

April 2010

Issues to Consider in a search:

- **Who is conducting the search? Requirements differ for school personnel vs. law enforcement, including school resource officers**
- **What is the personal background of the student involved? Is it reasonable to suspect this student of wrongdoing? Is there a past history related to the current allegation? IS the student generally credible?**
- **What is the nature of the alleged infraction? If there is reason to suspect the student has used to the phone to send text messages regarding illegal drugs, the phone can be searched for supporting text messages. If the student violated a school rule that cell phones be turned off during class, the phone may be confiscated and turned off, but not searched.**
- **What is the basis for the search? Anonymous phone call vs. generally suspicious conduct vs. a reliable student witness. The more reliable the source, the more likely the search is justified.**
- **Did the student consent to the search? If consent is NOT coerced, the school may search whatever applications the student agrees to have searched.**

Phone Searches

The test for legality when conducting a search of a student cell phone is the same as the test for any student search—is the search reasonable under all of the circumstances?

Whether the search is reasonable is determined by asking two additional questions:

Was the search justified in its inception and was the search, as conducted, reasonably related in scope to the circumstances justifying the search?

To determine whether a search of a cell phone is justified at its inception, consider:

What is the basis for conducting the search? In other words, what is the potential school rule being violated and who has supplied the information of a violation? If the rule is that the student not have a phone and the phone is sitting on top of the student's backpack, there is

no reason to search through the phone for further evidence of wrongdoing. If an educator receives an anonymous note that a non-identified student in the class is sending text messages during school, it would probably not be reasonable to search all student phones to see what time text messages were sent. If, on the other hand, the educator is told directly by a student (who has been reliable in the past) that another identified student is sending pornographic images via text during class, the educator is justified in searching the phone for text messages that include images (although, if the allegation does involve criminal activity, the educator should first contact school administration and law enforcement).

To determine if the search was reasonable, consider:

What was the allegation and what was searched? In

Klump v. Nazareth Area School District (E.D. Pa. 2006), school policy prohibited the use or display of a phone during school hours. Klump's phone fell out of his pocket and landed on his leg, where his teacher saw it. She confiscated the phone.

All of this was fine, but the school went further. School officials called numbers in the phone's directory to see *who else* might be using a cell phone during school hours. Officials also looked at the student's text messages and listened to his voice mail.

The court found this behavior unreasonable since the only suspected wrongdoing was the "display" of the phone when it fell out of Klump's pocket. Officials also could not use the student's property to search for wrongdoing by other students.

Sexting and Child Pornography Investigations

Students creating and sending nude or sexually suggestive photos to each other is a crime in Utah and most other states. If the person who creates, sends, or receives the photos is under the age of 18, the crime is a misdemeanor. If the creator, sender, or recipient is an adult, however, the crime is a felony. And a conviction for felony child pornography means permanent registration as a sex offender.

Educators who receive evidence of a “sext” message between students as part of an investigation or a report of student misconduct are protected from prosecution under state law.

Utah Code 76-5a-3 states that no civil or criminal liability may be imposed on “any entity or an employee, director,

officer, or agent of an entity when **acting within the scope of employment**, for the good faith performance of: (i) reporting or data preservation duties required under any federal or state law; or (ii) implementing a policy or attempting to prevent the presence of child pornography on any tangible or intangible property, or of detecting and reporting the presence of child pornography on the property. . .”

Educators are expected to report known criminal or degrading or humiliating conduct by students.

Thus, an educator who receives information about possible sexting and receives copies of the images as part of the report or the educator’s properly initiated investigation of the allegations, meets the standards of section 76-5a-3.

An educator who receives a sexting image from a student because the educator has failed to maintain proper boundaries with students, on the other hand, would be acting outside of the scope of employment and could be subject to prosecution.

An educator who receives an unwelcome, unsolicited sext message from a student should inform school administration and law enforcement at the first reasonable opportunity (it is reasonable to wait until a class is over, it may not be reasonable to wait until the end of a weekend).

Document your Investigation:

- **Who sent the image(s)?**
- **Who are the known recipients? School employees? Students?**
- **When? During school time? Was the image viewed during school time? Discussed at school?**
- **Was the message sent using school equipment in any way (e.g. school wifi service)?**
- **How did the school learn of the image(s)?**
- **Who sent the image(s) to the administrator? How did that person receive the image(s)?**
- **Has law enforcement been notified? When? Any delay between the time the image(s) was discovered and the call to the police? Why?**
- **Does law enforcement have the image(s)? Has law enforcement granted permission to delete the image(s) on other phones, computers, etc? Have the images been deleted?**