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PETRARCA, GLEASON,
BOYLE & IZZO, LLC
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SEARCHING SMART PHONES: DIGITAL CONTENT SUBJECT TO 4TH AMENDMENT PROTECTION

The United States Supreme Court has recently issued opinions restricting law enforcement searches of the digital content of smart phones. Those decisions should have implications for school officials' searches of student phones, as well.

The Fourth Amendment to the United States Constitution protects our right to be secure in our "persons, houses, papers and effects against unreasonable searches and seizures…" and requires that law enforcement obtain a search warrant "particularly describing the place to be searched…" More than 200 years ago, the Framers had no concept of modern communication devices which are so much a part of our lives. On June 25, 2014, the United States Supreme Court issued decisions in two cases, *Riley v. California* and *United States v. Brima Wurie*, addressing how the Fourth Amendment applies in the age of

19730 Governors Highway, Suite 10, Flossmoor, IL 60422-2083
Telephone: **708.799.6766** | Facsimile: 708.799.6866

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BOYLE & IZZO, LLC
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digital technology. While *Riley* and *Brima Wurie* were criminal cases, they raise considerations for educators whose responsibilities include the detection of disciplinary offenses that sometimes also constitute violations of the law and involve local police departments.

In an 8-1 decision, the Supreme Court ruled that police officers, who lawfully seized the cellphones of criminal defendants upon their arrest, violated the Fourth Amendment when they conducted a search of the phones' digital contents without first obtaining a warrant. The Court determined that police officers may seize a cell phone and search its hardware for weapons and evidence of a crime to protect the safety of police officers and to prevent the distribution of evidence. However, recognizing that modern cell phones are "mini computers" containing photographs, phone logs and Internet search capabilities and records, and that they are akin to "logs" and "diaries," the Court concluded that the Fourth Amendment prohibits law enforcement from reviewing the digital contents of a cellphone phone without first obtaining a warrant.

Of course, these Supreme Court decisions curtailed the power of *law enforcement* to conduct warrantless search of

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cell phones – not school administrators. Nonetheless, the decisions merit consideration by school officials.

The Court previously ruled in the 1985 case of *New Jersey v. T.L.O.* that even though students have a reasonable expectation of privacy in their persons and personal belongings, *school officials, unlike police officers, do not have to have probable cause, but only a reasonable suspicion, that student is in possession of fruits and/or instrumentalities of criminal activity, and/or contraband, to conduct a warrantless search of a student*. Moreover, searches by school officials are subject to a two-part "reasonableness" test. Provided that school officials are, first, able to point to factual circumstances which justified their decision to seize a student's phone and, second, limit the scope of their search of its content to the circumstances which justified the seizure in the first place, the Supreme Court's ruling should have no impact on their authority to conduct warrantless searches of student's phones. But, as with any item of personnel effects, justification for the initial search alone does not necessarily justify a highly intrusive examination of the item's contents.

Moreover, the application of the decisions to schools

becomes more complicated by the regular involvement of local law enforcement with school district disciplinary processes. Many police departments have resource officers (RSO) who are assigned to schools. Other times, police officers may be called in by school officials to conduct a search with or without the assistance of school officials. Or, school officials may confiscate a telephone and turn it over to the local police. Even though the Illinois Supreme Court has decided that RSOs are held to the same reasonableness standard as school officials, and the Illinois School Code states that students do not have a reasonable expectation of privacy in their lockers and their personal belongings in a locker, school officials should exercise caution before seizing a cell phone and searching its contents in conjunction with the local police because, depending on the extent of and circumstances surrounding the police involvement, police officials may be held to the more stringent probable cause standard instead of the reasonable suspicion standard that applies to school officials acting without law enforcement involvement.

This is an evolving area of the law. Therefore, school administrators should consult with legal counsel when

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considering a search of cell phone contents. If you have any questions, please contact one of our attorneys at our Flossmoor Office at 708-799-6766.