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## LEGAL UPDATE

July 9, 2012

**To:** Superintendents, Member School Districts (K-12)

**From:** Kristina Jansen, Schools Legal Counsel  
Loren Soukup, Assistant General Counsel *LS KJ*

**Subject:** **ACLU Cell Phone Report of September 2011**  
**Legal Issues and Options**  
**Memo No. 18-2012**

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It has recently come to our attention that the ACLU of California (ACLU) has issued a report regarding students' rights in the context of cell phone confiscation and searches. (Attached) The ACLU presents their opinion of the issue as well as a thorough discussion of the issue of cell phones and anecdotes of times when students' cell phone privacy was not respected. The ACLU also provides sample cell phone policies for school districts to adopt. We have been asked by several districts to review this information packet and provide a response.

The discussion presented by the ACLU in this packet accurately depicts the law and is an important conversation for school districts and employees to have so that all employees have guidance on how to handle the issues that can and will arise as more and more students begin carrying cell phones on campus. For the same reason, it is important that school districts consider implementing a policy in regards to when cell phones are confiscated, when and how thoroughly they are searched, and when and how the cell phones will be returned to the student.

The ACLU provides two sample policies, a search and seizure policy and a cell phone, use, confiscation and searches policy. In regards to the search and seizure policy, the ACLU's policy is very similar to the one proposed by the California School Boards Association (CSBA) with some minor differences. The ACLU's sample policy does not provide as much direction as the CSBA sample policy. For instance, the CSBA policy provides specific examples of items that may be seized; the ACLU policy does not address the seizure of items.

The ACLU's policy does identify some times when searching a student would not be appropriate, "curiosity, rumor, hunch, mere disruptive activity...cannot form the basis for said reasonable suspicion." The CSBA policy does not provide examples of this nature. Ultimately, every district must form a policy that most closely mirrors the reality of their own district, while also reflecting the legal boundaries so that employees have direction when any of these issues arise. Either of these policies can form a basis for any district's policy, but neither should be adopted without modifications.

In regards to the sample cell phone policy, the CSBA does not have a sample policy for us to compare to the ACLU's policy. However, the ACLU's policy is consistent with case law and statutory authority on this matter. The ACLU identifies the competing interests of schools, parents, students, safety, and privacy rights, and, as with the search and seizure policy discussed above, their sample policy is a great place to start forming a policy that works for your district. The ACLU policy does have one glaring oversight, in that it does not discuss the extent of any search of a student's cell phone. Their bullet point 5 on page 14 of the report states:

Notwithstanding any other school policies on searches in general, absent reasonable suspicion of wrongdoing with the device beyond merely possessing it or having it turned on or out in the open, school district employees may not search any personal telecommunication device without the express authorized consent of the student and the student's parent or legal guardian.

The ACLU policy then fails to explain what could or should happen in the case where there is reasonable suspicion of wrongdoing with the device, such as information that the student has been sexting, using his or her cell phone to buy, sell, or distribute drugs, or any other violation of law or school policy. We recommend that another section be added to this sample policy.

If a school district employee reasonably suspects the student has engaged in activities or behavior with his cell phone that would break any school policy (other than mere possession of the cell phone) or any state or federal law, the school district employee should confiscate the cell phone. The school district employee may then search the student's cell phone so long as the search remains limited in scope and designed to produce evidence related to the alleged violation.

In other words, a school district employee should not search a cell phone when the student is suspected of cheating via text message by searching the student's photo albums or call list. The teacher should look specifically at text messages and then open only those text messages sent during the suspected cheating window. Similarly, if a student is suspected of "sexting" their cell phone should be searched only for photo and/or photo text messages containing inappropriate materials, their call logs, calendar, games, or notes applications should not be accessed.

Once again, while this policy is a good place to start forming a policy for your school district, each district must craft a policy that works for their own staff, students, board, and parents and reflects the reality that each district is different and a one-size-fits-all policy is not likely to cover all of the concerns of your district. Our office is happy to assist in modifying these policies to meet your District's concerns.

As always, if you have any questions or concerns regarding this legal update or any other issue facing your district, please do not hesitate to contact one of our attorneys.

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