LEGAL ISSUES REGARDING STUDENT MOBILE PHONES: CONSIDERATIONS OF AUSTRALIAN CONTEXT AND CASE LAW FROM UNITED STATES PUBLIC SCHOOLS

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The advent of mobile phones has created new challenges for schools in maintaining student order and positive learning environments. The approach taken in many countries is to develop policies on phone use by students that address whether students may bring phones onto school sites, limits on their use on the school site, and consequences for breach of policy—including confiscation and student suspension. This article considers policy in general, in Australia more specifically, and in the absence of any Australian case law, turns to the US to examine statutory and policy directions and case law on student challenges relating to mobile phones. Several issues in the US challenges are considered including, seizure of phones in public schools; accessing content stored on phones; constitutional challenges of invasion of privacy; and intrusion on parents' rights in educating their child. The conclusion of the article is that, regardless of jurisdiction, sensible policies are necessary to direct schools and students in appropriate use of mobile phones in schools.

I THE IMPACT OF TECHNOLOGY ON SCHOOLS: STUDENTS AND MOBILE PHONES

Rapid changes in technology and communication are resulting in changing issues for maintaining good order in schools, minimising disruption, and ensuring student safety. Appropriate and inappropriate use of mobile phones by students, in school and outside school, is one such issue being addressed worldwide.[1] The most serious misuses of mobile phones causing concern for educators involve uploading of inappropriate personal images, images of other students and cyberbullying.[2] Misuse can result in criminal offences, with resultant import for students, or create civil liabilities if another child suffers harm as a result of such misuse of phones. More commonly, schools are concerned with potential disruption of mobile phone use to teaching and learning and the education of other students. What might be disruptive to good order or misconduct in many education systems, however, is frequently left to the discretion of school principals.[3] In many countries, common interpretations of appropriate phone use have led principals to institute policies that incorporate either a complete ban on the use of mobile phones in school class time or on the carrying of mobile phones on school premises.[4]

Such policies are common in Australia across all schooling, that is, in government schools and nongovernment schools (Catholic and Independent). All schools, government and nongovernment,

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must comply with federal and state legislation to gain accreditation or registration and also to receive support funding The Australian federal and state and territory ministers of education[6] are thus able to set overall policy expectations for all sectors These ministers have endorsed a *National Safe Schools Framework*,[7] which identifies the need for schools to have '[w]hole school, collaboratively developed policies, plans and structures for supporting safety and wellbeing' and '[a]greements for responsible use of technology by staff and students',[8] which, in light of identified concerns, could be expected to encompass mobile phone use by students.[9] Thus while individual school policies may vary in Australia, the common expectation is that a policy addressing the issue of mobile phone usage will in place

Australian state and territory legislation and policy for government schools delegate to government school principals responsibility for managing school discipline matters across a broad range of policy areas including phone use although legislation or guidelines may specify the nature and extent of punishments that can accrue.[10] General guidelines on school behaviour management detail procedures to be established at the school level that are more or less directive For example in Western Australia principals must have a strategy for mobile phone use as part of the behaviour management planning, which must include

- making an order stating that the use of mobile phones by students in classrooms is banned and
- developing and documenting an appropriate use statement stating the rules regarding the use of mobile phones in the school and the consequences students can expect for inappropriate use.[11]

The principals may ban use of mobile phones anywhere on the school site, following consultation Students who use phones inappropriately are to be suspended.[12]

Guidance for Queensland government schools more generally advises principals that they can ban anything likely to cause disruption to the education of other students Again, principals develop mobile phone policies including sanctions for inappropriate use.[13] While not banning mobile phones from school most Queensland government schools advise students not to bring phones or to hand them to the administration office for security during the day Students may be suspended if principals determine grounds exist,[14] including breach of mobile phone restrictions if in the policy, although such a suspension would be from 1 to 5 days As student suspension over misuse of phones is an internal school matter appeals by students are generally treated as an in-school or departmental administrative matter Students do not always have a right to appeal for 1 to 5 day suspensions,[15] as some policy statements identify short suspension as not 'punishment, but a strategy for negotiation of a satisfactory outcome for all concerned'.[16] Statistics on short student suspension for misuse of mobile phones are not available

Australian nongovernment school sectors provide similar advice to principals For example, a balanced perspective is provided by the Catholic Education Office in Sydney On the one hand the Office notes that digital devices, including mobile phones, are to be used in a responsible manner, and that personal devices may be taken by school staff or contents accessed if there is a reasonable belief that there has been a breach of school rules or policy or a threat to other students.[17] On the other hand, and more positively, although not necessarily primarily focused on mobile phones, the Office identifies the potential role of digital devices for learning,[18] noting that advances in technology mean that policies will never be able to anticipate all potential uses and misuses of phones and other digital devices and hence policies will always have to be general in nature Other nongovernment independent schools have policies that enable parents to authorise

their child to bring a mobile phone to school, although again 'strongly recommend[ed]' that phones are handed in to the 'office' during the day[19]— phone use is banned during school hours and breach of policy can lead to confiscation.[20] Nongovernment schools have greater discretion in the penalties imposed on students who do not follow policy.

In summary, most schools in Australia allow students to have mobile phones on school sites, recognising the security that they can provide for students and parents. Total bans on bringing mobile phones to schools have not been identified in Australian school policies, perhaps averting issues that are challenged in US case law. as discussed in following sections. The common approach to policies is that phones are not to be used in classes, are to be kept in lockers out of classes or handed in to administration offices, and not be kept on students' persons. Disruption of classes by use of phones, and breaches of mobile phone policy may lead to confiscation.[21] One 'prestigious' private Australian school has been reported as banning phone use in the playground because of concern at the loss of social skills, not disruptive behaviour.[22]

The legal standing of these school policies has not been tested in Australian tribunals or courts. Schools in Australia, both government and nongovernment, expect parents and students to sign agreements on enrolment that students will abide by behaviour management and good conduct policies of the school, although the binding nature of these agreements may be contestable. It is in these policies, however, that statements about appropriate use of mobile phones, and school action if the use is breached, are contained.

When government schools are concerned that students have committed more serious misuse of phones, incidents are to be reported to higher authorities, students are to be suspended, and further penalties, including police contact, may result. Definitions of 'serious misuse' other than illegal or dangerous activities are not provided but may relate to criminal law offences. Students in Australia have been expelled for misuse of phones involving bullying or the uploading of inappropriate images.[23] School principals are still delegated responsibility to manage matters. For example, Queensland government school policy guidance states that

> When principals become aware that these devices have been used to capture and distribute images of violence, malice, etc. and the images have been uploaded to a website, where possible, appropriate disciplinary action should be undertaken in accordance with the school's disciplinary policy.[24]

The policy further states that 'steps should be taken to seek removal of the material from the website ... [and w]here footage or images have been distributed electronically, via Bluetooth functionality or in hard copy, school principals, once aware and where possible, should seek to stop distribution',[25] seemingly placing responsibility on schools but also not classifying these actions as necessarily needing reporting.

The policy guidance does not say how principals may become aware of such misuse, with guidelines for search and seizure, a common concern in US case law. Issues of confiscation and subsequent search of mobile phone content, potentially giving rise to further and more serious allegations of misuse than disruption, may raise legal issues of privacy and property rights. Case law is scant on what constitutes reasonable suspicion; it is likely in Australian schools that if a student challenged the right of a school to search or seize a student's phone, the staff and public interest would prevail over student interests.[26] No Australian legal decisions related to school students and use or misuse of mobile phones have been identified, or appeals against the right to confiscate[27] or search phones.

A core difference between possible legal challenges in Australian and in the US is that Australian individuals are not provided with individual rights under the Australian Constitution such as those provided under the Amendments to the US Constitution. The two charters of human rights at state and territory level in Australia do provide for the right to 'privacy and reputation' including the right 'not to have ... privacy ... or correspondence interfered with unlawfully or arbitrarily'.[28] The rights provided in these charters do not override sanctions that may exist in other legislation,[29] such as school safety legislation.[30] In contrast to the US, Australian students do, perhaps, leave their rights at the schoolhouse gate.[31]

It is useful to turn to the US to consider how courts address student legal challenges about school management of mobile phone usage. While, as noted, the constitutional rights of individuals in the US provide a different basis for student rights and mobile phones, the issues raised have a commonality worldwide. The following sections discuss US case law that has already arisen with respect to such issues. As the case law is from the US, the terminology of 'cell phone' is used to be consistent with judgments.

II Introduction to US Context

Case law regarding student possession and use of cell phones in schools is surprisingly limited in the United States, considering the high numbers of students who own cell phones. The Third Circuit Court of Appeals observed in *J.S. ex rel Snyder v Blue Mountain School District* ('*J.S.*')[32] that 'approximately 66 percent of students receive a cell phone before the age of 14, and slightly less than 75 percent of high school students have cell phones'.[33] Most school districts in the US have a policy addressing the possession and use of cell phones on school premises. In many cases, the school district policies reflect state statutes prohibiting or limiting the presence and/or use of cell phones on school property.[34] School policies prohibiting the possession and use of cell phones on school premises tend to view cell phones as contraband which allows school officials to seize cell phones in much the same way as they could seize illegal drugs, weapons, or alcohol.[35]

However, the extent to which cell phones are contraband depends on the language of the school district's policy.[36] As far-reaching as the use of cell phone technology is in schools, it is surprising that the amount of litigation involving phone possession and use is still relatively limited. Legal issues tend to be fact-specific and reflect three factual patterns: whether a school district policy prohibits possession but not use, or both possession and use, of cell phones on school premises; whether examination of the content of cell phones messages and pictures, assuming that seizure was permissible, constitutes a violation of constitutional rights; and, whether school officials conducting or authorising seizure of cell phones can be individually liable. The discussion of US case law in this article is divided into sections. This section lays the foundation for the discussion to follow. The following sections, respectively:

- review examples of state statutes addressing the use of cell phones in schools;
- examine case law involving seizure of the cell phones in US public schools;
- discuss legal issues related to school accessing student comments and pictures stored on the phones; and,
- examine the two most common constitutional challenges to seizure of, and access to, student cell phones, invasion of privacy and intrusion on the right of parents to direct their children's education.[37]

The final section summarises these issues for the US and, more broadly, for international jurisdictions.

III Examples of State Statutes Relating to Cell Phones in US Schools

US state legislatures have taken different approaches to prohibiting or restricting cell phones at schools or school activities. In New Jersey, unless a school district grants written permission for the possession and/or use of cell phones, no student in New Jersey 'shall bring or possess any remotely activated paging device on any property used for school purposes, at any time regardless whether school is in session or other persons are present'.[38] California leaves the responsibility to school districts to regulate cell phones, which can include banning

> any electronic signaling device that operates through the transmission or receipt of radio waves, including, but not limited to, paging and signaling equipment, by pupils of the school district while the pupils are on campus, while attending school sponsored activities, or while under the supervision and control of school district employees.[39]

The Kentucky legislature has taken the same approach as California, requiring that each

> board of education of each school district shall develop a policy regarding the possession and use of a personal telecommunications device by a student while on school property or while attending a school-sponsored or school-related activity on or off school property, and shall include the policy in the district's written standards of student conduct.[40]

The Attorney General for the State of Mississippi has interpreted a broad state statute authorising the State Board of Education to make rules.[41] According to the Mississippi Attorney General Opinion, a school board can enact a policy governing the use of cell phones 'by students in the classroom, on school property or vehicles, or at school-related activities in the district only if a school board makes a finding that the possession of a cell phone in these circumstances is disruptive ...'.[42] In a more focused prohibition, Georgia prohibits the use of 'any electronic devices during the operation of a school bus, including but not limited to cell phones; pagers; audible radios, tape or compact disc players without headphones ...'.[43]

While permitting school districts to prohibit cell phones, the California legislature protects students where 'an electronic signaling device ... [has been] determined by a licensed physician and surgeon to be essential for the health of the pupil ...'.[44] New Jersey allows an exception to the ban on cell phones on school premises, but places the burden on a student to produce evidence 'to the satisfaction of the school authorities a reasonable basis for the possession of the device on school property'.[45] Effective August 16, 2013, the Arkansas legislature delegated authority to school districts to 'establish a written student discipline policy and exemptions concerning the possession and use by a student of a personal electronic device'[46] which could include, among other items, a 'cellular telephone'.[47] The Arkansas statute, worth noting because of its comprehensiveness, authorises school districts to:

(1) Allow or restrict the possession and use of a personal electronic device;

(2) Allow the use of a personal electronic device in school for instructional purposes at the discretion of a teacher or administrator;

(3) Limit the times or locations in which a personal electronic device may be used to make telephone calls, send text messages or e-mails, or engage in other forms of communication;

(4) Allow or prohibit the use of any photographic, audio or video recording capabilities of a personal electronic device while in school

(5) Exempt the possession or use of a personal electronic device by a student who is required to use such a device or health or another compelling reason

(6) Exempt the possession or use of a personal electronic device after normal school hours for extracurricular activities and

(7) Include other relevant provisions deemed appropriate and necessary by the school district [8]

The Arkansas statute therefore, similar to the Catholic Education Office of Sydney, recognises that digital technology such as cellphones may serve instructional purposes in classrooms but provides overall guidance as to how their use might reasonably be limited

In the following section, challenges by students to 'seizure' of their phones are discussed

IV US Case Law Involving Seizure of Cell Phones

Thus far, relatively few US cases address issues related to possession or use of cell phones on school property Among the issues reflected in the reported cases in addition to challenges to the lawfulness of cell phone seizures, are those addressing whether school personnel can be individually liable for unlawful seizure and whether discipline of students for violating a school's cell phone policy exceeds a school district's authority

In *Klump v Nazareth Area School District* ('*Klump*'),[49] a Pennsylvania federal district court declined to grant qualified immunity [0] to school personnel involved in the seizure of a student's cell phone The court determined that, since school policy permitted possession of a cell phone (but not its use) the mere fact that the cell phone fell out of the student s pocket in class provided no basis for seizure of the phone Moreover, both individual school officials and the school district could be liable for a Fourth Amendment search and seizure violation[51] as well as a state claim for invasion of privacy where the officials had accessed the names of student contacts and other items on the phone

In *Laney v Farley* ('*Laney*) the Sixth Circuit Court of Appeals upheld a school's one-day suspension of a student for possession of a cell phone that had rung while a student was sitting in class The school s rule banned students from having a personal communications device such as a cell phone on school property during class hours The parents of the student challenged the procedural fairness of the school s rule that punished their child's impermissible cell phone possession by holding the phone for 30 days and then returning it to the parents (not the student) and by punishing the student with a one-day in-school suspension The Sixth Circuit in *Laney* observed that the one-day suspension fell far short of the ten day-suspension that the US Supreme Court had held in *Goss v Lopez* entitled a student to a due process hearing In *Laney* the one-day suspension 'during which the student was required to complete school work and was recorded as having attended school'[54] had not deprived her 'of a property interest in educational benefits or a liberty interest in reputation' [5] The Sixth Circuit in *Laney* chose not to address whether the confiscation of a cell phone would have deprived the student of a First Amendment speech or Fourth Amendment privacy right, but rather, limited its decision to the procedural fairness of the school's enforcement of its policy

A New York appeals court, in *Price v New York City Board of Education* ('*Price*') [6] addressed a facial constitutional challenge to a school board policy that prohibited cell phones, ipods,

beepers and other communication devices ... on school property'.[57] The policy notwithstanding, a principal could 'grant permission for a student to bring a cell phone into a school building for medical reasons'.[58] In rejecting the parents' challenge to the policy as over-broad and devoid of legitimate purpose, the New York appeals court held that comparing student conduct regarding cell phones with that of adults was not an improper purpose. As the court observed, '[w]hile the vast majority of public school children are respectful and well-behaved, it was not unreasonable for the Chancellor[59] to recognize that if adults cannot be fully trusted to practice proper cell phone etiquette, then neither can children'.[60] In addition, the appeals court rejected the parents' claim that the policy as enforced interfered with their Fourteenth Amendment Liberty Clause right of parent and their children 'to communicate with each other between home and school'.[61] The appeals court observed that '[n]othing about the cell phone policy forbids or prevents parents and their children from communicating with each other before and after school'.[62] The trial court in *Price* made a perceptive comment regarding balancing the interests of schools and school administrators on one side with those of parents and their children on the other.

> As one cannot predict the future, except only to recognize there will continue to be rapid and significant changes in technology, it is clearly possible that, in the future, inexpensive, effective, appropriate and available devices and systems may change the situation. However, this Court also recognizes that, because the pace of change of technology is so rapid, Courts should also avoid, wherever possible, deciding issues on the basis of the current technology. Court decisions take several years from the commencement of a suit to the final appeal. Technology moves faster. Even where a Court had the perspicacity to understand all relevant technical issues properly, its ruling would probably be obsolete long before the last appeal. While Courts in some instances must make such decisions, they are better left to administrators who at least have the potential capacity to institute new rules to meet changing technologies.[63]

In *Koch v Adams*,[64] the Supreme Court of Arkansas affirmed the dismissal of a student's complaint for conversion and trespass of chattels, and unlawful taking of private property without due process of law, as that taking related to the confiscation of his cellular phone in a public school. A teacher had discovered that the student had a cellular phone in her classroom, in violation of school policy. The Supreme Court rejected the student's argument that the school policy permitting the confiscation of cell phones was outside the parameters of statutory authority. In accordance with the school district policy, the teacher delivered the phone with the subscriber identity module (SIM) card installed to the principal for storage, and the phone remained in possession of the school district for two weeks, after which it was returned to the student's father by certified mail. The court rejected the student's assertion that, since an Arkansas statute had not mentioned seizure of a cell phone as a remedy, public schools could not expel a student for possession of a cell phone. The court held that expulsion was consistent with the broad discretion delegated to school districts to address possession and use of cell phones in schools.

Overall, then, US cases have upheld school policies on mobile phone possession and disruption in schools and on the retention of phones as part of the remedy for noncompliance, if the school's action has been consistent with its policy. In the following section, challenges involving search of phone content are considered.

V US Cases Involving Search of Cell Phone Content

While US courts have been somewhat generous in protecting school officials' seizure of student cell phones, they have disagreed as to whether possession of a cell phone on campus in

violation of school board policy permits accessing the cell phone content. In *J.W. v Desoto County School District* ('*J.W.*')[65] a school district had a policy prohibiting both the possession and use of cell phones on school property. A student (R.W.) was observed by a school employee opening his cell phone within the school building to access a phone call from his father. After demanding and receiving the cell phone from R.W., a teacher opened the phone to review the personal pictures stored on it and taken by R.W. while at his home. Several photographs stored on the phone depicted R.W. dancing in his home bathroom and one photograph, also taken in the bathroom, showed B., another SMS student, holding a B.B. gun. The student was taken to the seventh grade principal, who opened the phone and examined the photographs. A police sergeant, present in the principal's office, also opened the phone and examined the photographs. The principal and sergeant then accused R.W. of having 'gang pictures', and issued a suspension notice to R.W. pursuant to Discipline Rule 5–3, which prohibited 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'. During a suspension, and later, expulsion, hearing, the police sergeant testified that, based on the pictures of a student with a B.B. gun and on the gang pictures R.W. represented 'a threat to school safety'. In rejecting the student's Fourth Amendment search and seizure claim, the federal district court reasoned that '[it was] apparent that the phone constituted contraband when it was brought on campus, and R.W. greatly increased his chances of being caught with that contraband (and of being suspected of further misconduct) when he elected to use it on school grounds'.[66] The district court further noted that it was irrelevant whether the cell phone was opened by the principal and police sergeant because 'the search in this case was justified at its inception'.[67] In summary, the court observed that 'a student's decision to violate school rules by bringing contraband on campus and using that contraband within view of teachers appropriately results in a diminished privacy expectation in that contraband'.[68]

However, in *G.C. v Owensboro Public Schools* ('*G.C.*'),[69] a teacher accessed the content of a student's cell phone after the teacher had found the student texting in class. The teacher asserted that she had looked at the cell phone content to find some way that she might help him not harm himself or others. G.C. had a past history of angry outbursts in class, smoking marijuana, and threatening suicide. In reversing a federal district court's summary judgment for the school district, the Sixth District held that the school had failed to assert reasonable grounds for using the seizure of the student's phone as the basis for reading student's text messages. Finding that school officials had violated G.C.'s Fourth Amendment's right to be free of unreasonable searches, the court of appeals determined that the student would be entitled to damages under s 1988 of the *Civil Rights Act*.[70] Even if the search had not caused him any injury for which he might be entitled to compensatory or punitive damages, he, nonetheless, would be entitled to nominal damages.[71]

VI US Constitutional Challenges

Three constitutional challenges to date have concerned improper seizure of and/or access to the content of cell phones. These three challenges are: invasion of privacy under the Fourth Amendment;[72] interference with the right of parents to direct the education of their children under the Fourteenth Amendment's Liberty Clause;[73] and, a First Amendment free speech right to not be subjected to compelled speech.[74] To date, no court has addressed, on the merits, a claim under the First Amendment's free speech clause that the content of student messages or pictures in cell phones is protected free expression. However, the Third Circuit, in *B.H. v Easton Area School District*,[75] held that students wearing breast cancer awareness bracelets were entitled to

a preliminary injunction since nothing in the wearing of the bracelets could be considered to be objectionable expression under the First Amendment.

A *Invasion of Privacy*

The extent to which school boards can prohibit or restrict cell phone use in schools and confiscate these devices depends very much on the facts of each case. With the exception of *Klump*, the primary issue at stake has been the reasonableness of board policies prohibiting the possession or use of cell phone on school premises. To the extent that the presence of cell phones on school premises is considered to be contraband, one can argue that the seizure of cell phones does not raise a constitutional question as to the reasonableness of a search since, arguably, no search has taken place. In *New Jersey v T.L.O.* ('*T.L.O*'),[76] the Supreme Court determined that the Fourth Amendment's probable cause standard for law enforcement searches was inapplicable to educators in schools. In upholding an assistant principal's search of a female student's purse for cigarettes, the Court held that the constitutionality of school searches would be assessed by a lower reasonable suspicion standard.

Whether even this lower reasonable suspicion standard should apply to seizing student cell phones seems doubtful. As the appellate court in New York noted in *Price*, the facial challenge to the policy which prohibited cell phones raised questions as to whether it was arbitrary or capricious, but not whether it was subject to the reasonable suspicion test. Another appellate court in New York, in *In re Elvin G.*,[77] upheld a principal's search of a student's pockets in response to a teacher's call that an apparently unknown student was making disruptive sounds, possibly with a cellular phone. The court acknowledged that the school rule prohibited the use of cell phones in classes and the search revealed a knife in the student's possession. The court, in upholding an adjudication that the student was delinquent, reasoned that restoring order in a classroom by having students empty their pockets '[was] not a law enforcement interest'.[78] As a result, the court was satisfied that the principal's actions in restoring order 'required neither probable cause nor reasonable suspicion to justify asking students to empty their pockets'.[79]

When school officials, though, examine the content of cell phones, as in *Klump*, one has moved closer to the facts of *T.L.O.*. Reasonable suspicion could include a report from a student or a teacher that a cell phone contains inappropriate content or has been used for the sale or purchase of prohibited substances. Subsequently, a court is likely to uphold school-based disciplinary sanctions flowing from such a search only if the information made available to educational officials met *T.L.O.*'s reasonable suspicion standard.[80]

The difference between punishing a student for violating a school rule by possessing a cell phone and for breaking a school rule by storing pictures on a cell phone that also violates a school rule is reflected in *J.W.*. Here school officials and the police opened the student's cell phone and discovered pictures of him dancing in the bathroom, holding a BB gun, and wearing gang clothing. In refusing to grant the school board's motion for summary judgment, and directing the case be set for a jury trial, the court observed that the student '[had been] expelled based on the contents of his cell phone, rather than the fact that he brought the phone onto school grounds'.[81] The court added that it was 'arguable that [the student] was expelled based not upon anything he *did*, but rather based upon what the school district subjectively believed he *was*'.[82]

B *Parental Right to Direct the Education of Their Children*

The claim by parents in *Price* that cell phone rules violate their right under the Liberty Clause under the Fourteenth Amendment to direct the education of their children is tenuous. The Fourteenth Amendment Liberty Clause right of parents to direct the education of their children would seem generally inappropriate to the facts of cell phone cases discussed in the prior section. While the US Supreme court, in *Meyer v Nebraska* ('*Meyer*'),[83] *Pierce v Society of Sisters* ('*Pierce*'),[84] and *Wisconsin v Yoder* ('*Yoder*'),[85] recognised such a parental right, subsequent cases have indicated a limitation to the assertion of the right when curriculum content is at issue.[86] Thus, although parents have a protected right under *Meyer*, *Pierce* and *Yoder* to make decisions regarding the venue where their children are to be educated, that right does not extend inside the schools.

In the context of student possession or use of cell phones at school, courts are more likely to consider the constitutional rights of students rather the rights of parents. In his dissent in *Yoder*, Justice Douglas queried that, '[r]eligion is an individual experience',[87] he suggested that 'if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections'.[88] In effect, Justice Douglas sowed the seed of differentiation between the interests of parents and the interests of their children.[89] *In determining whether students' possession or use of a cell phone in school*, especially in the context of medical or security concerns, has carved out a privacy right of minors, rejecting the notion that 'the right of parents to participate in the decisions of their children that involve sexual activity and birth control outweighs the right of minors to make these decisions independently'.[90]

To date, none of the cell phone cases have explored the medical issues that might be raised concerning the use of cell phones in school. When one considers that students with disabilities *under the IDEA*[91] have their medical-related issues addressed by school personnel pursuant to an Individual Educational Plan (IEP), the need for direct and immediate cell phone contact between students and parents would seem less demanding.

The court in *Price* rejected the parents' claim that banning cell phones violated their right to direct the education of their daughter. The *Price* court refused to apply a strict scrutiny standard to the parents' liberty clause right in positing that the rationale purpose test sufficed. Insofar as the school board's goal of maintaining order in the schools was 'unquestionably a legitimate one',[92] the court concluded that the policy was constitutional because it did not prevent parents from setting their own cell phone rules outside of school settings.

VII US Case Law and Cell Phones—Summary

In this article, in the absence of case law in Australia on student use of mobile phones, we turned to the US which is normally the source of considerable legal considerations. However, the dearth of US case law regarding the legality of school policies restricting or prohibiting cell phones on school premises limits the application of that case law even in the US. One can only speculate as to the viability of US constitutional claims that have yet to be addressed by courts, as well as the precedential value of claims that have been addressed in unreported decisions.

The threshold issue in US law is whether a cell phone can be classified as contraband. Whether a cell phone is considered to be contraband will depend on how a school district chooses to define their presence and use on school premises. Schools theoretically have a range of possibilities in defining cell phones as contraband. At one end of the continuum, cell phones can be treated as

tobacco, alcohol, or weapons and be banned completely from schools. However, at the other end of the continuum cell phones can be permitted and used at schools, and to that extent would be considered not to be contraband at all. Between these two extremes, the range of options includes cell phones that might be: carried by students in school, but not be permitted to be used; kept in student lockers (or other designated locations) but not be used; permitted in schools and used in limited venues, such as in the school lunchroom during lunch; limited in their use only to 'emergencies'; or, for those students with IEPs or s 504 plans, permitted to be used as specified in those documents. The limited case law suggests that courts are going to accord school boards and school administrators a broad swathe of permission in determining whether cell phones are going to be considered to be contraband. As suggested in *J.W.* a determination that a student's possession or use of a cell phone is contraband will probably be sufficient to support the seizure of a cell phone, but not necessarily accessing student files on the cell phone.[93]

The notion that restrictive school district cell phone policies, as well as seizure of cell phones pursuant to those policies, violate the Fourteenth Amendment Liberty Clause right of parents to direct the education of their children has been rejected.[94] Generally, courts, while recognising the Liberty Clause right of parents to make decisions concerning the venue in which their children are taught,[95] do not extend that right to parents making decisions about public school curriculum.[96]

No case has yet to address the issue of free speech in the context of school or law enforcement officials seizing a cell phone. In *Miller v Mitchell*,[97] the Third Circuit issued a permanent injunction regarding plaintiffs' First Amendment constitutional right to be free from compelled speech, although it did not address whether the injunction also applied to the plaintiff students' free expression claim. The Third Circuit's apparent reluctance to include the students' self-created nudity that they had recorded on their own cell phones but had not shown to anyone else as a form of protected free expression suggests judicial caution in defining what constitutes free speech under the First Amendment.[98] Whether students can assert free expression protection for pictures or words stored on their cell phones has been addressed in cases where students create web page pictures or descriptions considered to be objectionable by school officials and a threat to the safety of the school.[99]

School officials involved in the seizure and accessing of student cell phones and their content can open school personnel to individual liability where an established constitutional right exists and has been violated. However, where a clear constitutional right is not at stake, qualified immunity is a viable defence for school personnel. The extent to which the *T.L.O.* standard for seizing (although, not accessing the content) cell phones as contraband has been clearly established is doubtful. Even more uncertain is the extent to which a claim grounded in free expression could result in qualified immunity. A student complaint that compelled speech is protected by the First Amendment does not necessarily mean that the student's messages and pictures on a cell phone are also entitled to free speech protection.[100] In the absence of a clear constitutional right that pictures and messages on a cell phone are protected by free speech, school officials will most likely be entitled to qualified immunity.

Courts have yet to address whether rules prohibiting the possession and use of cell phones on school premises would represent discrimination against students with disabilities. In the absence of IEPs or 504 plans requiring that a student with a disability have access to a cell phone, no violation of the IDEA or 504 would seem likely.[101]

VIII Conclusion

US case law to date provides resolutions and remedies that reflect policy-based approaches to student cell phone use established in international jurisdictions In light of the rapid pace at which cell phones and related technological devices have become a central part of everyday life they have clearly reshaped daily activities in schools and society

The legislation and policy guidance that is directing student possession and use of mobile (cell) phones on school premises appears to be quickly becoming antiquated Digital technologies are frequently used in schools and desirable education practice for the 21st century While schools may implement firewalls on internet access students have access to a broad range of technologies within classrooms and possibilities for social interaction and disruption other than mobile phones

In both the US and Australia authorities have noted not only the potential positive benefits of mobile phone use to learning but also the extent to which rapid changes in technology can make prescriptive policies on matters such as mobile phone use obsolescent [1] Policies that lead to students paying money to external businesses to store phones while at school are neither helpful nor equitable, when students reason they need phones not only for safety but also for their employment [2] School policies on phones need to engage with the core issues of when and how phones are disruptive and how they can be managed in positive and constructive ways More importantly schools need to identify when a mobile/cell phone constitutes not contraband under a possession policy but a potentially 'harmful' item for search and retention[3]–[4] and subsequent management of the student—conclusions that have relevance for all education jurisdictions not just Australia and the US

To this end the sooner that educational leaders and their legal representatives learn the lessons of the US litigation discussed herein and develop sound policies for student use of phones in schools the more effective they are likely to be in maintaining safe and orderly learning environments for all members of their educational communities

Keywords students mobile phones policy, rights Australia, US case law

Endnotes

1 See eg for concerns of misuse of phones for text or cyber bullying Janis Carroll Lind *Responsive Schools* (Office of the Children's Commissioner NZ March 2010)

2 See eg Queensland Government/Queensland Schools Alliance Against Violence Keeping Queensland Schools Safe (7 December 2011) <www.qieu.asn.au/files/1413/3213/5579/keep_school-safe.pdf>

3 See eg for England Department for Education (DfE) Behaviour and Discipline in Schools—Advice For Headteachers and School Staff (17 July 2013) 6 <http://www.education.gov.uk/schools/pupilsupport/behaviour/behaviourpolicies/f0076803/guide-for-heads-and-school-staff-on-behaviour-and-discipline>

4 Burnage Media Arts College Manchester Behaviour Policy 2011-12 (2012) <http://www.burnage-manchester.sch.uk/index.php/school-policy-file/18-behaviour-policy-2011-12> (school operates ban on phones students advised not to bring them if seen confiscated cyberbullying may be criminal offence) David Krevitt Mobile Storage Trucks Prove School Cell Phone Bans Really Aren't Doing Much *Huffington Post* (online) 27 September 2013 <http://www.huffingtonpost.com/david-krevitt/nyc-schools-cellphone-ban_b_3977307.html> Melissa Archer Mansfield High School Student Marcus Brown Who Was Suspended for Having a Mobile Phone in his Bag Has Received No Sympathy from the Education Minister *The Courier Mail Quest East* (online) 7 March 2014 <http://www.couriermail.com.au/questnews-east/mansfield-high-school-student-marcus-brown-who-was-

suspended-for-having-a-mobile-phone-in-his-bag-has-received-no-sympathy-from-the-education-minister/story-fni9r0lo-1226848129072> (school policy required handing in phones to the resource centre and penalty for possession suspension, the student was suspended for two days)

5 See, for discussion of consistency of government and nongovernment schools in Australia through funding controls, J Joy Cumming and Ralph D Mawdsley, 'The Nationalisation of Education in Australia and Annexation of Private Schooling to Public Goals' (2012) 17(2) *International Journal of Law and Education* 7

6 Australia is a federation of six states and two territories (Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria Western Australia) and each state and territory has a Minister of Education as well as the federal (Australian Government) minister of education The ministers act as a bloc agreement to various policies and legislative requirements, known in recent times and for different purposes as the Ministerial Council for Education, Employment, Training and Youth Affairs (MCEETYA), the Ministerial Council for Education Early Childhood Development and Youth Affairs (MCEECDYA), and at the time of writing the Standing Council on School Education and Early Childhood (SCSEEC) The Councils are formed under the oversight of the Council of Australian Governments (COAG) which incorporates the federal and all state and territory governments

7 Standing Council on School Education and Early Childhood (SCSEEC), *National Safe Schools Framework* (SCSEEC, 2013) (These are guidelines rather than federal law but are followed strongly by states and territories) <http //www safeschoolshub edu au/documents/nationalsafeschoolsframework pdf>

8 Ibid 6

9 For requirements for compliance by nongovernment schools with such expectations, see, eg, Queensland Government *Form VSS 101 V1 2 New Non-State School Application for Accreditation and Funding Eligibility* (QG, 2014) which includes the requirement 'To be accredited a school must have the following within the provisional accreditation period written processes about the health and safety of students and staff <http / www nssab qld edu au/Pdf/101-New-school-form pdf> Board of Studies New South Wales *Registered and Accredited Individual Non-government Schools (NSW) Manual* (Board of Studies, 2013)

10 See, eg, *Education and Training Reform Act 2006* (Vic) s 2 2 19(1) 'The principal of a Government school may, in accordance with any Ministerial Order suspend or expel a student from that school , and Department of Education and Early Childhood (DEECD) (Vic) *Student Engagement and Inclusion Guidance 2014* 'Ministerial Order 625—Suspensions and Expulsions' (2014) Part 3 Suspension (6) 'a principal may suspend a student [who] consistently behaves in an unproductive manner that interferes with the wellbeing, safety or educational opportunities of any other student , (8) 'the maximum continuous period of time a student can be suspended is five school days, unless a longer period is approved by the Regional Director 4 6 <http //www education vic gov au school/principals participation/Pages/studentengagementguidance aspx>

11 Department of Education (DoE) (WA) Behaviour Management in Schools—Procedures' (9 April 2013) 3 1 2 (5-6) <http //det wa edu au/policies/detcms/navigation/school-management/behaviour-management/>

12 Ibid

13 Department of Education, Training and Employment Appropriate Use of Mobile Telephones and other Electronic Equipment by Students (9 July 2012) <http //ppr det qld gov au/education/learning/Pages/Appropriate-Use-of-Mobile-Telephones-and-other-Electronic-Equipment-by-Students aspx>

14 *Education (General Provisions) Act 2006* ss 284 285 Statistical reports indicate a growth in student suspensions across Australian states and territories for minor breaches, but do not distinguish for breach of mobile phone codes of conduct See also above n 4 for student suspension for possession of mobile phone

15 No appeal right under the *Education (General Provisions) Act 2006* (Qld)

16 Department of Education & Training (DET) (NSW), 'Suspension and Expulsion of School Students—Procedures (DET 2011) (statistics on short suspensions are not published but students have a general right to appeal on the basis of lack of process or an unfair decision (16 [10.0.1].) South Australia Government 'Suspension and Exclusion from School' <http://www.sa.gov.au/subject/Education%2C+skills+and+learning/Schools/School+life/Behaviour+management+and+discipline/Suspension+and+exclusion+from+school> (5.4% of suspensions in Term 2 2012 were 'interfering with rights of others' which may include disruptive use of mobile phones (Department for Education and Child Development (DECD) (SA) 'Behaviour Management' (DECD, 2013) 2)

17 Catholic Education Office (CEO) (Sydney) 'Student Acceptable Use Agreement Form' <http://www.ceosyd.catholic.edu.au/About/Documents/form-stu-acc-use.pdf>

18 See also L Fielden and P Malcolm 'Cell Phones in New Zealand Secondary Schools: Boon, Banned or Biased' in D Parsons and H Ryu (Eds) (online) *Proceedings: Mobile Learning Technologies and Applications (MoLTA) 2007 Conference* (2007) <www.massey.ac.nz/massey/fms/Molta/Fielden.pdf> (for discussion of different school perspectives on positive learning use of mobile phones and internet access in classrooms)

19 A major concern of schools is theft of phones and all schools indicate in policies that they are not liable for loss or theft of phones

20 See eg Brisbane Catholic Education St Teresa's Catholic College 'Application for Enrolment' <http://www.stteresa.qld.edu.au/enrolments/Documents/Enrolment%20Form.pdf> Brisbane Boys College (Qld) 'Student Information Guide' <http://www.bbc.qld.edu.au/assets/files/college_handbooks/student_information_guide_-_junior_school.pdf>

21 See eg Melbourne Grammar School 'Grimwade House Parents' Handbook (2012) <http://www.mgs.vic.edu.au/grimwade/Documents/MGS%20Grimwade%20House%20Parents%20Handbook%202012.pdf>

22 Amy McNellage 'School Bans Phones in Playground to Rekindle Teenage Social Skills' *The Sydney Morning Herald* (online) 2 October 2013 <http://www.smh.com.au/national/education/school-bans-phones-in-playground-to-rekindle-teenage-social-skills-20131028-2wbb6.html>

23 See eg David Mark 'School Expels Girls Over Cyber Bullying' (Lateline) (7 May 2009) <www.rsc.vic.edu.au/Resource%20Documents/CYBERBullying.pdf>

24 Department of Education, Training and Employment, 'Appropriate Use of Mobile Telephones and Other Electronic Equipment by Students' (2012) 1 <http://ppr.det.qld.gov.au/education/learning/Pages/Appropriate-Use-of-Mobile-Telephones-and-other-Electronic-Equipment-by-Students.aspx>

25 *Ibid*

26 For a general discussion of the right to search students in Australia see J Joy Cumming and Ralph D Mawdsley 'Student Searches in Australia: A Consideration of Teacher and Student Rights' (2008) 13(1) *Australia and New Zealand Journal of Law and Education* 49. See also eg *CF v The State of New South Wales* [2003] NSWSC 620 (students suspended during examination period for misconduct, suspension had been upheld even though aspects of procedural fairness were in doubt)

27 For example, under common law tort of trespass

28 *Charter of Human Rights and Responsibilities 2006* (Vic) s 13; *Human Rights Act 2004* (ACT) s 12

29 *Charter of Human Rights and Responsibilities 2006* (Vic) s 29; *Human Rights Act 2004* (ACT) s 32

30 See eg *Education and Training Reform Act 2006* (Vic) s 5.8A.3 and *Education and Training Reform (School Safety) Regulations 2011* (Vic) which provide the authority to schools to search student possessions

31 Ralph D Mawdsley & J Joy Cumming 'Students' Rights and Parents' Rights: United States Perspectives of the Emerging Conflict Between Them and the Implications for Education' (2005/2006) *10*(2)/*11*(1) *Australia and New Zealand Journal of Law and Education* 19, 20

32 *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.* 650 F.3d 915 (3d Cir. 2011)

33 *Ibid* 951

34 See, eg, Illinois 105 ILCS 5/34-18.14(b) (declaring that '[a school] board may establish appropriate rules and disciplinary procedures governing the use or possession of cellular radio telecommunication devices by a student while in a school or on school property, during regular school hours, or at any other time').

35 For a discussion of contraband and its application to searches, see C Russo and R Mawdsley, *Searches, Seizures and Drug Testing Procedures: Balancing Rights and School Safety* (LRP Publications, 2nd ed, 2008) (3rd ed in press) 1–2.

36 See *Price v New York City Board of Education*, 855 NYS 2d 530, 533 (NY App Div, 2008) where the New York Board of Education first considered cell phones to be contraband in 2006 and seised 'thousands of cell phones' through the use of metal detectors.

37 For a discussion of some of these issues, see Joseph O Oluwole & William Visotsky, 'The Faces of Student Cell Phone Regulations and the Implications of Three Clauses of the Federal Constitution' (2010) 9 *Cardozo Public Law, Policy & Ethics Journal* 51.

38 NJ Stat Ann § 2C: 33-19.

39 California Education Code §48901.5(a).

40 Kentucky Revised Statute § 158.165(1). A personal telecommunications device 'means a device that emits an audible signal, vibrates, displays a message, or otherwise summons or delivers a communication to the possessor, including, but not limited to, a paging device and a cellular telephone': ibid § 158.165(2).

41 Mississippi Code, § 37-7-301.

42 Mississippi Attorney General, Feb 20 2009, 2009 WL 572451.

43 Georgia Code Ann. § 20-2-751.5(b)(1)(B).

44 Ibid §48901.5(b).

45 NJSA 2C:33-19.

46 Ark. Code Ann. § 6-18-515.

47 Ibid § 6-18-515 (a)(1).

48 Ibid § 6-18-515 (c)(1-7)

49 *Klump* v *Nazareth Area School District*, 425 F Supp 2d 622 (ED Pa, 2006).

50 Qualified immunity is a defence available where a person has been found to have violated a constitutional right but avoids liability because the constitutional right had not been clearly established at the time of the violation. See, eg, *Stafford Unified School District v Redding*, 557 US 364, 378-379 (2009) (Supreme Court held that a strip search by school officials had violated a student's privacy rights under the Constitution, however, those school officials were entitled to qualified immunity from liability because the extent to which students were protected by privacy rights in a strip search had not been clearly established).

51 US Constitution, Amendment 4 ('The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...').

52 *Laney* v *Farley*, 501 F 3d 577 (6th Cir, 2007).

53 See *Goss v Lopez*, 419 US 565 (1975) (holding that a student suspension of ten or more days entitled a student to procedural due process).

54 Ibid 584.

55 Ibid.

56 *Price v New York City Board of Education*, 855 NYS 2d 530 (NY App Div, 2008).

57 Ibid 533.

58 Ibid.

59 The Chancellor in New York City is the highest education administrative official who is delegated authority to implement the regulations and by-laws enacted by the city's Board of Education. See *McKinney's Education Law* § 2554 (13) (b).

60 *Price*, 855 NYS 2d 530 (NY App Div, 2008), 538.

61 See *Price v New York City Bd. of Education*, 837 NYS 2d 507, 523 (NY Sup Ct, 2007).

62 *Price*, 855 NYS 2d 530 (NY App Div, 2008), 530–31.

63 *Price v New York City Bd. of Education*, 837 NYS 2d (NY Sup Ct, 2007) 507, 830-31.

64 *Koch v Adams* 2010 Ark 131, 2010 WL 986775 (2010)
65 2010 WL 4394059 (ND Miss 2010)
66 Ibid *4
67 Ibid
68 Ibid *5
69 711 F 3d 623, 290 *Education Law Reporter* 527 (6th Cir, 2013)
70 Ibid 634, 42 USC § 1988
71 Nominal damages can entitle a prevailing party under a s 1983 claim to recover 'a reasonable attorney's fee as part of the costs' 42 USC § 1988
72 US Constitution, Amendment 4 ('The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ')
73 US Constitution Amendment 14, § 1 ('nor shall any State deprive any person of life, liberty, or property, without due process of law') See *Meyer v Nebraska* 262 US 390 (1923), 399, 401, the 'liberty protected by the Due Process Clause

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men and the power of parents to control the education of their own [children's education]

74 US Constitution, Amendment 1 ('Congress shall make no law abridging the freedom of speech ') For an example of compelled speech, *see Rumsfeld v Forum for Academic and Institutional Rights, Inc* , 547 US 47 (2006) (the Supreme Court rejected a compelled speech claim from law schools that a condition for receiving federal aid that all schools permit ROTC programs on campus constituted compelled speech on the grounds that the requirement affected conduct, not speech)
75 *B H v Easton Area School District*, 725 F 3d 725 (3d Cir, 2013)
76 *New Jersey v T L O* , 469 US 325 (1985)
77 *In re Elvin G* , 851 NYS 2d 129 (NY App Div, 2008)
78 Ibid 132
79 Ibid
80 For a slightly different, but nonetheless related, set of facts, *see Professional Standards Comm'n v Adams*, 702 S E 2d (Ga Ct App, 2010) (upholding an order of the state's Professional Standards Committee revoking a principal's license under Standard 10 of its Code of Ethics for Educators that defined unethical conduct in part as 'a pattern of behavior or conduct that is detrimental to the health, welfare discipline, or morals of students' Here the principal was aware that a student brought a cell phone to school that displayed a video clip of a female peer and two male students engaged in oral sex Among the actions of the principal that the court considered to be unethical were her three-day failure to investigate the incident, to contact the students involved and their parents, and to contact law enforcement or social services The court considered the principal's defence, that she just did not get around to it to be part of her unethical conduct)
81 *J W* , 2010 WL 4394059 (ND Miss 2010), *8
82 Ibid *9
83 262 US 390 (1923) The ostensible purpose of the statute enacted by the Nebraska legislature in 1919 was 'to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals' ibid 401
84 *Pierce v Society of Sisters*, 268 US 510 (1925)
85 *Wisconsin v Yoder*, 406 US 205 (1972)
86 See *Brown v Hot Sexy and Safer Productions Inc* , 68 F 3d 525 (1st Cir, 1995) (parent right to direct education did not extend to content of school assembly), *Mozert v Hawkins Cty Board of Education* 827 F 2d 1058 (6th Cir 1987) (rejecting parent claim that the public school was required to provide a curriculum appropriate to their viewpoint) *Hansen v Ann Arbor Public Schools* 293 F Supp 2d 780 (EDMich, 2003) (denying parent claim that their daughter should be able to express their viewpoint of homosexuality at school presentation)

87 Ibid 243

88 Ibid 242

89 The notion that minors should have a right to express their opinion depending on their level of maturity, even when at odds with their parents has become adopted by some states as the 'mature minor' exception See, eg, *Belcher v Charleston Area Medical Center* 422 SE 2d 827 836 (W Va, 1992) (recognising a 'mature minor exception to the common law rule that a parent or guardian could consent to medical treatment for a child, minors who are mature may be involved in the medical decisions that affect their livelihood) See also *Cardwell v Bechtol*, 724 SW 2d 739 (Tenn, 197) (in a case of first impression ruling that '[p]arental consent to medical treatment of minor may not be required if minor has capacity to consent to and appreciate nature, risks, and consequences of medical treatment involved)

90 *Doe v Irwin*, 615 F 2d 1162, 1167 (6th Cir, 1980) (upholding injunction against plaintiffs seeking to prohibit center from providing contraceptive devices to minors without notice to parents) See also *Carey v Population Services International*, 431 US 678, 694 (1977) (upholding constitutionality of state statute prohibiting distribution of contraceptives to minors, ruling that [s]ince the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortion foreclosed')

91 See 20 USC § 1400(a)(3) ([the Individuals with Disabilities Education Act IDEA] ensur[es] children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities')

92 *Price*, 855 NYS 2d 542 Also worth noting in *Price* was the school s willingness to install lockers in which students could store their cell phones during the school day a solution that would restrict the possession of phones by students but still make them phones available during an emergency

93 See *Klump v Nazareth Area School District* 425 F Supp 2d 622 (ED Pa, 2006)

94 See *Price v N Y City Board of Education* , 855 NYS 2d 530 (NY App Div, 2008)

95 See *Wisconsin v Yoder*, 406 US 205 (1972) (holding that state compulsory attendance law did not apply to Amish parents where their children, while not attending a school until age 16, were involved in practical training after they completed eighth grade)

96 See *Brown v Hot Sexy and Safer Publications*, 68 F 3d 525 (1st Cir, 1995) (refusing to recognise that parent right to direct the education of their children extended to the content of a school assembly), *Mozert v Hawkins County Board of Education*, 827 F 2d 1058 (6th Cir 1987) (rejecting parent claim to select the curriculum for their child)

97 *Miller v Mitchell*, 598 F 3d 139 (3d Cir, 2010), aff'd *Miller v Mitchell*, 2010 WL 1779925 (MD Pa, 2010) (issuing permanent injunction on behalf of students and their parents and affirming that a district attorney's threat to charge students with child pornography for sending sexually suggestive photographs of themselves with text messages if they did not participate in a reeducation program violated their First Amendment right to be free from compelled speech)

98 See *Requa v Kent School District No 415*,492 F Supp 2d 1272, 1280-81 (WD Wash 2007) (student's lewd videotape of a teacher did not satisfy the 'irreparable harm' provision for granting the student a preliminary injunction allowing the student to return to school)

99 Cf *Layshock v Hermitage School Dist* , 650 F 3d 205, 271 *Education Law Reporter* 638 (3d Cir 2011) (en banc) (holding that student's comments about a school administrator although lewd and offensive, were protected speech where the comments had not been created or displayed at school) and *J S ex rel Snyder v Blue Mountain School District*, 650 F 3d 915, 271 *Education Law Reporter* 656 (3d Cir, 2011) (en banc) (in reversing expulsion of student who had placed off the school grounds lewd vulgar and offensive speech on his computer the could of appeals found no substantial likelihood of disruption or material interference with school discipline where student and no other students had accessed the computer) with *Wynar v Douglas County School District*, 728 F 3d 1062 CA9 (Nev),2013 (upholding expulsion of student who had sent violent and threatening messages from his home to his friends about planning school shooting the Ninth Circuit determining that such messages constituted a true threat that took the case out from under free expression)

100 See *V V v Tunkhannock Area School District* 801 F Supp 2d 312 316-17 (M D Pa 2011) (recognising that school officials may not be entitled to qualified immunity where compelled speech is at stake and the plaintiff is seeking only injunctive relief to have a cell phone returned but no issue raised as to the protected free speech status of the content of messages and pictures in the cell phone)

101 See *Hough v Shakopee Public Schools* 608 F Supp 2d 1087 (D Minn 2009) (holding that suspicionless searches of students that would violate the Fourth Amendment did not apply where all of the students were special education)

102 See above n 17 48

103 Krevitt above n 4

104 *Education and Training Reform Act 2006* (Vic) s 5 8A 3 (which authorises searches of student property for harmful items)