

ARE YOUR STUDENTS “SEXTING”? ARE YOUR TEACHERS?

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“Sexting” is the act of sending sexually-explicit images via cell phones, emails, iPods, pagers or social-networking sites. Unfortunately, the “sexting” phenomenon has exploded across the nation in the last decade and news reports of students engaged in sexting scandals are becoming all too common. Criminal prosecution of teenagers sending “sexts,” lawsuits instituted against schools and school officials due to their response to incidents of sexting, and even reports of teenagers allegedly committing suicide after sexting incidents spiraled out of control have received nationwide media coverage.

A study conducted by The National Campaign to Prevent Teen and Unplanned Pregnancy suggests that 20% of teens have posted or shared nude or semi-nude photos of themselves via text message or online. A slightly higher number of teens, 22%, admit to having received a nude or semi-nude photo from someone else. The prevalence of “sexting” in this day and age makes it an issue which can no longer be avoided by schools, lawmakers, or law enforcement.

IT CAN BE A CRIME

Since 2009, at least 25 states have introduced or considered bills or resolutions aimed at sexting. Generally, the legislation is geared toward deterring young people from engaging in sexting by applying penalties for those who engage in the practice. In most states with proposed or pending legislation, sexting is classified as a misdemeanor and penalties upon conviction range from fines and mandatory enrollment in educational programs to possible incarceration. Many states that have not yet adopted sexting laws are prosecuting minors under their child pornography laws, which call for what many consider to be very stringent penalties.

WHAT TO DO IF YOU DISCOVER SEXTING

When school officials are notified that sexting has occurred, it gives rise to many legal and practical implications. First, when notified of a sexting allegation, school officials must be careful to ensure that they do not violate students' rights by searching their cell phones during the course of their investigation. To avoid these issues, school officials may seek the consent of the students and their parents before searching the cell phone as part of their investigation.

In addition, private schools may implement an express policy in their Student Handbook which provides notice to students and parents that school officials reserve the right to search students' cell phones (as well as other items of personal property and areas on campus) if it suspects that a school policy has been violated. Public and charter schools should check with their attorney regarding a student's constitutional rights before searching a student's cell phone.

To limit the potential of criminal or civil liability on behalf of the school or school official conducting the investigation, the school needs to work with its counsel to find the best way to preserve evidence in case of a potential challenge to a disciplinary action, while protecting the school from a claim that it is itself disseminating child pornography. It's important that all school officials understand the need to take great care to avoid downloading, transferring, or viewing the images on school property. Methods of preserving evidence will depend on the form that the evidence takes.

For example, if a photocopy of an image is provided to the school, place it in a confidential envelope for safekeeping. If the only evidence of the activity is on the student's cell phone, consider other methods of preserving evidence, such as keeping the cell phone; writing in detail what the picture on the phone shows and having a witness (ideally the student or parent) confirm that the writing is an accurate description of the information; or asking law enforcement to permit the school to obtain and retain a copy of the image for evidence to sustain a challenge later.

Once sexting has been confirmed, school officials should immediately notify the parents of all students involved. Notifying the parents and keeping them abreast of the investigation and actions of the school creates an open line of communication between all parties, and may serve to minimize any ill feelings the parents may feel toward the school should legal action be pursued against their child.

Some state laws require schools to report to the police certain crimes that occur on school property. Because sexting is a new phenomenon and states are adopting different approaches on how to handle it, it is important to consult with your school attorney to determine if you are under an obligation to report the incident to local law

enforcement, or the district attorney. Likewise, depending on a state's definition of child abuse and neglect, images shared through sexting may implicate a school's child-abuse-and-neglect reporting obligations. This is also an area of concern which you should discuss with counsel.

Once a school has reported the incident to the parents of all students involved, as well as to all necessary government entities, it must determine the appropriate course of discipline for the students involved. As part of your school's policy, you should set out not only the consequences for students' participation in sexting, but also the school's obligations to report the incident to the proper authorities. Schools may also want to set forth the internal disciplinary measures that they will take upon discovery of a sexting incident, with a caveat that the disciplinary measures may be adjusted at the school's discretion.

As part of your internal disciplinary procedures, consider disciplining not only the sender and others who disseminated the image, but (depending on the circumstances) possibly the recipient as well. Disciplining some of the students involved in the incident, and not others, may result in possible inequality or discrimination claims on behalf of the disciplined students.

WHAT CAN SCHOOLS DO TO PREVENT THE PROBLEM?

Educating students, parents and school personnel about the risks associated with sexting, and the school's policies regarding it, is the most effective deterrent schools can exercise to prevent such issues on your campus. State lawmakers in New Jersey have proposed legislation which would require schools to annually disseminate information to students and parents or guardians on the dangers of distributing sexually-explicit images through electronic means. Other states are expected to follow suit. Implementing a sexting component into school sexual education or character-development curricula may be one way for schools to properly educate their students on "sexting" issues.

The sexting phenomenon is an extension of evolving technology. Unfortunately, schools are in the unique position of having to deal with this issue without established precedent because laws and policies are still being developed. Ensure that your school is establishing policies and following guidelines that minimize exposure to civil and criminal liability while protecting the best interests of the students.