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October 10, 2007

Board of Education
Boulder Valley School District
6500 Arapahoe
Boulder, CO 80303

By United States Mail and email to bvs.board@bvsd.org

To the members of the Boulder Valley School District Board of Education:

We write to ask you to resolve a serious civil liberties issue at Monarch High School. Monarch Administrators have been unjustifiably violating students' right of privacy by unreasonably confiscating their cell phones and reading and transcribing students' text messages. Administrators have reportedly declared that a student has no right of privacy while in school, and they have reportedly claimed the right to read any and all text messages they please.

Monarch administrators could not be more wrong. Students *do* have rights of privacy, and those rights are protected not only by the state and federal constitutions, but also by Colorado statutes that carry serious criminal penalties. The actions of Monarch administrators have violated these Colorado criminal statutes and the constitutional rights of Monarch students.

We ask the Board of Education to take action. Administrators at Monarch High School must stop seizing and searching students' cell phones in violation of state and federal law.

The ACLU learned of the actions of Monarch administrators in multiple interviews with Monarch students and their parents. The interviews began with students' complaints about a series of interrogations that took place at the end of the 2006-2007 school year during which their cell phones were seized and their text messages searched and transcribed. Follow-up conversations with the parents also included complaints that administrators were less than forthcoming and even disrespectful in the manner in which they handled parents' concerns about the investigation of their children. The following summarizes what the ACLU learned in these interviews:

On May 24th, 2007, the school's security officer detained a student who was accused of violating two school rules: one that prohibited him from being in a particular parking lot, and another that forbids smoking cigarettes. The investigation of these relatively minor violations of school rules soon led to a series of interrogations in which administrators questioned numerous students and carried out a wholesale search of multiple cell phones.

The security guard delivered the student to the office of Drew Adams, Assistant Principal of Monarch High School. Adams ordered the student to empty his pockets and his backpack, presumably to look for cigarettes. No cigarettes were found, nor did the search uncover

evidence of any other infractions. At that point, the search should have ended. Monarch administrators, however, were determined to go much further.

Adams asked the student to turn over his cell phone. The student protested and asked Adams why he wanted the phone. Adams replied that the phone “was a distraction,” and he did not want the student to send text messages while he was detained in the principal’s office. After confirming that the cell phone was turned off, the student reluctantly surrendered it. Adams took the phone and left the office.

When Adams returned some time later, it became immediately clear that he had not been truthful about the reason he wanted the student’s cell phone. Adams declared that he had read the phone’s text messages and had found some that mentioned marijuana that he characterized as “incriminating.”

Adams began interrogating the student about the text messages. The student asked that his mother be present, and Adams agreed to call her. When the student’s mother arrived, she learned that Adams had not merely read the text messages—he had also transcribed many of them. He produced a copy of the transcribed messages, which administrators eventually placed in the student’s disciplinary file. The disciplinary files of additional students soon contained transcripts of text messages found on their cell phones.

The student’s mother wanted the cell phone returned, but Adams insisted on keeping it over the Memorial Day weekend. When the student’s mother finally recovered it the following Tuesday, she discovered that Adams had apparently drafted a text message and had attempted to send it from her son’s phone to one of her son’s friends.¹ The text message appeared in the phone’s outbox with an unambiguous time and date stamp showing that it was drafted while Adams had possession of the phone. The text message itself appeared to be Adams’ attempt to engage the receiving student in a conversation while Adams was falsely representing himself as a student.

Monarch High School authorities followed up with a cascade of additional interrogations accompanied by seizures and searches of additional students’ cell phones. In conjunction with assistant principals Julie Wheeler, Mark Sibley and Principal Barbara Spelman, Adams used the names found in the first student’s text messages to call in more students, interrogate them, seize their cell phones, scour through their personal text messages, and transcribe additional text messages that administrators deemed to be “incriminating.” Using more names gathered in this second round of questioning, school administrators expanded the runaway investigation with yet another wave of interrogations and cell phone searches. In one case, Adams held one of the students’ cell phones in his hand, and while the student was detained in the office, Adams read and transcribed incoming text messages as they arrived.

The ACLU spoke with many of the parents and over a dozen students who were drawn into these successive waves of interrogations and cell phone searches. The ACLU did not speak with

¹ The text message was not sent because the student’s mother had cancelled the service over the weekend.

everyone, so the total number of students affected is certainly higher. From these interviews, a number of patterns emerge.

First, it is clear that Monarch school administrators believe, erroneously, that they have an unfettered right to seize a student's cell phone and rummage through and transcribe any and all text messages they find. When students questioned whether Adams had the authority to read their text messages, he replied that when they were on school property, he had the right to read any text messages he wanted. Similarly, Principal Spelman reportedly told one parent that Monarch High School students simply had no privacy rights.

Second, school administrators repeatedly misled students and parents in order to gain possession of the students' cell phones. Most students report being told by school administrators that they wanted to take custody of the cell phone only to prevent text messaging during the meeting. Parents report receiving the same false assurances. In one case, a student who had initially balked at surrendering his cell phone did so on his mother's instruction after Mr. Adams called the mother and claimed that the only reason he needed it was to prevent any disrupting use of the phone during his meeting with the student.

Third, school administrators hindered students' efforts to involve their parents and obstructed concerned parents' efforts to obtain accurate and complete information about the school's investigation of their children. Two students reported that over an extended period of time, they repeatedly requested and were denied an opportunity to call their parents. In one case, a student was denied permission to call his parents even though the school day had long since ended and his parents were expecting his call. Parents endured repeated delays and what they perceived as callous carelessness and bureaucratic evasiveness when they tried to obtain accurate and timely copies of the transcripts of their children's text messages, transcripts which administrators placed in students' permanent files. School officials delivered the transcript of one student's text messages to the parents of an entirely different student. Parents also complained about inaccurate transcripts. For example, a student who was merely the passive recipient of a transcribed text message was erroneously identified as the sender.

Finally, it appears that this is not the first time that Monarch High School administrators have abused their authority to seize and search students' text messages. While the wave of successive searches and interrogations conducted in May of 2007 is an especially egregious example, students and parents also mentioned two additional incidents in which Monarch school administrators seized students' cell phones and searched through their text messages. Indeed, parents report that the actions of Monarch administrators have been endorsed and ratified by the school district's legal counsel. Without action from the BVSD Board of Education, similar abuses are likely to occur in the future.

The BVSD Board of Education must take action to educate Monarch High School administrators and put a stop to these abuses. Contrary to the statements of Monarch administrators, students do indeed have privacy rights while in school, and those rights are protected by law. The actions of Monarch High School authorities violate state and federal constitutional provisions that forbid

unreasonable searches and seizures. They also violate Colorado statutes that carry serious criminal penalties.

Searching and transcribing students' text messages as described in this letter is a class 6 felony under a Colorado criminal statute enacted to protect the privacy of telephone and electronic communications. The statute appears in Section 18-9-303 of the Colorado Revised Statutes ("C.R.S."). As provided in subsection (1)(a), a person violates this statute if he or she knowingly "reads, takes, copies, or records a telephone, telegraph, or electronic communication," without the consent of either the sender or receiver. The text messages at issue here constitute telephone or electronic communications. It is clear that Monarch administrators read, copied, and recorded those communications without consent. In the absence of a warrant – which administrators did not and could not have obtained – the inescapable conclusion is that these searches of students' text messages are felonies under Colorado law.

A separate Colorado statute, titled "telecommunications crime," also applies to the actions of Monarch High School administrators. *See* C.R.S. § 18-9-309. Subsection 18-9-309(2) provides that a person is guilty of a misdemeanor if he or she knowingly "accesses, uses or manipulates . . . any telecommunications device without the authority of the owner or person who has the lawful possession or use thereof." It is clear that Monarch administrators accessed, used, or manipulated students' cell phones without the owners' authority or consent.²

In addition to violating Colorado criminal statutes, Monarch High School administrators also violated students' constitutional rights. The Fourth Amendment protects students' right of privacy by prohibiting unreasonable searches and seizures. In *New Jersey v. T.L.O.* 469 U.S. 325 (1985), the Supreme Court explained how the Fourth Amendment applies when school administrators carry out searches and seizures to investigate alleged violations of school rules. The Court explained that a search and seizure is reasonable only if it is "justified at its inception" and "reasonable in its scope." *Id.* at 341. The Court defined the test as follows:

[A] search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up

² The statute forbidding "telecommunications crime" provides an exception for law enforcement officers, correctional officers, prison wardens, and jail staff. Even if this law enforcement exception could somehow be interpreted to include school administrators (who are not engaged in law enforcement activity), the exception applies only to actions carried out "in the normal course of the . . . official's employment activities or duties." C.R.S. § 18-9-309(5)(b). Searching students' cell phones and transcribing the contents of text messages is surely not included in administrators' standard job description. This is especially evident in light of the absence of any school district policy authorizing or encouraging administrators to seize cell phones, access their content without consent, and read and transcribe the text messages. Even if the exception in the "telecommunications crime" statute could be stretched to insulate the actions of school administrators, (and such an interpretation is doubtful), there is no similar exception in the separate statute (C.R.S. § 18-9-303) making it a felony to read, copy, or record a telephone or electronic communication without consent.

evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible 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. at 342 (internal quotations and citations omitted).

The searches of students’ text messages clearly violated this constitutional standard. When there is a reasonable basis to suspect a student of smoking cigarettes, a search for evidence of that rule violation may be “justified at its inception.” But to be “reasonable in scope,” the search must be reasonably related to the objective that justifies it, and it cannot be excessively intrusive.

A student who is legitimately suspected of smoking cigarettes might reasonably be subjected to a search of his backpack and his pockets. Indeed, the decision in *New Jersey v. T.L.O.* concerned a similar search for evidence of smoking. But the search of the Monarch student suspected of smoking cigarettes went too far after administrators found nothing in the student’s pockets or backpack. No reasonable person could have believed that extending the search to the cell phone and its text messages would turn up evidence related to alleged cigarette-smoking. Thus, the search of the student’s cell phone violated the Fourth Amendment because it was not reasonably related to the initial justification for the search.

Searching a student’s cell phone in such a case also fails the Fourth Amendment standard because the search is “excessively intrusive.” *Id.* at 342. While a search of pockets or a backpack reveals a finite number of tangible physical items, cell phones are different. They are a portal to a wealth of personal and private information—easily accessible at the push of a few buttons—that has nothing to do with the suspected violations of school rules. Cell phones contain logs of all incoming and outgoing calls, logs and records of text messages, and contact information not only for friends and family, but also for doctors, therapists, and counselors. Students’ phones may contain hundreds of text messages, including personal messages related to medical or mental health care, private family issues, and communications with friends or boyfriends or girlfriends that are personal or embarrassing but evidence no violation of school rules. They may reveal that a student is seeking birth control, contemplating an abortion, questioning his or her sexual identity, or receiving counseling regarding HIV. The cell phone’s store of information is not limited to the private information of the phone’s owner—a search also reveals information about the private lives of the owner’s correspondents—persons who are not suspected of any violations of school rules. Cell phones may contain photos and video clips, logs of websites visited, passwords, instant messaging records, personal audio recordings, and emails. The phone’s email account may be connected to a family email account, providing access to email of other family members and even the family computer itself.

There is no way to limit a search of text messages to those that may arguably be relevant to the suspected violation of a school rule. Accordingly, such a search is seldom, if ever, “reasonable in scope” under the Fourth Amendment standard, because it is excessively intrusive.

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The searches at issue here also violate the state constitution's ban of unreasonable searches and seizures. While the state constitutional standards often mirror the Fourth Amendment standards, in some cases the Colorado Supreme Court has held that the state constitution prohibits searches that the Fourth Amendment would allow. *See, e.g. People v. Sporleder*, 666 P.2d 135 (Colo. 1983). Because the cell phone searches described in this letter violate the Fourth Amendment, they also violate the stricter standards of Article II, Section 7 of the Colorado Constitution.

In conclusion, Monarch High School administrators have violated Colorado criminal statutes that are designed to protect the privacy of telephonic and electronic communications, as well as state and federal constitutional provisions that prohibit unreasonable searches and seizures. They have declared that Monarch students have no rights of privacy that administrators are bound to respect. Without intervention by the Boulder Valley School District Board of Education, there is every indication that Monarch administrators will continue this flagrant disregard for the rights of students and the rule of law. It is imperative that the Board of Education intervene forcefully. The Board must direct administrators to stop conducting these cell phone searches that violate state and federal law.

Sincerely,



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