No. 02-2199

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEPHEN BUTLER and MARY BUTLER, as Parents and Next Friend of JOSHUA BUTLER, a Minor	)	**Appeal from the United States District Court for the District of New Mexico**
Plaintiffs-Appellees,	)	
v.	)	
RIO RANCHO PUBLIC SCHOOLS, et al.,	)	**Hon. E.L. Mechem, Senior Judge**
Defendants-Appellants.	)	

BRIEF OF AMICI CURIAE, NATIONAL SCHOOL BOARDS ASSOCIATION, NEW MEXICO SCHOOL BOARDS ASSOCIATION, COLORADO ASSOCIATION OF SCHOOL BOARDS, OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION, UTAH SCHOOL BOARDS ASSOCIATION, AND WYOMING SCHOOL BOARDS ASSOCIATION

JULIE K. UNDERWOOD*
THOMAS E. M. HUTTON
National School Boards Association
1680 Duke Street
Alexandria, VA 22314-3493
(703) 838-6710
***Counsel of Record**

Brief supporting position of Defendants/Appellants.
Brief supporting reversal of decision by United States Court for the District of New Mexico.

CORPORATE DISCLOSURE STATEMENT

Case Number 02-2199

Stephen Butler and Mary Butler, as Parents and Next Friend of Joshua Butler, a Minor
v. Rio Rancho Public Schools, et al.

Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Pursuant to Fed. R. App. P. 26.1, National School Boards Association, *amicus curiae,* makes the following disclosure:

1. The party is not a publicly held corporation or other publicly held entity;

2. The party has no parent corporations; and

3. No publicly held corporation or other publicly held entity owns 10% of more of the party's stock.

_____ _____
(Signature) (Date)

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INTERESTS OF *AMICI*

The National School Boards Association (NSBA) is a nonprofit federation representing the nation's 95,000 school board members, who, in turn, serve more than 90 percent of the K-12 students in the nation. NSBA has a strong interest in insuring that school boards maintain autonomy to implement effective student disciplinary policies that do not infringe on students' constitutional rights but recognize the rights of other students to receive an education in a safe environment.

The New Mexico School Boards Association (NMSBA), the Colorado Association of School Boards (CASB), the Oklahoma State School Boards Association (OSSBA), the Utah School Boards Association (USBA), and the Wyoming School Boards Association (WSBA) represent school boards and their members in each of their respective states. These state school board associations are committed to, and have strong interests in, safeguarding public education, preserving local autonomy in the operation of schools, and protecting the safety of students entrusted to their members' care.

Amici are requesting this court by motion to accept this brief pursuant to Fed. R. App. P. Rule 29(e).

STATEMENT OF THE CASE

On February 9, 2001, school officials at Rio Rancho High School spotted a 10-inch hunting knife in plain view between the front seats of a parked car. They determined that the car had been driven to the campus by student Joshua Butler. Searching the car, they also discovered a 9-mm semi-automatic handgun, ammunition, and a pipe for smoking marijuana. Joshua indicated that the car was his brother's and he had driven it to school, but, notwithstanding that the knife was visible from outside the car, he had not known that any of the items were there. The disciplinary hearing officer imposed a one-year suspension, which the Board upheld in an appeal.

Joshua, through his parents, filed suit in the U.S. District Court for the District of New Mexico, against the school district and, under Section 42 U.S.C. § 1983, school officials, requesting injunctive relief from the suspension. The district court found that the defendant school district and school officials violated or may have violated Joshua's right to substantive due process under the Fourteenth Amendment to the U.S. Constitution by imposing the suspension without finding that Joshua knowingly brought the weapons into the campus and that the law on this point was sufficiently clear so as to deprive the school officials of the benefit of qualified immunity.

SUMMARY OF THE ARGUMENT

Amici do not take positions on the full range of substantive and procedural issues addressed in the primary briefs of the parties. Rather, in submitting this brief, *amici* wish to call attention to the distinction between the constitutional standards that apply in the public school context and those that apply in other contexts, such as criminal law. In recognition of this distinction and the appropriate judicial deference to school authorities that the law requires on matters of educational policy and school safety, *amici* urge that this court not expand the scope of substantive due process and curtail the discretion of school officials by requiring a finding of scienter in this situation. In this case, the school policy holding students accountable for what they bring onto school property is rationally related to the legitimate state interest in the safety of all students.

ARGUMENT

I. PUBLIC SCHOOLS AND PUBLIC SCHOOL OFFICIALS ARE ENTITLED TO SPECIAL CONSTITUTIONAL CONSIDERATION AND JUDICIAL DEFERENCE ON MATTERS OF EDUCATIONAL POLICY AND SCHOOL SAFETY.

Policies and actions of school boards and school administrators designed to educate and protect school children are subject to less stringent constitutional

restrictions than apply in other areas. The courts have, in many areas of constitutional review, applied different standards to school officials than those imposed on other state actors. These special standards call for judicial deference to school officials' decisions on educational practice and on matters respecting the health and safety of students entrusted to their care. Thus, free speech protections enjoyed by students in school under the First Amendment are subject to special countervailing considerations. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 26 (1988) (students' free speech rights do not override the authority of school officials to make reasonable pedagogical decisions regarding the content of school newspapers); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (students' free speech rights do not prevent school officials from punishing a student for sexual innuendo in a speech during a school assembly); *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (noting that schools may regulate student "speech or action that intrudes upon the work of the schools or the rights of other students"); *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 926 (10th Cir. 2002) (recognizing that different analysis of viewpoint-based decisions on free speech applies in special characteristics of school environment than in other contexts). The Fourth Amendment applies differently to searches and seizures in the school setting than outside the school walls. *See Bd. of Educ. of Ind. Sch. Dist.*

No. 92 of Pottawatomie County, et al. v. Earls, 122 S. Ct. 2559, 2564-65 (2002) (addressing how "'special needs' [that] inhere in the public school context" affect constitutional review of suspicionless drug testing of participants in extracurriculars, in contrast to requirements in the criminal context); *Vernonia Sch. Dist. No. 47J v. Acton*, 515 U.S. 646 (1995) (recognizing public school's special responsibility as guardian and tutor of children as most significant factor in finding suspicionless drug testing of student athletes constitutionally permissible); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (requiring that students' right to be free from unreasonable searches be viewed in light of school officials' responsibility for health and safety of students).

Similarly, courts have explicitly recognized that the educational mission of schools alters constitutional analysis under the Due Process Clause of the Fourteenth Amendment. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 581 (1975) (describing "rudimentary precautions" required by Due Process Clause); *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237 (10th Cir. 2001) (applying case law specific to student discipline context to student's due process claims); *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358 (10th Cir. 2000) (same).

A common analytical thread running through these decisions is the contrast drawn between the constitutional standards applicable in "the criminal context" to

the standards appropriate for "the public school context." *Earls*, 122 S. Ct. at 2564. The law distinguishes not only between the constitutional requirements applicable in the actual administration of criminal justice and school discipline, but also between the constitutional requirements applicable to school board policies and to criminal statutes. *See, e.g.*, *TLO*, 469 U.S. at 340; *Goss*, 419 U.S. at 594; *Arnett v. Kennedy*, 416 U.S. 134, 161 (1974); *Edwards v. Rees*, 883 F.3d 882 (10th Cir. 1989); *Arrington v. Eberhart*, 920 F. Supp. 1208, 1224 (M.D. Ala. 1996).

Amici recognize that students and teachers do not "shed their constitutional rights . . . at the schoolhouse gate . . . ." *Tinker*, 393 U.S. at 506. Public high school students do have substantive and procedural due process rights while at school. *See id.*; *Wood v. Strickland*, 420 U.S. 308 (1975); *Goss*, 419 U.S. at 581. However, because the constitutional rights of school children *vis-a-vis* school administrators are not co-extensive with rights enjoyed by adults *vis-a-vis* criminal law enforcement officials, courts should view with initial skepticism arguments that the Constitution requires that they second-guess the decisions of those charged with preserving a safe learning environment for all children. As the Supreme Court made clear in *Wood v. Strickland*, "[t]he system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members." 420 U.S. at 326. *See also*

Tinker, 393 U.S. at 507; *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Fleming*, 298 F.3d at 925 at FN5 ("This court has also recognized our limited role as federal judges in reviewing school decisions.") (citations omitted); *Herrmann v. Bd. of Educ.*, No. 01-4019, 2002 WL 31498983, at *6 (D. Kan. Oct. 16, 2002) ("A school district and its administrators have vast powers in determining what constitutes appropriate conduct."). This court should accordingly be loath to blur the important distinctions between the school discipline and criminal law contexts and to curtail the discretion of local school boards and school administrators by rendering a decision that would expand the current applicability of substantive due process requirements to school disciplinary policies and actions.

Specifically, this court should not follow the Sixth Circuit's approach to this issue in *Seal v. Morgan.* 229 F.3d 567 (6th Cir. 2000) (invalidating expulsion of student for weapons possession where school officials failed expressly to find that the student knowingly brought weapon to school).[1] Like the District Court in the present case, the majority in *Seal* relied heavily on criminal law authority and analysis in reaching its decision that a *mens rea* requirement should be imposed on school safety measures. *See id.*, 229 F. 3d at 575-77. The scienter requirements

[1] *Amici* acknowledge that the present case may be distinguished factually from *Seal*, which, unlike the present case, involved both a "zero tolerance" policy and a situation in which the weapon was not in plain view.

applicable to criminal statutes addressing the possession of contraband are not necessarily dispositive of student disciplinary controversies involving the possession of dangerous weapons and drug paraphernalia in the legally distinct arena of school safety and disciplinary policy.[2] Still less advisable is heavy or exclusive reliance on authority from the criminal context in making a determination of whether, for purposes of a Section 1983 claim against school officials, a student's rights allegedly violated by the officials were so well established "in light of preexisting law" that the officials should be deemed legally accountable for knowing the parameters of those rights. *Seamons v. Snow*, 84 F.3d. 1226 (10th Cir. 1996).[3] That "[t]he requirements of scienter in cases involving the criminal possession of contraband have been long established," as the District Court determined in reaching its decision, would neither invalidate a student disciplinary action based on a violation of a school safety policy nor establish that

[2] Moreover, scienter is not even required in every criminal context, let alone in policies concerning student safety. *See Turner v. South-Western City Sch. Dist.*, 82 F. Supp. 2d 757, 767 (S.D. Ohio 1999).

[3] Indeed, even the *Seal* majority held that the right its decision was newly assigning to the student had not been "sufficiently clear to put a reasonable school superintendent on notice in 1996." 229 F.3d at 581 (noting that its holding should clarify issue for the future and citing *Daughenbaugh v. Tiffin*, 150 F.3d 594, 603 (6th Cir. 1998), in which government officials were not held responsible for knowing the contours of a violated right prior to any on-point Sixth Circuit ruling). As the Supreme Court has noted, "school board members are not 'charged with predicting the future course of constitutional law.'" *Wood*, 420 U.S. at 321 (*quoting Pierson v. Ray*, 386 U.S. 547, 557 (1967)).

any reasonable school official should know the equivalent requirements in the school context. CIV NO. 01-0466 M/WWD, at 13 (D.N.M. May 13, 2002). *Amici* urge this court instead to adopt the approach taken in *Bundick v. Bay City Ind. Sch. Dist.*, 140 F. Supp. 2d 735, 740 (S.D. Tex.) (expressly rejecting *Seal* analysis and holding that "[s]cienter is not a requirement of the school district's policy, and that policy is entitled to deference.").

II. A DECISION BY PUBLIC SCHOOL OFFICIALS TO HOLD STUDENTS RESPONSIBLE FOR KNOWING WHAT THEY BRING ON TO SCHOOL PROPERTY IS RATIONALLY RELATED TO THE STATE'S LEGITIMATE INTEREST IN SCHOOL SAFETY.

Because the U.S. Supreme Court has held that education is not a fundamental right (*see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 38-40 (1973)), a school policy affecting attendance of school will be valid under the Due Process Clause if the policy bears a rational relationship to a legitimate state interest. *See New Rider v. Bd. of Educ. of Ind. Sch. Dist. No. 1, Pawnee City, Okla.*, 480 F.2d 693, 698 (10th Cir. 1973). School safety is unquestionably a legitimate state interest. *See Board of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie County, et al. v. Earls*, 122 S. Ct. 2559, 2561 (2002).

There is nothing irrational about a school district holding students accountable for knowing for what dangerous or harmful items they bring onto

campus. The presence of a dangerous weapon on campus can have tragic consequences for school children, regardless of the intentions or state of mind of the individual responsible for its presence. *See, e.g., Hill v. Safford Unified Sch. Dist.*, 952 P.2d 754, 756 (Ariz. App. Div. 1997) (noting that student killed fellow student with gun obtained from another classmate's vehicle during lunch period). *Cf. Grieb v. Unemployment Comp. Bd. of Rev.*, 767 A.2d 1138 (Pa. Cmwlth. 2001) (upholding denial of unemployment benefits to teacher dismissed for inadvertently bringing guns to campus in vehicle, noting that guns were in plain view and posed self-evident threat to public safety). A school district's decision to teach students to be responsible for what they bring onto campus is presumptively valid. *See, e.g., Hammock v. Keys*, 93 F. Supp. 2d 1222, 1231 (S.D. Ala. 2000) (upholding principal's decision that students would be responsible for the contents of vehicles they brought on campus).[4]

Indeed, the rationality of such a policy is borne out by evidence that school safety policies that afford school officials less discretion than provided for by the disputed policy of Rio Rancho Public Schools may be effective. *See* Del Stover, *Despite charges of unfairness, zero tolerance is working*, School Board News,

[4] Furthermore, such a policy would in no way contravene the state statute establishing a statewide minimum penalty for a *knowing* weapons possession, N.M. Stat. Ann. §22-5-4.7(A) (2001), a distinction the District Court failed to recognize.

(January 25, 2000), *available at* http://www.nsba.org/sbn/00-jan/012500-3.htm. (quoting National School Safety Center executive director Ron Stephens as to utility of "zero tolerance" policies concerning weapons possession); Robert C. Johnson, *Decatur Furor Sparks Wider Policy Debate*, Education Week, (November 24, 1999), *available at h*ttp://www.edweek.com /ew/ew_printstory. cfm?slug=13zero.h19. (reporting that "zero tolerance policy" in Baltimore was credited with producing 67% decline in arrests and 31% decline in school crime in September and October 1999, compared with same period during previous year); *The Fight's Not Over*, The New Republic, (December 6, 1999), *available at* http://www.tnr.com/120699/editorial120699.html. (reporting survey finding that from 1993 to 1998, during which time Texas mandated expulsion of students for possession of drugs and weapons on school grounds and at school events, percentage of teachers who viewed assaults on students as "significant problem" dropped from 53% to 31%).

At any rate, even if the wisdom and effectiveness of such a policy may be debatable among well-meaning observers, such a debate creates no constitutional issue. "It is not the role of federal courts to set aside decisions of school administrators which the court may view as lacking basis in wisdom or compassion." *Wood*, 420 U.S. at 326; *see also Bd. of Educ. of Rogers, Ark. v.*

McCluskey, 458 U.S. 966 (1982); *Bundick*, 140 F. Supp. 2d at 740 (holding that harshness of expulsion as punishment does not warrant federal court's setting aside of school decision). Similarly, Section 1983 was "not intended to be a vehicle for federal court correction of errors in the exercise of discretion [by school officials] which do not rise to the level of violations of specific constitutional guarantees." *Wood*, 420 U.S. at 326. To find that a policy holding students responsible for exercising special care in bringing items onto campus bears no rational relationship to preserving school safety is inherently to substitute the court's judgment for that of school officials.

Even where, unlike in the present case, a school board's policy does define a student violation of school rules as one committed knowingly, a court could find that scienter can be inferred from either the fact of possession—particularly where, as here, the knife was plainly visible even from outside the car—or from the disciplinary decision itself, rather than requiring that an express conclusion as to scienter be recorded in every record of a student disciplinary action. *See Seal*, 229 F.3d at 585-86 (Suhrheinrich, J., dissenting) (arguing that possession could be imputed from presence of knife in student's car and criticizing decision's implications for school boards' articulation of findings in discipline cases); *Bundick*, 140 F. Supp. 2d at 740 (holding that scienter could be imputed from

student's possession of machete, even if additional findings of fact from Superintendent may have been helpful); *Turner*, 82 F. Supp. 2d at (finding it implausible, even if knowledge were required element of possession, that student was unaware of presence of realistic looking fake weapon lying exposed in front seat of student's car).

Nor is it for the courts to second-guess school boards and officials by engaging in construction or interpretation of such school policies to find a scienter requirement where none was expressly provided. Section 1983 "does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations." *Wood*, 420 U.S. at 326; *see also McCluskey*, 458 U.S. at 969 (noting that Supreme Court had "plainly stated that federal courts [are] not authorized to construe school regulations"); *Hammock*, 93 F. Supp. at 1233 (rejecting student's argument that school inappropriately elevated the "presence" to marijuana to "possession," finding that such a determination would require court to re-interpret school regulations).

CONCLUSION

Amici urge this court to make clear in its decision that the U.S. Constitution does not preclude school boards from holding students accountable for dangerous or harmful substances or items they have in their possession and bring onto campus without a specific finding as to the student's knowledge of the items' presence. Any holding to the contrary should be carefully and narrowly written to minimize its impact on the policies and actions of schools and school officials that protect students from school violence and narcotics. In addressing this appeal, this court should affirm the well-established principles of judicial deference to school officials and the special applicability of constitutional provisions in matters of school safety.

Respectfully submitted,

_____
JULIE K. UNDERWOOD*, General Counsel
THOMAS E. M. HUTTON, Staff Attorney
National School Boards Association
1680 Duke Street
Alexandria, VA 22314-3493
(703) 838-6710
*Counsel of Record

CERTIFICATE OF SERVICE

I, Julie K. Underwood, hereby certify that on this 13th day of January, 2003, true and correct copies of this *Amicus Curiae* Brief were delivered to United Parcel Service for overnight delivery, addressed to the following:

Charlotte H. Hetherington
Andrew M. Sanchez
Cuddy, Kennedy, Hetherington,
Albetta & Ives, LLP
1701 Old Pecos Trail
Santa Fe, NM 87502
Attorneys for the Appellants

Joan M. Waters
Attorney at Law
118 Wellesley Dr., S.E.
Albuquerque, NM 87106
Attorney for the Appellees

_____
JULIE K. UNDERWOOD
General Counsel
National School Boards Association

JULIE K. UNDERWOOD*, General Counsel
THOMAS E. M. HUTTON, Staff Attorney
National School Boards Association
1680 Duke Street
Alexandria, VA 22314-3493
(703) 838-6710
*Counsel of Record