

Preventing Strip Searches of Children and Youth: A Guide for Advocates

PENNSYLVANIA STATE SUPPLEMENT

*Prepared by the Children's Rights Litigation Committee of the American Bar Association's
Section of Litigation and Juvenile Law Center*

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What is the definition of a strip search in Pennsylvania State?

There is no statutory definition of a strip search in Pennsylvania. Rather, Pennsylvania's Law Enforcement Accreditation Commission ("PLEAC") requires accredited law enforcement agencies to have their own strip search policies; however, as of 2017, only 83 out of the estimated roughly 1,100 law enforcement agencies in Pennsylvania have been accredited, and only roughly 300 have sought accreditation.ⁱ

Philadelphia County's police guidelines defines a strip search as "the removal or rearrangement of clothing to permit the VISUAL inspection of a person's undergarments, buttocks, anus, genitals or breasts to search for a weapon or contraband such as controlled substances,"ⁱⁱ and a cavity search as "the actual entering or touching, by instrument or appendage, a person's anal or vaginal area ONLY in an effort to search for a weapon, evidence or contraband such as controlled substances."ⁱⁱⁱ This policy appears to apply to children because Section 24(D)(4) of the policy states that officers need to "ensure that if a juvenile has undergone a strip/body cavity search that is noted in the Remarks section of the computerized Juvenile Flow Chart."^{iv} Other county policies were not discoverable.

Where and in what circumstances are children and youth in Pennsylvania State subjected to strip searches?

Children can be strip searched in a variety of different settings, including:

➤ *In juvenile detention facilities*

Youth in Pennsylvania, and in the rest of the third circuit, may be strip searched pursuant to a blanket strip search policy when entering the general population of a juvenile detention center.^v This rule comes from a Third Circuit case decided in 2015 challenging the policy of the Lancaster County Youth Intervention Center to conduct strip searches of all juveniles entering the general population of the center. Under the policy, "[o]fficers are instructed to wear rubber gloves, refrain from touching the detainee, and to bring the detainee 'to the shower area and close the privacy curtain in order to obstruct the transporters' view'."^{vi} The search conduct on the plaintiff lasted 90 seconds in total.^{vii} In upholding the policy, the court reasoned that the same safety concerns present in an adult prison that informed the Supreme Court's decision in *Florence v. Board of Chosen Freeholders of Burlington County* were still present in a juvenile detention center.^{viii} After noting that strip searches have "given the Supreme Court 'the most pause'," and that they are a "serious intrusion upon personal rights," the court concluded that the security concerns of the detention center were greater in magnitude.^{ix} In addition, the court stated

that the center has the additional burden of acting as temporary guardian for the children giving rise to an interest in maintaining the health and physical safety of the children.^x The court concluded that the search policy furthered all of these interests.^{xi}

➤ ***In schools***

According to a memo accompanying a proposed bill in the 2014-2015 senate session, Pennsylvania does not have any laws regulating or prohibiting the strip search of juveniles in schools.^{xii} The bill failed to go to a vote and died in committee. No similar bill has been proposed since.

➤ ***Other***

Because no statewide policy regarding strip-searches exists, strip searches are governed by local law enforcement policy and case law. Individual counties may have policies, but they did not respond to requests for information.

PLEAC requires agencies seeking accreditation to have a policy governing strip searches that includes: “a. authority for conducting such searches with and without a search warrant; b. privacy provisions with search by same gender; and, c. any required reporting procedures when such searches are conducted.”^{xiii} The guidance for agencies writings such policies reads as follows:

Strip searches and body cavity searches by law enforcement personnel, even when legally permissible, are controversial. They should be done out of public view, with appropriate regard for the dignity of the suspect, and shall be considered legally necessary and reasonable. When possible all such searches should be witnessed. With the exception of oral swabs, body cavity searches should be conducted in a hygienic setting and by qualified medical personnel.^{xiv}

➤ ***By Law Enforcement***

In Montgomery County, the third largest county in Pennsylvania, a law enforcement policy specifically prohibits the strip search of children.^{xv} In Philadelphia County body cavity searches and strip may only occur when “an individual has been lawfully taken into custody AND sworn personnel can identify specific factors, which establish a reasonable suspicion that the individual possesses a weapon or contraband, such as controlled substances, or evidence of a specific crime.”^{xvi} The policy states that officers may also consider the “subject's reputation or conduct” in assessing whether a strip search is appropriate.^{xvii} The policy also outlines procedures for conducting the search (i.e. who can conduct such a search, where the search should be conducted, etc.)^{xviii} Additional county policies were undiscoverable.

What have courts in the Third Circuit said about strip searches of children and youth?

Aside from *J.B.*, there are few cases that deal with the strip search of children in Pennsylvania. In a 1999 case, the Eastern District of Pennsylvania, citing to *T.L.O.*, concluded that a student’s constitutional right to be free from unreasonable searches and seizures was a clearly established right and that the school nurse who conducted the search could not benefit from qualified immunity.^{xix} Two recent cases cited to *Safford* approvingly, but they did not expand upon the test laid down by the Supreme Court.^{xx} In addition, a 1989 Third Circuit decision held that, absent a

warrant, consent, or a good faith belief that “life or limb is in immediate jeopardy,” the State may not conduct a strip search of a child to determine whether they are subject to abuse.^{xxi}

What can we do in Pennsylvania State to curb unnecessary strip searches of children and youth?

Pennsylvania currently lacks a consistent legal scheme to regulate the strip search of children. Although many attempts have been made to institute a state-wide policy on strip searches, every attempt in the last decade has died after being referred to the respective Judiciary Committees.^{xxii} The primary proponent of strip search policy reform, Senator Greenleaf, is no longer in office, but Senators Hughes and Brewster cosponsored his most recent legislation and may be amenable to reform.

Do you have model language we can use in statutes, regulations, and contract provisions?

Yes. The American Bar Association passed a resolution urging all federal, state, local, territorial, and tribal governments to adopt policies and contractual provisions that prohibit conducting strip searches of children and youth, except in exceptional circumstances, using the following language:

Strip searches of children and youth are prohibited except when all of the following conditions are met: (1) the child or youth is in custody; (2) there is reasonable suspicion that the child or youth possesses or has immediate access to an implement that poses a threat of imminent bodily harm to themselves or others; (3) all other less intrusive methods of discovering and removing the implement have been exhausted, including the use of alternative search techniques that can be performed while the child or youth is fully clothed; and (4) the child or youth has been given notice, in a manner that is consistent with the child’s or youth’s primary language and developmental stage, and that takes into account accommodations for disability, that they will be searched and that they have an opportunity to reveal any implement they are carrying instead of being searched.

If a child or youth must be strip-searched, the search shall be conducted in a manner that respects the sexual orientation and gender identity of the child or youth and in the least intrusive manner possible.

Body cavity searches of children and youth are prohibited.

ⁱ Memorandum on Strip Searches, Senator Greenleaf, S.B. 850, Gen. Assemb., 2017-2018 Reg. Sess. (Pa. 2017).

ⁱⁱ *Id.* at §21(H)(2) at p.24.

ⁱⁱⁱ *Id.* at §21(H)(3) at p.24.

^{iv} Philadelphia Police Department Directive 5.7, §24(D)(4) at p.28.

^v J.B. ex rel. Benjamin v. Fassnacht, 801 F.3d 336 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1462 (2016).

^{vi} *Id.* at 338.

^{vii} *Id.* at 338.

^{viii} *Id.* at 342.

^{ix} *Id.* at 341-42 (quoting N.G. v. Connecticut, 382 F.3d 225, 233 (2d Cir. 2004)).

^x *Id.* at 343.

^{xi} *Id.* 342-343.

^{xii} Memorandum on Prohibiting Strip Searches of Students in Public Schools, H.B. 1129, Gen Assemb., 2013-2014 Reg. Sess. (Pa. 2013).

^{xiii} Pennsylvania Law Enforcement Accreditation Commission, *Standards Manual*, §2(1.25) at 3.

^{xiv} *Id.*

^{xv} Lower Merion Police Department Policy 3.5.4 (2018).

<http://www.lowermerion.org/home/showdocument?id=19964>

^{xvi} *Id.* at §21(D) at p.22.

^{xvii} *Id.* at §22(A)(1)(b)(5) at p.24.

^{xviii} *Id.* at §§22-24 at pp.22-28.

^{xix} *Sostarecz v. Misko*, No. CIV. A. 97-CV-2112, 1999 WL 239401, at *5 (E.D. Pa. Mar. 26, 1999).

^{xx} *Highouse v. Wayne Highlands School District*, 205 F. Supp. 3d 639 (M.D. Pa. 2016); *Gray v. Great Valley School Dist.*, 102 F. Supp. 3d 671 (E.D. Pa. 2015).

^{xxi} *Good v. Dauphin Cnty. Soc. Servs.*, 891 F.2d 1087, 1094-96 (3d Cir. 1989).

^{xxii} *See, e.g.*, S.B. 850, Gen. Assemb., 2017-2018 Reg. Sess. (Pa. 2017); S.B. 164, Gen. Assemb., 2015-2016 Reg. Sess. (Pa. 2015); S.B. 171, Gen. Assemb., 2013-2014 Reg. Sess. (Pa. 2013).