school safety and, by so doing, provided for a means of examining the reasonableness of individual decisions by school administrators. This consideration of the individual circumstances is significant in part because it signals a willingness of the Court to subject decisions of schools to some level of scrutiny. The Court will not merely assume that any decision by a school administrator or teacher is reasonably required to assure safety.

The willingness to carefully consider the circumstances of particular policies and practices holds considerable promise for assuring fairness for all students. *Redding* was an honor student with no disciplinary record.²⁷ Although the lack of her prior record underscores the randomness and humiliation of the strip search, the incident raises questions about whether and how such an analysis should be applied to students whose disciplinary records are not clean, whose school records are less than exemplary, and for whom searches for unspecified contraband are a daily routine. In fact, there is no reason to believe that these students would be categorically less sensitive to the humiliation and embarrassment attendant to intrusive disciplinary policies. It also cannot be the case that a different standard of reasonableness should apply to groups of students because of academic ability or prior disciplinary problems that have no relation to the searches and disciplinary policies in question.

For students with a disciplinary history, the *Redding* decision is of particular importance because the potentially invasive and systematic school disciplinary practices have reduced educational opportunities.²⁸ Moreover, the effect goes far beyond the injury suffered by an individual, isolated student and extends to all of the students subjected to routine, invasive searches. For the children seeking to escape the "school-to-prison pipeline," a collection of policies that direct children out of the

26. See, e.g., *T.L.O.*, 469 U.S. at 332, n.2.

27. Brief of Respondent at 1, *Safford Unified School District #1 v. Redding*, 129 S. Ct. 2633 (2009) (No. 08-479) (on file with author).

28. Russell Skiba, *Zero Tolerance: The Assumption and Facts*, 2 EDUC. POL'Y BRIEFS 1, 3 (2004), available at <http://ceep.indiana.edu/ChildrenLeftBehind/pdf/ZeroTolerance.pdf>.

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classroom and into the courthouse and the jail cell,²⁹ the *Redding* decision is a first step in achieving positive educational outcomes. Recognition that not all disciplinary policies are fair or effective and a requirement that any policies be reasonable represent a necessary first step for students who have not fared well historically in the education system.³⁰ Too often, it is assumed that these children are more likely to have weapons, drugs and other contraband and less likely to suffer any of the negative consequences of intrusive searches. As a result, sweeping and intrusive security policies are uniformly applied against students, particularly in low-income and disciplinary-alternative schools. These policies are applied notwithstanding the fact that the students against whom they are applied might have never committed offenses involving school safety or may never have been disciplined at all. So, for example, even though the overwhelming majority of students may have been sent to alternative disciplinary schools for non-violent offenses ranging from truancy to insubordination, all students are treated as if they are potential threats to the health and safety of themselves and other students. Although it is too early to know for certain what the effect of *Redding* will be for all students, it is hoped that the *Redding* decision will prompt school districts to assess security and disciplinary policies objectively with the knowledge that the failure to do so might result in litigation.

Strip searches are just one of many ways in which students may suffer the ill effects of unreasonable disciplinary policies. Broad sweeps of student populations and abusive treatment of students by administrators and school resource officers increase the possibility that individual students will be subjected to abusive search policies and increase the likelihood that the educational environment of the school will be adversely affected. Frequently, these effects are individualized ones, which affect only the students directly involved in an intrusive search. But on occasion, routine searches, in which there is little or no individualized suspicion, have a broader effect on the education environment of the school as a whole. Strip searching an honor student on suspicion of possession of Tylenol or its equivalent is shocking precisely because it is an exceptional and rare event. For many students, frequently students of color and often students with troubled disciplinary records, intrusive searches can be more the rule than the exception. Although these searches may be motivated by the desire to create a safe environment in the schools, the manner in which they are carried out can be ineffective or even counterproductive and may result in the creation of a school environment that more closely resembles a prison than an institution of learning.

In the course of their work, the ACLU and its affiliates have come across repeated instances of policies and practices which did not appear to either serve the overall goals of student safety or protect the privacy and dignity of individual students.³¹ A

29. Deborah N. Archer, *Introduction: Challenging the School-To-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 869 (2009/10).

30. Students who have historically been denied full access to equal educational opportunity include students of color, students from low socio-economic backgrounds, and students with special needs.

31. ELORA MUKHERJEE, ET AL., N.Y. CIV. LIBERTIES UNION, *CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS* (2007), available at www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf.

joint report by the New York Civil Liberties Union and the Racial Justice Project of the National ACLU examined a host of security practices involving police and school resource officers and the use of metal detectors in New York City schools.³² The report is filled with examples of security practices that adversely affect the educational environment and alienate teachers and, on many occasions, the educational staff at the schools.³³ Examples included the search of a New York City high school in which dozens of police officers and school security agents brought portable metal detectors and handheld wands, searched the school bags of every student, and subjected students to “a steady barrage of yelling and cursing by the officers.”³⁴ After the search, the school’s principal described the effort as having done more harm than good.³⁵ He complained that the “tone of the building” was disrupted and that children were subjected to repeated instances of disrespect.³⁶ Although the study was completed before the *Redding* decision was decided, anecdotal evidence suggests that the decision has not resulted in any large-scale shifts in the treatment of students by disciplinary schools.³⁷

In *Harris v. Atlanta Independent School System*, plaintiffs filed an action against the City of Atlanta Public Schools and a private company contracted to run one of its disciplinary alternative schools.³⁸ The plaintiffs alleged that every student attending the school was subjected to invasive personal searches on a daily basis.³⁹ They complained that they were frisked by security personnel even after going through a metal detector,⁴⁰ required to strip down to their underwear in view of other students in search of cell phones,⁴¹ and at least one student was required to pull her bra away from her body and shake it.⁴² Students were also routinely subjected to a search by hand under the waist band of their pants and those who had long hair were required to take their hair down.⁴³ What is most distressing is that these searches were not

32. *Id.* at 4, 11–16.

33. *Id.*

34. *Id.* at 13–14.

35. *Id.* at 14.

36. *Id.*

37. ELIZABETH SULLIVAN & ELIZABETH KEENEY, NAT’L ECON. & SOC. RIGHTS INITIATIVE AND TEACHERS UNITE, *TEACHERS TALK: SCHOOL CULTURE, SAFETY AND HUMAN RIGHTS* 15–16 (Catherine Albisa et al. eds., 2008), available at http://www.nesri.org/Teachers_Talk.pdf.

38. Verified Second Amended Complaint at 2, *Harris v. Atlanta Indep. Sch. Sys.*, No. 1:08-cv-01435-BBM, (N.D. Ga. Mar 31, 2009), available at http://www.aclu.org/files/pdfs/crimjustice/harrisvaiss_complaint.pdf. The case was settled on December 14, 2009. American Civil Liberties Union, *Harris et al. v. Atlanta Independent School System: Atlanta Alternative School Case*, <http://www.aclu.org/racial-justice/harris-et-al-v-atlanta-independent-school-system>.

39. Verified Second Amended Complaint, *supra* note 38, at 5.

40. *Id.* at 10.

41. *Id.* at 21.

42. *Id.* at 24.

43. *Id.*

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conducted on an individualized basis; instead, they were done routinely to every student entering the school.⁴⁴ Moreover, the purpose of these intrusive searches was not only to keep weapons and drugs out of the schools, but also to enforce school policies prohibiting students from possessing money in excess of five dollars, jewelry, combs, lip balm, house keys, and sanitary napkins and other personal hygiene products.⁴⁵

Sadly, these are not isolated examples. Other advocacy groups that deal with issues of education equity and children's rights have documented similar examples across the country.⁴⁶ What characterizes each of the examples above is the complete absence of the careful balancing of the interests required by the Supreme Court. Instead, justified by maintaining school safety, students are forced through security proceedings that become increasingly intrusive: starting with the relatively un-intrusive searches by metal detectors, proceeding through searches of backpacks, and, for far too many students, culminating in the forced removal of clothing.

The effects of intrusive searches are widely documented by social scientists. In an amicus brief to the Supreme Court in the *Redding* case, groups including the National Association of Social Workers, the National Education Association, the National Association of School Psychologists, and the American Society for Adolescent Psychiatry cited numerous studies documenting the effects of overly intrusive searches.⁴⁷ Referring to strip searches in particular, the social scientists recounted studies which demonstrated that students are subject to a host of negative effects from overly strict discipline, including "sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions."⁴⁸ What is most distressing is that research has suggested that intrusive searches are actually counterproductive to the goal of assuring safe schools and may lead to speeding children along the pipeline from the schools to the criminal justice system.⁴⁹ One study reported that the intrusive searches might result in Post-Traumatic Stress Disorder, which, in turn, might hasten the child's removal from school:

The more severe stress responses included refusal to go back to school, ruminations about revenge, undesired thoughts about the incident, loss of faith in school staff whom they once trusted, increased tendency toward either avoidance and withdrawal or aggression and increased anger and defiance at

44. *Id.* at 5, 37.

45. *Id.* at 5.

46. *See, e.g.*, ADVANCEMENT PROJECT ET AL., EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK (2005), available at <http://www.advancementproject.org/digital-library/publications/education-on-lockdown-the-schoolhouse-to-jailhouse-track>.

47. Brief for the National Association of Social Workers et al. as Amici Curiae Supporting Respondent, *Safford Unified School District #1 v. Redding*, 129 S. Ct. 2633 (2009) (No. 08-479).

48. *Id.* at 7-8 (citing Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 12 (1991)).

49. *Id.*

home. These symptoms lasted long enough in the older students to result in attempts to withdraw from school and alleged delinquent behavior.⁵⁰

IV. EFFECTIVE ALTERNATIVES TO DRACONIAN DISCIPLINARY POLICIES

The disastrous effects of overly intrusive searches in schools are only underscored by the availability of alternatives, which are more effective in creating safe environments and encouraging participation and learning by all students in schools.

One example of an alternative to draconian discipline and security schemes that is more effective at assuring safety and creating a positive learning environment is the system known as Positive Behavior Interventions and Supports (“PBIS”). The United States Department of Education created the Center for PBIS in order to assist schools in creating positive school environments by taking measures systemically and in a proactive manner rather than treating each disciplinary problem as an isolated incident that is addressed only after disciplinary problems have occurred.⁵¹ Top-down approaches to discipline under which disciplinary policies are dictated by school administrators or the school boards necessarily limit a student’s role to being the person disciplined with little additional role possible in shaping the rules and regulations for keeping schools safe. In contrast, PBIS seeks to modify the procedures and practices of staff by involving students in the process by creating behavioral expectations for students and rewarding them for positive behavior.⁵² Schools implementing the PBIS approach have reported impressive results. Studies of schools employing PBIS show decreases in disciplinary referrals; up to 50% greater work satisfaction from school staff; reduction in anti-social behavior, vandalism, and aggression; and increases in school engagement and academic achievement on the part of students.⁵³ In short, altering the method by which discipline is administered holds the promise of removing children from the school-to-prison pipeline.

The differences between the PBIS model and the traditional ways in which discipline has been meted out revolve around the extent to which students are treated as individuals and on whom in the school responsibility for administering discipline is placed. Many techniques relied upon in “traditional” discipline actually serve to minimize the possibility of treating students as individuals. For example, zero tolerance policies that require police involvement for any conduct that could be considered criminal have the effect of removing discretion from disciplinary administrators and assuring that every instance of bad behavior, from weapon

50. Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 14 (1998).

51. See Positive Behavioral Interventions and Supports, PBIS Goals, http://pbis.org/about_us/pbis_goals.aspx (last visited Feb. 24, 2010).

52. See *id.*

53. Jeffrey R. Sprague & Robert H. Horner, *Schoolwide Positive Behavioral Supports: The Handbook of School Violence and School Safety*, in THE HANDBOOK OF SCHOOL VIOLENCE AND SCHOOL SAFETY: FROM RESEARCH TO PRACTICE 423 (Shane R. Jimerson & Michael J. Furlong eds., 2006), available at <http://starfolk.khi.is/ingvar/agi/Greinar/Sprague%20%20Horner%20PBS%20paper.pdf>.

possession to physical conflict, are treated the same. The results of the policies are necessarily severe. For example, a school with a zero tolerance policy requiring expulsion of any student carrying a weapon would treat an honor student with no disciplinary record who carried a butter knife to eat his lunch the same way as a student with a history of violent infractions who carried a handgun into a school. Likewise, students caught in a shoving match over a place on the lunch line would be referred to the police in the same way as participants in a planned gang fight.

Instead of requiring a top-down, one-size-fits-all approach to discipline, PBIS seeks to create an educational environment tailored to the individual circumstances of a school. Notwithstanding the political appeal of get-tough policies such as zero tolerance, there is little to no research that supports the notion that these policies are effective disciplinary policies. In contrast, PBIS seeks “to develop a continuum of scientifically based behavior and academic interventions and supports and to use data to make decisions and solve problems.”⁵⁴ Instead of a reactive approach, i.e. stepping in after a behavioral problem arises, PBIS seeks to prevent negative behavior by creating an environment to prevent problems.⁵⁵ Rather than using suspension or expulsion as the primary means of assuring appropriate behavior, PBIS seeks to teach and encourage pro-social skills and behavior, and provide support to the needs of individual students.⁵⁶

V. CONCLUSION

The legal restrictions limiting the use of intrusive and unreasonable disciplinary measures, along with the educational benefits associated with the use of positive disciplinary methods, suggest that one important step in shutting off the school-to-prison pipeline is a careful evaluation of the way in which students are disciplined in American schools. At the very least, disciplinary measures should be carefully examined to assure that innocent students are not swept into overly broad and intrusive means of assuring safety. Measures must be truly proportionate to the goals of the security policies. The interests of individual students and the quality of educational environments should be carefully considered. Ideally, schools will explore and implement programs that seek to reduce violence while also creating a productive atmosphere for learning through the use of programs that seek to include students in the safe operation of schools and the creation of a positive environment. Failure to take these steps to modify school environments that mimic correctional institutions by treating children like future inmates of those institutions is a self-fulfilling prophecy.

54. Positive Behavioral Interventions and Supports, What is School-Wide Positive Behavioral Interventions & Supports?, http://www.pbis.org/school/what_is_swpbs.aspx (last visited Feb. 24, 2010).

55. *Id.*

56. *Id.*