ALAN WILSON
ATTORNEY GENERAL

May 9, 2011

Corporal Ricarda M. Fowler
Summerville Police Department
300 West 2nd North Street
Summerville, SC 29483

Dear Corporal Fowler:

We received your letter regarding incidents at public schools in your area involving confiscations of students' personal cell phones by school staff/administration, and the subsequent "searching, reading and looking at the contents of the cell phone." By way of background, you relate the following incident at a school:

> [a]dministration has been provided a "tip" that a student is in possession of illegal contraband (marijuana) while on the school campus. A search of the student and his personal belongings (book bag, outer clothing) reveal no contraband. The student had placed his cell phone on a table with contents from his pockets and an administrator stated they were able to visually observe a message on the phone that referred to "marijuana." At this time the administrator advised the student that they would now take possession of the phone and read the message and explore the contents of the cell phone in search of information that might lead them to contraband use or involvement. Law enforcement was notified via a phone call from the administration that the student might be a "subject of interest" regarding narcotics activity after exploring the contents of the cell phone. The contents of the phone were not revealed to law enforcement and no other information of the student having contraband on campus was located. The student was then advised that he was no longer allowed on campus and further information revealed that he might be in violation of school policy regarding "residency." No other information or documentation exists that this student is any other than a "model student."

Your letter further explains that although this is one specific incident, school staff/administration on other occasions have confiscated cell phones from students during their course of study after observing "sexting," inappropriate adult photographs (not pornographic), and inappropriate conversations. You state, however, that many incidents involve merely a "school policy violation," and that school staff/administration "randomly and without clear direction and with emphasis 'they could be breaking the

law' appears to be the catch all phrase used to solidify their motivation," as well as acting in *loco parentis*.

Regarding the confiscation of student cell phones by school administrators, you ask this office the following:

1. Is law enforcement on solid ground in charging a student or reviewing the cell phone information that is presented by school officials when obtained through these open ended searches?

2. Is there a need for concern that school officials may incur some form of liability, whether civil or criminal from these searches?

Law/Analysis

In previous opinions, we reviewed the general constitutional law in context of the use of drug enforcement dogs in public schools. Ops. S.C. Atty. Gen., February 22, 1996; October 16, 1989; August 28, 1984; June 25, 1981; January 23, 1979. This office has also advised regarding the validity of video equipment in classrooms for surveillance purposes. Ops. S.C. Atty. Gen., June 10, 1997; January 29, 1997. We are unaware of any prior decisions by this office or the South Carolina appellate courts concerning the validity of seizing student cell phones by school administrators under the circumstances presented in your letter.

At the outset, we note that there are several State statutes relevant to your inquiry. In particular, S.C. Code Ann. §59-63-1110 states:

> [a]ny person entering the premises of any school in this State shall be deemed to have consented to a reasonable search of his person and effects.

Section 59-63-1120 states:

> [n]otwithstanding any other provision of law, school administrators and officials may conduct reasonable searches on school property of lockers, desks, vehicles, and personal belongings such as purses, bookbags, wallets, and satchels with or without probable cause.

Section 59-63-1150 states:

> [n]otwithstanding any other provision of this article, all searches conducted pursuant to this article must comply fully with the "reasonableness standard" set forth in New Jersey v. T.L.O., 469 U.S. 328 (1985). All school administrators must receive training in the "reasonableness standard" under existing case law and in district procedures established to be followed in

> conducting searches of persons entering the school premises and of the students attending the school.

In addition, §59-63-280 (B) specifically addresses students' possession of paging devices on school campuses in South Carolina.

> The board of trustees of each school district shall adopt a policy that addresses student possession of paging devices as defined in subsection (A). This policy must be included in the district's written student conduct standards. If the policy includes confiscation of a paging device, as defined in subsection (A), it should also provide for the return of the device to the owner.

Subsection (A) defines a "paging device" as "a telecommunications, to include mobile telephones, device that emits an audible signal, vibrates, displays a message, or otherwise summons or delivers a communication to the possessor." Accordingly, Dorchester School District 2 has adopted a policy that prohibits the use of paging devices or cell phones by students while on school property during the instructional day, with the exception of students who need the device for legitimate medical reasons. (Policy JICJ).[1]

It is beyond question that school children do not shed their constitutional rights at the school house gate. Tinker v. Des Moines Independent Cmty. School Dist., 393 U.S. 503, 506 (1969). It is well recognized that school officials are subject to constitutional restraints as state officials. See, *e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) [due process hearing rights for school suspensions]; Tinker, supra [First Amendment rights available to students subject to application in light of special circumstances of the school environment]. We initially note that in T.L.O., the United States Supreme Court ("USSC") appeared to soundly reject the doctrine of in *loco parentis* as a rationale to justify a search of a student: The Court stated: "[i]n carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment." T.L.O., 469 U.S. at 336-37. The Court explained its reasoning as follows:

> [t]eachers and school administrators, it is said, act in *loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment [citation omitted]. Such reasoning is in tension with contemporary reality and the teachings of this Court. We have held school officials subject to the commands of the First Amendment . . . and the Due Process Clause of the Fourteenth Amendment . . . If school authorities are state actors for purposes of the constitutional

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[1]For elementary and middle school students, the devices will be returned to the parents/legal guardians for a first offense, and confiscated for the remainder of the school year for subsequent offenses. For high school students, the devices may be returned after payment of a $25.00 fine, or the device will be retained for the remainder of the school year. (Policy JICJ-R).

> guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." Ingraham v. Wright, 430 U.S. 651 (1977). Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies.

Id.; see DesRoches by DesRoches v. Caprio, 156 F.3d 571, 574 (4th Cir. 1998) [recognizing that searches and seizures carried out by school officials are governed by the same Fourth Amendment principles that apply in other contexts]; see also Tarter v. Raybuck, 742 F.2d 977, 981 n. 4 (6th Cir. 1984) [expressly rejecting the doctrine of in *loco parentis* as a means of avoiding application of the Fourth Amendment to school officials].[2] Thus, in light of the rather clear language of T.L.O., a persuasive argument could be made that the in *loco parentis* doctrine serves no purpose in cases involving the Fourth Amendment rights of public school students.

In determining whether the facts demonstrate a constitutional violation, a court's first task will be to determine what Fourth Amendment standard governs the conduct of school administrators. The Fourth Amendment protects "[t]he rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Board of Education of Independent School Dist. No. 92 v. Earls, 536 U.S. 822, 828 (2002). This "prohibition on unreasonable searches and seizures applies to searches conducted by public school officials." T.L.O., 469 U.S. at 333. To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. United States v. Sokolow, 490 U.S. 1, 8 (1989). Courts typically require that a search be conducted only pursuant to a warrant supported by probable cause. See Griffin v. Wisconsin, 483 U.S. 868, 873 (1987); State v.

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[2]Later, however, the Court added confusion when it referred to the powers school officials have over students as "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 665 (1995). Vernonia acknowledged "that for many purposes school authorities act in *loco parentis* with the power and indeed the duty to inculcate the habits and manners of civility." Id. [quoting Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986)].

We note that most recently, the USSC failed to clarify whether the in *loco parentis* doctrine has any significance in school search cases. See Safford Unified School Dist. No. 1 v. Redding, ___ U.S. ___, 129 S.Ct. 2633, 2637 (2009). In Redding, the Court reviewed the conduct of a school official who subjected a thirteen-year-old student to a search of her bra and underpants on the suspicion that she was secreting prescription and over-the-counter drugs. The Court held that the search violated the student's constitutional rights, but because the relevant law that surrounded the right was not clearly established, the school official who ordered the search was entitled to qualified immunity. Id. at 2644. In Justice Thomas' partial dissent, however, he urged the majority to adopt an in *loco parentis* standard to govern all school search cases, a point the majority declined to address. Id. at 2646, 2655 (Thomas, J., concurring in part, dissenting in part) [advocating for a "return to the common-law doctrine of in *loco parentis*" and a "complete restoration" of the doctrine].

Baccus, 367 S.C. 41, 625 S.E.2d 216, 221 (2006). However, a warrant is not required to establish the reasonableness of all government searches. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995). When a warrant is not required, probable cause is not invariably required either. Id. A search unsupported by probable cause can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Id. The USSC has held that a reasonable, articulable suspicion may be all that is necessary to satisfy constitutional requirements. T.L.O., 469 U.S. at 341; see also State v. Butler, 343 S.C. 198, 539 S.E.2d 414, 416 (Ct. App. 2000) ["Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause"].

The USSC has determined, however, that the school setting required some easing of the restrictions to which searches by public authorities are ordinarily subject. On three separate occasions, the Court has recognized that "special needs" exist in the public school setting, thereby permitting school officials to search a student without a warrant and without probable cause to believe that the student violated the law. See Earls, 536 U.S. at 838 [upholding the constitutionality of a school's policy to randomly drug test students participating in extracurricular activities]; Vernonia, 515 U.S. at 664-65 [rejecting Fourth Amendment challenge to random drug testing of student-athletes]; T.L.O., 469 U.S. at 340-41 [concluding that the probable cause and warrant requirements are unsuited to the public school setting].

These three decisions show that students retain a privacy interest while at school, but explain that the probable cause and warrant requirements are ill-suited in the school setting, because the requirements would overbear school administrators' and teachers' ability to maintain order and insure an environment conducive to learning. The Fourth Amendment's reasonableness inquiry, therefore, must account for "the schools' custodial and tutelary responsibility" over the students entrusted to their care. Vernonia, 515 U.S. at 656; see also see In Interest of Thomas B.D., 326 S.C. 614, 486 S.E.2d 498, 504 (Ct. App. 1997) [recognizing the "special needs" exception elucidated in T.L.O.].

T.L.O. remains the preeminent USSC case discussing fourth amendment rights of school students within the confines of the educational environment and the right of school officials to search an individual student based on a belief that the student violated a school rule.[3] In T.L.O., a teacher discovered two students smoking in the lavatory in violation of a school rule. The students were taken to the principal's office, where one student denied she had been smoking. At that point, the assistant principal demanded to see the student's purse and found a pack of cigarettes in it. The principal also noticed a package of cigarette rolling papers in the purse. Suspecting that a closer examination might lead to evidence of drug use, the principal thoroughly searched the purse and discovered a small amount of marijuana and other material which implicated the student in marijuana dealing. When delinquency charges were brought against the student, she moved to suppress the evidence found in her purse on the ground the principal's search of the purse violated the Fourth Amendment. Id., 469 U.S. at 328-29.

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[3]The Court in T.L.O. was careful to recognize that it was not addressing any Fourth Amendment applicability or analysis with respect to "lockers, desks or other school property provided for the storage of school supplies." T.L.O., 469 U.S. at 740, n. 5 [citing other court decisions in this context].

The USSC found that the Fourth Amendment applied to this situation. Notwithstanding Fourth Amendment applicability, the real question, noted the Court, was "the standard governing such searches." In that vein, the Court concluded that "school children may find it necessary to carry with them a variety of legitimate, contraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds." Counter-balancing that interest, however, was the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." Id., 469 U.S. at 341. Taking cognizance of the fact that "[t]he school setting also requires some modification of the level of suspicion of illicit activity to justify a search. . .," the Court held:

> [w]e join the majority of courts that have examined this issue in concluding that the 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 strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

Id.

The USSC specifically indicated a certain deference to the school's interest in an orderly learning environment by adopting a two-part "reasonableness" inquiry. Id. In such a case, the Court explained that the lawfulness of the search first depends on whether the official's search was "justified in its inception." Id. [quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)]. If so, the second inquiry is whether the search was reasonable in scope. Id.

A search is justified at its inception "when there are 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 341. A search is reasonable in its scope "when the measures adopted are 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." Id. [4]

The Court in T.L.O. did not, however, address the applicable standard in context of a cell phone search and seizure at a school. In fact, two commentators have recognized the "clear dearth of judicial

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[4]The Court also noted in T.L.O. that it was not addressing the question of what standard would apply when a search is conducted by school officials in conjunction with or at the behest of law enforcement agencies, and it expressed no opinion on that subject. T.L.O., 469 U.S. at 341, n. 7; see also Thomas B.D., 326 S.C. 614, 486 S.E.2d 498, 500-01 (1997) [holding that since the search of the student was not carried out by school officials, the reasonable suspicion standard of T.L.O. was inapplicable to the search conducted by a police officer]. Because the searches presented in your request letter have been conducted by school officials, we do not address in the opinion whether these warrantless searches violated the prohibitions against unreasonable searches and seizures under a "probable cause" standard.

review and literature examining the constitutionality of student cell phone regulations in the United States." Joseph O. Oluwole & William Visotsky, "The Faces of Student Cell Phone Regulations and the Implications of Three Clauses of the Federal Constitution," 9 Cardozo Pub. L. Policy & Ethics 51, 53 (Fall 2010). In the article, the authors stress the Fourth Amendment limitations imposed on school administrators when enforcing school regulation of student cell phones, and they analyze a Pennsylvania district court opinion addressing the issue you present. In Klump v. Nazareth Area School District, 425 F. Supp.2d 622 (E.D. Pa. 2006), school officials seized the cell phone of a student at a high school, after he displayed the phone in violation of the school's policy against display or use of cell phones during school hours. The school officials also looked through the student's text messages and listened to his voice mail. Moreover, they used the phone to call nine other students found in the phone's directory in order to determine if those students were also violating the cell phone policy. Posing as the student, they used the phone's Instant Messaging service to communicate with the student's brother. During a subsequent meeting about the events with the student's parents, the assistant principal informed them that, while the phone was in the school's custody, a text message came in from the student's girlfriend asking him to get her a "f* * *in' tampon." According to the assistant principal, tampon was "a reference to a large marijuana cigarette." The assistant principal subsequently used the student's cell phone to launch an investigation into drug use at the school. Klump, 425 F. Supp.2d at 627.

The student and his parents sued the school district and school officials, claiming a violation of his Fourth Amendment rights. The student and his parents contended that the school found that particular text message only after accessing his text messages. Id. at 631, 639. The school district argued that, pursuant to the test established in T.L.O., the search was "justified at its inception and was reasonable in scope." Id. at 639 & n. 26.

The school district relied on the text message from the student's girlfriend to support its contention that the search of the cell phone's contents and subsequent use of the phone by the assistant principal was justified at its inception. Id. The court in Klump noted that, according to the student, the text message was only discovered after the contents of the phone had been searched. Id. In other words, "[he] dispute[d] the factual premise by which [the school district] reach[ed] their conclusion that the search was justified at its inception." Id. Since the court was ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the court viewed the facts in the light most favorable to the student as plaintiff. Id. Accordingly, the court ruled the student had a cause of action against the school district for unreasonable search and seizure.

The court determined the seizure of the phone was justified "at its inception," because the student had violated the school's cell phone policy. It ruled, however, that the subsequent use of the phone to call the other students at the school, if proven, was an unreasonable search in these circumstances. Id. at 640. The court explained that at the inception of the phone seizure, the school officials had no reasonable suspicion the student was violating any other school policy beyond the cell phone policy itself. Id. Consequently, the court held there could be no reasonable suspicion that a search of his cell phone would reveal "evidence of other students' misconduct." Id. The court concluded, "there was no justification for the school officials to search [the student's] phone for evidence of drug activity." Id. at 261.

In their final analysis, the authors of the article state the following:

> [e]ssentially, the lesson from [Klump] is that to succeed in a search and seizure case, any school regulation of student cell phones (including the seizure of the phone as well as any subsequent search of its contents) must comply with each prong of the T.L.O. test and the reasonable suspicion requirement.

A somewhat analogous scenario was presented to a Mississippi federal district court in J.W. v. Desoto County School District, 2010 WL 4394059 (N.D. Miss. 2010). In this case, a seventh grade student was caught opening his cell phone to retrieve a text message during school in violation of school policy. The student closed the cell phone after a teacher requested it, but another school district employee seized the phone and then opened it to review the personal pictures stored on it and taken by the student while at his home. Several photographs stored on the phone depicted the student dancing in his home bathroom and one photograph, also taken in the bathroom, showed another student holding a B.B. gun. After viewing these photographs, the employee gave the cell phone to another employee, who pressed a button on the phone to view its contents, as the screen had gone dark. A police officer inside the office also opened the phone, examined the photographs, and then accused the student of having "gang pictures." The student was suspended from school pursuant to a school policy which prohibits students from "wearing or displaying in any manner on school property . . . clothing, apparel, accessories, or drawings or messages associated with any gang . . . associated with criminal activity, as defined by law enforcement agencies." Desoto County, 2010 WL 4394059, at *1.

The student's parent brought an action against the school district, seeking recovery against the suspension. She argued that while the phone itself was admittedly contraband, the pictures were personal and expressive in nature and taken at home, and were therefore protected by the Fourth Amendment and not subject to search by school officials. Id. at *1, *3.

The court dismissed the Fourth Amendment claims of the student. In assessing the reasonableness of the school district employees' actions under T.L.O., the court noted the crucial factor is that the student was caught using his cell phone at school in violation of school district policy. Upon witnessing a student improperly using a cell phone at school, the court held it was reasonable for a school official to seek to determine to what end the student was improperly using that phone. For example, the court reasoned it may have been the case that the student was engaged in some form of cheating, such as by viewing information improperly stored in the cell phone. It was also true that a student using his cell phone at school may reasonably be suspected of communicating with another student who would also be subject to disciplinary action for improper cell phone usage. Desoto County, 2010 WL 4394059, at *4. The court concluded the search in the case was justified at its inception, and that the search itself was "reasonably related in scope to the circumstances which justified the interference in the first place." Id.

The court further addressed the search of the cell phone by school officials in light of the Klump decision. The court explained that Klump presented a fact pattern where the student unintentionally violated school policy by having a cell phone which was not otherwise contraband fall from his pocket. The court noted the school officials in Klump appeared to use that accident as a pretext to conduct a wholesale fishing expedition into the student's personal life, in such a manner as to clearly raise valid Fourth Amendment concerns. In the case before it, however, the court explained the student conceded he

used the cell phone despite being aware of the policy against such contraband. In the court's view, the student's decision to violate school rules by bringing contraband on campus and using that contraband within view of teachers appropriately resulted in a diminished privacy expectation in the contraband. Moreover, it found the decision by the school officials in the case to merely look at the photos on the student's cell phone was far more limited, and far more justified, than that taken by the school officials in Klump. Desoto County, 2010 WL 4394059, at *4-5. Because of these facts, the court concluded the search of the student's phone itself was not contrary to clearly established law and was not a Fourth Amendment violation. Id.

We further reference a recent Virginia Attorney General opinion dated November 24, 2010, that discusses the seizure and search by school administrators of students' cell phones (and laptops) to combat "cyber bullying" and student "sexting." The opinion presented the following issues:

> [y]our 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, it is my general 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 [T.L.O.]. 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. [T.L.O., 425 U.S. at 341-42].
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> 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.
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> 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, the knowing possession and distribution of which is prohibited under [Virginia law]. Any person who distributes such material shall be punished by five to twenty years imprisonment, 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. 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.

It is important to note the South Carolina Constitution also provides a safeguard against unlawful searches and seizures. S.C. Const. art. I. §10. The South Carolina Supreme Court has recognized the relationship between the state and federal constitutions is significant, because "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." State v. Forrester, 343 S.C. 637, 541 S.E.2d 837, 840 (2001) [quoting State v. Easler, 327 S.C. 121, 489 S.E.2d 617, 625, n. 13 (1997)]. The Court in Forrester concluded that it may interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution. Forrester, 541 S.E.2d at 840.

In State v. Weaver, 374 S.C. 313, 649 S.E.2d 479, 483 (2007), a case involving the search of a vehicle in the back yard of a private residence, the South Carolina Supreme Court noted that in addition to language that mirrors the Fourth Amendment, S.C. Const. art. 1, §10 contains an express protection of the right to privacy: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ." Id. [Emphasis in original]. The Court stated: "[b]y articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution. . . . Accordingly, the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. The Court noted in Weaver, however, that the focus in the state Constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy in the vehicle to be searched. The Court concluded that once the officers had probable cause to search a vehicle, the state Constitution's requirement that the invasion of one's privacy be reasonable was met. Id.

Also relevant to the Fourth Amendment issue, in a non-school search context, is the USSC's recent decision in City of Ontario v. Quon, ___ U.S. ___, 130 S.Ct. 2619 (2010), which reversed a Ninth Circuit's decision that held a government employee had a reasonable expectation of privacy in text messages sent and received by a third party. The employee, a police officer, brought suit against the city, its police department, and police chief pursuant to 42 U.S.C. §1983, contending the police department's review of text messages sent and received on his department owned and issued pager violated the Fourth Amendment's proscription against unreasonable searches and seizures. Id., 130 S.Ct. at 2625-26.

The Court declined to decide whether the employee's asserted privacy expectations were reasonable, although it acknowledged the case "touches issues of far-reaching significance." Id. at 2624. After remarking that it "must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer," the

Court cautioned that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Id. at 2629. The Court explained: "In Katz [v. United States, 389 U.S. 347 (1967)], the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth." Id., 130 S.Ct. at 2629. In Quon, the Court found "[i]t is not so clear that courts at present are on so sure a ground" as to electronic devices. Id. Therefore, the Court stated that "[p]rudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations" in communications on electronic devices. Id. The Court specifically noted that ongoing "[r]apid changes in the dynamics of communication and information transmission" caused similar rapid change "in what society accepts as proper behavior." Id. at 2630.

To underscore its desire not to establish broad precedents as to privacy rights with respect to electronic devices and emerging technologies, the Court explained the difficulty in determining what privacy expectations are reasonable, stating:

> the Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.

Id.

Again, the Court refused to apply "a broad holding," finding it "preferable to dispose of this case on narrower grounds" and "settled principles." Id. at 2624, 2631. It thus declined to answer the constitutional question of whether the employee's privacy expectation was reasonable or even to set forth the governing principles to answer that specific question.[5] Instead, the Court (1) assumed *arguendo* the employee had a reasonable expectation of privacy, (2) assumed that the government's review of a transcript of his text messages was a search under the Fourth Amendment, and even (3) assumed principles governing a search of a physical office applied to "the electronic sphere." Id. at 2630-31. It then concluded that the employee's government employer did not violate the Fourth Amendment, because its review of his personal text messages on a government-owned pager was reasonable and motivated by a legitimate work-related purpose. Id. 2632-33.

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[5]The Court noted that, under the particular circumstances present in the case, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the government-owned pager was being used appropriately. Quon, 130 S.Ct. at 2631.

You also mention §§17-30-10 *et seq.*, the "South Carolina Homeland Security Act" ("HSA"). Several rules of statutory construction are applicable here. The primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature. South Carolina Coastal Conservation League v. South Carolina Dep't of Health and Environmental Control, 390 S.C. 418, 702 S.E.2d 246 (2010). "The text of a statute is considered the best evidence of the legislative intent or will." Peake v. South Carolina Dep't of Motor Vehicles, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007). When terms of a statute are clear and unambiguous on their face, there is no room for statutory construction and a court will apply the statute according to its literal meaning. Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457 (2007).

The HSA clearly applies to the "interception" of wire, electronic, or oral communications. "Intercept" is defined in §17-30-19(3) as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." [Emphasis added].[6] It is therefore a logical construction of the HSA to include only interceptions committed by a separate "electronic, mechanical or other device." Undoubtedly, based on the plain text of the HSA, the acquisition of communications from cell phones merely seized by school officials pursuant to a reasonable search would generally not involve an "intercept" within the meaning of the HSA.[7]

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[6]Section 17-30-15(4) defines "Electronic, mechanical, or other device" as:

> . . . any device or apparatus which can be used to intercept a wire, electronic, or oral communication other than:
>
> (a) any telephone or telegraph instrument, equipment, or facility, or any component thereof:
>
> (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by the subscriber or user for connection to the facilities of the service and used in the ordinary course of its business; or
>
> (ii) being used by a provider of wire or electronic communications service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of his duties; or
>
> (b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal.

[7]We note also the federal Wiretap law prohibits a person from intentionally intercepting, endeavoring to intercept or procuring any other person to intercept or endeavor to intercept "any wire, oral or electronic communication." 18 U.S.C. §2511(1) (a). The Act similarly defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. §2510(4).

Cases which have interpreted "intercept" support this conclusion. For example, in United States v. Meriwether, 917 F.2d 955 (6th Cir. 1990), agents lawfully seized a paging device belonging to a drug dealer. From the time of its seizure, the pager was activated by incoming calls. Agents monitoring the pager recorded forty incoming phone numbers. Several of the phone numbers recorded were followed by a "911" emergency code. One of the numbers, which appeared repeatedly with the "911" emergency code, was chosen at random and called by an agent. The agent spoke with a man identified as "Chester." During the conversation, "Chester" asked if the caller was "Boner". The agent replied in the affirmative. "Chester" then arranged to purchase drugs from the agent at a designated time and place. At the designated time and place, Meriwether appeared and identified himself as "Chester." The agents arrested him and seized money from his person. At trial, the court denied Meriwether's motion to suppress evidence of his phone number and all subsequent phone conversations with DEA agents. Id. at 957.

On appeal, Meriwether argued the seizure of his telephone number from the pager was an illegal "interception" and that all evidence obtained from that seizure should be suppressed The Sixth Circuit Court of Appeals disagreed, holding that the agent lawfully had possession of the paging device and by pressing the digital display button, he became a party to the communication. Thus, the agent did not "intercept" Meriwether's number when he displayed it. Id. at 960. The court further held the agent did not acquire the contents of the communication by "electronic, mechanical or other device" as proscribed by the definition of "intercept." It noted the agent, after legally obtaining the pager, simply pressed the digital display button and the challenged evidence appeared. The agent then visually observed the telephone numbers and recorded them. Because the agent did not utilize any electronic, mechanical or other device as proscribed by the statute, the court concluded the agent did not "intercept" Meriwether's telephone number within the proscription of the statute. Id.; see also United States v. McLeod, 493 F.2d 1186, 1188 (7th Cir. 1974) [where agent stood about four feet from defendant while she placed her call on a public telephone and he heard without using any device, he did not "intercept" the call and the conversation which he overheard was not subject to suppression]; United States v. Jones, 451 F. Supp.2d 71, 75 (D. D.C. 2006) [holding Wiretap Act, governing interception by government agents of electronic messages as they were transmitted, did not apply to cell phone text messages involving alleged drug dealers, preserved by electronic communication service providers, which government acquired from service providers pursuant to search warrants issued to companies], *rev'd on other grounds*, 615 F.3d 544 (D.C. Cir. 2010); State v. Gonzales, 78 Wash. App. 976, 900 P.2d 564, 567 (1995) [holding no violation of privacy act for police officer to answer phone in defendant's home in his absence because no device was used and no interception had occurred].

We also note several court decisions determining that only the acquisition of the contents of communications that occur contemporaneous with their transmission is governed by laws regulating the interception of electronic or wire communications. See, *e.g.*, Steve Jackson Games, Inc. v. U.S. Secret Service, 36 F.3d 457, 462 (5th Cir. 1994) [analyzing statutory text and legislative history and concluding that "Congress did not intend for 'intercept' to apply to 'electronic communications' when those communications are in 'electronic storage' "]; Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 878 (9th Cir. 2002) (holding that "for [an electronic communication] to be 'intercepted' in violation of the Wiretap Act, it must be acquired during transmission, not while it is in electronic storage"); United States v. Steiger, 318 F.3d 1039, 1048-49 (11th Cir. 2003) [holding that "a contemporaneous interception - *i.e.*, an acquisition during 'flight' - is required to implicate the Wiretap Act with respect to electronic

communications"]; State v. Bell, 142 Ohio Misc. 72, 870 N.E.2d 1256, 1262-63 (2007) [holding Ohio wiretap statute is properly characterized as referring to a "real time" acquisition of electronic information upon transfer, *i.e.*, wiretapping or electronic eavesdropping, as opposed to an after-the-fact seizure of stored information contained inside a computer]; compare with Jennings v. Jennings, 389 S.C. 190, 697 S.E.2d 671, 678-79 (Ct. App. 2010) [holding that federal Stored Communications Act's protection of communications in "electronic storage" extends to computer e-mails in "post-transmission" state].[8]

The last issue to discuss is whether liability may attach to a school district if a teacher or administrator conducts or participates in an unreasonable search. One possibility would be an action in federal court for damages which could be sought by filing a civil rights action under §1983 for violation of a student's Fourth Amendment rights.[9] A local governmental body such as a school district is a "person" under §1983. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). For a local government to be liable for its employee or agent, however, the action alleged to be unconstitutional must implement or execute a policy, ordinance, regulation or decision officially adopted by that body's officers. Id. at 670; see Moore v. Florence School Dist. No. 1, 314 S.C. 335, 444 S.E.2d 498, 499-500 (1994). A local government cannot be held liable in a §1983 action under a theory of respondeat superior. Id. A relevant case to the circumstances presented in your letter is Moore, where a high school student commenced an action against the school district alleging he was damaged as a result of an unreasonable search of his car on school grounds. The student relied on the T.L.O. decision and argued the school principal failed to follow school district policy allowing only a reasonable search based upon a reasonable belief, because the anonymous tip was insufficient to provide a reasonable suspicion to justify the search and the search was unreasonable in scope. The South Carolina Supreme Court held that, even if the search by the principal was deemed unreasonable as the student contended, it was not conducted pursuant to official school district policy and thus the school district was not liable under §1983. Moore, 444 S.E.2d at 500.

Individual officials or employees who commit the alleged constitutional acts may, however, be subject to §1983 suits. See Hafer v. Melo, 502 U.S. 21 (1991) [holding state officials sued in their individual capacities are "persons" for purposes of §1983]; Cone v. Nettles, 308 S.C. 109, 417 S.E.2d 523 (1992) [discussing §1983 suit against state official in individual capacity]. We note, however, that individuals are immune from liability for civil actions if they undertook the actions complained of in good faith in the performance of their duties and the acts do not violate any clearly established constitutional right. Harlow v. Fitzgerald, 457 U.S. 800 (1982). In an opinion dated June 24, 2003, we referenced the United States Supreme Court's decision in Wilson v. Layne, 526 U.S. 603 (1999), which articulated the

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[8]Although the HSA was raised in the complaint, it was not addressed in the decision.

[9]Section 1983 states, in pertinent part, that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

parameters of a public officer's liability under §1983 for that officer's alleged violation of an individual's federal constitutional rights by reiterating the standard for immunity from liability for an unconstitutional act. Therein, the Court explained:

> [g]overnment officials performing discretionary functions generally are granted a qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S., at 818. What this means in practice is that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639 (1987) (citing Harlow, supra, at 819; see also Graham v. Connor, 490 U.S. [386], at 397 [1989].
>
> In Anderson, we explained that what "clearly established" means in this context depends largely "upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S., at 639. "[C]learly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Id., at 640 (citations omitted); see also United States v. Lanier, 520 U.S. 259, 270 (1997).

Wilson, 526 U.S. at 515-16; see also Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894, 898-99 (1994) [finding police officer who led drug raid was not entitled to qualified immunity from apartment residents' civil rights claims arising from strip search, because the officer knew or should have known the strip search was not reasonable after the search of apartment revealed no narcotics or presence of individual informant said he had purchased drugs from]; Cone, 417 S.E.2d at 525-26 [holding that under federal civil rights statute, deputy sheriff was not liable, in his individual capacity, for injuries sustained by motorcycle passenger when motorcycle crashed during high speed chase where deputy was acting within course and scope of his employment, deputy merely pursued fleeing driver, and motorcycle crash was not caused by deputy].

We refer you to §§15-78-10 *et seq.*, the South Carolina Tort Claims Act, which is designed generally to immunize public officials from personal liability for their torts when acting within the scope of their employment. See Murphy v. Richland Mem'l Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995); Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998). Section 15-78-70 (a) provides that "[t]his chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the scope of his

official duty is not liable therefor except as expressly provided for in subsection (b)." Subsection (b) states that

> [n]othing in this Chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm or a crime involving moral turpitude.

Section 15-78-40 further provides that "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." "Government entity" means "the State and its political subdivisions." Section 15-78-30 (d). The Act defines "political subdivision" to include "school districts." Section 15-78-30 (h). In the present case, §15-78-30 (c) defines an "employee" as "any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty." The "'scope of official duty' or 'scope of state employment' means (1) acting in and about the official business of a governmental entity and (2) performing official duties." Section 15-78-30 (i). The Act is intended to cover those actions committed by an employee within the scope of the employee's official duty. "The provisions of [the Act] establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State." Section 15-78-20 (f); see also Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007); Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998) [noting that §15-78-20 (f) limits coverage to employees acting within the scope of official duty].

Finally, we note that immunity under the Tort Claims Act would not immunize an officer from a §1983 suit in state court. See Martinez v. California, 444 U.S. 277 (1980). The USSC has asserted that "[f]ederal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." Howlett v. Rose, 496 U.S. 356, 367 (1990). The Court explained that:

> [c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.

Martinez, 444 U.S. at 284 n. 8 [holding state law "sovereign immunity" defense was not available to school board in §1983 action brought in state court when such a defense would not be available if the action were brought in federal forum].

Conclusion

School districts may adopt policies prohibiting students from possessing cell phones on school property pursuant to statute. We believe that confiscation policies such as the one employed by Dorchester District 2 are constitutionally defensible and would most likely be upheld in the courts against any attack that it violates either the Fourth Amendment or the state Constitution. Although students retain privacy interests at school, a court will balance these interests against the State's substantial interests related to protecting and maintaining the learning environment of a school and the safety and welfare of students, most likely in favor of the latter.

We urge caution, however, because there is very little judicial review involving the seizure and search of student cell phones by school officials under the circumstances presented in your letter. School officials are subject to the strictures of the Fourth Amendment, and it is likely a court may find the in *loco parentis* doctrine serves no purpose in a case involving the Fourth Amendment rights of public school students. Students have a right to be free from unreasonable searches and seizures. While the meaning of "unreasonable searches and seizures" is different in the school context than elsewhere, it is evident a search should be conducted only if it is based on reasonable suspicion or reasonable grounds to believe that the search will uncover activity that is inimical to the safety and welfare of a student or other students or activity which is adverse to the educational atmosphere of the school, even though the Court held in T.L.O. that students clearly have a diminished expectation of privacy in the school setting. The legality of any search of a student will depend on the reasonableness, under all the circumstances, of the search. It is the opinion of this office the violation of school policy regarding cell phones, while justifying a seizure by a school official, would not support a wholesale fishing expedition by school officials into the contents of a cell phone. We advise that any search must comport with the T.L.O. requirements that there must be reasonable suspicion the particular student is either violating the law or the rules of the school beyond the cell phone policy. Thus, a court could likely find such a search would be permissible in its scope when the measures adopted under the circumstances are "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." In other words, the purpose underlying the search is an extremely critical factor. As we have attempted to point out, the issue presented is fact-specific and a court's analysis will depend upon what is reasonable under the particular circumstances in each case.

While we believe good arguments can be made to support such a policy where there is clearly reasonable suspicion of a violation of the law or school policy, this is as far as we are able to go at this point. Facts establishing whether there is a federal or state constitutional violation are beyond the scope of an opinion of this office and could only be established with finality by a court. Any policy should be carefully considered by the school board together with its attorney prior to its implementation in light of the federal and state Constitutions. The Tort Claims Act would generally immunize public officials from personal liability for their torts when acting within the scope of their employment. Also, depending on the facts in a particular situation, there could be the possibility of a suit under §1983 in circumstances of the deprivation of constitutional rights. School officials might be entitled to a qualified good-faith immunity from liability for damages under §1983, but they are not immune from such liability if they knew, or reasonably should have known, that the action they took within their sphere of official responsibility would violate the constitutional rights of the student affected, or if they took the action with the malicious

intention to cause a deprivation of such rights or other injury to the student. Conduct by persons acting under color of state law which is wrongful under §1983 cannot be immunized by the Tort Claims Act. However, again, each situation must be evaluated on its own.

If there are any questions, please advise.

Very truly yours,

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Senior Assistant Attorney General

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