UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

DANIEL AND MANUELA GALLIMORE, Parents and Next Friends of W.S.G., a Minor, Plaintiffs,	)	
v.	)	
HENRICO COUNTY SCHOOL BOARD,	)	
	)	Civil Action No. 3:14CV009 (JAG)
DIANE R. SAUNDERS, and	)	
ROBERT A. TURPIN, III,	)	
Defendants.	)	

MEMORANDUM IN RESPONSE TO COURT'S JUNE 25, 2014 ORDER AND IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants[1] Diane R. Saunders and Robert A. Turpin, III, by counsel, hereby submit this memorandum in response to the Court's Order of June 25, 2014, which directs the parties to file briefs stating what effect, if any, the U.S. Supreme Court's recent decision in *Riley v. California*, No. 13-132, slip op. (U.S. Jun. 25, 2014) has on this case, and in further support of their previously-filed motion to dismiss, which seeks dismissal on the grounds of qualified immunity.

INTRODUCTION

[1] The Henrico County School Board joins in this memorandum in support of its own motion to dismiss insofar as the School Board cannot be liable if the Administrators' conduct was not unconstitutional. *See Collins v. City of Harker Heights*, 503 U.S. 115 (1992) (emphasizing "the separate character of the inquiry into the question of municipal responsibility and the question whether a constitutional violation occurred," and that a deliberately indifferent city policy which may have caused injury was immaterial, when that injury was not constitutional in scope).

On February 11, 2013, Saunders and Turpin, in their capacity as administrators of Hermitage High School (the "Administrators"), conducted a search of W.S.G., a minor suing through his parents and next friends (hereinafter, "Plaintiff" or "W.S.G."). During this search, Plaintiff claims that his cellular telephone was "taken from him, and searched – without his consent – by Mrs. Saunders." Compl. at ¶ 28.[2]

The Administrators' search – even as alleged by Plaintiff – was well within the scope of clearly established law governing school-based searches and did not violate W.S.G.'s Fourth Amendment rights. Even if this Court were to determine that the alleged search of W.S.G.'s cell phone somehow violated those rights, Saunders and Turpin are nevertheless entitled to qualified immunity, as no clearly established law existed – either at the time of the search or now – that would have placed them on notice that their alleged conduct was unconstitutional.

The recent decision issued by the Supreme Court of the United States in *Riley v. California*, No. 13-132, slip op. (U.S. Jun. 25, 2014), does not mandate a different conclusion for two reasons. First, although the *Riley* opinion clearly establishes the law for *future* cell phone searches, it does not retroactively set a standard by which the Administrators' 2013 conduct can be judged. Because *Riley* had not been decided at the time of the February 2013 search, the Administrators could not have been on notice of its standard for cell phone searches. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (concluding that a constitutional right must be clearly established by law *at the time of the challenged conduct*) (emphasis added).

[2] Both Saunders and Turpin deny that W.S.G.'s cell phone was ever searched. Despite this factual dispute, the lack of clearly established law on cell phone searches is a question of law, not fact, and thereby easily resolved at the pleadings stage as an issue attendant to the "purely legal" question of qualified immunity. *See Cloaninger v. McDevitt*, 555 F.3d 324, 331 (4th Cir. 2009) (internal citations omitted) (noting that factual findings are generally unnecessary in the context of qualified immunity analyses).

Second, the standard enunciated by *Riley* pertains to searches conducted *by law-enforcement officers* and is fundamentally distinct from the standard for searches conducted by school personnel. The question decided by *Riley* was "whether the *police* may, *without a warrant*, search digital information on a cell phone *seized from an individual who has been arrested*." *Riley*, slip op. at 1 (emphasis added). This law-enforcement standard is inapplicable to the school search in this matter, which was not conducted by police, did not require a warrant, and did not occur incident to arrest. The constitutionality of a school search, as articulated by the *New Jersey v. T.L.O.* line of cases remains wholly unchanged by *Riley*. In *T.L.O.*, the Supreme Court stated that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search," and predicated "reasonableness" on two prongs: whether the search was (1) justified at its inception; and (2) permissible in scope. 469 U.S.325, 341-42 (1985). These prongs remain the applicable standard for the search alleged by Plaintiff and, as discussed in Defendants' prior memoranda, both prongs are satisfied in this case.

I. At the Time of the Search, There was No Clearly Established Law Pertaining to Cell Phone Searches.

Notwithstanding the *Riley* decision, the Administrators remain entitled to qualified immunity at the pleadings stage because they cannot be "liable for bad guesses in gray areas," where there was no clearly established law to put them on notice that their conduct was unconstitutional. *Figg v. Schroeder*, 312 F.3d 625, 636, (4th Cir. 2002) (*citing Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir.1992)). At the time of the February 2013 search, the law on cell phone searches was not clearly established. At that time, the issue had not been "authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals,

or the highest court of the state" in which the official acted. *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980).

Although the Supreme Court has now articulated a clear standard for law-enforcement searches of cell phones, *Riley*, Slip Op. at 10, this standard cannot be applied retroactively to render illegal the Administrators' conduct. *See Reynoldsville Casket Co. v. Hyde*, 515 U.S. 749, 757-58 (1995) (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) for the premise that qualified immunity prevents retroactive application of new law, and allows officials to rely upon law in effect at the time of their action, "lest threat of liability 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'") Thus, even if *Riley* applied to student searches (which it does not), it does not deprive the Administrators' qualified immunity from liability for actions taken 18 months before the standard was announced.

Moreover, it is unclear whether *Riley*'s bright line standard would render the Administrators' alleged conduct unconstitutional. Were such a search to be conducted today, *Riley* makes clear that "law-enforcement officers remain free to examine the *physical aspects of a phone*" and acknowledges the "sensible concession" that "officers could have seized and secured [the suspect's] cell phones to prevent destruction of evidence while seeking a warrant." *Id.* at 10, 12. As to the alleged cell phone search, Plaintiff's complaint alleges solely that his cell phone was "taken from him, and searched – without his consent – by Mrs. Saunders." Compl. at ¶ 28. The complaint is silent as to the nature of the alleged search and it does not describe the type of intrusion that *Riley* seeks to prohibit without a warrant (*e.g.*, activating or reviewing any data contained on the device). Based on the facts alleged in the complaint, the alleged "search" of W.S.G.'s phone does not fall outside Riley's permissible parameters.

II. The Reasonableness Standard for School Searches Remains Unchanged and Distinct from the Law-Enforcement Standard.

Riley provides an "answer to the question of what *police* must do before searching a *cell phone seized incident to arrest.*" *Id*. at 28 (emphasis added). It does not supplant the standard applicable to searches of students by school administrators first articulated in *New Jersey v. T.L.O.*, which stated that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." 469 U.S. at 341. Unlike the reasonableness standard applied in the law-enforcement context – which "generally requires the obtaining of a judicial warrant," *Riley*, Slip Op. at 5 (*citing Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)) – the *T.L.O.* decision held that the reasonableness of a search in the school context depended only on whether the search was (1) justified at its inception; and (2) permissible in scope. 469 U.S. at 341-42.

Here, both prongs of the *T.L.O.* reasonableness test are satisfied. The search of W.S.G. was justified at its inception because the Administrator's had "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 342. As alleged by Plaintiff, two separate parents reported to the Administrators that a student with long hair was using illegal drugs on a school bus and conducted their search of a student on the basis of that information. Compl. at ¶ 32. Plaintiff has pled no facts to support that the Administrator's reliance on this information was at all unreasonable – for example, by claiming that W.S.G. did not ride the bus on which the drug use was reported, that W.S.G. does not have long hair, or even that no drug use had taken place.

As detailed at greater length in Defendants' prior memoranda, the search of W.S.G. also meets the second prong of the reasonableness test because it was "reasonably related to the

objectives of the search and not excessively intrusive" considering the student's age, sex, and suspected infraction. *T.L.O.*, 469 U.S. at 342.

The fact that Plaintiff alleges that W.S.G.'s cell phone was "taken from him and searched" does not automatically render the Administrators' search unreasonable under *T.L.O.* The objective of the search was to locate contraband that was small, easily concealed, illegal, and dangerous. The complaint fails to articulate any facts to suggest that the alleged search of the phone was not reasonably related to the suspected infraction or was otherwise excessively intrusive. The search that was alleged to have been conducted was appropriate under the governing *T.L.O.* standard. Even under the standards articulated by *Riley* (which permit even law-enforcement officers to conduct a warrantless search of "the *physical aspects of a phone"* and to take the cell phone from its owner during the course of the search (Slip Op. at 10, 12)), the alleged search is not unreasonable.

Having met the two prongs of *T.L.O.*'s reasonableness test, the school administrators are entitled to qualified immunity. *Riley* mandates no different result.

CONCLUSION

School administrators are not police officers. Tasked with protecting the safe and orderly functioning of schools, they are not required to obtain a warrant prior to conducting a search of a student. *Riley* does not supplant *T.L.O.*, nor does it establish, *post hoc*, a new standard to govern the Administrators' conduct. Given the absence of law defining the parameters of cell phone searches in the school context – both in February 2013 and now – the Administrators are entitled to qualified immunity.

For the foregoing reasons, Defendants Diane R. Saunders and Robert A. Turpin, III request that this Court dismiss the Complaint with prejudice and for any such further relief as the Court may deem appropriate.

Respectfully submitted,

DIANE R. SAUNDERS and
ROBERT A. TURPIN, III

By: /s/
Counsel

Joseph P. Rapisarda, Jr. (VSB #14836)
County Attorney
Lee Ann Anderson (VSB #72419)
Senior Assistant County Attorney
Audrey J. Burges (VSB #72569)
Assistant County Attorney
ajburges@henrico.k12.va.us
Henrico County Attorney's Office
P.O. Box 90775
Richmond, Virginia 23273-0775
Telephone: (804) 652-3712
Facsimile: (804) 501-4140
Counsel for the Defendants

CERTIFICATE OF SERVICE

I certify that on this 7th day of July, 2014, the foregoing Defendant's Memorandum in Response to Court's Order of June 25, 2014, and in Further Support of Defendants' Motions to Dismiss, will be electronically filed with the Clerk of Court using the CM/ECF system, which

will then send a notification of such filing (NEF) to the following:

Scott D. Cardani
Robert L. Peresich
Bowen Ten Cardani, PC
3957 Westerre Parkway, Suite 105
Richmond, Virginia 23233-1319
Telephone: (804) 755-7599
Facsimile: (804) 755-7552
rperesich@btclawva.com
scottcardani@gmail.com

/s/
Audrey J. Burges (VSB #72569)
Assistant County Attorney
Henrico County Attorney's Office
P.O. Box 90775
Richmond, Virginia 23273-0775
Telephone: (804) 652-3712
Facsimile: (804) 501-4140
ajburges@henrico.k12.va.us
Counsel for the Defendants