



COMMONWEALTH of VIRGINIA

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The Honorable Robert B. Bell
Member, House of Delegates
2309 Finch Court
Charlottesville, Virginia 22911

Dear Delegate Bell:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask in what circumstances middle and high school principals and teachers may seize and search students' cellular phones and laptops to combat "cyber bullying" and how school officials can address student "sexting" without violating Virginia law themselves.

Response

It is my opinion that searches and seizures of students' cellular phones and laptops are permitted when there is a reasonable suspicion that the student is violating the law or the rules of the school and, further, that school officials should not share explicit materials depicting minors with other school personnel, but rather that the material should be brought to the attention of the appropriate law enforcement agents.

Applicable Law and Discussion

The Fourth Amendment to the Constitution of the United States provides that "[t]he right of the people to be secure in their persons, house, papers, and effects, against unreasonable search and seizure, shall not be violated."¹ This "prohibition on unreasonable searches and seizures applies to searches conducted by public school officials."² "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing."³ The Supreme Court of the United States typically requires that a search be conducted only pursuant to a warrant supported by probable cause.⁴ When the purpose of a Fourth Amendment search is not to discover evidence of a crime,

¹ U.S. CONST. amend. IV.

² *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985).

³ *Chandler v. Miller*, 520 U.S. 305, 313 (1997).

⁴ *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

however, but is intended to serve some “special needs, beyond the normal need for law enforcement,”⁵ the Supreme Court has held that a reasonable, articulable suspicion may be all that is necessary to satisfy constitutional requirements.⁶

The supervision and operation of schools present “special needs” beyond normal law enforcement and, therefore, a different framework is justified.⁷ The United States Supreme Court concluded in *New Jersey v. T.L.O.* that “maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures. . . [that] preserves the informality of the student-teacher relationship.”⁸ The Court recognized the competing interests that are distinct to the school environment: “On one side of the balance are arrayed the individual’s legitimate expectation of privacy and personal security; on the other, the government’s need for effective methods to deal with breaches of the public order.”⁹ The court modified ordinary Fourth Amendment analysis in two significant ways. First, an “accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require the strict adherence to the requirement that searches be based on probable cause.”¹⁰ Second, the warrant requirement does not apply to school officials who search a student under their authority.¹¹

Accordingly, searches of a student’s belongings – including an examination of the messages found on a cell phone or laptop – are justified if, when the search is made, the teacher or principal 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.”¹² In addition, the subsequent 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.”¹³

Your first inquiry specifically presents the following scenario: a student reports to a teacher that he received a text message from another student that is either threatening or criminal or violates the school’s bullying policy. You ask whether the teacher can seize the alleged bully’s cellular phone and conduct a search of the outgoing text messages to investigate the claim. Recognizing that no court has considered the matter and that a definitive determination whether the situation you present creates a reasonable suspicion of wrongdoing depends on a complete and detailed set of facts,¹⁴ it is my general

⁵ *New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

⁶ *See id.* at 341; *see also* *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (“While ‘reasonable suspicion’ is a less demanding standard than probable cause . . . , the Fourth Amendment requires at least a minimal level of objective justification.”).

⁷ *See T.L.O.*, 469 U.S. at 340.

⁸ *Id.* at 340.

⁹ *Id.* at 337.

¹⁰ *Id.* at 341.

¹¹ *Id.* at 340.

¹² *Id.* at 342. *See also In the Interest of Jane Doe*, 887 P.2d 645 (Haw. 1994) (applying the *T.L.O.* framework and upholding search of a student’s purse).

¹³ *Id.*; *see also Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) (finding a strip-search of student by school officials unreasonable and stating that *T.L.O.*’s mandate that school searches be reasonable in scope requires a specific suspicion that a student is hiding evidence of wrongdoing in his or her underwear “before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts”).

¹⁴ Factors school officials may consider include, for example, the perceived credibility of the person making report and whether the received message is still on the phone and made accessible to the official.

opinion that a search of a cellular phone by a school principal or teacher under these circumstances would be reasonable under the Fourth Amendment and the standard established in *New Jersey v. T.L.O.*¹⁵ Moreover, under *T.L.O.*, once a reasonable suspicion of wrongdoing exists, a search of a student's personal belongings does not require the student's consent or the consent of his parents.¹⁶

Your second inquiry concerns whether a teacher who has discovered sexually explicit material on a student's cellular phone can show the material to another teacher or a principal for disciplinary purposes without violating Virginia law. The outcome of the inquiry depends on whether your question relates solely to sexually explicit material involving adults or whether the sexually explicit material involves children.

If a teacher, upon lawful search of a student's cellular phone, discovers sexually explicit material involving adults, he or she may show the material to a principal or another teacher for disciplinary purposes pursuant to any existing school policies without violating Virginia law. If, however, the discovered material involves a person under the age of eighteen, it may constitute child pornography,¹⁷ the knowing possession and distribution of which is prohibited under § 18.2-374.1:1. Any person who distributes such material shall be punished by five to twenty years imprisonment,¹⁸ and, therefore, prudence counsels that a teacher who discovers sexually explicit visual material involving a suspected minor during a legal search of a student's cellular phone should refrain from showing, transmitting, or distributing such material.¹⁹ Upon discovery of potential child pornography, the teacher or principal should promptly contact the appropriate law-enforcement agency within his jurisdiction and turn the material over to one of its authorized agents without distributing the material to others. The teacher discovering the material may, of course, discuss the nature of the material with a principal or another teacher for disciplinary purposes pursuant to the school's respective policies.²⁰ As with the legal standard

¹⁵ It should be noted that, if the search is being conducted by a school security officer, it may be governed by the heightened probable-cause standard. For a more thorough discussion of the standards governing school searches and seizures by school security officers, see 2001 Op. Va. Att'y Gen. 109.

¹⁶ See *T.L.O.*, 469 U.S. at 341-42.

¹⁷ "Child pornography" is defined as "sexually explicit visual material which utilizes or has as a subject an identifiable minor." VA. CODE ANN. § 18.2-374.1(A) (2009). "Sexually explicit visual material" means "a picture, photograph, drawing, sculpture, motion picture film, digital image, including such material stored in a computer's temporary Internet cache when three or more images or streaming videos are present, or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, a state of sexual excitement, sexual conduct, or sadomasochistic abuse[.]" Section 18.2-374.1(B).

¹⁸ Section 18.2-374.1:1(A), (C).

¹⁹ Section 18.2-374.1:1(C) prohibits the "display with lascivious intent" and the "distribution" of child pornography. A school official who discovers child pornography and displays it to another school official for disciplinary purposes would lack lascivious intent. See *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970) (defining "lascivious" as "a state of mind that is eager for sexual indulgence, desirous of incident to lust or of inciting sexual desire and appetite."). The "distribution" of child pornography under our statute, however, does not require lascivious intent. Although it is highly unlikely that a prosecution would be initiated based on a school official showing the images to another school official in good faith and for legitimate purposes, the absence of an exception for school officials, noted below, signals caution in engaging in conduct that could be viewed as the distribution of child pornography.

²⁰ The Code does provide an exception for materials possessed for bona fide governmental purposes, but the exception extends only to "a physician, psychologist, scientist, attorney, or judge who possesses such material in the course of conducting his professional duties[.]" Section 18.2-374.1:1(H). School officials are not among those listed in this exception.

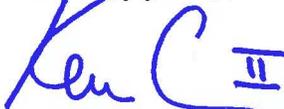
governing searches and seizures within the school context, a definitive determination of whether an action constitutes a criminal violation is a matter reserved to Commonwealth's Attorneys and the courts.

Conclusion

Accordingly, it is my opinion that searches of students' cellular phones and laptops by school officials are permitted when based on reasonable suspicion that the particular student is violating the law or the rules of the school and the search is "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."²¹ In instances where a school official discovers sexually explicit material involving an identifiable minor, the official should refrain from showing, transmitting, or distributing that material to any other person except an authorized agent of the appropriate law-enforcement agency.

With kindest regards, I am

Very truly yours,



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²¹ *T.L.O.*, 469 U.S. at 342.