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And Gateway School District

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KESHARA SENANAYAKE,	:	
	:	**Docket No. 20-cv-3352 CDP**
Plaintiff,	:	**Civil Action**
	:	
v.	:	
	:	
JANE SYLVESTER, Principal, Gateway Central High School, in her official and individual capacities; EMILY SU, Superintendent, Gateway School District, in her official and individual capacities; and GATEWAY SCHOOL DISTRICT,	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Public school officials must have the flexibility to take reasonable steps to protect the well-being of students entrusted to their custody. As principal of Gateway Central High School, Jane Sylvester has the responsibility of keeping Gateway students safe from traumatizing cyberbullying, addictive nicotine vaping, and the array of other threats students face. After years of rampant cyberbullying, Gateway adopted a policy which allowed school officials to randomly search student athletes' phones to deter online harassment. Keshara Senanayake, a junior on the water polo team, was chosen to have his phone searched. After investigating the appropriate apps, Sylvester saw a notification indicating Senanayake was selling prohibited nicotine vapes on school grounds. Sylvester conducted a second search of additional apps where she found evidence of Senanayake's vaping violation. Senanayake was subsequently suspended from the water polo team. He brought this suit, alleging the policy and the searches violated the Fourth Amendment.

To prevail regarding the challenges to the first suspicionless search pursuant to Gateway's Anti-Cyberbullying Policy and the second suspicion based search, the plaintiff must prove that the searches were unreasonable under the Fourth Amendment. The reasonableness of suspicionless searches in schools balances the nature of the student's privacy interest, the character of the intrusion, and the nature of the government's concern. Searches predicated on suspicion evaluate whether the search was justified at its inception and reasonable in scope. For the first search, Gateway's policy was constitutional because student athletes have diminished privacy interests, the search was limited in scope and consequences, and the policy was effective in addressing Gateway's serious cyberbullying concern. The second search was constitutional because the search was initially justified due to the vape sale notification and reasonable in scope due to the narrow tailoring of the apps viewed. Summary judgement must be granted for the defendant because, as a matter of law, the policy and the searches were valid under the Fourth Amendment.

STATEMENT OF MATERIAL FACTS

Jane Sylvester has been the principal at Gateway Central High School since 2012. (Deposition of the Defendant, Jane Sylvester ("Sylvester Dep."), at 3:8-13, attached as Ex. A) Prior to taking on this role, Sylvester spent a number of years as a teacher and administrator in Gateway School District. (Sylvester Dep. at 3:8-13). In 2014, Gateway teachers approached Sylvester about the rampant, pernicious cyberbullying that was taking place among students, especially student athletes, on social media and messaging apps. (Sylvester Dep. at 3:8-13). Teachers struggled to keep order in classrooms, and students' psychological states became increasingly distressed. (Sylvester Dep. at 3:23-31). The concern over the spread and impact of cyberbullying was not unique to Gateway. A 2016 report found one in six high school students across the country has been a victim of online bullying, and the effects of cyberbullying range from depression and anxiety to self-harm and suicide. (New Study Shows Cyberbullying on the Rise at High Schools Nationwide, Grace Chen, ("Article"), at 2, attached as Ex. B); (Cyberbullying, School Bullying, and Psychological Distress: A Regional Census of High School Students, Shari Schneider, ("Study"), at 1, attached as Ex. C).

Incidents of cyberbullying became so pervasive at Gateway that Sylvester and the school district had to settle two lawsuits for over $150,000 resulting from Gateway's alleged failure to protect students from severe online harassment. (Gateway School District Anti-Cyberbullying Task Force Report ("Task Force Report"), at 1, attached as Ex. D). Both settlements were related to cyberbullying by members of Gateway's athletics teams. (Sylvester Dep. at 7:11-23). Cyberbullying on the girls' soccer team was so relentless and troublesome that the coach decided it was necessary to cancel the Spring season that year. (Sylvester Dep. at 7:11-23).

After Missouri adopted an anti-cyberbullying law at the behest of concerned parents, Gateway created a taskforce which proposed a new cyberbullying policy directed at student

athletes. (Sylvester Dep. at 4:22-30). Gateway parents assisted in drafting the rule as they felt it was a necessary response to a real student threat. (Gateway School Board Meeting on Student-Athlete Anti-Cyberbullying Policy Minutes ("School Board Meeting"), at 1, attached as Ex. E).

The Student-Athlete Anti-Cyberbullying Policy allowed for random searches of student athletes' phones as a means of investigating and deterring cyberbullying. (Gateway School District Student-Athlete Anti-Cyberbullying Policy ("Policy") at 1, attached as Ex. F). Students who joined any Gateway athletic team were required to disclose the messaging applications or groups they use or belong to, and the school was allowed to search and retain the phones for the duration of the school day. (Policy at 2). Student athletes were required to sign a written copy of this policy at the start of the season to participate in any sport. (Policy at 2). Sanctions for cyberbullying were limited to suspension from athletics, and no academic sanctions were imposed. (Policy at 2). After the first offense, students were required to meet with school officials to develop an action plan to stop the cyberbullying behavior. (Policy at 2). The second offense resulted in a 15 day suspension from interscholastic sports, and the third offenses resulted in sports suspension for the remainder of the school year. (Policy at 2). With strong parental support, Gateway adopted the policy in May 2017, and Sylvester began to enact the new measures to safeguard students from cyberbullying. (Sylvester Dep. at 6:19-23).

On May 4, 2020, Sylvester sought to enforce the Anti-Cyberbullying Policy by searching the phone of Keshara Senanayake, a Gateway student and member of the water polo team. (Sylvester Dep. at 8:16-18). As an eighteen year old junior, Senanayake was old for his grade, and Sylvester believed he enjoyed having a reputation for acting tough. (Sylvester Dep. at 9:22-28). Sylvester knew Senanayake was part of the school's popular crowd which was known for being unkind to "nerdy" students. (Sylvester Dep. at 9:22-28). On the morning of the searches, Sylvester was monitoring the students during arrival when she noticed Senanayake showing his phone to

Coco Xu and a group of other students. (Sylvester Dep. at 9:4-10). Sylvester elected to search Senanayake's phone and requested his device pursuant to Gateway's policy. (Sylvester Dep. at 9:22-28). Senanayake agreed and turned over his phone. (Deposition of the Plaintiff, Keshara Senanayake ("Senanayake Dep."), at 5:2, attached as Ex. G).

Sylvester proceeded to check the designated apps Senanayake had disclosed and consented to being searched at the start of the season. (Sylvester Dep. at 11:14-20). She reviewed recent texts, Instagram messages, Twitter messages, Snapchat messages, and What's App messages. (Sylvester Dep. at 11:14-20). After finding no evidence of cyberbullying, Sylvester placed the phone on her desk to be returned at the end of the day. (Sylvester Dep. at 12:1-3).

As Sylvester went to retrieve the phone hours later, she noticed a suspicious message flash on the screen. (Sylvester Dep. at 12:8-10). Sylvester saw a notification from Venmo indicating that another student, Coco Xu, had sent Senanayake ten dollars with the comment, "thanks for the pod" and an emoji depicting a puff of smoke. (Sylvester Dep. at 12:10-15). In addition to cyberbullying, addictive nicotine vaping was an alarming and dangerous problem at Gateway. (Senanayake Dep. at 14:28-30). Many students used vaping products on school property. (Senanayake Dep. at 7:29). As an attentive principal, Sylvester knew that pods are the flavored nicotine component of the vape product, Juul, commonly used by popular students like Senanayake. (Sylvester Dep. at 13:18-24). Gateway had banned the possession of Juuls and other vape products from campus, yet the notification alerted Sylvester that Senanayake was selling pods to underage users on school property. (Sylvester Dep. at 13:1-4). Unable to turn a blind eye to this violation of school policy, Sylvester decided to further look through Senanayake's phone to confirm her suspicions. (Sylvester Dep. at 12:20-25).

After searching and closing out the Venmo app, Sylvester noticed that Notes was the last app Senanayake had opened on his phone which indicated this was the app Senanayake was showing to Xu and the other students at the start of the day. (Sylvester Dep. at 14:27-30). Concerned the morning interaction she witnessed may have been related to Senanayake's vape sales, Sylvester assessed the Notes app. (Sylvester Dep. at 15:1-2). After briefly viewing a few unrelated personal entries, Sylvester found a clear record of payments Senanayake was owed for his vape sales to Xu and other Gateway students. (Sylvester Dep. at 16:28-31).

With sufficient proof to confirm Senanayake had violated school policy by distributing vape products, Sylvester presented Senanayake with the evidence. (Sylvester Dep. at 17:10-14). Senanayake admitted to vaping and reselling Juul pods to students. (Sylvester Dep. at 17:10-14). He was suspended from the water polo team as a result. (Sylvester Dep. at 17:10-14). For his senior year, Senanayake chose not to rejoin Gateway's water polo team. (Senanayake Dep. at 16:24-25). Due to his suspension and decision to remain off the team, Senanayake lost his athletic scholarship to the University of Southern California. (Senanayake Dep. at 15:7-9). Senanayake initiated this action, seeking monetary damages and injunctive relief against Gateway's policy for an alleged violation of the Fourth Amendment. (Compl. at 1:1-3, August 31, 2020).

SUMMARY JUDGMENT STANDARD

The court must grant summary judgement on behalf of the moving party if the movant shows there is no genuine dispute as to any material facts and the movant is entitled to judgement as a matter of law. Fed. R. Civ. P. 56(a). Material facts are those that affect the outcome of the suit under governing law, and it is required that the court construe all material facts in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 248 (1986). The court must determine that no genuine dispute of material facts exists unless the presented evidence

makes clear that a reasonable jury could find in favor of the nonmoving party. *Id*. Thus, if the nonmoving party fails to establish any element of its claim, the court must grant summary judgment for the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Burlison v. Springfield Pub. Sch.*, 708 F.3d 1034 (8th Cir. 2013) (affirming grant of summary judgement because a public school student's Fourth Amendment rights were not violated by the reasonable search and seizure of the student's backpack).

ARGUMENT

Summary judgment must be granted because Gateway's Anti-Cyberbullying Policy and the second search of Senanayake's phone were reasonable under the Fourth Amendment. Senanayake has brought suit under 42 U.S.C. § 1983 which grants individuals the right to sue state employees acting "under color of state law" for violations of constitutional rights. 42 U.S.C. § 1983 (Westlaw through Pub. L. No. 116-259). Senanayake claims that Gateway's Student-Athlete Anti-Cyberbullying Policy, Sylvester's first search of Senanayake's phone under this policy, and the second search of the Venmo and Notes applications violated the Fourth Amendment. (Compl. at 8:47-51, 9:52-55). The Fourth Amendment, incorporated against the states by the Fourteenth Amendment, protects an individual's right to be secure "against unreasonable searches and seizures." U.S. Const. amend. IV; U.S. Const. amend XIV. Reasonableness, which is determined by balancing the intrusion of the individuals' privacy rights against legitimate government interests, is the crux of the constitutionality of a state search. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).

Though Fourth Amendment protections apply against school officials, the importance of swift discipline to maintain order and safety in schools creates a special need which makes probable cause warrant requirements impracticable and unnecessary. *Vernonia*, 515 U.S. at 653.

Given student's reduced Fourth Amendment rights, courts have developed distinct standards for the reasonableness of random searches based on school policy and searches based on individualized suspicion. *Id*.; *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). For suspicionless searches, courts balance the nature of the student's privacy interest, the character of the intrusion, and the nature of the government's concern. *Vernonia*, 515 U.S. at 653. Searches predicated on suspicion require that the search is justified at its inception and reasonable in scope. *T.L.O.*, 469 U.S. at 341. Thus, while students do not shed their constitutional rights when entering public schools, the government's custodial responsibility over children allows school officials to conduct searches if the balanced factors weigh in favor of reasonableness. *Vernonia*, 515 U.S. at 655.

Here, Gateway's Anti-Cyberbullying Policy was reasonable because the privacy interests of the narrow group of student athletes covered under the policy were minimal; the policy's intrusion was insignificant because only a limited number of apps were searched and the consequences for cyberbullying were contained to sports; and the school's interest in protecting students from cyberbullying was amply compelling to justify the effectively tailored search policy. The second search of Senanayake's phone was reasonable because the search was justified at its inception due to the Venmo notification indicating Senanayake was selling vape pods and reasonable in scope due to the narrow tailoring of Sylvester's search to apps sufficiently related to evidence of Senanayake's vape sales.

A. The Court Must Grant Summary Judgement Because Gateway's Anti-Cyberbullying Policy was Constitutional Due to Student Athletes' Diminished Privacy Interests, the Limited Scope and Consequences of the Searches, and the Effectiveness of the Policy in Addressing Gateway's Serious Cyberbullying Concern.

The court must grant summary judgement regarding Gateway's Anti-Cyberbullying Policy because the policy was reasonable given that student athletes have a diminished expectation of privacy, the intrusion was limited in its scope and consequences, and the policy was an effective

means of addressing the school's serious concern over the dangers of cyberbullying. The Fourth Amendment imposes no requirement of individualized suspicion to conduct searches in public schools. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 829 (2002). The school's custodial responsibility to discover and prevent harm to students creates a special need that makes probable-cause requirements impractical and justifies suspicionless search policies. *Id*. at 830. To determine if a random school search policy is reasonable under the Fourth Amendment, courts consider three factors: (1) the nature of the privacy interest, (2) the character of the intrusion, and (3) the nature and immediacy of the government's concern as well as the efficacy of this means of meeting it. *Vernonia*, 515 U.S. at 654, 658, 660. Here, the nature of the privacy interest for students subjected to the policy is minimal because the policy targeted only student athletes; the policy's intrusion was reasonable because only a limited number of predesignated apps were searched for specific evidence of cyberbullying and the consequences were contained to athletics; and the government's interest in protecting students from the dangers of cyberbullying was amply compelling to justify searches effectively tailored to student athletes.

1. The Nature of the Students' Privacy Interest is Insignificant Because the Students Subject to Being Searched Under the Anti-Cyberbullying Policy were Voluntary Members of Gateway's Athletics Teams.

Students whose phones are searched pursuant to Gateway's Anti-Cyberbullying Policy have a minimal privacy interest because they are willing participants on Gateway's sports teams. The nature of the privacy interest factor evaluates an individual's subjective expectations of privacy that society recognizes as legitimate based on the specific context and the individual's relationship with the state. *Vernonia*, 515 U.S. at 654. Children temporarily committed to the custody of the state as schoolmaster have a diminished privacy interest. *Id*.

Because student athletes voluntarily subject themselves to heightened school regulation through athletic participation, their privacy interests are lower than the average student. *Vernonia*,

515 U.S. at 657. In *Vernonia*, the school implemented a random drug testing policy exclusively directed at student athletes. *Id*. at 650. By voluntarily taking part in athletics, student athletes have reason to anticipate greater intrusions upon their privacy. *Id*. at 657. Members of school athletics willingly subject themselves to regulations other students avoid such as mandatory practices, rules of conduct, insurance requirements, dress codes, physical exams, and communal undress. *Id*. Because student athletes voluntarily reduce their rights within the school to gain the privilege of participation, their privacy expectation is less than normal students. *Id*.; *see also Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 354 (8th Cir. 2004) (holding searches for the general student body were unreasonable because the policy was not aimed at only student athletes who "agree to waive certain privacy expectations…in exchange for the privilege of participating in the activity").

Here, the privacy interest of students searched under Gateway's Anti-Cyberbullying Policy are minor because only students who voluntarily participated in school athletics were searched. Like in *Vernonia* where drug testing was limited to athletic participants, Gateway's Anti-Cyberbullying Policy searched only the devices of student athletes. (Policy at 2). Gateway sports participants voluntarily waived their phone related privacy interests to gain the privilege of interscholastic athletics. (Senanayake Dep. at 3:19-22).

Though drug testing and phone searches for cyberbullying are distinct, student athletes' reduced privacy interest is not limited to physical bodily intrusions, and phones have not been determined to have heightened privacy protections in the school context. *Vernonia*, 515 U.S. at 654; *Jackson v. McCurry*, 762 F. App'x 919, 927 (11th Cir. 2019). While phones taken during criminal arrests require warrants to be searched, it is well established that students have less privacy interests than adults in criminal circumstances. *Riley v. California*, 573 U.S. 373, 401 (2014); *T.L.O.*, 469 U.S. at 340. Because probable cause requirements are unsuited for maintaining

safety in school environments, rules dictating that warrants are needed to search phones are inapplicable to students. *Jackson*, 762 F. App'x at 927. As such, drug tests and phone searches are both constitutional means of protecting student athletes' safety given their lesser privacy interests.

2. The Intrusion of the Policy was Minimal in Character Because the Policy Confined Searches to Evidence of Cyberbullying and the Consequences for Violations were Limited to Extracurriculars.

The intrusion of Gateway's Anti-Cyberbullying Policy was insignificant because the policy limited the search to only evidence of cyberbullying on specific apps and penalties for violating the policy were restricted to athletic suspension. The character of the intrusion factor considers the method and manner of information production as well as how the specific information gathered is used by the school. *Vernonia*, 515 U.S. at 658.

When a school search policy is limited to specific, predesignated inquiries, the character of the intrusion is minimal. *Id*. In *Vernonia*, the urine testing of student athletes screened only for illicit drugs. *Id*. at 650. Because searches were confined to standardized, predetermined drugs the school was trying to control and not "whether the student is, for example, epileptic, pregnant, or diabetic," the limited information disclosed made the intrusion insignificant. *Id*. at 658.

Here, the intrusion of Gateway's policy was minimal because searches were contained to only evidence of cyberbullying on specific apps students disclosed to the school. Like in *Vernonia* where the district limited its testing to a standardized list of drugs the school was aiming to regulate, Gateway's policy confined its inquiries to exclusively cyberbullying related violations. (Policy 2). Administrators were granted access to search only messaging apps or groups that students could use for cyberbullying in order to curb the practice. (Policy 2).

The character of the intrusion is inconsequential when punitive actions for an infraction are limited to suspension from extracurriculars. *Earls*, 536 U.S. at 833. In *Earls*, the school district implemented a random drug testing policy for any students participating in extracurricular

activities. *Id*. at 826. The intrusion of the search was insignificant because the only consequence for failing a drug test was to limit the student's participation in extracurriculars, and full suspension only arose after three violations. *Id*. at 834. Given the limited uses to which the test results were put, the character of the intrusion was insubstantial. *Id*.

Conversely, an intrusion is significant when search results are given to law enforcement and criminal sanctions are involved. *Doe*, 380 F.3d at 355. In *Doe*, the school subjected students to random searches of their persons and belongings. *Id*. at 351. The intrusion was consequential because the search findings were provided to law enforcement and "used in criminal proceedings against students." *Id*. at 355. Because the school was encouraging criminal sanctions rather than promoting student safety with the searches, the intrusiveness of the school policy was severe. *Id*.

Here, the intrusion of Gateway's policy was minimal because the consequences for cyberbullying were limited to sports participation only. Similar to *Earls* where consequences for positive drug tests were confined to extracurricular suspension, Gateway's policy constrained sanctions to "limiting or revoking student privileges to participate in interscholastic sports." (Policy 1). Unlike in *Doe* where the school turned over the fruits of searches to law enforcement for criminal proceedings, Gateway implemented only non-criminal, non-academic punitive measures for cyberbullying. (Policy 1). Additionally, like in *Earls* where the first two drug infractions resulted only in school meetings or a temporary suspension before being barred from sports participation, Gateway's policy adopted equally lenient consequences. (Policy 2). The first offense required a meeting with the principal, the second offense induced a fifteen day sports suspension, and the third offense caused athletic suspension for only the remainder of the school year. (Policy 2). Though outside consequences may arise from Gateway's policy, such as Senanayake's revoked athletic scholarship, Gateway cannot be responsible for a university's

independent decision to withdraw a scholarship or a student's choice to not participate in athletics after the suspension is over. (Senanayake Dep. at 15:7-9; 16:24-25). The Anti-Cyberbullying Policy itself imposes lenient, limited athletic sanctions which makes the intrusion insignificant.

3. The Nature and Immediacy of the Government Concern is Substantial Because Cyberbullying Represents a Serious, Immediate Threat to Students' Health, and the Policy is Effectively Tailored to Address Cyberbullying at Gateway.

The nature and immediacy of the government's concern for student's safety makes the policy reasonable because Gateway has particularized evidence of the national cyberbullying hazard, and the policy is effective because it is logically connected to addressing student athletes' substantial cultivation of cyberbullying. The nature of government concern evaluates whether there is a compelling need for state action that is important enough to justify random searches and whether the state's action is effective in addressing the state's concern. *Vernonia*, 515 U.S. at 661.

A school's need to preempt a national threat to students' physical and psychological health and safety creates a nature of government concern sufficient to justify suspicionless searches. *Earls*, 536 U.S. at 838. In *Earls*, the school initiated its random drug search policy for extracurriculars in response to a nationwide epidemic of drug use. *Id*. at 834. Highlighting that student drug use has destructive effects on physical health, mental development, and educational outcomes across the country, the court reasoned "it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use." *Id*. at 834, 836.

Here, Gateway's policy is reasonable because cyberbullying is a substantial national threat to students' psychological and physical wellbeing. Like in *Earls* where student drug use was determined to be a national epidemic with severe detrimental impacts, the harms of cyberbullying have been on the rise at schools across the country. (Article at 1). Recent studies have demonstrated that one in six students nationwide have been victims of cyberbullying, and the traumatizing effects

of cyberbullying range from depression and anxiety to self-harm and suicide. (Article at 2); (Study at 1). Based on the extreme risk cyberbullying poses to students' mental health, Gateway's concern with protecting its students from a national threat makes the policy objectively reasonable.

Furthermore, particularized evidence that a school is facing an immediate problem jeopardizing student safety is an even stronger justification for suspicionless searches. *Earls*, 536 U.S. at 835. In *Earls*, the school's random drug test policy was also in response to specific evidence of drug use in the district. *Id*. Teacher were reporting students under the influence in class, parents were calling the school board about the "drug situation," and drugs were found in the school parking lot. *Id*. Though not a requirement, evidence of drug use in the district shored up the school's need to enact policies to protect students from the dangers of illegal substances. *Id*.

Here, Gateway's policy is reasonable because there is significant evidence that the school is facing a particular cyberbullying problem that threatens the health and safety of students. Like in *Earls* where the district was specifically battling drug abuse amongst its students, Gateway has been overwhelmed by the adverse impacts of cyberbullying. (Task Force Report 1). As in *Earls* where teachers and parents expressed concern about student drug use, Gateway teachers reported that rampant cyberbullying among students made it difficult to maintain order in classrooms. (Sylvester Dep. at 3:23-31). Gateway parents consistently vocalized their concern about the psychological danger cyberbullying posed to children and their desire for Gateway to formulate solutions. (School Board Meeting at 1). The two lawsuits regarding Gateway's alleged failure to protect students from online harassment provide unequivocal evidence that cyberbullying was causing actual, immediate harm to both students and the district. (Task Force Report at 1).

A random school search policy is effective when there is a narrow, logical connection between the source of a specific problem and the means of targeting the threat's origin. *Vernonia*,

515 U.S. at 663. In *Vernonia*, the school aimed its drug testing policy at student athletes because substance abuse in the district was spearheaded by the athlete population. *Id*. Drug testing only students on sports teams was deemed effective because it linked the students entangled with the issue to a direct method of preventing and detecting drug use. *Id*.

Here, Gateway's policy is effective because there is substantial evidence that student athletes are the source of the cyberbullying problem, and the policy was tailored to regulate cyberbullying among the student athlete population. Similar to *Vernonia* where athletes were spurring drug use in the school and the policy was aimed at remedying this issue, Gateway has strong reason to believe student athletes drive the cyberbullying situation, and, as a result, Gateway tailored the policy to effectively address the problem. (Sylvester Dep. at 7:1-23). Not only has Sylvester obtained an abundance of anecdotal evidence from teachers, coaches, parents, and administrators that Gateway student athletes are the usual perpetrators of cyberbullying, but both of the settled lawsuits related to incidents of online harassment on sports teams. (Sylvester Dep. at 7:1-23). Directing searches to only Gateway student athletes is a narrow and effective means of eradicating cyberbullying in the entire school. Though the plaintiff may assert there were less invasive means of addressing cyberbullying, the failure to adopt the least intrusive means is not enough to overcome states interest in protecting students. *Vernonia*, 515 U.S. at 663. Courts have never held that only the least intrusive means are reasonable. *Id*. Alternate strategies for addressing cyberbullying, such as searches based on suspicion, face problems of impractical and discriminatory enforcement which ultimately make searches less protective for students. *Id*. at 664.

B. Summary Judgement Must be Granted Because the Second Search of Senanayake's Phone was Reasonable Due to the Search Being Justified at Inception by the Venmo Notification and Narrowed in Scope to Only Apps Related to the Violation.

The court must grant summary judgement for the second search of Senanayake's phone because the search was justified at its inception due to the suspicious Venmo notification and

reasonable in scope due to the narrow tailoring of the search to apps related to evidence of the wrongdoing. Because school officials need to act promptly to cultivate order and security for students, the legality of school searches based on suspicion depends on reasonableness rather than probable cause. *T.L.O.*, 469 U.S. at 341. Evaluating the reasonableness of a suspicion based school search hinges on two factors: (1) whether the search was justified at its inception and (2) whether the search was reasonably related in scope to the circumstances that first justified the search. *Id*. Here, Sylvester's search was justified at its inception because the Venmo notification created reasonable suspicion that a phone search would reveal evidence Senanayake was selling vape pods, and the search was reasonable in scope because Sylvester tailored her search to only a few recent entries of the Venmo and Notes apps which were reasonably related to Senanayake's vape sales.

1. Sylvester's Search was Justified at its Inception Because the Venmo Notification Indicating Vape Sales Created Logical Suspicion that a Search Would Reveal Evidence of a Violation of School Policy.

Sylvester's search was justified at its inception because the visible Venmo notification created reasonable suspicion that a phone search would reveal proof Senanayake was breaking school rules by selling vape pods to other students. 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." *Id*. at 342.

School officials need only an inkling of suspicion based on practical reasoning that a search will turn up evidence of the suspected violation to justify a search at its inception. *Id*. at 346. In *T.L.O.*, the principal carried out two searches of a student's purse after she was caught smoking in the bathroom. *Id*. at 328. Upon initially searching the purse for cigarettes, the principal found marijuana rolling papers which prompted him to conduct a second search. *Id*. The primary search was justified at its inception because there was a sufficient probability that the student's purse would contain cigarettes after being caught smoking by a teacher. *Id*. at 346. As long as the

school's hypothesis that taking on a search will uncover wrongdoing is sensible, the search is appropriately justified at its inception. *Id*.; *see also Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 982 (8th Cir. 1996) (holding the search of students' pockets for weapons was justified at its inception based on a bus driver's tip that weapons had been brought to school); *J.W. v. Desoto Cty. Sch. Dist.*, No. 2:09-CV-00155-MPM, 2010 WL 4394059, at *4 (N.D. Miss. Nov. 1, 2010) (holding direct observation of prohibited phone use at school justifies a search at its inception to determine "to what end the student was improperly using that phone."); *DeCossas v. St. Tammany Par. Sch. Bd.*, No. CV 16-3786, 2017 WL 3971248, at *19 (E.D. La. Sept. 8, 2017) (holding phone searches in relation to specific allegations of drug possession and sales are justified at inception).

Here, Sylvester's search was justified at its inception because the Venmo notification indicating vape pod sales created logical suspicion that further investigation of Senanayake's phone would reveal evidence of a serious school policy violation. Like in *T.L.O.* where the teacher's report that students were smoking in the bathroom created a sufficient expectation that the student's purse contained cigarettes, the Venmo notification stating "thanks for the pod" with a smoke emoji established the requisite probability that Sylvester would find evidence of prohibited vape sales on Senanayake's phone. (Sylvester Dep. at 12:10-15). Directly witnessing the suspicious Venmo notification gave Sylvester ample justification to start the search.

2. <u>The Second Search was Reasonable in Scope Because Sylvester Constrained Her Search of Senanayake's Phone to Only Two Apps Rationally Related to Findings Regarding the Suspected School Policy Violation.</u>

The second search of Senanayake's phone was reasonable in scope because Sylvester tailored her search to a discreet number of recent Venmo and Notes entries which were logically related to Senanayake's vape sales. A search is reasonable in 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." *T.L.O.*, 469 U.S. at 342.

The discovery of additional evidence related to the infraction during an initial search makes further investigation reasonable in scope. *Id*. at 347. In *T.L.O.*, the principal's search of a student's purse for cigarettes inadvertently turned up marijuana rolling papers. *Id*. Based on this finding, the principal searched other compartments of the purse where he discovered a pipe, marijuana, and letters that implicated the student in drug dealing. *Id*. The scope of the extended search did not exceed permissible bounds because the newly found contraband created reasonable suspicion of drug violations that justified further exploration. *Id*. Though the student claimed reading personal letters was unreasonably intrusive, the circumstances and evidence of drug trafficking made investigating the documents the appropriate next step in the search. *Id*.; *see also Mendoza v. Klein Indep. Sch. Dist.*, No. CV H-09-3895, 2011 WL 13254310, at *11 (S.D. Tex. Mar. 16, 2011) (holding a continued search of a student's phone was unreasonable in scope because no newly discovered evidence linked the extended investigation with the initial reason for the search).

Here, Sylvester's search of Senanayake's phone was reasonable in scope because each additional investigation into the Venmo and Notes apps was based on new findings of evidence related to vape sales. Similar to *T.L.O.* where each subsequent discovery of rolling papers, marijuana, and drug sale letters justified further searches of the purse, Sylvester based her Venmo and Notes searches exclusively on the notification from Coco Xu indicating vape sales and the discovery that Senanayake showed the Notes app to Xu that morning. (Sylvester Dep. at 14:4-30). While closing out her Venmo search, Sylvester saw that Notes was the app Senanayake used just prior to the first search. (Sylvester Dep. at 14:4-30). Like in *T.L.O.* where the principal's search of the student's purse for drugs was reasonable after inadvertently finding rolling papers, Sylvester's accidental revelation that Senanayake was showing Xu his Notes justifies a search of the app to determine if any entries were related to vape sales to Xu. (Sylvester Dep. at 14:4-30).

On the other hand, for a search to be unreasonable in scope, school officials must be searching a student for non-dangerous contraband in an improbable and intimate place without specific suspicion. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 376 (2009). In *Safford*, school officials conducted a strip search of a young female student based on the belief that she was hiding common painkillers in her bra. *Id*. at 368. The scope of the search was beyond the bounds of reasonability because school officials had no reason to suspect the student was carrying harmful pills in her underwear. *Id*. at 376. Without a specific, fact-based justification that the investigation is likely to uncover evidence of conduct threatening student safety in that particular location, searches of a young female student's physical body are unreasonable. *Id*.

Here, Sylvester's search was reasonable in scope because she had specific suspicion that Senanayake's Venmo and Notes apps were likely places where one would find evidence of harmful nicotine vape sales. Unlike in *Safford* where there was no evidence the student was hiding pills in her underwear, Sylvester directly witnessed Senanayake's phone being used to sell vapes which indicated the phone was the proper location to begin investigating. (Sylvester Dep. at 12:8-15). Furthermore, unlike in *Safford* where a young female was intimately searched for having a small quantity of harmless over-the-counter medicine, Senanayake, an adult male, had just two apps briefly searched because he was selling nicotine vapes which are far more addictive and dangerous to the health of adolescents. (Sylvester Dep. at 12:31). Due to the immense threat vaping poses to students, Sylvester's specific suspicion created an obligation to investigate Senanayake's device.

A search of a student's phone is reasonable in scope when it is narrowly tailored to relevant apps where evidence of the potential wrongdoing could justifiably be uncovered. *Simpson, Next Friend of J.S. v. Tri-Valley Cmty. Unit Sch. Dist. No. 3*, 470 F. Supp. 3d 863, 871 (C.D. Ill. 2020). In *Simpson*, the principal searched a student's photos app hoping to discover evidence of a meme

being used to bully another student. *Id*. at 866. The search was reasonable in scope because the investigation was limited to areas on the phone where the meme would rationally be uncovered. *Id*. at 871. Though the plaintiff claimed searching the camera roll equated to a "digital strip search" that infringed on personal privacy, by refraining from looking at unrelated apps like calls or web browsers, the principal kept the search reasonable in scope. *Id*.; *see also J.W.*, 2010 WL 4394059, at *5 (holding the decision of school officials to only search a student's photos app for gang related images was limited enough to make the search justifiable in scope).

Here, Sylvester's inquiry is reasonable in scope because she contained her search to only two apps that were related to her suspicions regarding Senanayake's prohibited vape sales. Like in *Simpson* where the principal limited the search to only the app most likely to reveal evidence of bullying, Sylvester limited her search to Venmo, which first displayed the suspicious notification, and Notes once she realized this was the app Senanayake was showing to Xu that morning. (Sylvester Dep. at 14:4-30). It is logical that a student who is using his phone to sell vape products would have some record of this infraction on his phone. Sylvester's self-restrictive search of only apps relevant to the violation ensures that the search was reasonable in scope.

Sylvester's viewing of personal Notes entries prior to discovering Senanayake's record of vape sales does not make the search overly intrusive. Not only did Sylvester view only the first few visible Notes entries, but phone searches that unintentionally uncover personal information about a student are not unreasonable in scope as long as the search remained sufficiently related to the objectives of the investigation. *Jackson*, 762 F. App'x at 927. In *Jackson*, the school searched a student's text messages after accusations of bullying. *Id*. at 922. Despite reading unrelated texts between the student and her ex-boyfriend and family, the search was reasonable in scope because the possibility of finding useful evidence of bullying disguised or buried within these texts justified

expanding the search to additional messages. *Id*. at 927. Like the principal in *Jackson* whose search was reasonable despite reading these personal messages, Sylvester's search is not excessive in scope because she happened upon some personal Notes entries in her search for vape sale evidence. (Sylvester Dep. at 16:18-19).

Furthermore, phones do not possess an explicitly unique privacy expectation in the public school environment. *Id*. Though phones seized incident to criminal arrest necessitate warrants to be searched, this requirement has not been transposed on the school setting. *Riley*, 573 U.S. at 401; *Jackson*, 762 F. App'x at 927. Given the widespread prevalence of phones in schools today, administrators must be able to react swiftly to threats that are facilitated through student's phone use. Therefore, the search of Senanayake's phone based on Sylvester's suspicion of prohibited vape sales was a reasonable exercise of the school's constitutional power to take measures necessary to protect students in their custody.

CONCLUSION

For the foregoing reasons, summary judgment must be granted for the defendant because, as a matter of law, Gateway's Anti-Cyberbullying Policy and the second search of Senanayake's phone did not violate the Fourth Amendment. No reasonable jury could conclude that searches under Gateway's Anti-Cyberbullying Policy were an unreasonable invasion of constitutional privacy rights because student athlete's privacy interests are minimal, the searches were limited in scope and consequence, and the government implemented an effective strategy to deal with a serious and immediate concern over cyberbullying. Additionally, no reasonable jury could conclude the second search was unconstitutional because the search was justified at its inception due to the vaping notification and reasonably confined in scope to relevant inquires. As there is no dispute as to any material fact, it follows that summary judgment must be granted for the defendant.

DATED: February 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing Memorandum of Law in Support of the Motion for Summary Judgment of Defendants, Jane Sylvester, Emily Su, and Gateway School District, was served this day via email to counsel for Plaintiff at the following address:

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/s/ Jared Cohen
Date: February 18, 2022

LPS Assignment Self-Assessment Sheet—Due Friday, February 18, by 5:00 p.m.

Name: Jared Cohen

1. Describe three changes you made to the Facts Section after submitting the initial draft to make the section more persuasive.

First, I added more information about the specific mental harms that cyberbullying has on students. Second, I altered the way in which I described Senanayake and Sylvester's relationship to make it seem less like the principle had a grudge against the student. Finally, I added more short, punchy sentences.

2. Did you review any of the comments we wrote on the open memo assignment prior to completing the brief? Comment briefly on what you did to incorporate our comments on previous assignments.

Based on the comments from my open memo, I tried to include brief mini-umbrellas for each individual factor to help the reader understand the broader rules and where I was going with my arguments.

3. Highlight at least three specific places in the brief that demonstrate choices you made to incorporate persuasive techniques we discussed in class this semester.

For each of my explanation paragraph hooks, I made sure that each rule was clearly persuasive for my side of the argument. I also included some rule refinements for cases that did not explicitly go towards my side, such as *Safford* and *Doe*, and demonstrated how the present facts were distinct from that case. Finally, I included counter-arguments that addressed the opposing side's strongest point, specifically *Riley*, without explicitly making the argument for them.

4. Describe the aspect or aspects of your finished brief that you are most proud of.

I am most proud of how my brief came together to flow together naturally despite how each argument in each section is distinct. I am also proud of my facts section as I feel I was able to present the story in a way that strongly supported my side.

5. Looking back to the beginning of the year in LPS, what progress have you made in researching, formulating, and writing legal analyses? What do you still need to work on?

I feel as though I have made significant progress in my legal research. Prior to LPS, legal research seemed incredible daunting, but now Westlaw feels easy to navigate. I think I still need to work on breaking out of the strict formulaic legal writing style and learning to include some creativity in my legal analysis. I also need to work on using other parentheticals other than see also.