

## SAN DIEGO FOSTER CHILDREN SUBJECT TO “BODY CHECK”

*by Bill Grimm*

### Introduction

San Diego’s child welfare agency recently adopted a policy requiring caseworkers to conduct “body checks” of children in foster care during visits to the foster home. These “checks” are part of a new safety and risk assessment “field tool” provided to caseworkers. All children three years old and younger are to be “examined” by the caseworker. Infants are “observed” naked. Toddlers “change to clothing that covers the least possible amount of the child’s body” and their clothing pulled back to examine their trunk, back, and buttocks. Older children, including developmentally disabled youth, are subject to a body search also. There is no prerequisite that the agency receive a report of suspected abuse, have any suspicion whatsoever that the foster child is being mistreated in the foster home, or that the foster home was reported for any type of licensing violation. The policy is part of other changes in the agency’s supervision of foster homes that include a mandate that the caseworker “make occasional unannounced home visits.” Agency officials say they adopted the policy “as a result of reviewing cases for children abused in out-of-home care” and “to protect care providers.”<sup>1</sup>

Representatives of several of the San Diego foster parent associations contacted the National Center for Youth Law (NCYL) and asked NCYL attorneys to assess the legality of the searches. They reported that caseworkers were asking children to “pull up their shirts” and “pull down their underpants.” Some children older than three who were not disabled were being subjected to the body checks, too. Foster parents and other care providers

expressed their concerns in a letter to Roger Lum, the agency director. One wrote:

Of grievous concern is that it appears that this practice may, in fact, endorse social workers re-traumatizing our children by conducting strip searches... We ask foster parents to create safe and healthy homes for our children and then require that they strip the child in front of a relative stranger and examine their bodies...”

On April 30 of this year, NCYL, along with the officers of three San Diego foster parent associations, wrote to the agency director asking that the body check policy be rescinded or revised. Their letter urged Director Lum to reconsider the policy in part because:

Many of the children subjected to the “body checks” are in care because some stranger or relation sexually abused them. They were forced, coerced, or cajoled into surrendering to the demands of an adult. Many were told that this was right for them to do. Upon entering care, they are given a different message. They are told that their bodies are private and that no one should force them to surrender this privacy. Their foster parents and the agency assure them that they will be protected from further harm while in foster care. To subject such children to random searches not warranted by any report or suspicion of abuse, compounds the injury they suffered before entering the state’s custody. Such an intrusion on the child’s personal security conflicts

<sup>1</sup> A recent opinion of the California Court of Appeals notes “recent scandals regarding abuse in foster care placements in Southern California.” *In re Jayson T.*, 118 Cal.Rptr.2d 228, 236 (4th Dist.2002).

with the state's obligation to do no further harm.

NCYL staff concluded that the "body check" policy violated foster children's right to privacy and their constitutional right to be free from unreasonable searches by government officials.

### **Description of the Policy<sup>2</sup>**

County child welfare agencies are responsible for monitoring a foster child's progress and safety in placement. Policy requires that workers have face-to-face visits with children once a month.<sup>3</sup> Less frequent visits are permitted but only if many stringent requirements are met.<sup>4</sup> The regulations describe the purpose of the monthly visits but provide no further guidance on how they are to be conducted.<sup>5</sup> Consequently, a county office may provide additional instructions for caseworker visits.

The "body check" policy is part of a guide entitled "Contacts With Children – A How To." It was developed by county officials for caseworkers of children in foster care. Among other things, the guide suggests questions to ask the child and observations to be made of the child and the foster home. For example, the caseworker is instructed to see the child's bedroom, assess the cleanliness of the home, ask the child how many times she eats a day, and whether

or not all children in the home are treated the same.

The guide also includes provisions for an examination of the child's body. The worker is directed to examine the child according to another agency protocol. This protocol appears to be the procedure used by child protective services workers when examining a suspected victim of child abuse. It calls for observing children under 12 months totally naked while having older children pull down their pants or rearranging their clothes so the worker can observe the trunk, back and buttocks.

Caseworkers must be given considerable discretion in carrying out their duty to monitor a child's safety in foster care. However, this discretion is not without limitations particularly where it may impinge upon the child's constitutional right to be free from unreasonable searches. As written, the "body check policy" leaves many unanswered questions about how the nude search is to be conducted and makes it likely that there will be an abuse of discretion. For example,

- Is a body check to be conducted during every home visit or does the caseworker have some discretion to waive the search?
- Can the child's assigned caseworker send a proxy to do the home visit and the body check?
- Are there exceptions to the body check when the child has been seen for a well-child or other medical examination within five days of the caseworker's visit?
- Where the body check should occur – in the bathroom, bedroom, living room – is not specified.
- What is the child to be told is the reason(s) for disrobing?
- The extent of the body check is unclear. A worker is instructed to "visually scan" the child.
- Are only caseworkers of the same sex as the child being stripped

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<sup>3</sup> The agency has issued several versions of the Field Tool and a Special Notice describing the policy. Though some of the language was changed, the policy of conducting random intrusive examinations, even when there is no suspicion of abuse, continues under the most recent version.

<sup>3</sup> CA-DSS-Manual of Policy and Procedures (hereinafter 'MPP') Division 31 Section 320.41.

<sup>4</sup> MPP 31-320.411 (a) – (d) and 31-320.412. In some counties waivers of monthly visits are common. This practice led the presiding judge of the Los Angeles County Juvenile court to order that waivers of monthly caseworker visits to the foster home were to be reviewed by the juvenile court judge. *Alliance For Children's Rights v. Los Angeles County Dept. of Children and Family Services*, 116 Cal.Rptr.2d 288 (2<sup>nd</sup> Dist. 2002).

<sup>5</sup> MPP Handbook 31-320.11.

- permitted to conduct the examination?
- For infants and toddlers still in diapers, the worker is required to change the child's diaper. The extent of any genital examination or observation of the child the worker should or may conduct is not clear.<sup>6</sup>

### **San Diego Body Check is a Fourth Amendment "Search"**

Foster parents report that caseworkers, using the new guide, are conducting a search of the child's unclothed or mostly nude body. Such an intrusion upon the privacy of a child implicates the protections of the Fourth Amendment right to be free from unreasonable searches. As the court summarized in *Flores v. Meese*,<sup>7</sup>:

It is axiomatic that a strip search entails perhaps the most severe intrusion upon personal rights. Thus, a strip search policy "instinctively gives us the most pause."<sup>8</sup> That plaintiffs are children under the age of eighteen is also a factor we must consider. Children are especially susceptible to possible traumas from strip searches. As the Supreme Court has noted, "[y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to

influence and to psychological damage."<sup>9</sup> It follows that a nude search of a child is an invasion of constitutional rights of some magnitude.<sup>10</sup>

*Flores* involved the strip search of children confined in INS facilities but, as explained more fully below, the federal courts have held that strip searches of children in the course of child abuse investigations also give rise to Fourth Amendment claims.<sup>11</sup> Government officials' plea to suspend children's right to privacy on the basis of "the societal imperative to protect children, particularly young children suspected of being victims of neglect or abuse..." have been rejected.<sup>12</sup>

### **Fourth Amendment Protections Apply in Child Abuse Investigations**

The United States Supreme Court has yet to determine what conditions must be met before government officials may subject a suspected victim of child abuse to a strip search. However, strip searches of children by caseworkers following receipt of a child abuse report have been the subject of reported decisions in the Seventh, Third, and Ninth Circuits.<sup>13</sup>

There is a crucial distinction between all these cases and the San Diego body-check policy. In each case described

<sup>6</sup> In *M.W. and A.W. v. Dept of Social & Health Servs.*, 39 P.3d 993 (Wash. App. Div. 2, 2002), the Court reversed summary judgment for the defendants – DSHS & caseworker supervisor – on claims that the removal of an 18-month-old girl's diaper and examination of her vaginal area by DSHS staff was an unreasonable and negligent investigation of suspected child abuse. The examination followed the father's complaint that the child was being sexually abused in the foster home. The case was sent back for trial.

<sup>7</sup> 681 F.Supp. 665 (D.Cal.1988) *aff'd* 942 F.2d 1352 (9th Cir. 1991) *rev'd on other grounds sub. nom. Reno v. Flores*, 507 U.S. 292, (1993).

<sup>8</sup> *Bell*, 441 U.S. at 558, 99 S.Ct. at 1884, 60 L.Ed.2d at 492; *cf. Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir.1983) (describing strip searches as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.").

<sup>9</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982).

<sup>10</sup> *See, e.g., Doe v. Renfro*, 631 F.2d 91, 92-93 (7th Cir.1980), *cert. denied*, 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981).

<sup>11</sup> *Good v. Dauphin County Social Services*, 891 F.2d 1087 (3<sup>rd</sup> 1989), *Calabretta v. Floyd*, 189 F.3d 808 (9<sup>th</sup> Cir. 1999); *Darryl H. v. Coler*, 801 F.2d 893 (7<sup>th</sup> Cir. 1986); *Franz v. Lytle*, 997 F.2d 784 (10<sup>th</sup> Cir. 1993).

<sup>12</sup> *Franz v. Lytle*, 997 F.2d 784 (10<sup>th</sup> Cir. 1993)(Court refuses to "balkanize the Fourth Amendment as recommended" by defendants "because of our deep concern for the safety and well-being of young children...").

<sup>13</sup> *Darryl H. v. Coler*, 801 F.2d 893 (7<sup>th</sup> Cir. 1986), *Good v. Dauphin County Social Services*, 891 F.2d 1087 (3<sup>rd</sup> 1989), *Calabretta v. Floyd*, 189 F.3d 808 (9<sup>th</sup> Cir. 1999); *See also, Franz v. Lytle*, 997 F.2d 784 (10<sup>th</sup> Cir. 1993)(police officer examination of vaginal area of two year old).

below, the strip search was preceded by a report of suspected abuse concerning the particular child who was subjected to the search. Though the details of the reports vary and some were anonymous, in each instance, the caseworker had been given some information to suspect the child had been harmed by his or her parent. The San Diego policy authorizes a nude search of the child in the absence of any such report or suspicion. No reported decision from any jurisdiction has found this practice to pass constitutional muster.

*Darryl H. v. Coler*

The first court to consider the issue was the Seventh Circuit in *Darryl H. v. Coler*,<sup>14</sup> *Darryl H.* involved two separate cases consolidated on appeal. The cases came to the court at a very preliminary stage of the litigation process – one on a motion for summary judgment and the other on a motion for preliminary injunction. The court noted that it was not required to accomplish a definitive resolution of the competing constitutional value concerns.<sup>15</sup> As a result, though *Darryl H.* provides some guidance on the issue, it fails to set definitive guidelines for strip searches in child abuse cases.

In *Darryl H.*, as in all the succeeding cases, the court determined that the visual inspection conducted by government officials of those parts of the human body usually covered by clothing implicates Fourth amendment concerns.<sup>16</sup> Citing to precedent in the same circuit, the court stated that “[s]ubjecting a student to a nude search is more than just the mild inconvenience of a pocket search, rather, it is an intrusion into an individual’s basic justifiable expectation of privacy.”

The court concluded that neither a warrant nor probable cause were necessary. It then turned to consider whether the Department’s strip search of the plaintiff children satisfied the Fourth Amendment

requirement of reasonableness. In making this determination, the Court focused on the procedures set forth in the state *Child Abuse and Neglect Investigations Handbook*. The *Handbook* required that before undertaking any child abuse investigation, five criteria must be met. The five-part criteria included the following:

- 1) a child less than eighteen years old is involved;
- 2) the child was either harmed or in danger of harm;
- 3) a specific incident of abuse is identified;
- 4) a parent, caretaker, sibling or babysitter is the alleged perpetrator of neglect; or
- 5) a parent, caretaker, adult family member, adult individual residing in the child’s home, parent’s paramour, sibling or babysitter is the alleged perpetrator of abuse.<sup>17</sup>

Based on the subsequent investigation done by the caseworker, if the caseworker deems a physical examination is necessary, the caseworker is supposed to consult the caretaker and choose one of four options.<sup>18</sup> One of these options would include having the caseworker disrobe the child and conduct a cursory physical examination while the caretaker is present. The Illinois policy also placed some restrictions on the examination itself. It required that (1) a physician must conduct the examination if sexual abuse was alleged, (2) a child over 13 years old must be examined by a caseworker of the same sex, and (3) a severely ill child must be taken to a physician.

Under the policy set forth in the agency *Handbook*, DCFS may conduct physical inspections based on any report,

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<sup>17</sup> *Id.* at 895.

<sup>18</sup> The four options were (1) require the caretaker to take the child to a physician for a physical examination, (2) take the child to a physician for a physical examination, (3) disrobe the child and conduct a cursory physical examination while the caretaker is present; or (4) permit the school nurse to examine the child.

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<sup>14</sup> 801 F.2d 893 (7<sup>th</sup> Cir. 1986).

<sup>15</sup> *Darryl H.*, 801 F.2d at 895.

<sup>16</sup> *Darryl H.*, 801 F.2d at 900.

including an anonymous report, which merely meets the five hot-line criteria for determining if an investigation should be initiated.<sup>19</sup> The court expressed reservations about whether the policy satisfied the Fourth Amendment's reasonableness requirement. It was "unconvinced that the Handbook will ensure, in all cases, the reasonableness of the visual inspection."<sup>20</sup> It is doubtful that a nude body search could be constitutionally conducted in every instance in which the department's five part criteria is met.<sup>21</sup> However, it left for further litigation, "whether the hot-line criteria are sufficiently precise to achieve the legitimate ends of DCFS without amounting to a needless intrusion into the privacy of the child and his family."

In commenting on the privacy issue for young children, the court noted, "[a] child of very tender years may not exhibit a subjective expectation of privacy in the same sense as an older child. He is, however, a human being, entitled to be treated by the state in a manner compatible with that human dignity."<sup>22</sup>

There are critical distinctions between the policy at issue in *Darryl H.* and the body check policy in San Diego, all of which suggest the San Diego policy does not satisfy even the reasonableness test applied in *Darryl H.* First and foremost, the *Darryl H.* policy required that there be some suspicion that the child who was the subject of the search had been harmed or was in danger of harm. The level of information warranting the suspicion may be slight, the threshold may be low, but there must be some basis to suspect the child is being mistreated. There is no such prerequisite in the San Diego policy. Second, in *Darryl H.* there had to be a specific incident of abuse identified. Vague concerns about the child's well being would not support an intrusive strip search of the child. Again this factor is missing from the San Diego policy. No

specific incident or complaint of abuse or neglect in the foster home is required. Third, the DCFS policy in *Darryl H.* permitted children to refuse to cooperate with the search at any time.<sup>23</sup> No such provision is included in the San Diego policy. Finally, as discussed in Section II, the San Diego policy leaves many questions about the nature and extent of the strip search unanswered thus vesting the caseworker with virtually unbridled discretion on the scope of the search. The absence of clear guidelines that circumscribe the caseworker's discretion is an important factor in determining if the policy is unconstitutional on its face.<sup>24</sup>

*Good v. Dauphin County Social Services*  
In *Good v. Dauphin County Social*

*Services*, a mother and her seven-year-old child sued county officials, an individual caseworker, and a police officer for violation of their Fourth Amendment rights during a child abuse investigation. Following receipt of an anonymous call that the child had bruises on her body and that the seven year old said they were caused by a fight with her mother, a DSS worker and police officer went to the Good home. Believing that she had no choice in admitting them to her home, the mother opened the door to allow the caseworker and officer to enter. Without the mother's consent and with no ostensible indication the child was injured, nonetheless, the policewoman then stripped and inspected the seven-year-old girl. She did so on instructions from the DSS caseworker.

The trial court granted defendants' motion for summary judgment holding that their actions did not violate any clearly established constitutional rights of the plaintiffs.<sup>25</sup> On appeal, quoting from the

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<sup>23</sup> *Darryl H.*, 801 F.2d at 901.

<sup>24</sup> *Franz v. Lytle*, 997 F.2d 784, 789-791 (10<sup>th</sup> Cir. 1993).

<sup>25</sup> The defendants also argued that they were entitled to a dismissal because Pennsylvania law grants them immunity for "participating in good faith in the making of a [child abuse] report, *cooperating with an investigation...*" The Court of Appeals rejected this

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<sup>19</sup> *Darryl H.* 801 F.2d at 903.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 901.

<sup>22</sup> *Id.* at 901.

Supreme Court's opinion in *New Jersey v. T.L.O.*,<sup>26</sup> and a Seventh Circuit decision in *Doe v. Renfrow*,<sup>27</sup> the Third Circuit noted:

A search of a child's person... no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.<sup>28</sup>

The Third Circuit reversed the dismissal of the case against the caseworker and police officer. It held that:

"[t]he decided case law made it clear that the state may not, consistent with the prohibition of unreasonable searches and seizures found in the Fourth and Fourteenth Amendments, conduct a search of a home or strip search of a person's body in the absence of consent, a valid search warrant, or exigent circumstances."<sup>29</sup>

After reviewing the facts alleged in the complaint, the Court concluded that Ms. Good had not consented to the entry into her home or the subsequent strip search.<sup>30</sup> It also found that the circumstances in the case did not amount to "exigent circumstances" justifying the search. The case was sent back for trial for the jury to determine if the caseworker and police officer's actions were lawful.<sup>31</sup>

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argument holding that "state law cannot immunize government officials from liability resulting from violation of federal law." *Good*, 891 F.2d 1087, 1090-1091.

<sup>26</sup> 469 U.S. 325 (1985).

<sup>27</sup> 631 F.2d 91,92-93 (7th Cir. 1980) *cert. denied* 451 U.S. 1022.

<sup>28</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 337-338 (1985) [other citations omitted].

<sup>29</sup> *Good*, 891 F.2d 1087, 1092.

<sup>30</sup> *Id.* at 1095.

<sup>31</sup> *Good* does not appear to accept the argument that in child abuse investigations, both a warrant and probable cause may be dispensed with. It mentions only briefly the decision in *New Jersey v. T.L.O.* The court writes:

It evidences no lack of concern for the victims of child abuse or lack of respect for

*Calabretta v. Floyd*

In *Calabretta v. Floyd*,<sup>32</sup> the Department of Social Services received an anonymous report from a caller who said that she was awakened at 1:30 a.m. by a child screaming "No Daddy, no." the caller also described the children as home schooled and part of an extremely religious family. A caseworker accompanied by a police officer went to the Calabretta home and after gaining entry interviewed the Calabretta's twelve-year-old daughter. In response to questions from the caseworker, the twelve year old told her that her parents used a very thin wooden dowel to discipline her. During this interview, Natalie, her three-year-old sister, came into the room and told the caseworker "I get hit with the stick, too." While the police officer was interviewing the mother in another room, the caseworker asked the twelve year old to pull down Natalie's pants so she could examine her buttocks for marks. Natalie began to cry, the twelve year old refused and her mother then ran into the room to see what was happening. The caseworker insisted that the child's pants be pulled down so she could examine her. With Natalie fighting and screaming to get loose, the mother pulled down the three year old's pants.

The Ninth Circuit refused to read *New Jersey v. T.L.O.* "as a blanket suspension of ordinary Fourth Amendment

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the problems associated with its prevention to observe that child abuse is not sui generis in this context. The Fourth Amendment caselaw has been developed in a myriad of situations involving very serious threats to individuals and society, and we find no suggestion there that the governing principles should vary depending on the court's assessment of the gravity of the societal risk involved. We find no indication that the principles developed in the emergency situation cases we have heretofore discussed will be ill suited for addressing cases like the one before us.

It then concludes by citing cases in which "current doctrine accommodates situations where the health of a child would be endangered had social workers taken the time to apply for a warrant." 891 F.2d at 1094, n.4.<sup>32</sup> *Calabretta*, 189 F.3d 808 (9<sup>th</sup> Cir. 1999).

requirements where children are involved.”<sup>33</sup> After discussing both *Darryl H.* and *Good*, the Court found that “[t]his case is like *Good*, not *Darryl H.*” as it occurred following a forced entry into the parent’s home.<sup>34</sup> Absent from the discussion in *Calabreta*, is any determination of whether the requirements of a warrant and probable cause are inapplicable in a child abuse investigation and, if so, under what circumstances.

Towards the end of the court’s opinion in *Calabreta*, there is some language, which San Diego officials may argue legitimizes their body check policy. The Court wrote:

There is not much reason to be concerned with the privacy and dignity of the three year old whose buttocks were exposed, because with children of that age ordinarily among the parental tasks is teaching them when they are not supposed to expose their buttocks.<sup>35</sup>

This language, which is not part of the Court’s holding, provides little basis for legitimizing the San Diego policy. First of all, it is immediately preceded by the Court’s citation to the Tenth Circuit’s decision in *Franz v. Lytle*,<sup>36</sup> a case in which the court declared the nude search of a two-year-old child unconstitutional.<sup>37</sup> Second, the *Calabreta* court heard no evidence considering the potential harmful impact of random strip searches of infants and toddlers by strangers. Clearly, a strip search of even very young victims of sexual abuse compounds their trauma.<sup>38</sup> Third the court’s

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<sup>33</sup> *Id.* at 816.

<sup>34</sup> *Id.* at 820.

<sup>35</sup> *Id.* at 820.

<sup>36</sup> 997 F.2d 784 (10<sup>th</sup> Cir. 1993),

<sup>37</sup> *Calabreta* 189 F.3d at 820.

<sup>38</sup> As Mr. Wisconsin wrote: “[O]f grievous concern is that it appears that this practice may, in fact, endorse social workers re-traumatizing our children by conducting strip searches... what is this doing to the fragile bonding of our children? We ask foster parents to create safe and healthy homes for our children and

comments apply only to very young children while the San Diego policy authorizes strip searches of older children and children with disabilities.

#### *Wallis v. Spencer*

More recently, the Ninth Circuit again considered the constitutional prerequisites to a physical examination of two children ages two and five suspected of being abused. In *Wallis v. Spencer*,<sup>39</sup> the Court held:

We agree with the Second Circuit which held in *Van Emrik v. Chemung County Dep’t of Social Servs*, that the “Constitution assures parents that, in the absence of parental consent, [physical examinations] of their child may not be undertaken for investigative purposes at the behest of state officials unless a judicial officer has determined, upon notice to the parents, and an opportunity to be heard, that grounds for such an examination exist and that the administration of the procedure is reasonable under all the circumstances. Barring a reasonable concern that material physical evidence might dissipate, or that some urgent medical problem exists requiring immediate attention, the state is required to notify parents and to obtain judicial approval before children are subjected to investigatory physical examinations.<sup>40</sup>

In summary, each of the cases discussed above hold that a nude search of a child who is the suspected victim of abuse

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then require that they strip the child in front of a relative stranger and examine their bodies!” Letter of Brad Wisconsin to Rodger Lum, (February 1, 2002)(Attached as Appendix G).

<sup>39</sup> 202 F.3d 1126, 1141 (9<sup>th</sup> Cir. 2000),

<sup>40</sup> 911 F.2d 863, 867 (2d Cir.1990). Child Protective Services, San Diego County DSS was one of the defendants in *Wallis*.

gives rise to Fourth Amendment protections. With a few narrow exceptions, the Ninth Circuit requires that such physical examinations must be preceded by a judicial determination that the exam is reasonable under all the circumstances.

Foster children no less than children in the general community are entitled to the protections of the Fourth Amendment. They are not in custody as a result of any criminal wrongdoing and may not be treated as criminals under the guise of their own protection. None of the reported cases authorize blanket policies of random strip searches of children either in state custody or being considered for protective custody. Indeed, even the Seventh Circuit that explicitly required only that such searches meet the test of reasonableness demands that there be a factual basis for suspecting that the individual child who is the subject of the search has been abused. The San Diego policy fails to meet even this very minimal test.

**Absent Some Reasonable Suspicion of Abuse or Neglect Random Strip Searches of Foster Children Violate Their Right to Be Free From Unreasonable Searches**

Although there is a general requirement under the Fourth Amendment for individualized suspicion, there are rare exceptions in which the government may be allowed to conduct suspicionless searches.

[P]articulated exceptions to the main rule are sometimes warranted based on “special needs” beyond the normal need for law enforcement. When such “special needs” – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.<sup>41</sup>

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<sup>41</sup> *Chandler*, 520 U.S. 313-314.

Based on this careful balancing test, in limited circumstances where the privacy interest is minimal and an important government interest would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of suspicion.<sup>42</sup> In any instance where government officials seek to impose a suspicionless search, courts are required to assess the search to determine whether it fits “within the closely guarded category of constitutionally permissible suspicionless searches.”<sup>43</sup>

The Supreme Court has sustained suspicionless searches in a limited number of instances. See *Vernonia School Dist*<sup>44</sup> (random drug testing of students who participate in interscholastic sports); *Treasury Employees v. Von Raab*,<sup>45</sup> (drug tests for U.S. Customs Service employees who seek transfer or promotion to certain positions); and *Skinner*,<sup>46</sup> (drug and alcohol tests for railway employees involved in train accidents and for those who violate particular safety rules). In *Chandler*, the court found that the Georgia law, requiring each candidate seeking nomination to a state office to certify that they have tested negative for illegal drugs, failed to demonstrate a special need for such searches as there was no safety risks or prior evidence of drug abuse by state officials to warrant a suspicionless invasion of privacy. In addition, the court in *Chandler* noted that the state had offered no good reason why ordinary law enforcement mechanisms would be insufficient to apprehend any state official in the future that was abusing drugs.

Thus, in any instance when the government seeks to conduct suspicionless searches, the government must first show the existence of a special need. Second, it must show that the nature of the privacy interest is outweighed by the nature and

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<sup>42</sup> *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 624 (1989).

<sup>43</sup> *Chandler*, 520 U.S. at 309.

<sup>44</sup> 515 U.S. 646 (1995).

<sup>45</sup> 489 U.S. 656 (1989).

<sup>46</sup> 489 U.S. 602 (1989).

immediacy of the government concern, the nature of the intrusion, and the nature and efficacy of the search.<sup>47</sup>

Applying this standard to the San Diego policy for strip searching children it is apparent that it falls far short of the “closely guarded” category of constitutionally permissible suspicionless searches. The county cannot justify its infringement on the rights of children simply by alleging that a “special need” exists. San Diego officials are required to demonstrate a level of urgency supporting the assertion of a special need. In other words, there must be evidence of a rash of abuse reports of children in the care of foster parents. There are, however, no accurate data on the incidence of foster parent abuse in California.<sup>48</sup> Second, they would also have to show that all other alternative means for protecting the interests of children are ineffective and would not suffice to prevent the alleged rash of abuse by foster parents. Finally, the nature of the search is one of the most intrusive imaginable and therefore requires a greater showing to justify its reasonableness. None of these criteria appear to be met in San Diego.<sup>49</sup>

### **Professional Standards of Practice Suggest the Policy is Unreasonable**

The extent to which professional standards and other child welfare agencies have adopted similar policies is another measure of the policy’s reasonableness. No published standards support the intrusion upon a foster child’s privacy inherent in the

agency’s policy. The Council on Accreditation for Children and Family Services (COA) requires that the child welfare agency “ensures that foster parents provide each child in care with ... a pleasant, safe, and nurturing family atmosphere.”<sup>50</sup> This is to be accomplished, in part, by making at least monthly visits to the foster home.<sup>51</sup> Nowhere do these standards suggest that “body checks” of the nature described in the San Diego policy should be part of routine visits to foster homes. Child Welfare League of America (CWLA) Standards also do not support the violations of a child’s right of privacy inherent in the “body checks.”<sup>52</sup> Similar to the COA Standards, CWLA Standards require that “the social worker should meet face to face with the child at least monthly.”<sup>53</sup> The *CWLA Standards* suggest the worker should “be aware of any evidence of maltreatment, or failure of the child to develop” but do not call for workers to engage in random searches of the child’s person as a means of accomplishing this.

We also posted a question about the policy through the National Foster Parent Association website. None of the respondents had heard of similar policies in their state. A foster parent and a regional training coordinator in one state wrote:

Many, if not most, of these children have been sexually abused. To have another adult require them to disrobe in front of them can re-traumatize them. Our role as foster/adoptive parents and social workers is to help these children learn to set boundaries so they are not taken advantage of in the future. What happens when we disregard these boundaries? Do we want to send those mixed messages?

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<sup>47</sup> *Chandler*, 520 U.S. at 308; *Vernonia*, 515 U.S. at 652-53. The “character of the intrusion that is complained of” is a necessary part of the constitutional analysis. *Vernonia*, 515 U.S. at 658. In *Vernonia*, the Court described in detail the procedures for collecting urine samples from students and noted that “they remain fully clothed and are only observed from behind, if at all.” *Vernonia*, 515 U.S. at 658.

<sup>48</sup> Personal communication with Glenn Jue, Associate Information Systems Analyst, Case Management System Support Branch, California Department of Social Services (March 28, 2002).

<sup>49</sup> Protecting the county from potential lawsuits for harm suffered by foster children in county licensed homes would not meet the special needs or reasonableness tests.

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<sup>50</sup> *COA Standards Relating to Foster and Kinship Services Standards*, S21.4.04.

<sup>51</sup> *COA Standards* S21.4.02 - S21.4.03.

<sup>52</sup> See *CWLA Standards of Excellence for Family Foster Care Services*.

<sup>53</sup> *CWLA Standards* 2.55.

What does that do to their self-esteem?

A foster parent association president in another state wrote “leave this [body checks] up to nurses, physicians under direction of human services if they think it's necessary.”

Another foster parent commented:

Never heard of such a thing on a routine basis. Only when an allegation has been made and even then, many times such things are done at a special child advocacy center so that a child doesn't go through such indignities more than once!!!

#### **Fourth Amendment Violations Are Not Cured By The Agency's Consent**

The San Diego agency's status as the child's legal custodian, standing *in loco parentis*, does not authorize it to consent to and conduct searches of any foster child they deem appropriate. Neither the Fourth Amendment case law nor the California laws governing child protection support such position.

*DSS Does Not Have Authority to Consent to the Search*

In *New Jersey v. T.L.O.* defendants argued that they were exempt from the strictures of the Fourth Amendment because:

“[t]eachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment

In rejecting this argument, the Supreme Court explained:

Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather,

they act in furtherance of publicly mandated educational and disciplinary policies.... In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.<sup>54</sup>

Similarly, the caseworkers here are acting not with the consent of the parents. Rather they are carrying out the searches at issue here pursuant to the child abuse and juvenile court laws. Thus, like the teachers and administrators in *T.L.O.*, they are acting as representatives of the state not as surrogates for the parents.

The Supreme Court's more recent decision in *Vernonia* affirms that government officials acting *in loco parentis* are subject to the strictures of the Fourth Amendment requirement of reasonableness:

[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.<sup>55</sup>

Subjecting children, many of whom have been forced or coerced into disrobing for strangers, to take off their clothes or to expose parts of their body usually covered by clothing, simply does not meet the test of reasonableness.<sup>56</sup>

#### **Random Strip Searches of Foster Children Are Not Authorized by Statute**

<sup>54</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 336-337 (1985).

<sup>55</sup> *Vernonia*, 515 U.S. at 665.

<sup>56</sup> Recognition that a foster child's vulnerability to certain acts is greater than other children who have not been the victim of abuse or neglect is one of the reasons behind child welfare standards ban on the use of corporal punishment even though it may not be illegal for parents to use such discipline. *See, e.g., CWLA Standards of Excellence for Family Foster Care Services, Standard 2.70.*

## or Regulation

Nor does California law vest caseworkers with the authority to conduct strip searches of children in foster care.<sup>57</sup> Indeed, if such searches are to be conducted at all, the legislature has made clear that they are to be conducted by a specially trained health care practitioner in a medical care setting.

The Lance Helms Child Safety Act of 1998 authorized the local child welfare department to consent to a physical examination of a child who is the suspected victim of abuse.<sup>58</sup> The statute sets forth several prerequisites for the examination and limits the persons who may conduct it. Before the agency consents to the examination the following conditions must be met:

- The allegation(s) must include either physical or sexual abuse
- The child is taken into protective custody
- Consult with a health care professional who has specialized training in detecting and treating child abuse injuries and neglect
- The health care professional deems the examination to be appropriate under the circumstances

Once the examination is deemed appropriate, a medical practitioner must conduct it. Not all medical practitioners are qualified to conduct this examination. The agency is required to take the child to one who has specialized training in detecting and treating child abuse injuries and neglect.

The statute explicitly addresses situations in which there is an allegation of child abuse while the child is in foster care. It directs that:

In the event the allegations are made while the child is in custody, the physical examination shall be performed within 72 hours of the time the allegations were made.

Clearly the statute is intended to insure that all children – those at home and those living in out of home placements in DSS custody – shall have the same protections. No physical examination shall occur without first obtaining the advice of a trained health care professional. Furthermore, the examination is to be completed by a health care professional not a caseworker. It would be anomalous to say the least if upon an allegation of child physical or sexual abuse of a foster child, the examination of the child must be conducted in a medical office setting by a health care professional someone with specialized training, yet in the absence of such an allegation, the child could be subjected to a strip search by a caseworker with much less training in diagnosing non-accidental injuries.

## Conclusion

Upon entry into foster care, children do not surrender their basic constitutional rights to be free from unreasonable searches and seizures. Nor do they surrender their rights to privacy. Though some physical examination of a child in foster care may be conducted without a warrant or probable cause, there must be some reasonable basis for suspecting that the child has been harmed. Random strip searches of children cannot be justified either by the agency's desire to protect foster parents from false allegations of abuse or, as is more likely the case here, by the agency's desire to protect itself from liability. Without substantial revision and additional criteria to guide the caseworker's decision on when and how to conduct a physical examination of a child in care, the San Diego policy infringes upon a child's constitutional rights and is likely to be struck down.

On May 14, 2002, County Counsel for San Diego agreed to review the issues

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<sup>57</sup> While not specifically addressing searches of a foster child's body, the legislature has declared that children in foster care have the right "to be free from unreasonable searches of personal belongings." Welf & Inst. Code §16001.9 (a)(20).

<sup>58</sup> Welf & Inst. Code § 324.5.

raised in NCYL and the foster parents' letter and respond within 30 days.

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