Schools, Cellphones, and Searches

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By: Dean B. Eggert, Esquire
Alison M. Minutelli, Esquire
WADLEIGH, STARR & PETERS, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
Telephone: 603/669-4140
Facsimile: 603/669-6018
E-Mail: deggert@wadleighlaw.com
aminutelli@wadleighlaw.com
Website: www.wadleighlaw.com

About the Authors

Dean B. Eggert, Esquire (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the past 29 years he has had extensive experience representing school districts in special education matters at the administrative and appellate levels. He has spoken and lectured extensively on a wide range of legal issues in the field of education law.

Alison M. Minutelli, Esquire (JD., Franklin Pierce Law Center; B.A. Brandeis University) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. For the past 9 years, Ms. Minutelli has practiced in the field of school law, and has experience representing school districts in special education matters at the administrative and appellate levels. She has also written numerous articles on a wide range of legal issues in the field of education law.

A Word of Caution

No two legal matters are exactly alike. This material is designed to provide educators with a deeper understanding of the Fourth Amendment right to be free from unreasonable searches and seizures, with a focus on searches of student cell phones. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case.

I. Overview

The purpose of this material is to provide the educator with a deeper understanding of the Fourth Amendment right to be free from unreasonable searches and seizures. This material will examine the Fourth Amendment in the context of the educational system by examining the limits placed on student searches, with a focus on searches of student cell phones. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case.

II. The Fourth Amendment

The Fourth Amendment protects all individuals, including students, from unreasonable searches by school officials. The Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment 4.

The Supreme Court has held that this provision applies to searches conducted by school officials. See Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 652 (1995); New Jersey v. T.L.O., 469 U.S. 325, 336-37 (1985). Searches by state actors, including school officials, must be reasonable. In the majority of cases, a search by a state actor, such as a police officer, will require a warrant; however, school officials may conduct searches without warrants as long as the search is reasonable. See T.L.O, 469 U.S. 325.

In the educational context, the Supreme Court has defined a "reasonable" search as one that is justified at its inception, and is reasonably related in scope to the circumstance which justified the interference in the first place. New Jersey v. T.L.O., 469 U.S. 325 (1985). With this standard, the Court is striking a balance between students' expectations of privacy and the state's 'substantial' interest in maintaining discipline on school grounds. Id. at 339.

When determining whether a search is reasonable, courts will "carefully balance the students' important constitutional rights with the school officials' duty to provide a safe environment conducive to education . . . [and] duty to protect [the students] from

dangers posed by antisocial activities – their own and those of other students." Doran v. Contoocook Valley Sch. Dist., 616 F.Supp.2d 184, 191 (D.N.H. 2009).

A. School Searches

The seminal case of New Jersey v. T.L.O., 469 U.S. 325 (1985) sets the legal standard for student searches. T.L.O. stands for the premise that students are protected by the Fourth Amendment, but that the probable cause requirement does not apply to students in the school setting. Instead, the Supreme Court held that a student search must satisfy the reasonableness requirement of the Fourth Amendment. In the school setting, this means that the search must be justified at its inception and reasonable in scope. For a search to be justified at its inception, there must be reasonable grounds for believing that the search will turn up evidence that the student has violated, or is violating either the law or the rules of the school. See T.L.O., 469 U.S. at 341-342.

In T.L.O., a teacher discovered two students smoking in a school bathroom. Because smoking violated a school rule, the teacher took the students to the principal's office. One of the students, TLO, denied that she had been smoking and claimed that she did not smoke at all. The principal brought her into his office and demanded to see her purse, where he found a pack of cigarettes and rolling papers. Believing that the rolling papers were "closely associated with marijuana" he continued to search her purse and found marijuana, a pipe, and a number of empty plastic bags, a substantial quantity of money, an index card that appeared to list students that owed TLO money, and letters that implicated TLO in marijuana dealing. The principal turned the evidence of drug dealing over to the police, and delinquency proceedings were filed against TLO. TLO sought to suppress the evidence found in her purse, asserting that it was tainted by the unlawful search.

The Court first noted that the Fourteenth Amendment protects the rights of students against encroachment by public school officials, and went on to state "the accommodation of the privacy interests of schoolchildren with 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 to believe that the subject of the search has violated or is violating the law." Thus, a search warrant is not required before a student is searched by a public school official.

Key Points:

- The legality of a school search depends on the reasonableness of the search.

- A search is reasonable if, based on the totality of the circumstances, it is:
    - Justified at its inception, and
    - Reasonably related in scope to the circumstance which justified the interference in the first place.
- As a general rule, a search by a teacher or 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."
- The scope of a search will be permissible "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."

The New Hampshire Supreme Court has adopted the reasonableness standard set forth in New Jersey v. T.L.O. See State v. Drake, 139 N.H. 662 (1995).

In State v. Drake, 139 N.H. 662 (1995), the New Hampshire Supreme Court upheld a search conducted by a school principal. In January 1993, the administrative assistant to the principal received an anonymous phone call. The caller said that the defendant, a senior, would be "carrying a substantial amount of drugs including LSD with him in school that day." Teachers had previously expressed concern that the student was likely using, and possibly distributing, drugs. In addition, the assistant's mother in law had told him that the student had recently been arrested for drug possession in Massachusetts.

The assistant informed the principal about the phone call, and the principal requested that the student come into his office. The student was told to empty his pockets, which contained a wallet, a package of cigarettes, a pipe, and some rolling papers. The principal asked him to open his knapsack, which contained several bags of marijuana. The principal called the police and the student was taken into custody. In addition to the marijuana, the police also found an unloaded semi-automatic pistol and two baggies containing "121 'hits' of LSD."

The student was indicted and moved to suppress all evidence seized as a result of the search by the school officials. The motion was denied, and after being found guilty, he appealed.

The court affirmed the trial court's decision in a case that established the standard for school searches in New Hampshire. The court noted that the New Hampshire Constitution provides that "Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions," and that "[p]ublic school officials are not exempt from constitutional prohibitions against unreasonable searches and seizures." Id. (quoting N.H. Constitution, Part I, article 19).

The court went on to state:

> Certain constitutional rights apply equally in the public school setting as elsewhere. . . . Public school students have legitimate privacy interests in a variety of personal items they bring to school. These privacy interests are not waived when the student merely passes through the schoolhouse door. But while students bring certain rights with them when they enter a public school, additional rights attach upon that entry. In particular, students are entitled to a safe and healthy educational environment. This is worthy of particular notice because school attendance is mandated by law.
>
> The right to a safe and healthy school environment necessarily vests certain responsibilities in those administering public education. Among those responsibilities is a duty to protect school children from antisocial behavior on the part of irresponsible classmates. This duty requires administrators to take preventive and disciplinary measures that must be swift and informal to be effective. Swiftness and informality are especially important in dealing with problems such as weapons that may pose the threat of immediate physical harm to other students, or drugs that could easily be destroyed or otherwise disposed of should a search be delayed. Flexibility is critical because of the importance of protecting children from dangers such as drugs and weapons when they are in the charge of public school officials. . . .
>
> The need for swift and informal procedures necessary for educators to assure a safe and healthy educational environment must be balanced against a student's legitimate privacy interest in non-contraband items. . . .

> Ordinarily, a search must be based on probable cause, even when that search may be validly conducted without a warrant. . . . a warrantless search of a student by a public school official is constitutional if it is reasonable under all of the circumstances. It must be justified at its inception and reasonably related in scope to the circumstances giving rise to the search. Prior to beginning a search, the school official must have reasonable grounds to believe that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Additionally, the action taken must be '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.

The court found that the search was reasonable, based on the totality of the circumstances, noting that school officials feared that the student was bringing a substantial amount of drugs to school, possibly to distribute to other students. This behavior would pose a significant danger to the student body and school officials have a legitimate interest in preventing such dangers.

B. What "Justifies" a Search?

Student searches must be justified at their inception. That is, there must be "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." New Jersey v. T.L.O., 469 U.S. 325 (19850; State v. Drake, 139 N.H. 662 (1995). When determining whether a search is justified, courts will look at all of the facts that led the school officials to conduct the search.

Searches have been justified based on reports from students who have seen drugs, anonymous phone calls, teacher reports, teacher observations, and student consent. The following cases illustrate the justification standard.

In re Anthony F., 163 N.H. 163 (2012).

Facts: On April 8, 2010, at approximately 9:00 am, a parking lot monitor at the student's high school radioed one of the assistant principals that a student was walking away from school. The monitor, along with the assistant principal, caught up with the student approximately 200 yards from the school building.

The student initially refused to return to the school, stating that he did not feel well, however, the staff persuaded him to return and he was escorted back and directed

to an empty lunchroom.

The assistant principals twice told the student that he was going to be searched because it was school policy to search students who return to school after leaving an assigned area. One of the assistant principals asked the student if he had "anything on him that he shouldn't have on school property," and the student pulled a small bag of marijuana out of his sock. Subsequently, a delinquency petition was filed against the student.

The student moved to suppress the marijuana, on the basis that the search was unconstitutional under the State and Federal Constitutions. The trial court denied the motion on the basis that the search and the school policy were reasonable, and the policy was "evenly applied." Student appealed, arguing that the search was unreasonable because there was no "individualized suspicion" of any wrongdoing.

Held: For the student. The court disagreed with the assertion that the "lack of physical intrusion or the lack of an explicit command rendered [the assistant principals'] conduct not a search," and noted that the "assistant principals twice informed the juvenile that he was going to be searched and then immediately inquired into what he had on his person. We see no meaningful distinction between twice telling the juvenile that he was going to be searched" and then asking if he had "anything on [him] that [he] shouldn't have" and "commanding him to reveal" what he had. The assistant principals' conduct in this case was akin to a command," and constituted a search.

The search was not justified at its inception because there was no evidence that the search of the student would turn up contraband. The assistant principals searched the student because it was school policy to do such when a student returned to school after leaving an assigned area. However, the student was leaving school, and only returned when persuaded by school officials. In addition, there was no indication that the administrators suspected that the student would have contraband on his person, as there was no evidence that the student had prior disciplinary infractions or any prior involvement with the administrators. Therefore, the search was not justified at its inception, and it was an unreasonable search.

In re Juvenile, 156 N.H. 233 (2007).

Facts: On October 12, 2005, a teacher informed the assistant principal that the student had a "large pot pipe" in his possession. The teacher had heard about this situation from other students. The assistant principal did not take any immediate action because the student had left for the day. The following day, the teacher again heard from students that the juvenile had a pot pipe, and he reported the information to the assistant principal. The assistant principal searched the student's locker and found a

backpack containing a pot pipe that smelled like burnt marijuana, vegetative matter he believed to be marijuana, a lighter and $32. The discovery led to a delinquency petition being filed against the juvenile.

The student moved to suppress the evidence obtained from the search; the motion was denied, and the student appealed. The student argued that the assistant principal lacked reasonable grounds to search his locker because:

1. The assistant principal did not know the identities of the students from whom the teacher had heard about the pot pipe, thus undermining the reliability of the information upon which the search was based;

2. Possession of a pot pipe is not against the law, and neither the student informants nor the teacher made any direct allegations of drug possession or distribution; and

3. The assistant principal was given no specific information identifying the juvenile's locker as a place where the pot pipe might be found.

Held: For the state. The court began by noting "[i]t is well settled that public school officials are not exempt from the constitutional prohibitions against unreasonable searches and seizures. They are, however, afforded greater flexibility than are law enforcement officials when searching for contraband."

The court found that the search was justified at its inception because "the report of the juvenile's possession of a large pot pipe provided the assistant principal with reasonable grounds for suspecting that a search of places where a large pot pipe might be located would also turn up marijuana which, necessarily, would be evidence that the juvenile had violated or was violating RSA 318-B:2, I (2004), which prohibits marijuana possession. Moreover, given the age of the student (fifteen years old), and the moderate degree of intrusiveness of the search and its primary objective (the detection of marijuana in association with a large pot pipe), we conclude that the scope of the search, which focused upon a place where a large pot pipe might be stored, was constitutionally permissible."

State v. Tinkham, 143 N.H. 73 (1998).

Facts: On September 15, 1995, two students at Kingswood Regional High School reported to the principal that they saw a plastic bag containing marijuana in a book bag belonging to another student. The principal approached that student, searched the bag, and found marijuana. The student told the principal that she had purchased it from another student. The principal gave the marijuana to the police and

told them that she was going to question the other student.

The principal returned to school and brought the other student into her office. She explained that she had reason to believe that he was carrying an illegal substance and asked him to empty his bag. The student agreed. While searching the bag, the principal "discovered a small wooden cylindrical object with a peculiar odor." She seized the item and told the student that she would be giving it to the police. The principal did not find any other items. The principal then explained that a student confessed to purchasing marijuana from him, and the student admitted to selling the marijuana, but stated that he received it from someone else "whose name he would not reveal." Student was suspended for 5 days. In addition, the principal contacted the police and informed them about the search and her conversation with the student.

Student was charged with selling marijuana to another student on school property. He moved to suppress the container seized from his backpack and the statement he made to the principal. The trial court denied the motion and the student appealed.

Held: For the State. The court stated that "[p]ublic school officials are not exempt from the constitutional prohibitions against unreasonable searches and seizures. They are, however, afforded greater flexibility than law enforcement officials when searching for contraband." (quotations and citation omitted).

The principal's search of the student was reasonable under the circumstances. The other student's statement that she had purchased drugs from the student justified the principal's search of the student to prevent future drug sales and confiscate drugs in his possession. In addition, the scope of the search – which was limited to the student's backpack, and asking him to remove his socks and shoes and empty his pockets – was reasonable and not excessively intrusive given that those are obvious places where one might hide contraband.

III. Cell Phone Searches

The search of cell phones is an emerging area of the law and the jurisprudence addressing the issue is scant. Recently, however, the New Hampshire Legislature passed a law that prohibits governmental entities from searching portable electronic devices, without a warrant, unless a legally recognized exception to the warrant requirement applies.

A. RSA 644:21, Searches of Portable Electronic Devices

The New Hampshire Legislature recently passed a law pertaining to searches of

portable electronic devices. See 2014 N.H. Session Laws, Ch. 184 (effective July 1, 2014). The law provides that:

> No information contained in a portable electronic device shall be subject to search by a government entity, including a search incident to a lawful arrest or for inventory purposes, except pursuant to a warrant signed by a judge and based on probable cause, or pursuant to a legally recognized exception to the warrant requirement.
>
> Evidence obtained in violation of this section shall not be admissible in a criminal, civil, administrative, or other proceeding, except as proof of a violation of this section.
>
> A person injured by a government entity as a result of a violation of this section may file civil suit against the government entity.

Id. (quoting RSA 644:21, II-IV).

The new law contains the following definitions:

A. Government entity: "a federal, state, county, or local government agency, including but not limited to a law enforcement agency or any other investigative entity, agency, department, division, bureau, board, or commission, or an individual acting or purporting to act for, or on behalf of, a federal, state, county, or local government agency. 'Government entity' shall not apply to a federal government agency to the extent that federal statute preempts state statute."

B. Information: "includes any information concerning the substance or meaning or purported substances or meaning of a communication, including without limitation the name and address of the sender and receiver and the time, date, location, and duration of the communication."

C. Portable electronic devices: "any portable device that is capable of creating, receiving, accessing, or storing electronic data or communications, including but not limited to cellular telephones."

Id. (quoting RSA 644:21, I).

The bill's legislative history indicates that the intent of the law is to "expand privacy protections by prohibiting government entities from searching 'portable electronic devices' including cell phones, without a warrant." See HB 1533 Legislative History (Statement of Intent, House Committee on Criminal Justice and Public Safety, Feb. 20, 2014). The legislative history makes numerous references to police searches, but is silent as to searches by school officials.

The legislative history also indicates that the bill would apply to all portable electronic devices capable of storing information, such as laptop computers, iPads and tablets, and digital cameras. Id. Finally, the legislative history references the extensive scope of information that can be stored on these devices, including, but not limited to, internet search history, telephone calls, photographs, text messages and social media.

While this legislation is new, the underlying premise – that a warrant (or lawful exception to the warrant requirement) is required before a cell phone can be searched by a governmental agent – is not.

In Riley v. California, 134 S.Ct. 2473 (U.S. June 25, 2014), the United States Supreme Court affirmed the holding of the First Circuit Court of Appeals in U.S. v. Wurie, 728 F.3d 1 (1st Cir. 2013) that the search-incident-to-arrest exception to the warrant requirement did not authorize the warrantless search of data on a cell phone. In Wurie, a police officer performing routing surveillance in South Boston observed the defendant engage in what the officer believed was a drug sale. The officer stopped the buyer and discovered two plastic bags in his pocket, each containing crack cocaine. The buyer admitted that he had purchased the drugs from the defendant.

The police subsequently apprehended the defendant and arrested him. When he arrived at the police station, two cell phones, a set of keys, and $1,275 in cash were taken from him. Shortly after he arrived at the police station, the officers noted that one of his phones was repeatedly receiving calls from a number identified as "my house." After about 5 minutes, the officers opened the phone to look at the call log. They pressed one button to determine the phone number associated with the "my house" caller ID reference.

One of the officers typed the phone number into an online telephone directory and obtained the name and address associated with the number. After questioning the defendant, the police went to the address associated with the "my house" number. The officers obtained a warrant and seized a substantial amount of drugs. Defendant was charged, and filed a motion to suppress the evidence obtained as a result of the

warrantless search of the cell phone. The motion was denied, he was convicted, and appealed.

The First Circuit held that the evidence obtained after the warrantless search of the cell phone should have been suppressed. The court held that "a warrantless search is *per se* unreasonable under the Fourth Amendment, unless one of a 'few specifically established and well-delineated exceptions' applies." The court stated "[w]e suspect that eighty-five percent of Americans . . . own cell phones and 'use the devices to do much more than make phone calls,' such that they are "a computer," and "not just another purse or address book." The court noted that the "information is, by and large, of a highly personal nature: photographs, videos, written and audio messages, texts, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records. It is the kind of information one would previously have stored in one's house and that would have been off-limits to officers performing a search incident to arrest."

The First Circuit held "that the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee's person, because . . . such a search is [not] necessary to protect arresting officers or preserve destructible evidence." The First Circuit noted that there were other exceptions to the warrant requirement that did not apply to the present case, but that might justify a warrantless search of cell phone data, such as the exigent circumstances exception, which would allow officers to conduct an immediate, warrantless search of a cell phone's data where they have probable cause to believe that the phone contains evidence of a crime, as well as a compelling need to act quickly that makes it impracticable for them to obtain a warrant.

This case, which was decided prior to the enactment of the revisions to RSA 644, clearly established that a warrantless search of a cell phone is prohibited, absent an exception to the warrant requirement. However, indicated above, school officials are permitted to search students so long as the search is justified in its inception and reasonable in scope.

1. School Officials as Agents of the Police

In certain circumstances, school officials have been deemed to be agents of the police department. When that occurs, school officials are required to provide students with increased Fourth Amendment protections. The following case illustrates the agency relationship.

State v. Heirtzler, 147 N.H. 344 (2002).

Facts: A Londonderry Police Officer was assigned to the high school as the school resource officer (SRO). One of the reasons the SRO was assigned was because the police department perceived "that the school was investigating criminal matters, which should have been reported to and handled by the department." The SRO remained under the direct control and supervision of the police department, and his job was to investigate reports of criminal activity on school grounds, in the same manner as other criminal complaints.

The SRO instructed school officials to contact him when cases involved criminal activity or required criminal investigation. The administration agreed, but maintained that administrative and disciplinary matters involving students fell within the sole authority and control of the school.

"Because of the number of searches conducted at the school under its search policy, [the SRO] could not handle the investigation of every potential criminal matter. The school, therefore, agreed to investigate the less serious potential criminal matters, including searches. . . . This delegation of responsibility, according to [the SRO], would occur at his discretion after he assessed the information brought to his attention to determine 'what level it rose to.' . . . Essentially, if [the SRO] lacked probable cause to pursue a less serious criminal matter and perhaps make an arrest, he would deem it a school issue and turn the information over to school officials. Once he turned the information over, he had no further involvement unless the school requested it," although school officials would contact him if they seized contraband from a student.

During science class, student was observed by his teacher passing what appeared to be a folded piece of tinfoil to another student. The student removed something from the tinfoil, put it in a piece of cellophane, and passed the tinfoil back to the student. After class, the teacher contacted the SRO and reported her observations. The SRO determined that he did not have enough information to warrant further investigation and passed the information on to the administration.

The administration called the student into the office, questioned him, and asked if they could search him. The student agreed and a piece of paper wrapped in tinfoil was found in his cigarette pack. After further questioning, the student stated that the paper might be LSD. At that point, the administration turned the matter over to the SRO.

The student moved to suppress the evidence, arguing that the school officials were acting as agents of the police and their search had to comply with the requirements of the Fourth Amendment. The trial court agreed and granted the motion. The State appealed.

Held: For the student. The court began by discussing the standard for searches, and the duties of agents of the police. "A warrantless search or seizure is presumptively illegal and the prosecution has the burden of establishing that it falls within a recognized exception to the warrant requirement. The acquisition of evidence by an individual acting as an agent of the police must be reviewed by the same constitutional standards that govern law enforcement officials. This 'agency rule' prevents the police from having a private individual conduct a search or seizure that would be unlawful if performed by the police themselves." (citations omitted).

The court went on to state that "[a]n agency relationship requires proof of some affirmative action by a police officer or other governmental official that preceded the interrogation of the defendant, which can reasonably be seen to have induced the third party to conduct the interrogation that took place."

Here, the "[s]chool officials are responsible for administration and discipline within the school and must regularly conduct inquiries concerning both violations of school rules and violations of law. Their administrative duties, however, do not include enforcing the law or investigating criminal matters. School officials are not law enforcement officers and they should not be charged with knowing the intricacies of constitutional criminal procedure.

Because they are not law enforcement officers, when school officials search for contraband in order to foster a safe and healthy educational environment, they are afforded greater flexibility than if a law enforcement officer performed the same search. If school officials agree to take on the mantle of criminal investigation and enforcement, however, they assume an understanding of constitutional criminal law equal to that of a law enforcement officer. . . . In sum, the role of school officials is to foster a safe and healthy educational environment. In order to do so, it is necessary that they be afforded some flexibility to swiftly resolve potential problems affecting this environment. However, enforcing the law or investigating criminal matters is outside the scope of a school official's administrative authority."

In this case, the SRO's decision to report the incident to administration "can reasonably be seen to have induced" the administration to interrogate and search the student. In addition, there was a prior agreement between the SRO and the school that the SRO would report suspicious criminal activity to the administrators when he would not take action himself. This created an agency relationship between the SRO and school, and therefore, the school officials were required to comply with the heightened Fourth Amendment protections prior to conducting the search.

B. Recent Decisions

There have been several decisions involving cell phone searches in school settings. These cases have generally held that cell phone searches by school officials require reasonable suspicion and must be limited in scope.

The case of Klump v. Nazareth Area School District, 425 F.Supp. 2d 622 (E.D. Pa. 2006) is instructive on this issue. In Klump, the school district prohibited cell phone usage and display, but did not prohibit the presence of a phone on campus. The phone slid out of the student's pocket and came to rest on his leg. His teacher enforced the anti-display policy by confiscating the phone. She and the principal then began making calls with his phone to see if other students were violating the cell phone policy. They accessed the student's phone number directory to do such. They examined his text messages and listened to his voicemail messages. They also held an online conversation with the student's brother without identifying themselves. The conduct by the educators resulted in a multiple count law suit alleging violation of the Fourth Amendment, invasion of privacy, two violations of the wiretap laws, violation of the state constitution and negligence. The court declined to dismiss the Fourth Amendment, invasion of privacy, and one of two wiretap claims. Significantly, they allowed these claims to proceed against the individual defendant teacher and principal.

The case of G.C. v. Owensboro Public Schs., 711 F.3d 623 (6th Cir. 2013), also involved a search of a student cell phone. From 2005 through 2009, student was enrolled as a non-resident student in the Owensboro School District. Beginning with the 2007-2008 school year, student began to have disciplinary problems. Shortly thereafter, he informed school officials that he used drugs and was disposed to anger and depression. During that school year, he was disciplined for using profanity in class, and he informed staff that he "had a plan to take his life." The school suggested that the student be evaluated for mental health issues, and his parents took him to a treatment facility.

During the 2008-09 school year, student was disciplined for excessive tardies, and for fighting and arguing in the boys locker room. In March 2009, student left the school building without permission. He "made a phone call to his father and was located in the parking lot in his car, where there were tobacco products in plain view." Student then went to the principal's office. The principal reported that she was very concerned about student's well-being because he had indicated that he was thinking about suicide again, and that as a result, she checked student's cell phone to see if there was any indication that he was thinking of suicide. The following month, student was suspended after yelling and hitting a locker.

In September 2009, student violated the cell-phone policy when he was seen

texting in class. His teacher confiscated the phone and a staff member read four texts, "to see if there was an issue with which I could help him so that he would not do something harmful to himself or someone else." After this incident, the school revoked Student's non-resident attendance privileges. Student filed suit, alleging violations of his constitutional rights.

The court noted that "a search is justified at its inception if there is reasonable suspicion that a search will uncover evidence of further wrongdoing or of injury to the student or another. Not all infractions involving cell phones will present such indications. Moreover, even assuming that a search of the phones were justified, the scope of the search must be tailored to the nature of the infraction and must be related to the objectives of the search."

In this particular case, the court found that "general background knowledge of drug abuse or depressive tendencies, without more, [does not] enabl[e] a school official to search a student's cell phone when a search would otherwise be unwarranted." In September 2009, the school had no reason to believe that student was engaging in unlawful activity or contemplating injuring himself or another student.[1]

The court also rejected the defendants argument that student's claim must fail because he did not suffer any harm as a result of the search, because he was not disciplined "based on the contents of his phone," noting that the Student may be able to recover nominal damages.

The search of cell phones is an emerging area of the law and the jurisprudence addressing the issue is scant. However, all indicators are that the seminal case of New Jersey v. TLO, 469 U.S. 325 (1985) sets the legal standard for the search of a cell phone. In the context of school, this means that the search must be justified at its inception and reasonable in scope. For a search to be justified at its inception, there must be reasonable grounds for believing that the search will turn up evidence that the student has violated, or is violating either the law or the rules of the school. See TLO, 469 U.S. at 341-342.

C. The Parameters of a Legal Search of Portable Electronic Devices by School Officials in a School Setting

Pursuant to RSA 644:21, I, governmental entities may search portable electronic devices without a warrant, so long as there is a legally recognized exception to the warrant requirement. School districts are not agencies that are obligated to secure search warrants. Therefore, there is an open question as to whether districts are an

[1] Student did not dispute that the school had reasonable suspicion for the first search.

entity that was targeted by this statue. Assuming that school districts are subject to this law, the issue becomes whether there are any exceptions to the warrant requirement that would permit school districts to search portable electronic devices without a warrant; the answer to that question is "yes," under certain conditions.

As set forth above, school districts may conduct searches of students without a warrant as long as the search is reasonable. A reasonable search is one that is justified at its inception and reasonably related in scope to the circumstances which justified the search. There is a strong argument to be made that school officials – so long as they are not acting as agents of the police or other law enforcement unit – can search a student's cell phone if the school official has reasonable grounds for suspecting that the search of the phone will turn up evidence that the student was violating the law or rules of the school, and that the scope of the search is limited.

However, even if a school official has a reasonable basis for searching a cell phone (or other electronic device), making telephone calls and/or listening to voicemail or other electronically stored messages may violate the State's wiretapping laws, RSA 570-A. We strongly recommend that you seek advice from your school district's counsel on specific cases involving cell phone searches.

The following guidelines can be used when a school official would like to search a student cell phone or other electronic device:

- Does the student consent to the search? If so, then the administrator may search the phone, consistent with the consent provided by the student.[2]

- If the student does not consent to the search, are there reasonable grounds for suspecting that the search of the device will turn up evidence that the student has violated or is violating either the law or rules of the school? If not, then do not search the device.

- If there are reasonable grounds to suspect a student is violating a law or school rule, then the scope of the search must be reasonable in light of the circumstances that justify the search. In other words, the cell phone must be 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.

[2] Depending on the age of the student, it may be necessary to obtain parental consent as well, particularly if the student does not own the telephone.

Practice Pointer: On many occasions, the administrator will have a choice between searching the cell phone/electronic device owned by the alleged perpetrator or the alleged victim(s). The information may be contained on more than one student's electronic device; thus, if one student declines to provide consent it may be possible to obtain the information without searching the electronic device.

IV. Conclusion

As a general rule, administrators should seek permission from the student and their parents before looking at that child's cell phone. The search of a cell phone or other portable electronic device should only occur if the administrator has a reasonable basis for concluding that either the law or a rule of the school has been violated, and any such search should be limited in scope. The mere possession of a cell phone, or other portable electronic device, even if in violation of a school rule, is not sufficient to search the device.

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