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Via U.S. Mail & Facsimile (804-786-1991)

The Honorable Kenneth T. Cuccinelli II
Attorney General of the Commonwealth of Virginia
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Re: School Searches / Advisory Opinion of November 24, 2010

Dear Attorney General Cuccinelli:

The United States Supreme Court has declared that students do not shed their constitutional rights at the schoolhouse gate, *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969). Nevertheless, your recent advisory opinion to Delegate Robert B. Bell on searches by school officials flies in the face of this "unmistakable holding" by undermining and violating the fundamental privacy rights of students guaranteed by the Fourth Amendment to the United States Constitution and encouraging school officials to do so as well.

I would expect someone in your esteemed position to be a judicious and stalwart guardian of the rights of *all* citizens of the Commonwealth, irregardless of age or circumstance. However, your opinion provides only grudging acknowledgment of the rights of students and is an open invitation to school officials to become cyberpolice and seize and search student effects in the first instance of alleged malfeasance without considering whether such an intrusion is actually justified and/or even necessary. While we all want our schools to be safe and nurturing environments for our children, your opinion does nothing to further that aim. Instead, I fear its only accomplishment will be to transform our schools into authoritarian police states that undermine the schools' true

purpose of imparting respect for individual rights and educating our young people about their civil liberties.

In setting out the applicable law on searches by school officials, your opinion fails to recognize the privacy rights of students and shows little consideration of the circumstances under which school officials are justified in invading that privacy. It is clear that students retain their Fourth Amendment right to privacy when they are on school grounds, including a right to privacy in the property and effects they possess. *DesRoches by DesRoches v. Caprio*, 156 F.3d 571, 576 (4th Cir. 1998). Indeed, your opinion fails to mention that the Supreme Court has held that a search of students' private effects "is undoubtedly a severe violation of subjective expectations of privacy." *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985). Your opinion instead improperly implies that school officials have *carte blanche* to seize and search the property and effects of students upon *any* report of misconduct. This is clearly not the case.

The fundamental problem with your opinion is it gives virtually no consideration to the fundamental questions school administrators should ask themselves in determining whether there is "reasonable suspicion" that a student has violated school rules or the law and whether there is legal justification for seizing and searching the student's personal property. These include the degree to which known facts imply prohibited conduct, the specificity of the information received and the reliability of the source. *Safford Unif. Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009).

But these factors are ignored when, in answering Delegate Bell's question about whether a school official may seize and search a student's cell phone or laptop when another student reports he has received a text message in violation of the school bullying policy, you write: "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[.]" As such, your opinion clearly encourages school officials to immediately conduct a search of an accused student and his or her effects without requiring that the official first determine whether there is a legally sufficient justification for doing so.

In particular, it is crucial that school officials consider the credibility of student reports of misconduct of the kind posed by Delegate Bell's question, yet your opinion wholly fails to advise officials to give consideration to this factor before conducting a student search. Children may have any number of motives for accusing a classmate of misconduct, from rivalries over the affections of others to some perceived slight on a social networking site. School administrators must not accept at face value and without any degree of skepticism reports from students of misconduct or violations of the law by other students, especially when such reports are to form the basis of encroaching upon students' inviolable constitutional right of privacy.

Instead, your opinion should have instructed administrators to seek corroborating information buttressing the credibility of the accusation before resorting to a seizure and search of devices that, for contemporary youth, have become the place where their most intimate information is housed. Your opinion does not even mention the possibility of attempting corroboration but instead suggests that school officials may proceed directly to seizing and searching the effects of a student based solely upon an accusation of "cyber bullying."

For example, a school official who is told that a "bullying" text message has been sent should at a minimum require the accuser to show the text message on his device to the official. However, your opinion fails to acknowledge any duty on the part of school officials to corroborate facts in even the most basic and common sense way. Instead, you advise school officials to invade a student's privacy rights based upon nothing more than a bald, unsubstantiated accusation. Indeed, your opinion suggests that the continued existence of the alleged offending message on the accuser's phone is simply a "factor" officials should consider, whereas its absence should give rise to serious doubts about the veracity of the accuser. Your advice creates a grave danger to the Fourth Amendment rights of students.

Additionally, your opinion pays mere lip-service to the principle that any search by school officials must not be "excessively intrusive" given the nature of the infraction. In fact, school officials may not search anything and anywhere even when they have reasonable suspicion that some violation of the law or school rules has been committed. The search must be limited to match the justification for the search. *See Redding*, 129 S. Ct. at 2643 (strip search of student was not justified by an accusation that she had given out ibuprofen and naproxen-sodium; the content of the suspicion failed to match the degree of intrusion).

In the situation posed by Delegate Bell's question, there does not appear to be any necessity for examining the suspected student's list of text messages and other private information on a cell phone in order to confirm the accusation of cyber bullying. The accusation could be corroborated with minimal intrusion into the privacy of the accused student simply by determining whether the accused student's cell phone number matches the number attached to the offending message. Instead of advising officials to limit their intrusion so that it is not excessively intrusive, your opinion invites school officials to act as cyberpolice and conduct a full-scale search of a student's belongings that is clearly "excessively intrusive" in light of the needs presented.

It is not the business of the state or school officials to pry into the private lives and thoughts of students. Cell phones and laptop computers have become the preferred mode of communication among youth and where they engage in discussions about the most intimate aspects of their lives, from their sexual identities to their fears and frustrations. Contrary to the opinions of some, searching a student's cell phone or laptop is not like seizing a note being passed between students during class. The breadth of

personal information on modern electronic devices dwarfs that divulged in a mere note, and searching a cell phone or laptop invades the sanctity of the individual to a much greater degree. While students should feel secure in their ability to conduct private electronic discussions among their friends, your opinion serves only to undermine that privacy and security.

Apart from the general encouragement of school officials to search student effects, your opinion also raises troubling issues in the context of the specific hypothetical presented by Delegate Bell. The fact that the case presented involves investigating and punishing students for expressive activity, *i.e.* "cyber bullying," raises significant First Amendment questions for school officials. While students are not free to engage in disruptive or threatening expression while on school property, school officials' authority over students is limited with respect to expression that occurs *off* campus; "the reach of school authorities is not without limits" and the fact that a school could discipline a student because of the content of speech engaged in at school does not necessarily mean it has the power to discipline a student for speech that occurs outside of school. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, 260 (3d Cir. 2010), *pet. for reh'g en banc granted* Apr. 9, 2010 (citing *Morse v. Frederick*, 551 U.S. 393, 404 (2007)). Thus, courts have held that a school may not discipline students for the content of a newspaper produced outside of the school, *Thomas v. Bd. of Education*, 607 F.2d 1043 (2d Cir. 1979), or for a speech delivered outside of the school context. *Morse*, 551 U.S. at 260.

Similarly, school officials should not be policing student-to-student speech that occurs off-campus. In your opinion's hypothetical, there is no consideration given to whether the allegedly offending message was sent while the students were *outside* of school, which would greatly affect the school's authority to conduct a search of the accused student's effects. While school officials should be sensitive to reports of harassment and intimidation even if they occur off-campus, their enforcement authority should be exercised only when these incidents occur within the school environment. No matter what, officials should discuss accusations of bullying with the parents of the affected students or, when and if appropriate, law enforcement officials.

Additionally, the concepts of "cyber bullying" and "sexting" posited in Delegate Bell's question are wholly vague, and attempts by school officials to police "cyber bullying" and "sexting" present significant risks to First Amendment freedoms. "Cyber bullying" or "bullying" are not defined in the Virginia Code, nor is "sexting." A policy of the School Board of Albemarle County, where Delegate Bell resides, on bullying and harassment, similarly fails to provide clear guidance on what conduct is forbidden, providing that it "includes, *but is not limited to*, physical intimidation, taunting, name-calling, and insults and any combination of these activities." Albemarle County School Board Policy JBA (emphasis added).

When laws or regulations target expressive activity, it is crucial that they not be unduly vague but identify with specificity the prohibited conduct. Where a vague regulation abuts upon areas of First Amendment freedoms, it serves to inhibit the exercise of those freedoms. "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). Additionally, vague regulations are prone to arbitrary and unequal enforcement because there are insufficient standards to guide school officials. These problems certainly apply to the idea of "cyber bullying" and "sexting" addressed in your opinion and are additional reasons school officials should, contrary to the opinion, be wary of acting as law enforcement officers. Indeed, your opinion will certainly be read by many school administrators as an invitation to seize and search the private effects of students upon the pretext that constitutionally protected expression by the student is construed by the official to constitute "cyber bullying," a term lacking in definition.

In conclusion, your opinion is an ill-advised invitation to school officials to invade the Fourth Amendment rights of students. Instead of encouraging school officials to carefully weigh whether the information presented justifies the severe intrusion into the privacy of students that would result from the search of cell phones and laptops, your opinion encourages school officials to search first and ask questions later.

If this advice takes hold with school officials, it will only serve to severely undermine the rights of students and their respect for the law. As the Supreme Court has warned: "'That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.'" *T.L.O.*, 469 U.S. at 334 (quoting *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

Sincerely yours,

John W. Whitehead
President

cc: Virginia Board of Education
Delegate Robert B. Bell