



March 3, 2008

VIA FACSIMILE AND U.S. MAIL

Clay Titus, President
Linden Unified School District Board of Trustees
18527 East Main Street
Linden, CA 95236

RE: Linden Unified School District Cell Phone Search Policy

Dear President Titus and Members of the Board:

I am writing on behalf of Justin Tomek and his family concerning the cell phone search policy adopted by the Linden Unified School District, Board Policy 5131.2. That policy purports to give school authorities unfettered discretion to search students' cell phones, including the right to access and read their private text messages. As discussed below, the District's policy, both on its face, and in the manner in which it has been applied to Justin Tomek, violates the Fourth Amendment and the California Constitution. Accordingly, we ask that the Board immediately rewrite the policy so that it conforms to constitutional requirements and instruct school personnel that no student's cell phone may be searched other than in compliance with the revised policy.

The Law Governing Searches of Students' Belongings

As the California Supreme Court made clear in its seminal decision discussing the constitutional limits on searches by school personnel, students' rights of privacy are not to be disregarded:

The right of privacy is vitally important. It derives, in this state, not only from the protections against unreasonable searches and seizures guaranteed by the Fourth Amendment and article I, section 13, but also from article I, section 1, of our state Constitution. . . . The privacy of a student, the very young or the teenager, must be respected. By showing that respect the institutions of learning teach constitutional rights and responsibilities by example. "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

M. QUINN DELANEY, CHAIRPERSON | ROBERT CAPISTRANO, SUSAN FREIWALD, LISA HONIG, NATALIE WORMELI, VICE CHAIRPERSONS | NANCY PEMBERTON, SECRETARY/TREASURER
MAYA HARRIS, EXECUTIVE DIRECTOR | CHERI BRYANT, DEVELOPMENT DIRECTOR | ERIKA CLARK, COMMUNICATIONS DIRECTOR | JUSTINE SARVER, ORGANIZING DIRECTOR | ALAN SCHLOSSER, LEGAL DIRECTOR
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STEPHEN V. BOMSE, GENERAL COUNSEL



In re William G., 40 Cal. 3d. 550, 563 (1985) (quoting *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)).

A search of a student's belongings "no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." *New Jersey v. T.L.O.*, 469 U.S. 325, 337-38 (1985); accord *In re William G.*, 40 Cal. 3d at 563 ("a student always has the highest privacy interests in his or her own person, belongings, and physical enclaves, such as lockers."). That is particularly true of searches of a cell phone, which, today, are small personal computers carrying a wealth of private information.

[M]odern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages.

United States v. Park, 2007 WL 1521573 at *8 (N.D. Cal. 2007) (footnote omitted).

In order to meet Fourth Amendment and California constitutional standards, a search of a student's cell phone must meet two tests: First, before conducting a search of a student's belongings, school officials must have "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." *T.L.O.*, 469 U.S. at 342; accord *William G.*, 40 Cal. 3d at 564. Equally important, the scope of the search 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." *T.L.O.*, 469 U.S. at 342; accord *William G.*, 40 Cal. 3d at 564.

Reasonable suspicion is not simply "an inchoate and unparticularized suspicion or hunch." *T.L.O.*, 469 U.S. at 346 (internal citation and quotation marks omitted). Rather, before a student's cell phone may be searched, school officials must be able to point to "objective and articulable facts" that support the assertion that the search will provide evidence that the student is violating the particular rule he or she is suspected of violating. *William G.*, 40 Cal. 3d at 566. Thus, the fact that a student is violating one school rule does not provide reasonable suspicion to support a search to determine whether the student may also be violating some other rule. It is that kind of "hunch" or "unparticularized suspicion" that is forbidden as the basis for searching a student's cell phone. See *Cales v. Howell Pub. Sch.*, 635 F. Supp. 454, 457 (E.D. Mich. 1985) (not enough that school official believes that *some* rule has been violated; "burden is on the administrator to establish that the student's conduct is such that it creates a reasonable suspicion that a specific rule or law has been violated and that a search could reasonably be expected to produce evidence of *that* violation." (emphasis added)). Nor does it provide a basis for a search of one student's cell phone designed to determine whether other students may be violating school rules. *Klump v. Nazareth Area School District*, 425 F. Supp. 2d 622, 640 (E.D. Pa. 2006). Rather, "[r]espect for privacy is the rule—a search is the exception." *William G.*, at 564.

The District's Policy and Its Application to Justin Tomek

The District's policy on searches of cell phones does not begin to meet the constitutional requirements for searches of students' belongings set forth in *T.L.O.* and *William G.* To the contrary, the District's policy asserts an absolute right to search students' cell phones. Board Policy 5131.2 states, without qualification, that cell phones are "subject to search and seizure under Education Code 48900(q)" and that "Text messages, phone calls, photos shall also be . . . subject to search and seizure under Education Code 48900(q) and can be accessed/used as deemed necessary by the site administration during disciplinary issues/investigations or allegations of misconduct."¹

The search of Justin Tomek's cell phone by school officials illustrates the unconstitutional manner in which school officials are invading their students' privacy. A teacher confiscated Justin's cell phone when he was caught talking on it to his mother on October 25, 2007. Despite the fact that the school had no reason to believe that Justin had been text messaging in violation of school rules, school officials accessed and read approximately *three weeks* worth of text messages, many of which contained very personal communications, some with his mother. The absence of justification for the search at its inception, together with its unconstitutional scope that extended to (a) reading the contents of messages; and (b) doing so for messages stretching back over a three-week period, leaves no doubt that Justin's privacy was invaded and his constitutional rights violated.

Similarly, it is our understanding that school officials have confiscated students' cell phones and read the text messages on them in order to determine whether *other* students were breaking the rules against sending text messages. That is an impermissible basis for a highly intrusive search. *Klump v. Nazareth Area School District*, 425 F. Supp. at 640 (search of address book of student's cell phone in order to call other students to see whether they were violating school rules violated Fourth Amendment).

In sum, Board Policy 5131.2 is invalid on its face and has been implemented in a manner that violates the constitutional rights of its students, including those of Justin Tomek. It also exposes the District to liability under common law principles of invasion of privacy and may very well violate Penal Code section 637 (prohibiting willful disclosure of a telephonic message when the disclosing party was not a party to the communication). Accordingly, we ask that you revise Board Policy 5131.2 to clearly provide that school officials may not search students' cell phones, including the accessing and reading of their text messages, unless those officials (1) have a

¹ We assume that the reference to subsection (q) of Education Code section 48900 is a typographical error. We were able to find no provision of the Education Code that purports to authorize an unfettered right to search student cell phones, including accessing and reading their personal text messages. Education Code section 48901.5, while authorizing school districts to regulate the use of cell phones, does not—and could not—authorize searches that violate students' rights under the California and United States constitutions.

reasonable suspicion, based on objective and articulable facts, that the search will provide evidence that the student was violating either the law or a school rule; and (2) limit the scope of the search to the infraction of which *the student whose cell phone is being searched* stands accused and is not extended to determine whether that student might conceivably have violated some other rule or whether some other students are violating a school rule.

I appreciate your attention to this matter and look forward to your prompt response.

Very truly yours,



Ann Brick
Staff Attorney