

HELLO!

Students Have a Right to Privacy in their Cell Phones

Indiscriminate Cell Phone Searches Violate Students' Privacy Rights



A report by the ACLU of California
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“students do not
shed their
constitutional
rights at the
schoolhouse gate”

AUTHORS

Brendan Hamme, Legal Extern Fall 2010 and Spring 2011, ACLU of Southern California, and Hector O. Villagra, Executive Director, ACLU of Southern California

CONTRIBUTING WRITERS/EDITORS

David Blair-Loy, Legal Director, ACLU of San Diego & Imperial Counties, Linda Lye, Staff Attorney, ACLU of Northern California, and David Sapp, Staff Attorney, ACLU of Southern California.

RESEARCHERS

Brendan Hamme, Negin Iraninejadian, Legal Extern Spring 2011, ACLU of Northern California, Maggie Stehn, Legal Extern Spring 2011, ACLU of San Diego & Imperial Counties.

DESIGN

Hillary Weiss

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Preface

The right to privacy is one of our most basic and cherished constitutional rights. It protects us from unwarranted government intrusions into our personal affairs. As one of our most well known and highly respected U.S. Supreme Court justices put it nearly eighty years ago, the drafters of the Constitution “sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the [Constitution].”¹

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The American Civil Liberties Union (ACLU) has a long and proud history of defending the right to privacy. As technology has advanced, the law has often struggled to keep pace and ensure protection for personal information. As technology now provides new ways to gather information and databases containing personal information proliferate, the need for privacy protections becomes more urgent. The ACLU is a national leader in working to guarantee that individuals may determine how and when the government can gain access to their personal information. The ACLU has protected employees in their personal electronic mail; patients in their medical records and, indeed, their very DNA; airline passengers in the face of intrusive and ineffective full body scans; internet users in their profiles, search histories and purchases; and cell phone users in their phone records and data.

The ACLU also has long advocated to protect the privacy rights of public school students. Although it has long been established that students do not shed their constitutional rights at the schoolhouse gate,² students’ privacy rights have been under constant threat of erosion. The ACLU has been at the forefront of their defense, opposing such invasions of student privacy as electronic monitoring and tagging of jerseys and backpacks, the collection of student information in electronic databases to be shared with the federal government and military recruiters, random drug testing, and unreasonable surveillance.

This report addresses the intersection of technology and student rights – the searches and seizures of students’ cell phones.

Introduction

Indiscriminate searches of students' cell phones threaten students' privacy rights in ways that have never before been possible. Sweeping searches threaten to expose a tremendous amount of private, personal information, especially given modern smart phones and their e-mail, Internet, calendaring, messaging, photo and video capabilities. Perhaps worst of all, sweeping searches threaten to teach our youth that such invasions of privacy are unavoidable, or worse, routine parts of civic life.

The U.S. Supreme Court laid down the standards for searches of students and their belongings in *New Jersey v. T.L.O.*³ The Court, which sought to balance the privacy rights of students against the need for safety and order in schools, established a two-part test for any such searches. Essentially, a search must be justified from the outset and limited in its scope to finding evidence related to the alleged violation of school rules or illegal conduct that justified the search in the first place.⁴

Having received several complaints of unjustified cell phone searches, and knowing of various lawsuits across the country challenging such searches, we decided to investigate the standards for searches of student cell phones on public school campuses in California. This report examines both cell phone possession and search and seizure policies in California school districts.

In conducting our research, the need for clear guidelines on the scope of student searches quickly became apparent. The majority of California school districts allow for student searches where there are "reasonable grounds" for suspecting a student has violated the rules of the school, without limiting the scope of any resulting searches. Without sufficient guidance on when school district employees may search student belongings and how far the search may go, particularly in the context of a cell phone, there is an extremely high risk that any search will become a general, exploratory search and students' privacy rights will be infringed.

Part I of this report provides background information on student cell phone use and examines the privacy concerns that arise from searches of student cell phones. Part II surveys current school district policies regarding the possession and use of cell phones by students, assesses the current legal limits on searches of student cell phones, and examines the policies of surveyed districts⁵ in light of the legal limits. Part III recommends the components of model cell phone possession and search and seizure policies. The Appendix to this report includes a quiz to test your knowledge of search and seizure principles as applied to students' cell phones.

It is our hope that this report will help students, parents, and school staff understand the constitutional limits on searches and seizures of students' belongings and the threat posed to student privacy rights by indiscriminate cell phone searches. Simply put, to avoid potential constitutional violations and ultimately to ensure the privacy of students, school districts should refrain from searching students' cell phones when students violate policies on cell phone possession. Confiscation of phones is a fair and reasonable alternative to searching them. Indeed, absent reasonable suspicion of wrongdoing with the phone, beyond merely possessing it or having it out in the open or turned on in violation of school rules, there is no need and no legal justification for searching the phone.



"Simply put, to avoid potential constitutional violations and ultimately to ensure the privacy of students, school districts should refrain from searching students' cell phones when students violate policies on cell phone possession."

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PART I: Issue of Growing Concern

A. YOUTH CELL PHONE USE

A cell phone is now a practical necessity of modern life, and recent years have seen explosive growth in the use of cell phones among our nation’s youth. A recent Pew research study shows an increase in rates of cell phone possession among seventeen year-olds from 68% in 2004 to 83% in 2009.⁶ The same study indicates that not only do a high percentage of teenagers use such devices, but also that their use is quickly spreading to younger demographics. While in 2004 only 18% of twelve year-olds had their own cell phone, by 2009, 58% did.⁷ It seems likely that this upward trend will continue.

This proliferation of cell phones among our youth is hardly surprising. Youth have always used phones for social purposes, and they are increasingly using cell phones to connect to social networking sites. Cell phones also serve a vital purpose for both youth and their parents. They provide a sense of security for both in case of an emergency situation or an unexpected change in plans.⁸ The phone provides a potential life line for students in danger, allowing students to communicate with their parents, as during the tragic Columbine shooting. In schools with aging infrastructures, they may even allow students to phone for help when the school’s in-class telephones do not work. More frequently, cell phones allow parents and students to communicate to each other changes in after-school plans. For example, parents stuck in traffic may wish to tell their children they are going to be a few minutes late and not to worry.

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B. CELL PHONE MISUSE

Cell phones, however, can be and are misused by students, and they can disrupt the school learning environment.

Youth are taking their cell phones to school and even using them in class, although many schools restrict their use and some prohibit their possession altogether on school grounds.⁹ Among teens who have cell phones, 77% reportedly bring their phones to school on a daily basis.¹⁰ Indeed, 64% of teens who own cell phones have sent a text message while in class and 25% have received a phone call during that time.¹¹ Even in schools that ban cell phone possession on campus, 65% of students still bring them every day.¹² In those schools, 58% of teens who own cell phones have sent a text message and 43% text in class at least once a day.¹³ When a cell phone rings in class, or when students text each other during class, students are distracted from their teachers and their lessons.

Moreover, students use cell phones to cheat – texting each other the answers to test questions, using their phones’ cameras to copy other students’ answers, bringing their notes into the classroom or using the Internet function on their smart phones to simply search for an answer online. In a 2009 Common Sense Media poll, 35% of cell phone-owning teenagers admitted having used their cell phones to cheat at least once.¹⁴

Last, as has been widely publicized, students use their cell phones to engage in “sexting” or “cyberbullying”. A Pew study found that 4% of teenagers between the ages of twelve and seventeen who owned cell phones had sent sexually charged images of themselves via text message and 15% of such students had received them.¹⁵ Online studies, such as one produced jointly by the Associated Press and MTV, indicate higher rates – 24% of teens reported being involved in sexting in some way.¹⁶ Such studies, however, may exaggerate the phenomenon by polling those teens most likely to “sext” in the first place. Media coverage, though, has framed this issue and others as seemingly epidemic. For example, reports of harassing and humiliating incidents in which students have photographed their peers changing in the locker room or using the bathroom have also received widespread coverage.¹⁷

While cheating, cyberbullying, and sexting present pressing problems, their solution cannot justify wholesale invasions of privacy,¹⁸ particularly in the more common instances when no such misuse of the phone is suspected. Sweeping and unjustified searches of students’ cell phones are not the answer.¹⁹

C. CELL PHONE CONFISCATION

Whatever the motive or cause, the confiscation of students’ cell phones has now become a common occurrence in schools. For example, one Florida High School principal quipped that she sometimes cannot go more than ten feet from her office without confiscating a cell phone.²⁰ Middle School 54 in New York conducted random metal detector sweeps in search of cell phones, yielding 404 confiscated cell phones for a student population of 961.²¹ Similarly, in Morristown-Hamblen High School West in Tennessee, administrators responded to rumors of a violent action by searching students – ultimately confiscating over 600 cell phones.²² And in Fred Thompson Jr. High in Bakersfield, a school with about 800 students, school staff reportedly confiscate up to 50 cell phones a week.²³

D. PRIVACY CONCERNS IN STUDENT CELL PHONE SEARCHES

Searching a cell phone opens a floodgate of private information. Cell phones not only keep records of call logs, text messages and voicemails, but also store videos, photo albums, e-mail, records of webpages visited, and provide access to social networking sites and personal calendars. Searching a cell phone, therefore, can reveal not only virtually everyone a person knows and with whom he/she communicates and how often, but also what he/she discusses. This may include unveiling a student’s political views, financial and personal struggles, family and romantic relationship dynamics and medical information such as doctor, therapist and counselor appointments. Searching the contents of a student’s cell phone, in effect, opens a window into every aspect of his/her private life.

Unjustified invasions of students’ privacy are tremendously troubling, not only because they are illegal, but also because they can cause psychological harm to a student at a time when he/she is most fragile. For example, an administrator reviewing a student’s cell phone may uncover information regarding the student’s sexual orientation that the student has chosen to keep private from classmates, school staff, or perhaps even his/her parents. As

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“Although the vast majority of the disciplinary actions involve mere confiscations and/or warnings, they potentially set the stage for illegal searches of cell phones.”

a result of the search, the potential for outing LGBTQ youth to their friends and family before they are ready or before they have even come to terms with their own sexual identities, then, becomes very real. School principals have outed students in Texas,²⁴ Tennessee²⁵ and Florida,²⁶ sometimes calling a student’s parents to inform them.²⁷ These actions can tear individuals and their families apart.

A distinct problem occurs when, as is often the case, student’s cell phones are paid for and owned by their parents or shared with them and/or siblings. Under these circumstances, an unrestrained search of a student’s cell phone threatens to reveal not only the private information of that particular student, but that of the entire family.

Given the frequency with which school staff confiscate student cell phones, the risk of privacy violations when student cell phones are searched, and the consequences of such violations, it is critical that school staff have proper guidance about the propriety of and limits on searches of student cell phones and best practices for deciding whether and how to engage in such searches.

PART II: Policy Review

We attempted to study 298 school districts²⁸ in California – from Alameda, Fresno, Los Angeles, Orange, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, San Mateo, Santa Clara, Tehama, Tulare, and Ventura counties – to assess their cell phone and search and seizure policies. Of these, only 164 had publicly available search and seizure policies and 178 had publicly available cell phone policies.

A. DISTRICTS' CELL PHONE POSSESSION POLICIES

1. POSSESSION AND USE

The authority to regulate possession or use of cell phones is given to individual school districts or their appointees by California Education Code § 48901.5(a). A district, however, may not prohibit the use of cell phones or other “electronic signaling” devices where it is “determined by a licensed physician and surgeon to be essential for the health of the pupil and [its] use . . . is limited to purposes related to the health of the pupil.”²⁹

The districts we surveyed have adopted a wide range of policies regarding cell phone possession and use:

- One district, Moreno Valley Unified School District, delegated the responsibility of creating a cell phone policy to individual schools.
- A relatively small number of districts ban cell phone possession on school grounds, even if they are turned off and out of sight.³⁰
- Many districts ban cell phone use during the school day, but allow for their possession so long as they are shut off and stored away.³¹ Of these, a number make explicit exceptions for use during school-wide emergencies, in addition to the required health exceptions.³²
- Fewer districts prohibit cell phone possession by elementary or middle school students, while allowing for possession by older students.³³
- Other districts limit cell phone use to before and after school and during the lunch period.
- Several districts allow for possession or use of basic cell phones while prohibiting or restricting the use of camera-equipped phones.³⁴
- Most commonly, districts provide for cell phone use during the school day so long as the phone is powered off while the student is under the supervision of a district employee and its use does not “disrupt the educational program or school activity.”³⁵ Some of these districts also provide that the devices not be used for unethical activities such as cheating.

2. DISCIPLINARY ACTIONS

The majority of districts surveyed have enacted a progressive disciplinary scheme for violations of their cell phone policy. For a first offense, almost all districts provide that a student will either be instructed to turn off the device and/or the teacher may confiscate it. Some districts allow for students to retrieve the devices from the teacher after the class period or school day, while others require a parent or guardian to retrieve it after the first offense. Under such policies, a school may retain possession of the phone for weeks on end if a working parent is unable to retrieve the phone during school hours.

For a second offense, most districts provide, at a minimum, that a device will be confiscated and a parent must collect the device. For any subsequent offense, some districts will hold the phone until the end of the school year and prohibit a student from possessing a phone for even emergency use. Carlsbad Unified School District, like others, restricts a student from possessing a cell phone at school-related events. Others provide for suspension or expulsion for repeated violations or defiance of authority if the student refuses to surrender the phone. Still others, such as San Diego Unified School District, provide for unspecified “disciplinary action” in response to repeated offenses.

Some districts do not take a progressive disciplinary approach. Students in East Whittier School District, for instance, face suspension or expulsion for text messaging or picture taking on the first offense.

Some districts' policies specifically state that an administrator may search the contents of a student's confiscated

Coalinga Middle School policy cautions students: “there is no expectation of privacy in school; if students are caught texting or the cell phone is confiscated for any reason, text messages will be read and photos/videos will be viewed!”

PRIVATE
KEEP
OUT!

cell phone, including viewing text messages and photos, when allowable under their search and seizure policy. But, even where such provisions are not made, the policies of every district surveyed contained generic language allowing for searches of both a student and student property, which presumably includes cell phones.

Information gathered from our Public Records Act requests, made under Government Code § 6250 et seq., indicates that disciplinary actions for cell phone possession are widespread in public schools. During the 2009-2010 school year, for example, Upland Unified School District reported 1,799 incidences regarding cell phones for a student population of 14,404; 250 of these resulted in detentions and thirty-nine resulted in suspension. Similarly, Redlands Unified School District reported 1,279 incidences for a student body of 21,810 and Colton Joint Unified School District recorded 1,150 incidences for 23,608 students. Although the vast majority of the disciplinary actions involve mere confiscations and/or warnings, they potentially set the stage for illegal searches of cell phones.³⁶

3. PRIVACY WAIVERS

Two districts’ policies contained broad statements purporting to warn students that they have no privacy expectations with respect to cell phones and to justify intrusive searches of such devices. Such unlimited search policies are unconstitutional in scope; students have well established privacy rights that must be respected on campus.

By far the most extreme “waiver” comes from Coalinga Middle School in the Coalinga-Huron Joint Unified School District in Fresno. The Coalinga Middle School policy cautions students: “Remember, there is no expectation of privacy in school; if students are caught texting or the cell phone is confiscated for any reason, text messages will be read and photos/videos will be viewed!” This policy violates established Fourth Amendment principles.

The Chaffey Joint Union High School District had a similar policy as recently as 2009-2010, although the policy was laudably changed for the 2010-2011 school year. Chaffey’s previous policy asserted not only that students waived all privacy rights to their cell phones, but that administrators had the same rights of access as a parent or guardian. Chaffey’s current policy merely provides that cell phones must be turned off in classrooms. The welcome change was made in response to a webinar on cell phones that laid out the privacy rights of students and the requirements for cell phone searches. Unfortunately, we do not know the extent of privacy invasions that resulted from the old policy.

B. DISTRICTS' SEARCH AND SEIZURE POLICIES

District policies regarding search and seizure fall into two categories: the overwhelming majority – 101 of 164 districts surveyed or approximately 62% – that simply require reasonable suspicion (or grounds) for a search and the sizeable minority – sixty-three of 164 districts surveyed or approximately 38% – that additionally require that the scope of a search be limited to finding evidence related to the alleged violation.

For example, although the San Diego County Office of Education sets the baseline policy for forty-two school districts by requiring reasonable suspicion for a search, its policy provides no guidance on the permissible scope of any such search. Fortunately, school districts in San Diego County are free to establish more detailed search policies, and Oceanside Unified School District, La Mesa-Spring Valley Unified School District, and Bonsall Unified School District have incorporated language providing guidance on the permissible scope of student searches.

In this section, we first explain the governing legal standard for student searches and how it applies to cell phone searches, then discuss two categories of policies that our review identified, and finally describe how insufficient policy guidance both invites conduct by school officials that can harm students and potentially exposes school districts to legal liability.

1. THE LEGAL STANDARD AND ITS APPLICATION

The United States Supreme Court established the legal standard for student searches in *New Jersey v. T.L.O.*³⁷ Reaffirming that students have legitimate privacy expectations in public schools, the Supreme Court ruled that any searches of students or their property need to be 1) justified from the beginning and 2) “reasonably related [in scope] to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”³⁸

A search is justified from the beginning when an administrator has “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”³⁹ The California Supreme Court has similarly held that an administrator must have reasonable suspicion, which he/she is able to put into words; “curiosity, rumor or hunch” are not sufficient grounds to search a student.⁴⁰ Simply being disruptive is not enough to warrant a search either.⁴¹ Nor do a student’s attempt to shield his/her private possessions from an administrator’s view or a student’s invocation of his/her constitutional rights establish reasonable suspicion.⁴² In addition, a school may not search one student’s cell phone to discover evidence of another student’s potential misconduct.⁴³

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The first prong of the test – whether there is an initial justification for the search – will depend on the school rule alleged to be violated. For instance, if a student were suspected of having a cell phone visible during instruction, which is prohibited in the vast majority of districts, no search of the phone’s contents can be justified because simply having the phone out is the violation and no further evidence is necessary to prove it. It would be inappropriate to view the contents of any text messages or emails or any attachments to them, because they are unrelated to producing evidence of the rule’s violation.⁴⁴

The second prong of the test requires that the search of a student or his/her property be reasonably related to the objectives of the original search.⁴⁵ Essentially, the search, as conducted, must be limited to finding evidence related to the particular school rule the student was initially suspected of violating.

The scope of a valid search is further defined by its intrusiveness compared to the type of the violation. For example, in *Safford Unified School District v. Redding*, the U.S. Supreme Court ruled that a strip search of a student to find over-the-counter pain relievers violated the Fourth Amendment.⁴⁶ Given the invasion of privacy that is inherent in any search of a student’s cell phone compared to the relatively minor nature of, for example, having a phone out or on during instruction, a search of a student’s cell phone will only be constitutional, if at all, where strictly limited and under very limited circumstances.⁴⁷

Even when a limited search may, as a matter of law, be permissible, there is still a substantial likelihood, given how modern cell phones work, that it will be impossible to limit the scope of the search to what is legally permissible and to prevent uncovering private information. Searches of phones may easily uncover private content beyond the scope of any justification for the search.

Take for example a hypothetical policy against texting during class time. If a student were suspected of violating such a policy, and there is doubt about whether the student actually sent a message at a forbidden time, there would be a justification for searching the phone for the exclusive purpose of viewing time stamps on the text message log. However, it may be impossible as a practical matter to limit the scope of the search to the purpose for which it was initially justified. Depending on the phone’s configuration, for example, a

search might automatically reveal a photograph on the phone's homepage and the content of text messages, even though all such information bears no reasonable relation to the justification for the search – determining when the text message was sent – but has the real potential for invading privacy. A photograph could inadvertently reveal the sexual orientation of a student who is not out. The content of a text message may contain confidential medical information. Such a search therefore may not be justified, given its intrusiveness as compared to the relatively minor nature of the infraction.

Accordingly, to ensure that school staff do not invade students' privacy and potentially expose themselves and their school districts to legal liability, school staff must avoid searching the content of phones altogether unless there is suspicion of wrongdoing with the phone beyond merely possessing it or having it out or on. The risk of inadvertent invasions of privacy can be mitigated, as the above discussion demonstrates, by adopting a policy that prohibits possessing a phone or having it out or on at school or during instruction rather than a policy that prohibits texting during school hours or instruction.

2. POLICIES WITH GENERAL LIMITATIONS ON SCOPE

Of the 298 districts we studied and of the 164 with information available online, sixty three included language in their search and seizure policies addressing the permissible scope of searches. These policies state, in essence, that (1) students or their property may be searched provided the school official has reasonable suspicion, based on specific and objective facts, that the search will uncover evidence that the student is violating the law or school rules and (2) “[a]ny search of a student, his/her property, or district property under his/her control shall be limited in scope and designed to produce evidence related to the alleged violation.” In determining the scope of the search, these districts take into account the threat posed to the safety of students and staff, the relation of the items to be searched to the alleged violation and the intrusiveness of the search compared to the student's age, gender and the alleged violation's nature.

The policies of these districts conform to the standard established in T.L.O. and clearly articulate both prongs of that standard. This is necessary to ensure teachers and administrators are aware of the extent of their search and seizure powers and to preserve the privacy rights of their students.

However, even these districts do not provide specific guidance on searches of cell phones as differentiated from other searches of student property.⁴⁸ In failing to distinguish cell phones from other student property, they consequently ignore the enormous potential for privacy invasions that part of cell phone searches and the difficulties of properly limiting such searches.

3. POLICIES THAT REQUIRE REASONABLE SUSPICION BUT PROVIDE NO GUIDANCE ON SCOPE OF SEARCH

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“[a]ny search of a student, his/her property, or district property under his/her control shall be limited in scope and designed to produce evidence related to the alleged violation”

Of the 298 districts we studied and the 164 with information available online, 101 have policies that specify only a reasonable suspicion requirement, with no language articulating the legal limitations on the scope of the search. These policies, with only minor variations, state that “[s]chool officials may search individual students and their property when there is a reasonable suspicion that the search will uncover evidence that the student is violating the law or the rules of the district or the school.” Almost half of such districts also urge “that discretion, good judgment and common sense be exercised in all cases of search and seizure.” However, this does little to guide teachers or administrators in all but the most obvious cases.

There is cause for great concern when policies set forth only the reasonable suspicion standard but fail to specify the limitations on the scope of the search, even where, as is true in many districts, the board policy cites *New Jersey v. T.L.O.* It is simply unreasonable to expect a school teacher or administrator, faced with a disciplinary problem, to first consult case law to determine how extensively they may search a student or even to be aware of potential limitations on the scope of the search. Such requirements must be laid out explicitly in advance to avoid infringement of students’ rights and to ensure the efficient operation of the school. For example, Laguna Beach Unified School District’s policy, allowing reasonable searches so long as they do “not violate the legal rights of students,” is circular and ineffective in providing necessary guidance.



4. POLICIES THAT FAIL TO LIMIT THE SCOPE OF A SEARCH LEAD TO PRIVACY VIOLATIONS

The concern with policies that fail to specify limitations on the scope of a search, particularly in the context of a cell phone, is far from hypothetical. The ACLU has represented students fighting against intrusive cell phone searches across the country, stemming from a lack of guidance on how far a teacher or administrator may go in searching a student.

In Boulder, Colorado, a student suspected of smoking was forced to turn over his cell phone to the assistant principal because it “was a distraction” during their meeting. The administrator then left the office and reviewed the student’s text messages. Finding what the assistant principal characterized as “incriminating” texts, he began a sweeping investigation in which he transcribed the student’s messages, attempted to send texts to the student’s friends while posing as the student, and called in many of the student’s contacts for interrogation, seizing their phones and transcribing their texts, with still further waves of searches resulting.⁴⁹ The ACLU persuaded the district to adopt a new policy after sending a demand letter highlighting the ways in which the administrator’s actions violated both the Constitution and state law.

In Pennsylvania, the ACLU settled a suit against the Tunkhannock Area School District for an illegal cell phone search after the phone was confiscated because the student used it during homeroom. Rummaging through the student’s pictures without cause, the principal discovered that the student had taken semi-nude photos of herself and stored them on her phone. Although these pictures were only to be shared with her longtime boyfriend and had not been taken or sent on school property, the principal suspended her and referred her to the district attorney for prosecution.⁵⁰

In Mississippi, Richard Wade, a twelve year-old honor student, had his phone confiscated by his DeSoto County School District football coach for checking a text message from his father. School officials then reviewed the contents of the phone and discovered pictures of him dancing in his bathroom and of a classmate holding a BB gun. In a disciplinary hearing, Wade was accused of gang-related activity, called a threat to school safety, and expelled. The search there was conducted under a policy allowing searches “when there is reason to believe that some material or matter detrimental

to health, safety and welfare of the student(s) exists.”⁵¹

Similarly, in Northern California, the ACLU successfully fought for a change in the Linden Unified School District’s cell phone search and seizure policy after a senior’s phone was confiscated for talking to his mother. Administrators read approximately three weeks’ worth of private text messages despite lacking any suspicion that he had violated any other school rule. The new policy properly reflects that any search’s scope must be related to the objectives of that search.⁵²

We have received, moreover, multiple complaints of similar actions taking place more recently in California.

In one instance, a student’s phone was confiscated after checking a text message from his father. After class, the student’s friend left a hostile voicemail message on the phone directed at the teacher as a joke. The student returned to class to retrieve the phone only to find the teacher listening to the voicemail. The administration called the police. No charges were filed but both students were suspended for ten days. The student’s mother attempted to pick up the phone, but was told it was being held as evidence. She was informed by the vice-principal that if the teacher had not checked the voicemail, that she would have gone through every text message and voicemail herself for evidence of drugs, although the student was never suspected of drug use.

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Elsewhere, a student suspected of smoking was told to turn over everything in his pockets. The administrator picked up his cell phone and began reviewing text messages and pictures, finding nude pictures of the student’s girlfriend which the principal downloaded onto his own phone and the school computer. The police were called and the student was suspended from school for three days.

A parent in another district reported that all of the members of an athletic team had their cell phones confiscated on the school bus and the information gathered was used to discipline many of the students. Another caller’s son took a video of an off-campus fight with his phone; his phone was confiscated by the vice principal and the video as well as private, unrelated material, was downloaded to the school computer.

Unfortunately, these cases very likely represent the tip of the iceberg compared to the number of complaints that go unreported.

PART III: Model Policies

In this section, we lay out model search and seizure policies that provide school staff with guidance on how to comply with the law in the least burdensome manner possible. We believe schools should adopt two search and seizure policies, a general policy that requires reasonable suspicion to conduct a search and that requires searches to be limited in scope to producing evidence related to the alleged rule violation. Given the unique potential for privacy invasions posed by cell phone searches, we also believe schools should adopt a separate policy for cell phones that does not permit cell phone searches, absent reasonable suspicion of wrongdoing beyond mere possession or use of, absent the consent of the student and parent, and that provides for graduated discipline for violations of the school’s cell phone use policy.

A. SEARCH AND SEIZURE

The following represents what we believe to be an ideal search and seizure policy for adoption by school districts based on our assessment of the current state of the law:⁵³

- School district employees may only search an individual student, his/her property, or district property under his/her control when there is a reasonable and individualized suspicion that the search will uncover evidence that he/she is violating the law, Board policy, administrative regulation, or other rules of the district or the school. Reasonable suspicion must be based on specific and objective facts that the search will produce evidence related to the particular alleged violation. Curiosity, rumor, hunch, mere disruptive activity, attempts to shield private possessions from view, or invocations of a student's constitutional rights cannot form the basis for said reasonable suspicion. Searches may not be conducted to find evidence of other students' violations of school rules.
- Any search of a student, his/her property, or district property under his/her control must be limited in scope and designed to produce evidence related to the particular alleged violation. No search of a student shall extend beyond that which is necessary to produce evidence of that particular violation. Factors to be considered by school district employees when determining the scope of the search shall include the danger to the health or safety of students or school district employees, such as the possession of weapons or other dangerous instruments, and whether the item(s) to be searched by school district employees are reasonably related to the contraband to be found. In addition, school district employees must consider the intrusiveness of the search in light of the student's age, gender, and the nature of the alleged violation.
- The Superintendent or designee will ensure that school district employees who conduct student searches receive training regarding the requirements of the district's policy and administrative regulation and other legal issues, as appropriate.⁵⁴
- The Superintendent or designee will also ensure that both students and parents are notified of the policy herein stated.
- This policy does not apply to searches of cell phones or other electronic signaling devices, as to which a separate policy applies.

NOTES:⁵⁵

In *New Jersey v. T.L.O.*, the United States Supreme Court held that, where a teacher had caught the student and her friend smoking in the lavatory, but the student later denied smoking, the principal's initial search of the student's purse to find evidence of cigarette possession was reasonable. Finding rolling papers (commonly associated with marijuana) along with the cigarettes in the course of the initial justified search, the principal was justified in a further search deeper into the purse's compartments to search for marijuana.⁵⁶

In *In Re William G*, the court held that the assistant principal lacked reasonable suspicion for a search of a student's "bulging calculator case" where the principal had no prior knowledge of the student's involvement with drugs, the student attempted to hide the case from the assistant principal's view and then refused to turn the item over, invoking his Fourth Amendment rights.⁵⁷

In *In Re Lisa G*, the court held that the student's disruptive behavior during class – arguing with the teacher, and then leaving the classroom – did not authorize the teacher to rummage through the student's purse in search of an identification card to write a disciplinary referral.⁵⁸

In *Safford v. Redding*, the Court held the strip search of a thirteen year old student to find prescription strength Ibuprofen was unreasonable in scope, as the pills posed little threat to campus safety and nothing indicated that she was hiding

“No search of a student shall extend beyond that which is necessary to produce evidence of that particular violation.”



“Reasonable suspicion must be based on specific and objective facts that the search will produce evidence related to the particular alleged violation.”

them in her underwear.⁵⁹ It should be noted, however, that strip searches are illegal under California statutory law no matter the circumstances.⁶⁰

B. CELL PHONES: USE, CONFISCATION, AND SEARCHES

The following represents a model cell phone policy for adoption by school districts based on our assessment of the current state of the law, our balance of the competing interests, and the most practical, economical, and effective method for ensuring that searches of cell phones are limited in scope to what is lawful:

- Students may possess or use personal electronic signaling devices on school campus provided that such devices do not disrupt the educational program or school activity and are not used for illegal or unethical activities such as cheating on assignments or tests.
- Electronic signaling devices shall be turned off and kept out of sight during class time or at any other time as directed by a school district employee, except where deemed medically necessary or when otherwise permitted by the teacher or administration. No student shall be prevented from using his/her cell phone in case of an emergency, except where that use inhibits the ability of school district employees to effectively communicate instructions for the safety of students.
- Violations of this policy shall be subject to progressive discipline. If a student's use of an electronic signaling device causes a disruption, a school district employee on the first offense may direct the student to turn off the device or reprimand the student. On subsequent offenses, the employee may confiscate the device and return it to the student at the end of the class period, school day or activity. A student's right to carry such devices may be revoked for subsequent offenses except where deemed medically necessary. Students may be subject to other disciplinary measures when their use of an electronic signaling device violates independent school rules, such as prohibitions on cheating.
- Notwithstanding any other school policies on searches in general, absent reasonable suspicion of wrongdoing with the device beyond merely possessing it or having it turned on or out in the open, school district employees may not search any personal telecommunication device without the express authorized consent of the student and the student's parent or legal guardian.
- No student shall use an electronic signaling device with camera, video or voice recording function in a way or under circumstances which infringe the privacy rights of other students.
- Confiscated electronic signaling devices shall be stored by school district employees in a secure manner.
- Students are responsible for personal electronic signaling devices they bring to school. The district shall not be responsible for loss, theft or destruction of any such device brought onto school property, except that it shall be the responsibility of the school to ensure the safekeeping of any confiscated devices.
- Students and their parents shall be notified of the above policy at the beginning of every school year.

Conclusion

Respect for the rights of students is critically important. Public schools not only have an obligation to teach their students about reading, writing and arithmetic; as the producers of tomorrow's leaders and voters, they must also instill in our youth the civic virtues that we as a society hold dear. This is the aim of every government class in every school nationwide.

However, a school cannot teach the Constitution while brushing aside the rights established by that document. A school has an ethical, as well as a legal, obligation not only to teach this material in the classroom, but also to model these principles in every aspect of the educational environment. To do otherwise is to risk teaching our youth that the laws of our nation are not worth the paper on which they are written – niceties to be sacrificed when convenient. A school, moreover, cannot expect students to comply with its rules when school employees violate the constitutional rights of students.

To preserve students' privacy rights, it is the school's duty, at a minimum, to circumscribe clearly the extent to which a teacher or administrator can search a student. Unfortunately, this responsibility is not being met in a majority of public school districts, threatening our students' rights daily through indiscriminate and unrestrained cell phone searches.

If you have any questions regarding searches and seizures of cell phones on your campus please contact the ACLU. We need your help to ensure the rights of our children are being protected.

Appendix: Quiz

Test your knowledge of the constitutional limitations on search and seizure. For the following scenarios determine whether the search of the student's cell phone was legal.

- 1) A student is suspected of text messaging in class in violation of school rules. The teacher confiscates the phone and reads the last ten texts sent by the student over the last several days.
Y___ N___

- 2) A teacher receives a tip that students have been circulating nude photos of a classmate. The teacher was told the names of two particular students who sent the photos, but has a hunch that one of the students' friends also has them on his phone. The teacher confiscates the friend's phone and reviews the stored pictures for the nude photos.
Y___ N___

- 3) A group of students is standing around talking in hushed voices. One of the students has her cell phone out. When the principal approaches, the student calmly closes her phone and places it behind her back. The principal instructs the student to surrender her phone to which the student objects as a violation of her right to privacy. When the principal orders the student to turn over the phone again, the student complies and the principal reviews the student's text messages.
Y___ N___

- 4) A student is caught in the hallway without a pass while talking on his cell phone. The school security guard stops the student and reviews the student's call log to determine with whom he was speaking.
Y___ N___

The answers to all of the above questions are "no." In each scenario, the authority figure exceeded his/her power to search the student's cell phones. In the first, the scope of the search is clearly unconstitutional. Even if the teacher was entitled to review the log of text messages to determine when the last text was sent,

the content of the message is unrelated to gathering evidence of the offense of texting. Reading the last ten messages is outside the permissible scope of the search and an invasion of privacy. Because on many phones it may be impossible to review only the time a text message was sent without also reviewing some of the text of the message, the cell phone should not be searched at all because of the difficulty of conducting the search in a way that does not unduly invade the privacy of the student. In the second scenario, the search of the student based solely on the teacher's hunch is in violation of the standard set by *In Re William G*, that rumor, curiosity or hunch are not sufficient to justify a search. In the third scenario, the student's placement of the phone behind her back and subsequent objection to the search cannot create reasonable suspicion to justify the principal's search, as they did not in *In Re William G*. In the final scenario, the violation of school rules is being out of class without a pass and possibly use of the cell phone. The identity of the person to whom she was speaking is inconsequential as evidence of the violation and therefore outside the justified scope of the search. The security guard should merely have confiscated the phone.

Endnotes

¹ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

² *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (paraphrasing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503,



506 (1969)).

³ T.L.O., 469 U.S. at 348.

⁴ Id. at 341.

⁵ This report examines the cell phone possession and search and seizure policies of school districts around the state that make such information publicly available over the Internet. The policies themselves were compiled via a thorough review of each district's website. In many cases, where district policies on either search and seizure or cell phone possession were unavailable over the Internet, Public Records Act requests were directed to the Superintendent for the district. The policies obtained through Public Records Act requests were in keeping with the trends we describe in the report. As such, the discussion here covers only those districts for which policies were publicly available online. The absence of publicly accessible information in a large number of districts was striking because the student/parent handbooks often did not state the search and seizure policy, leaving students without adequate notice of when the district might search them.

⁶ Pew Internet and American Life Project, *Teens and Mobile Phones 14*, available at <http://www.pewinternet.org/~media/Files/Reports/2010/PIP-Teens-and-Mobile-2010-with-topline.pdf> (Apr. 20, 2010).

⁷ Id. at 14.

⁸ Id. at 66.

⁹ S. John Obringer and Kent Coffey, *Cell Phones in American High Schools: A National Survey*, 33 *The Journal of Technology Studies* 41 (2007) (random survey of high school principals across the country found that majority of schools had policy regarding cell phones and most prohibited cell phone use by students), available at <http://scholar.lib.vt.edu/ejournals/JOTS/v33/v33n1/obringer.pdf>.

¹⁰ Id. at 82.

¹¹ Id. at 4.

¹² Id. at 83.

¹³ Id. at 4.

¹⁴ *Hi-Tech Cheating: Cell Phones and Cheating in Schools 4*, available at <http://www.common sense media.org/sites/default/files/Hi-Tech%20Cheating%20-%20Summary%20NO%20EMBARGO%20TAGS.pdf> (last visited Apr. 12, 2011).

¹⁵ Pew Internet and American Life Project, *Teens and Sexting 2*, available at http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf (Dec. 15, 2009).

¹⁶ AP-MTV, *A Thin Line 2*, at http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Executive_Summary.pdf (2009).

¹⁷ See, e.g., Sean Nisteadt, *Student Accused of Taking Locker Room Pictures*, at <http://www.keloland.com/NewsDetail6162.cfm?Id=110760> (Feb. 14, 2011).

¹⁸ The Oak Harbor school district in Washington state recently proposed a policy allowing the search of the contents of a student's cell phone for evidence of "sexting" or "cyberbullying." The policy states that "by bringing a cell phone and other electronic devices to school or school sponsored events, the student and parents consent to the search of the device when school officials have a reasonable suspicion that such a search will reveal a violation of school rules." The school district believes that their "bullying" problem is important, and cell phones, like school lockers, are subject to search at school. The ACLU of Washington sent a letter to the Oak Harbor school district advising that this search policy may violate students' privacy rights, and advised it to change the policy to one that respects students' privacy rights while still addressing concerns about sexting and cyberbullying. Surely, if the right against unreasonable searches and seizures is to mean anything, it must prevent a school official from scrolling through students' cell phones just because he or she merely fears (without reasonable suspicion) that some unknown students may be engaged in cyberbullying or sexting.

¹⁹ In addition to addressing cheating through more scrupulous supervision by teachers, schools may also consider alternative approaches, such as a school-wide policy requiring cell phones be kept in school lockers or class closets during class time or when tests are administered or providing that having a cell phone out during a test will be presumed to be cheating (which a student can rebut by consenting to a search of his/her phone). Also, Mississippi's State Department of Education reported a 70% reduction in cheating after beginning use of one company's "data forensics" services, which analyze student answers for statistically anomalous patterns that indicate

cheating. Trip Gabriel, *Cheaters Find an Adversary in Technology*, at http://www.nytimes.com/2010/12/28/education/28cheat.html?_r=1&ref=education (Dec. 27, 2010).

²⁰ Isabel Mascarenas, *Hernando student cell phones may be confiscated and searched*, at <http://www.wtsp.com/news/local/story.aspx?storyid=131246> (May 4, 2010).

²¹ Julie Bosman, *Cell Phone Raid Roils Manhattan School*, at <http://empirezone.blogs.nytimes.com/2007/06/01/cellphone-raid-roils-manhattan-school/> (Jun. 1, 2007).

²² WBIR.com, *Parents react to 600 confiscated cell phones at Morristown West High School (2010)*, at <http://www.wbir.com/news/article/136600/1/Parents-react-to-600-confiscated-cell-phones-at-Morristown-West-High-School> (Oct. 1, 2010).

²³ Jorge Barrientos, *Schools examining cell phone policies to address distractions*, *Bakersfield.com*, at <http://www.bakersfield.com/news/local/x1685666237/Schools-examing-cell-phone-policies-to-address-distractions#> (July 18, 2010).

²⁴ Brandon Miller, *Texas School Outs Lesbian Student to Her Parents*, at http://gayrights.change.org/blog/view/texas_school_outs_lesbian_student_to_her_parents (Jan. 27, 2010).

²⁵ Nick Langewis, *Principal outs gay kids, ACLU steps in*, at http://www.pageoneq.com/news/2008/aclu_042908.html (Apr. 29, 2008).

²⁶ Associated Press, *Principal's outing of gay student roils Fla. town*, available at http://www.msnbc.msn.com/id/26316235/ns/us_news-life/ (Aug. 21, 2008).

²⁷ *Id.*

²⁸ Collectively, these districts enroll over four million students, which represent about 65% of California public school enrollment.

²⁹ CAL. EDUC. CODE § 48901.5(b) (permitting districts to “regulate the possession or use of any electronic signaling device that operates through the transmission or receipt of radio waves, including, but not limited to, paging and signaling equipment, by pupils of the school district while the pupils are on campus, while attending school-sponsored activities, or while under the supervision and control of school district employees”).

³⁰ In Southern California, for instance, of the 104 districts with publicly available cell phone policies, ten had complete bans. Similarly, in Northern California, thirteen of the seventy-four districts with publicly available information banned cell phones entirely.

³¹ Twenty-three of the 104 Southern California districts and twenty of the seventy-four Northern California districts allowed for this.

³² Interestingly, Desert Sands Unified School District allows its principals to restrict cell phone use even during school emergencies.

³³ For example, six Southern California districts forbid cell phone possession among elementary students, one of which (Palm Springs) extends the prohibition to their middle schools. Seven Northern California districts had separate policies for their elementary and/or middle school students.

³⁴ Seven districts in Southern California and six districts in Northern California had such policies. Desert Sands Unified School District, for example, restricts the use of photo capabilities in places “considered private or confidential.” Similarly, Norwalk-La Mirada Unified School District allows for suspension or expulsion of students who take pictures of undressed students where they would have an expectation of privacy.

³⁵ Out of our Southern California sample, twenty-eight districts had such policies. See e.g. San Gabriel Unified School District, Board Policy 5131, at <http://www.gamutonline.net/DisplayPolicy/389752/5> (last visited Apr. 15, 2011) (username: sangabriel, password: public). Over half (thirty-nine) of Northern California districts likewise had such policies.

³⁶ In most instances, information obtained from the Public Records Act requests did not differentiate statistics on confiscations and warnings.

³⁷ 469 U.S. 325.

³⁸ *Id.* at 341.

³⁹ *Id.* at 341-42.

⁴⁰ *In re William G.*, 40 Cal. 3d 550, 564 (1985).

⁴¹ *In re Lisa G.*, 125 Cal. App. 4th 801, 807 (2004).

⁴² *William G.*, 40 Cal. 3d at 567.

⁴³ Klump v. Nazareth Area School District, 425 F. Supp. 2d 622, 640 (E.D. Pa. 2006) (search of a student's cell phone address book to determine whether other students had been violating school rules violated the Fourth Amendment).

⁴⁴ This position was recently endorsed by a U.S. magistrate judge who recommended denying summary judgment to an assistant principal accused of an overly broad search of a student's phone. The magistrate found the assistant principal did not need to view the text of the message to determine that the message was sent during school hours in violation of a school rule. The magistrate therefore ruled that, as a matter of law, it could not be said that the teacher's search was reasonable. Mendoza v. Klein Ind. School Dist., No. 09-3895, at *27 (S.D. Tex. Mar. 16, 2011), available at http://www.onpointnews.com/docs/CellSchool_MSJ_opin.pdf (last visited Apr. 12, 2011).

⁴⁵ T.L.O., 469 U.S. at 341.

⁴⁶ Safford Unified School District #1 v. Redding, 129 S. Ct. 2633, 2642 (2009).

⁴⁷ The California Supreme Court, in People v. Diaz, 51 Cal.4th 84, 98 (2011), ruled that a cell phone's text messages could be searched by a police officer without a warrant as a search incident to a lawful arrest, but the decision, whatever its wisdom, is plainly inapplicable in the context of simple investigatory searches of students by school administrators, where the "search incident to lawful arrest" doctrine does not apply.

⁴⁸ The Dinuba Unified School District was, however, unique in its recognition of the unsettled nature of the law in the specific area of searches of personal electronic devices. Furthermore, it observed that disciplining a student for off-campus behavior may prove problematic.

⁴⁹ American Civil Liberties Union, School Administrators Violate Colorado Law, Constitutional Rights by Searching Students' Text Messages, at <http://aclu-co.org/news/school-administrators-violate-colorado-law-constitutional-rights-by-searching-students-text-mes> (Oct. 10, 2007).

⁵⁰ American Civil Liberties Union, ACLU Settles Student-Cell-Phone-Search Lawsuit With Northeast Pennsylvania School District, at <http://www.aclu.org/free-speech/aclu-settles-student-cell-phone-search-lawsuit-northeast-pennsylvania-school-district> (Sept. 5, 2010).

⁵¹ American Civil Liberties Union, ACLU Lawsuit Challenges Expulsion Of Middle School Student After Illegal Cell Phone Search, at <http://www.aclu.org/racial-justice-technology-and-liberty/aclu-lawsuit-challenges-expulsion-middle-school-student-after-> (Sept. 1, 2009).

⁵² American Civil Liberties Union, School District Changes Its Unconstitutional Cell Phone Search Policy, at http://www.aclunc.org/cases/other_legal_advocacy/school_district_changes_its_unconstitutional_cell_phone_search_policy.shtml (Apr. 16, 2008).

⁵³ Additional policies and practices that apply in the search and seizure context were excluded because they are beyond the scope of this report. For example, California Education Code § 49050 proscribes that strip searches of students and general searches of students should be conducted in the presence of at least two district employees.

⁵⁴ Both the Pasadena Unified School District and the Dinuba Unified School District explicitly require training for all staff who conduct student searches. This provision for training of all such staff is vital to ensuring the preservation of students' civil rights -- written policies are meaningless if they are not communicated to the staff responsible for their execution.

⁵⁵ The inclusion of examples from case law should be encouraged to provide notice of the boundaries for acceptable action.

⁵⁶ T.L.O., 469 U.S. at 347.

⁵⁷ William G., 40 Cal. 3d at 566-67.

⁵⁸ Lisa G., 125 Cal. App. 4th at 807.

⁵⁹ Safford, 129 S.Ct. at 2642. The Pasadena Unified School District and Dinuba Unified School District's policies are exceptional in their specific references to both T.L.O. and Safford. The explanation provided by Safford is particularly useful in clarifying the extent of a district employee's search and seizure powers.

⁶⁰ CAL. EDUC. CODE § 49050.



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ACLU of Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493
www.aclunc.org

ACLU of San Diego & Imperial Counties
P.O. Box 87131
San Diego, CA 92138
(619) 232-2121
www.aclusandiego.org

ACLU of Southern California
1313 West Eighth Street
Los Angeles, CA 90017
(213) 977-9500
www.aclu-sc.org

