Legal Update

Safe Schools, Cell Phones, and the Fourth Amendment

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Reform in education law continues to give school officials broad authority to implement policies that are designed to keep campuses safe. The primary reason for this trend is that each State, "having compelled students to attend school and thus associate with the criminal few-or perhaps merely the immature and unwise few-closely and daily, thereby owes those students a safe and secure environment.'" 4 W. LaFave, Search & Seizure § 10.11(a), at 802-03 (3d ed. 1996). The U.S. Supreme Court has held that, "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship". New Jersey v. TLO, (469 U.S. 325, 340-341 (1985)). Educators who take up this challenge find themselves under constant pressure to keep their campus policies up-to-date in response to the evolving ways in which student conduct may conflict with a safe and effective learning environment.

New technology, including cell phones, pagers, and other personal digital assistants (PDAs) raise important questions about the authority of educators to seize, search and inspect the contents of these devices when their possession or use violate school rules. Do students have an expectation of privacy in these devices that outweighs the authority of educators to ban their possession and use on campus? If school codes may prohibit these devices, then may educators search the contents of seized devices? Does the law require educators to obtain a search warrant before the contents of the devices can be inspected? Or, may school officials rely on mere reasonable suspicion to inspect student devices that violate the code of conduct?

This topic is now a timely one. Many educators have prohibited possession and use of the devices on campus to eliminate disruptions, crimes, and harassment as well as to discourage cheating on exams. These educators routinely examine the confiscated phones. Other educators wish to do so, but are unclear as to what the law permits. Lawyers for both schools and students frequently discuss the issue and disagree over what the law requires in this regard.

Test your " cell phone IQ" on the following scenarios.

1. A student is stopped in the hallway for being out of class between periods without the hall pass required by the code of conduct. The assistant principal searches the

student and feels an object under the student's coat. The principal reaches into the coat and pulls out a cell phone in a case. The principal felt there was something in the case in addition to the phone, opened the case and found what was later determined to be heroin. The student was suspended and the police were called. Was the search of the cell phone case lawful?

Y___ N___

2. A student was caught smoking in the bathroom in violation of school policy. The student's purse was searched by the principal who suspected her of having more cigarettes therein. The principal discovered cigarettes in her possession, and discovered the drug marijuana, a cell phone, and a written list of alleged users from the school. The principal believed that the cell phone contained information about drugs on campus and read several text messages. The messages led the principal to other students who had drugs and a non-student who was the supplier of the drugs. The students were suspended and the police called to arrest the students. Is the search of the cell phone a valid under the Fourth Amendment?

   Y___ N___

3. A student is taken to the principal's office after his pager starts ringing in class. Possession of pagers and cell phones are prohibited by the school code of conduct. The principal seized and made a list of the telephone numbers stored in the student's pager. Is this search valid without a search warrant?

   Y___ N___

4. While patrolling campus during the school day, an SRO observes a student talking on a cell phone in the campus parking lot. Possession and use of a cell phone during the school day is a violation of the school code of conduct. The student was brought to the office of the principal, who examined the cell phone. He observed numerous calls logged on the caller ID screen. While reviewing the contents of the phone, it began ringing. When the phone rang, the principal flipped it open, activating the backlight. He observed a "wallpaper" photo of another student who was the caller. It was later determined that the caller was truant from school. Is this handling of the phone valid?

   Y___ N___

The Standards for Searching Student Property

Under the Fourth Amendment, searches and seizures must be "reasonable". There are at least two branches of reasonableness jurisprudence. Under the criminal law branch a reasonable search must be based on probable cause to believe that a violation of the law has occurred and a search warrant. However, under the education law branch neither probable cause nor a warrant is required. The U.S. Supreme Court has decided that, "[t]he accommodation of…the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the

requirement that searches be based on probable cause." TLO, 469 U.S. at 341. Instead, the following rules govern.

> "Determining the reasonableness of [a student] search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception"; [and] second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are 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. Such a search will be permissible in its scope when the measures adopted are reasonably related 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. New Jersey v. TLO, (469 U.S. 325, at 341 (1985)).

Under these guidelines, those arguing against the validity of content searches of confiscated phones assume a heavy burden of persuasion because current judicial attitudes uphold school policies that are designed to uncover and prevent misconduct by students that, "materially disrup[t] classwork or involv[e] substantial disorder or invasion of the rights of others". Tinker v Des Moines Independent Community School Dist. (393 US 503, at 509 (1969). The TLO standard has been applied to uphold a broad range of content searches that are difficult to distinguish from the search of a phone. The contents of **lockers** (State v. Jones, 666 N.W.2d 142 (Iowa 2003)), **purses** (New Jersey v. TLO, (469 U.S. 325 (1985)), **backpacks** (DesRoches v. Caprio, 156 F.3d 571 (4th Cir. 1998)), **cars** (Enterprise City Bd. of Educ. v. C.P. by & Through J.P., 698 So. 2d 131 (Ala. Civ. App. 1996)), and **clothing** (Thompson v. Carthage Sch. Dist., 87 F.3d 979 (8th Cir. 1996) and In re William V.; 111 Cal. App. 4th 1464 (2003)), have all been upheld when the educator has a reasonable suspicion for suspecting that the student has violated or is violating either the law or the rules of the school.

When applied to cell phone searches, it is clear that the initial seizure and search that occurs when a student is found in possession (and or use), of a phone in violation of school policy is justified at its inception. Students have no immunity from the seizure or the search of a phone or PDA which school officials have prohibited from campus. Possession of the phone in violation of school rules supports, at a minimum, an inquiry (as to both the student and the phone) to determine the circumstances of its possession and the uses, if any, to which it has been put that affect the campus. Indeed, when TLO is faithfully applied to school polices of cell phones and other devices, then the focus will be not on whether such a search is justified at its inception, but on the scope of the search. How far can an educator go in harvesting the contents of a phone before it is no longer (to use the words of TLO), "reasonably related in scope to the circumstances which justified the interference in the first place?"

At one end of the "how far can the educator go" issue, some content searches of a phone will not be controversial at all. For example, an educator who examines the contents of a

phone in order to determine its true owner would be acting under the best of our traditions in public education. So too, a teacher who handles and examines a phone that is receiving a call, delivering a message, or signaling an alarm, would not be second-guessed. The searches in these examples are directly related in scope to the interest of the educator to make an accurate assessment of the nature of the disruption and its risk to the school. Beyond these "safe" scenarios lies considerable discomfort and disagreement over both the legality and the wisdom of content searches of phones that harvest the contents of a confiscated phone.

Court Cases involving School Searches of Cell Phones

Only five cases have been decided that involve cell phones in public education. Three cases uphold school enforcement of policies that prohibit phones and other devices on campus. Price v. New York City Bd. of Educ., 51 A.D.3d 277 (N.Y. App. Div. 1st Dep't 2008); Laney v. Farley, 501 F.3d 577 (6th Cir. 2007); Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272 (W.D. Wash. 2007). Two cases address the decision by school officials to search the contents of the phones. In Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009), officials confiscated several students' cell phones, examined them, and discovered that the students were engaged in "sexting". In additional to school discipline, the phones were turned over to the over to the District Attorney who began a criminal investigation. The parents did not challenge the searches, but the parents sued to stop the district attorney from initiating criminal charges for the nude photographs. In Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622 (E.D. Pa. 2006), the trial court agreed that the seizure of a student's cell phone and search of the phone number directory and call log was valid. But the court ruled that school officials crossed the line when they pretended to be the student while sending an instant message to the student's brother and when they called nine other students listed in phone number directory.

These early cases support school policies that prohibit possession and use of cell phones and other devices on campus. The Klump decision provides useful guidance for educators who wish to stay on the constitutional side of the line when searching the contents of these devices. The outcomes in the two search cases are consistent with the rules that apply under the more rigorous Fourth Amendment standard in criminal cases where the courts have ruled that police may retrieve text messages and other information from cell phones and pagers seized incident to an arrest. See United States v. Murphy, 552 F.3d 405, 2009 U.S. App. Lexis 677 (4th Cir. Va. 2009), cert. denied, 129 S. Ct. 2016 (2009); and United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996). (holding that police may retrieve of call records and text messages from a cell phone or pager without a warrant during a search incident to arrest). See also United States v. Young, 278 Fed. Appx. 242, 245-46 (4th Cir. May 15, 2008) (per curiam) (holding that officers may retrieve text messages from cell phone during search incident to arrest), cert. denied, 129 S. Ct. 514 (2008); United States v. Hunter, 1998 U.S. App. Lexis 27765 (4th Cir. Oct. 29, 1998) (holding that officers may retrieve telephone numbers from pager during search incident to arrest). See United States v. Finley, 477 F.3d 250, 260 (5th Cir.), cert. denied, 549 U.S. 1353, 127 S. Ct. 2065, 167 L. Ed. 2d 790 (2007). The basis for these rulings is that when a custodial arrest of a suspect is valid, the subsequent search is also valid as

either a search incident to arrest or inventory search. This is because since the initial intrusion is lawful, the search incident to the arrest requires no additional justification.

In a school setting, when the initial encounter with the student is based upon reasonable suspicion, the subsequent search of the phone will also be valid and requires no additional justification so long as it is reasonably related to the need of the educator to turn up evidence of the extent to which the student has violated or is violating either the law or the rules of the school. The nature of the violation may go well beyond mere possession of the phone. It may involve theft of the device, use of the device to text or call other students during the school day, taking pictures or videos of students, teachers, or of school exams. The shell of the device may be a housing for a weapon that would otherwise go undetected without a rigorous search policy.

In the future, school boards, courts, and legislators will undoubtedly examine the policy question and will control the future of the matter with far more clarity than now exists. However, it is important to note that the U.S. Supreme Court makes a critical distinction between school searches that may be controversial and searches that are unlawful. This year, in Safford Unified School District v. Redding (129 S. Ct. 2633 (2009)), while holding that the strip search of a 13 year-old honor student was unconstitutional, reaffirmed TLO and the deference that education policies should receive by the courts. The justices stated that the job of keeping schools safe remains, "for school administrators to determine without second-guessing by courts", and that “[t]he indignity of the search does not, of course, outlaw it".

The answers to the questions in the I.Q. test are all "yes". In Question One the educator has reasonable suspicion to search the student because the student was out of class between periods without the hall pass required by the code of conduct. The school officials are allowed to complete the search of the student without any additional justification. See In re William V., 111 Cal. App. 4th 1464 (Cal. Ct. App. 2003); D.L. v. State, 877 N.E.2d 500 (2007); New York v. Butler,725 N.Y.S.2d 534 (2001). Question Two is the fact pattern of New Jersey v. TLO, (469 U.S. 325 (1985), with a cell phone added to the other items in the purse. The search of the cell phone is reasonably related to the need of the educator to turn up evidence of the extent to which the student is violating the law. Question Three involves a search that is directly related in scope to the interest of the educator to make an accurate assessment of the nature of the disruption and its risk to the school. See United States v. Hunter, 1998 U.S. App. LEXIS 27765 (1998)(a criminal law case using the probable cause standard). For a school version of the confiscation of a ringing phone, see Laney v. Farley, 501 F.3d 577 (6th Cir. 2007). The answer to Question Four is borrowed from a criminal law probable cause case, United States v. Wurie, 612 F. Supp. 2d 104 (D. Mass. 2009). In Wurie, the court ruled that if copying the names and telephone numbers from a list found in arrestee's wallet was proper, then it could see no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers. The result would be the same in a school context with reasonable suspicion. Such a list was taken from the student's purse in New Jersey v. TLO, (469 U.S. 325 (1985).