

August 26, 2010

Dr. Rick Schulte
Superintendent, Oak Harbor School District
350 S. Oak Harbor Street
Oak Harbor, WA 98277

**Re: Proposed Changes to Students and Telecommunication
Devices Policy**

Dear Dr. Schulte,

The ACLU of Washington is writing in regard to the changes proposed by the School Board to your Students and Telecommunication Devices policy (policy 4314). As a policy, the ACLU of Washington believes that to protect student privacy, school administrators should not search students' telecommunication devices without the permission of the student or parents.

As we understand it, the proposed revisions to the policy would prohibit students from sending, sharing, viewing, or possessing material of a sexually explicit nature on a cell phone or other electronic device while the student is at school. In addition, the policy revisions would permit school administrators to search the device when they have reasonable suspicion that such a search will reveal a violation of school rules. The revisions also state that “[c]ontent or images that violate criminal laws will be forwarded to law enforcement.”

We understand the school district's need to address the problem of sexting and other improper student uses of telecommunication devices, but we have concerns with several aspects of the proposed policy revisions. Our primary concern relates to the provisions allowing school administrators to search students' telecommunication devices without the permission of students or their parents. We recognize that schools are able to search students' backpacks or lockers without permission, if they have reasonable suspicion that materials inside violate school rules. But we believe that telecommunication devices are different. Unlike backpacks or lockers, telecommunication devices store a virtually limitless amount of highly personal information dating back months or years. This information includes a log of every call the student has made and received, along with whom they called, the content of every text message the student has sent or received, and frequently dozens of personal photographs. Smart phones, which most students will likely have within a few years, contain even more highly personal information, including emails, personal documents, and a record (in a browser cache) of what websites a student has visited.

In short, students carry a record of their personal lives on their phones. By searching a phone, administrators could determine a student's political views,

whether a student is having relationship problems, whether their parents might be considering a divorce, whether the student has personal health issues or is pregnant, and whether the student likes sports, World of Warcraft, or shopping for lingerie. This is vastly more information than can be found during a traditional backpack or locker search. In addition, in the case of backpacks and lockers a student has a clear choice to bring to school only what he needs for the day. Textbooks and school supplies go to school, whereas personal items like diaries stay home. With a cellular or smart phone, the choice is not so easy. Unless students take active steps to delete most things on their phones, everything comes to school in the phone, whether it is private or not. For these reasons, searching telecommunication devices impinges on student privacy significantly more than a traditional backpack or locker search.

By allowing searches of cell phones, the proposed revisions may open the school district and its administrators to civil and criminal liability. Both in Washington and elsewhere, school administrators have faced civil lawsuits after viewing images as part of sexting investigations. After school administrators in Bothell received a copy of a nude image of students and launched an investigation, one of the students' parents sued the school district. The parents claimed that the administrators knowingly viewed child pornography and, in the course of their investigation, shared that material with other adults. The parents state that these actions violated their daughter's privacy, and are seeking damages from the school district.¹

Similar cases have occurred around the country. A Pennsylvania student recently sued her school after a school administrator confiscated her phone and searched it. The student had violated school rules by making a phone call during school hours. During the search, the administrator found sexually explicit photographs and suspended the student. The student alleges that the administrator violated her constitutional rights.² In another incident in Virginia, a school administrator downloaded a sexually explicit photograph from a student's cell phone in order to launch a sexting investigation. The investigation got nowhere, but Loudoun County prosecutors charged the administrator with possession of child pornography.³ In all these cases, viewing the illegal images created more problems rather than resolving the issue through other means.

Further, allowing school administrators to look through students' phones is, by itself, unlikely to reduce the frequency of sexting among students. Most students who sext are not thinking about the potential consequences of their actions. If the potential for dissemination of the images, embarrassment and humiliation, and the risk of criminal prosecution does not deter them from sexting, then they will likely also not be thinking about the risk of having their phone searched at school. To reduce sexting, the school district should instead educate students about the potential dangers and consequences of the activity.

¹ First Amended Complaint, *Nielsen v. Northshore Sch. Dist.*, No. C08-1704 JLR (W.D. Wash. Nov. 25, 2008).

² Complaint, *N.N. v. Tunkhannock Area Sch. Dist.*, No. 3:10-cv-01080-ARC (M.D. Pa. May 20, 2010).

³ See Ting-Yi Oei, *My Students. My Cellphone. My Ordeal*, WASH. POST, Apr. 19, 2009.

The district can deter sexting at school by banning students from sending, sharing, or viewing sexually explicit material while at school. The proposed revisions include such a ban. We believe, however, that “sexually explicit material” should be specifically defined so that both students and administrators have reasonable notice about what is banned and what is not. We also believe that the policy should not ban mere possession of such material, since such a ban would be nearly impossible to enforce given that a student’s telecommunication device could contain such content without the student’s knowledge or consent. What matters is whether a student is viewing, sending, or sharing the material at school, not whether such material is inadvertently on a device as a result of a third party’s message or a student’s web browsing while away from school.

As currently written, the school district's policy states that school administrators will forward content believed to be in violation of criminal laws to law enforcement. To protect student privacy and to reduce the risk of civil or criminal liability for the district, we believe a more effective policy would be that school officials may seize devices that they reasonably suspect to contain illegal content and, without attempting to search the device, the school may offer to turn the devices over to law enforcement. Law enforcement officials must then proceed to obtain a warrant to search the device where there is probable cause to do so.

We have included some suggested revisions to Oak Harbor’s proposed policy consistent with the above comments. We believe that these suggested revisions would be effective in dealing with sexting and other issues raised by student cell phone use while also addressing our concerns. We look forward to working with you and the School Board to develop a policy that addresses the problems posed by modern telecommunication technology while also protecting student privacy rights.

Sincerely,

Brian J. Alseth
Technology and Liberty Project Director