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Testimony of the Office of Chief Public Defender
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Education Committee Public Hearing – March 1, 2017

Raised H. B. 7154
An Act Concerning Students' Right to Privacy in their Personal Mobile Electronics Devices

The Office of Chief Public Defender opposes passage of this bill as drafted, which attempts to define certain extraordinary, broad search and seizure powers of school employees and others. While understanding the intent of this legislation, the Office of Chief Public Defender believes that the bill is overly broad and, if passed, would permit unreasonable searches and seizures of electronic technology, including cell phones, computers and tablets, in violation of the state federal constitutions. The Office of Chief Public Defender would ask that work be continued on this legislation to ensure that the personal privacy rights of students and their families are protected.

The bill as drafted is overly broad and may therefore be unworkable. The definition of "school employee" is so broad that it could include parent volunteers, cafeteria workers, crossing guards or vendors that have regular contact with students and provide services "to or on behalf of students" that are in grades K-12. (See Section 1(2)(A)). These employees and contractors would have the ability to seize a student's computer, tablet or cell phone. They may do so under the draft even if the electronic device is the property of their parent. Today's school handbooks are robust, and so, too, is the list of violations a school employee might cite to seize a student's device. (See section (c).) In short, it would be far too easy for a student to face a profound intrusion

in response to a relatively minor infraction. If there is a risk of "imminent personal injury," law enforcement should be contacted immediately.

The bill allows for the mobile electronic device to be searched. But there is no time frame articulated under section (c) of this proposal, a search of the tablet, cell phone or other mobile electronic device as defined here, could continue indefinitely, Related, it is unclear what party or parties would: a) train school administrators on how to conduct such digital searches, and b) pay for such training. [1]

Most importantly, this legislation may violate the prohibition against unreasonable searches and seizures as guaranteed by the state and federal constitutions. The Supreme Court of the United States has long balanced the rights of students and school authorities. *See, e.g.*, *Tinker v. Des Moines*, 393 U.S. 503 (1969); *Goss v. Lopez*, 419 U.S. 565 (1975). With respect to searches and seizures in school contexts, the Court has held that "[t]he determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

Usually, school officials need not have probable cause to conduct a search to protect school safety, but their search must be "justified at its inception" and conducted in a manner "reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 469 U.S. at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). A search is justified at its inception "when there are 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," and "permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not

[1] Section (c) notes that a "school employee" would conduct the search (see lines 42-43), but at line 35 the title "school administrator" is utilized as one who can conduct a search. Therefore, it is unclear who or if both may conduct a search.

excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.* 469 U.S. at 341-42.

In 2014, however, the Court held that police must obtain a warrant before searching a cell phone (absent exigent circumstances or a specific exception); the Court cited cell phones' capacity to contain large amounts of personal data, and the fact that most Fourth Amendment jurisprudence predated such technology. *Riley v. California*, 573 U.S. ___ (2014). This reasoning applies to other personal mobile electronic devices, as well. If police need a warrant before searching the phone of someone already under arrest, it stands to reason that a school administrator may not conduct such a search with mere reasonable suspicion that a student violated educational policy.

It is as yet unclear whether students' heightened expectation of privacy in their devices will survive their reduced privacy expectation at school.

Even if this legislation eventually is found to pass constitutional muster, the legislation is overly broad, and thus unworkable. Subsection (d) is unworkable because, while it restricts school employee activity, it contains no penalty or other accountability mechanism to address instances in which school employee fails to comply with the restriction against disclosure of information obtained from or observed on the student's device.

The Office of Chief Public Defender respectfully requests that further discussion be held on these issues to ensure that any legislation is constitutional.