



## BOARDING BRIEFING PAPER

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## CONDUCTING A SEARCH of a pupil's room, belongings or person

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FOR THIS PUBLICATION

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*On 18 November 2004, the Education and Skills Secretary Charles Clarke unveiled a set of proposals aimed at improving pupil behaviour. These included new powers for head teachers to search pupils suspected of carrying knives, so that they can conduct searches themselves rather than having to wait for the police to do so. The proposals are to be taken forward in consultation with professional associations, the Police and the Crown Prosecution Service. Watch this space!*

*This announcement is not reflected in the guidance set out below which focuses on the law as it currently stands.*

With the introduction of The Care Standards Act, National Minimum Standards for Boarding Schools, Human Rights legislation and a perceived cultural shift towards litigiousness, the issues surrounding a search of a pupil's room, belongings or person are not what they were.

This Briefing Paper reviews the legal requirements and potential pitfalls which a school should have in mind before it undertakes any type of search against a pupil.

## A. Background

The starting point is s.3 (5) of the Children Act 1989, which provides that:

*“ A person who does not have parental responsibility but has the care of the child may do what is reasonable in all the circumstances of a case for the purpose of safeguarding or promoting the child's welfare.”*

The section clearly embodies a sensible principle, but leaves opaque the question of what might be a “reasonable step” in any given circumstances. That there is no absolute definition allows flexibility, and acknowledges that there are a myriad of ways in which someone *in loco parentis* might act to safeguard or promote a child's welfare. It does, however, leave room for argument.

Schools will, understandably, want to avoid any argument and will take some comfort from the National Minimum Standards for Boarding Schools which provide more detailed guidance on appropriate conduct in relation to a number of specific issues.

The stated purpose of the Standards is “to safeguard and promote the welfare of children for whom accommodation is provided by a boarding school”. They represent the **minimum** a school **must** do. Since April 2004, compliance with the Standards has been assessed by the Commission for Social Care Inspection, which has replaced the National Care Standards Commission.

Many schools will exceed (or will want to exceed) the basic requirements. Many will also choose to encapsulate their approach to searches in a written policy document: particularly relevant will be those policies relating to discipline, exclusion, drugs and drugs testing.

Written policies have a number of advantages, especially in that they provide certainty and a point of reference if a difficult issue arises. It is essential, of course, that:

- policies are consistent with general law, with the Standards and with relevant DfES guidance. In particular, any drugs policy should have regard to the guidance produced by the DfES in Spring 2004, which is available on their website at [www.dfes.gov.uk/drugsguidance](http://www.dfes.gov.uk/drugsguidance);
- equally important is that staff act strictly in accordance with them and with the parent-school contract (to the extent that it is applicable whenever a search is contemplated); and
- relevant policies are drawn to the attention of (and ideally provided to) the pupils and their parents.

## B. Protection of a pupil's person

### Standard 37

Standard 37 aims to protect boarders' personal privacy, and provides that staff supervising boarders:

- 37.1: should avoid intruding unnecessarily on their privacy; and in particular that they
- 37.2: should carry out appropriate patrols and make themselves available in boarding accommodation, rather than intruding inappropriately or in a way that embarrasses boarders at sensitive times such as dressing, undressing, changing, bathing or showering.

### Search of a pupil's person

Personal searches should be avoided, as they might violate Standard 37 and can lead to allegations of assault.

If a pupil is suspected of carrying an unauthorised item (for example, alcohol) the best approach is to ask him<sup>1</sup>, in the presence of a second adult witness, to turn out his pockets or bag. If he refuses to cooperate, a school will have the option of contacting the pupil's parents and disciplining him in accordance with an agreed disciplinary policy.

Whatever the pupil's response, staff should not:

- touch the pupil forcibly;
- search the pupil's person, which for these purposes extends to his outer clothing and pockets; or
- remove the pupil's clothing - even his coat - for the purpose of searching it.

Suspected possession of illegal drugs or weapons is a more serious matter. Nonetheless, it remains inappropriate for staff to conduct a personal search. They should instead make every effort, in the presence of a second adult witness, to persuade the pupil to hand the drugs or weapons over to staff voluntarily. If the pupil refuses, he should be told that the police will be called. The police may then conduct a personal search if they believe that a crime has been committed, or to prevent harm to themselves or others following an arrest.

### Citizen's arrest

A citizen's arrest will only ever be appropriate if:

- staff come across a pupil who is in the act of committing an arrestable offence; or if
- staff have reasonable grounds for suspecting that the pupil is committing such an offence (Police and Criminal Evidence Act 1984 s 25(4)).

Even if a citizen's arrest is made, there is no power to search the pupil's person. It is also important to bear in mind that a member of staff might be vulnerable to a charge of false imprisonment if the arrest subsequently proves unlawful.

### C. Protection of property

Less contentious (although only slightly so) are the issues arising out of searches of a pupil's personal property.

In practice, matters are complicated by the fact that one boarder's possessions will often be identical or similar to another's; it follows that labelling is essential and schools are wise to emphasise that their charges should take responsibility for and good care of their property.

#### Standard 20

This Standard deals with the protection of boarders' money and possessions.

- 20.1: first, the school should ensure that boarders' personal possessions are reasonably protected, and in particular that any money and valuables held by the school on his behalf are safe;
- 20.2: secondly, if school has a system for providing or distributing pocket money, or looking after personal possessions for boarders, this must be done fairly and a proper written record should be kept; and
- 20.3: thirdly, each boarder should have a suitably secure place to keep personal possessions and valuables (eg a lockable drawer, cupboard, locker, box or trunk).

Even if boarders are provided with secure storage facilities, possessions can be mislaid, borrowed and never returned and, on occasion, even stolen. Housemasters or housemistresses (HsMs) may be asked to assist in the search for the 'lost item'.

This is one of a variety of circumstances in which the HsM may need to consider whether a search of pupils' rooms and possessions is justified, bearing in mind Standard 20.

Another reason for such a search is where there is a suspicion of illegal drug possession.

The new DfES guidance on drugs draws a distinction between the right of staff to search **personal** property and the right of staff to search **school** property. The two issues are therefore dealt with separately below.

### D. Searches of a pupil's personal property

The DfES suggests that, even where the possession of drugs is suspected, staff should not search personal property (such as a bag, or even a pencil case) without consent. If the pupil objects (which he has the right to do) staff should either notify parents who may persuade the child to give consent or consider calling the police.

Just because the pupil cannot be contacted (for example, because he has gone home for the weekend) does not mean that staff have an excuse to search his personal property. They should instead wait for the pupil to return so that his consent can be sought. If the situation is urgent (to use an extreme example: if the pupil is suspected of leaving a bomb in his bag) the best approach would be to call the police.

If a search of personal property is considered inappropriate where drugs are suspected, it is even less likely to be merited in less serious circumstances. It would therefore be extremely difficult to justify carrying out a personal search for a minor item such as a lost CD. In the circumstances it would be more appropriate to ask the pupils to search their own property to see if the item had been misplaced.

## E. Searches of school property

It may well be common practice for the HsM to keep a duplicate set of keys to lockers, or a note of the numbers needed to open combination locks. When a pupil loses keys or forgets his security number the system will be very convenient and welcomed by him.

A more difficult question arises when the pupil does not seek assistance in unlocking his room or locker, but staff wish nevertheless to search it.

The DfES guidance states that:

*“Staff may search school property such as pupil’s lockers or desks if they believe drugs to be stored there. Prior consent should always be sought. Individuals should be made aware that if consent is refused the school may proceed with a search. However, where consent is refused, the school will need to balance the likelihood that an offence has been committed against the risk of infringing the individual’s privacy without just cause.”*

Set out below is a checklist of factors a school should take into consideration before initiating a search of school property.

1. Whether or not the item under search is high risk - such as a knife or drugs - school property should only be searched if the search is legitimate and has a reasonable prospect of success.
2. The extent and nature of the search should be proportionate to the value of or “risk factor” of the item sought (even in the case of stolen property), otherwise there is a danger that it will be considered unreasonable and perhaps lead to a suspicion of an ulterior motive: for example, if every child’s locker were searched regularly for lost textbooks this could be seen as a mere pretext for an unreasonable intrusion into their privacy. To use the example of the lost CD: staff would have to consider whether their approach was reasonable, taking into account the fact that relatively little was at stake and the extent of the search which would be required to resolve the issue.
  - On this basis, it might well be reasonable to search the lockers of a handful of children, particularly if they consent to the procedure.
  - On the other hand, a time-consuming search of many rooms, or the targeting of specific pupils without adequate justification (which could lead to allegations of victimisation) would be more difficult to defend - unless the CD was particularly valuable.
3. The extent of the search should also be proportionate to likelihood of the item being found. Consequently, to search all school property when it is most likely that the item will be found in the first form block might be an unjustified invasion of the privacy of the other year groups. A wider search might, however, be justified if the item was particularly valuable or dangerous.
4. Again, to reduce the chance that a search is the subject of argument at a later stage, it is important that, insofar as possible, the school’s policy documents set out explicitly the circumstances in which a search is likely to be made. Using the example of drugs, the policies might make it clear that a search would be undertaken where possession, supply or manufacture of illegal drugs is reasonably suspected, particularly given that:
  - it is an offence under s.8 of the Misuse of Drugs Act 1971 for the management of schools knowingly to permit the supply or production of any illegal drugs on their premises; and
  - it is also an offence to allow the school to be used for the smoking of cannabis or opium and the preparation of opium.

5. The policies should set out clearly the circumstances in which:
  - the pupil's consent would not be necessary for the search to go ahead;
  - the search could go ahead in the pupil's absence; and
  - the school could access locked storage by effecting forcible entry.
6. Having considered these factors and decided that a search is reasonable and (hopefully) supported by policy documents, the school should seek the pupil's consent.
7. If consent is refused, and the matter is considered sufficiently serious, and in the circumstances the school's written policy supports a search without consent, a HsM may proceed notwithstanding the pupil's objections. If, however, the allegation is sufficiently serious to warrant this degree of searching, then the pupil's parents should be informed and/or the police called.
8. Similarly, if the pupil is away and, as a result, it is not possible to seek his consent, the HsM should check whether the school's policies warn that a search of school property may be carried out in the pupil's absence and consider whether the particular circumstances are serious enough to warrant the search. Make sure that the search is witnessed by a second adult to minimise the risk of a claim that a pupil has been "set up".
9. Any search which involves forcible entry into school property (for example, breaking into locked storage) is necessarily a more drastic step. The HsM should consider whether the end really justifies these means, and his actions should ideally be supported by a policy which set out the circumstances in which forcible entry might be necessary.
10. In any event, searches must always stop short of personal belongings.
11. If possible, the pupil should be present during any search of school property used to store his belongings. This will hopefully reduce the chances of an allegation that the school "planted" any item which is otherwise difficult to explain.
12. The search should always take place in the presence of an adult witness and a written record of the search should be made setting out the main details of the search, including the date, time, people present and the outcome.

#### **F. Victimisation**

A quick word about victimisation which applies to all of the types of search which are described above. It is not necessary to search the belongings of every pupil in the house each time that an item goes missing or there is a suspicion of drugs use. Indeed, the extent of the search must be proportionate to the value of the lost item or the danger involved.

That said, schools should tread a careful line to ensure that they have very good reasons for limiting their search to certain individuals. In particular, they need to be alive to the risk that targeting the "usual suspects" could give rise to an allegation of bullying or victimisation and that targeting specific racial/gender groups could lead to a complaint of discrimination.

#### **G. After the search**

Schools should always contact the affected pupil's parents after any search, regardless of the outcome. A proper record should also be kept.

If an illegal item is found as a result of the search (for example, drugs, a knife or a firearm) it should be handed to the police. In other cases, confiscated items should be returned to the pupil's parents, and should not be destroyed or kept by staff for their own use.

## H. Impact of recent human rights legislation

The Human Rights Act 1998 came into force on 2 October 2000. It incorporates into English law the rights and freedoms articulated in the European Convention on Human Rights, an international treaty drawn up in 1950. The central provision of the Act is to make it unlawful for a public authority to act in a way that is incompatible with a person's convention rights.

The Act binds public authorities or other bodies exercising public functions. Independent boarding schools are, in contrast, generally viewed as private communities exercising private functions, since the provision of educational services is regulated by contracts with parents. It is unlikely, therefore, that independent schools are vulnerable to direct claims from pupils (or parents) based on breaches of human rights. However, this is a developing area of law and, for that reason among others, most schools seek to act in a way that is compatible with human rights legislation.

It is important to remember that not all of the rights enshrined in the Human Rights Act are absolute. The rights most likely to be invoked by a pupil unhappy with a search of his person or his property are the qualified rights to respect for private and family life and to the protection of property.

"Qualified" means that the right is capable of being interfered with by the State without the right being breached. The circumstances in which this applies are set out in the Human Rights Act and include, as far as the right to respect for family life is concerned, when it is "*necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*".

Fortunately, in addition to the prescribed qualifications to human rights, recent case law has developed the idea that restrictions on the exercise of human rights may be justifiable in certain circumstances, providing that those restrictions are:

- lawful;
- intended to pursue a legitimate purpose;
- proportionate to the legitimate aim pursued; and
- not discriminatory.

The Act can be applied to relatively mundane scenarios. For example, it is conceivable that a pupil whose property (for example, cigarettes) has been confiscated might allege that his right to peaceful enjoyment of possessions had been violated. The school might in turn avail itself of the statutory defence that the deprivation of his possessions in this instance was in the public interest, but this leads to an argument almost philosophical in nature. It is therefore better if schools can rely on an appropriately worded policy, because if school rules explicitly prohibit smoking, enforcing that rule would be a contractual matter of a private nature and therefore outside the scope of the Act.

## SUMMARY

### DO...

1. Make sure you have written policies dealing with discipline, exclusion, drugs and drugs testing. Ideally these should set out the circumstances in which the school can carry out searches of school property:
  - (a) without the pupil's consent;
  - (b) in the pupil's absence; and
  - (c) using force to gain entry to locked storage.
2. Ideally, ask the pupils and their parents to give their agreement in writing to the policies.
3. Advertise the policies regularly so that both pupils and staff are aware of the school's preferred procedures.
4. Ask for consent before you conduct any search of a pupil's personal belongings or school property.
5. Consider whether the search is permitted by the policies and any parent/school contract. If so, make sure the procedures set out in those policies are adhered to.
6. If the policies are silent, consider whether the proposed search is of school property or personal property.
  - (a) If school property is to be searched, consider whether the search is reasonable, legitimate and proportionate given what is at stake, and make sure that you have good grounds for targeting a specific pupil or group of pupils. Balance the likelihood that an offence has been committed and the value or danger posed by the item sought against the risk of infringing pupils' privacy without just cause.
  - (b) If a pupil refuses to consent to a search of his personal belongings, consider whether the matter is sufficiently serious to proceed, and then call his parents to see whether they can persuade him. If not, it may be appropriate to call the police.
7. Make sure that the search is witnessed by a second adult and, ideally, the pupil himself.
8. Notify the parents after the search has been carried out and keep a full written record.
9. Hand over any confiscated items to the pupil's parents or the police as appropriate.

### DON'T...

1. Carry out a search of a pupil's person (which includes outer garments such as coats). Instead, ask him to turn out his pockets and, if you believe he presents a danger, call his parents and/or the police.
2. Carry out a search of a pupil's personal belongings without his consent. If there is a danger, call the police.