

STUDENT SEXTING: A SERIOUS ISSUE IN NEED OF A THOUGHTFUL RESPONSE

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Sexting among today's teens is a problem that is under-the-radar in many schools. For those who have not yet encountered the issue, "sexting" is when young people take nude pictures or video images of themselves or others, using cell phones or webcams, and share them with others via text message, email, social-media post, or similar internet dissemination. The pictures are sometimes of sexually provocative poses or real or simulated sex acts. In other cases, images may be taken covertly and shared without the knowledge or consent of the subject. In some cases these images are taken in school locker rooms or bathrooms – places where privacy is reasonably expected.

In recent studies, including by WiredSafety, CosmoGirl.com, and the National Campaign to Prevent Teen and Unplanned Pregnancy, one in five teen girls admits to taking a sexually-provocative, explicit or nude photo of themselves and sharing it with others (most often their boyfriends). Similarly one in six teen boys admits sharing these "private" images, often during a fight or after the relationship ends. Nearly half of the teen boys interviewed admit having seen sexual images of classmates, whether sent to them directly or forwarded by another classmate.

What these studies confirm is that sexting is prevalent among teens, that the participants often abuse the implied and unstated conditions of sharing intimate images and information, and that the harm caused within the school community by unauthorized forwards can be profound. Teasing, bullying, and feelings of shame and fear are the unfortunate byproducts that can last for many uncomfortable weeks; in severe cases it can result in profound consequences, such as suicide.

School reaction to the issue of sexting has varied from ignoring it until a problem arises to proactively engaging the issue by deciding what will be tolerated, how the school will respond if its students are involved, what role law enforcement and parents will play, and what resources will be offered if an image that was intended to be private is later shared broadly within the school community. As you assess your options and determine what is best for your school, it's important to start with a solid understanding of how your state treats sexting behavior.

EVOLVING CRIMINAL CONSEQUENCES OF SEXTING

Sexting incidents may begin somewhat innocently as romantic expressions between students who are dating. But even in these situations, things can quickly escalate if sending and receiving of nude photographs of a minor is discovered by school officials or other adults; the images associated with sexting may be considered child pornography, and may carry serious consequences.

Under federal law, child pornography is defined broadly, and can include a visual depiction of a minor engaging in sexually explicit conduct – the very content that is oftentimes part of a typical sext. In the past, sexting was also typically classified as child pornography at the state level. As a result, there were surprising criminal and sex-offender-registry consequences for unsuspecting teens – and heavy responsibilities for schools that became aware of such behavior.

Most states, including California, treated sexting as a serious crime, sometimes even a felony, and did not necessarily differentiate between minors and adults. Recently, however, there has been a push to view sexting through a different lens and lessen the severe consequences for teens. Indeed, several states have created exceptions or made other changes to the applicable statutes to recognize the differences in context and degree of harm related to sexting. Here are a few examples:

- Florida narrowly defines “sexting” to include transmission of images of nudity that are harmful to minors, and reduces the penalties for teens convicted of such an offense. First-time violators receive a \$60 fine or eight hours of community service; no sexual-offender registration is required. Subsequent violations have harsher penalties, however.

- Hawaii differentiates between teen and adult consequences when it comes to the electronic transmission of nude images of minors. Adults engaging in this behavior are subject to a felony charge, while minors involved in similar conduct are only charged with a misdemeanor.

- Oregon limits the crime of online corruption of a child to conduct involving children the defendant reasonably believes were under 16 years of age.

·Texas decreases the seriousness of sexting to a misdemeanor where the teen sends or shares images of a minor that have sexual content where the subject of the image created is aware of the image and that it will be shared.

The criminal treatment and classification of sexting is still an evolving area and will grow and change as situations arise that prompt legislatures to assess if the current structure is effective and appropriate. We will update you about these changes and what they mean for you as they occur. In the meantime, schools should reflect on their current understanding of the issues sexting raises in their schools and have an action plan in place in the event a situation arises.

KEY CONSIDERATIONS

Even though there are gradual changes in state law regarding the consequences to teens of sexting, school officials must exercise great caution when these situations arise in the school setting. Early and effective intervention, proactive policies designed to clarify the school's right to inspect or take control of a cell phone that is the subject of investigation, and a plan to limit the further dissemination of images are critical.

If you have not already done so, it may be time to create an anti-sexting policy for your school. While the policy may not deter all sexting behavior, it does put students and parents on notice of your expectations, your declared right to investigate violations of school policy, including by inspecting phones and text messages, and the potential consequences if a policy violation is found.

One important issue to address head-on is that conduct occurring outside of school, such as the initial creation of the image and sending of the sext, can raise a variety of issues at school that implicate the policy. This is particularly true if the phone is brought onto campus, shown to others, or used to then forward the image to classmates, some of whom may consider it harassing. Finally, as you draft this policy, consider your other policies, such as your policy on emails or bullying, and whether they need to be modified to address the concerns associated with sexting.

Even the best intended policies are of no consequence if they are not shared and explained, or if they are not lived out through the behavior of school officials. Reducing the incidents of and problems surrounding sexting will require a concerted effort by and the cooperation of students, parents, teachers, staff and administrators.

One place to begin is sharing information about the dangers of sexting, the increasing prevalence of this behavior among teens, and the steps each element of the school community can take to make a difference. Different schools have taken different approaches, but most agree that frank discussion about the issue of sexting

is the place to begin. Sharing your policy and conduct expectations, as well as identifying parent and student resources can also be helpful in deterring or correcting current behavior.

If an incident of sexting is discovered at your school, think broadly about the issues when planning "next steps." In addition to possibly involving parents and law enforcement, the sexted message may also be viewed as an incident of child abuse or neglect, thus posing a mandatory reporting situation. Erring on the side of caution, and taking at least the initial steps to make the abuse report is advisable in most situations.

PROTECT YOUR OFFICIALS

One of the greatest risks to schools associated with a sexting incident is an official overstepping his or her role in the investigation and actually becoming part of the problem. More than one well-meaning school official has done this by taking custody of a student's phone, demanding that images be forwarded to the official and possibly even deleted off the student's phone, or searching all content of the phone rather than just the image complained about.

While preserving evidence from destruction is critical, acting too aggressively or without thinking through the issues at this key point in the investigation can result in legal claims being asserted against the school or official, as well as possible criminal sanctions associated with the school official's possession of child pornography.

While many states have clarified their statutes to be exempt from criminal treatment, the possession of sexted images by school officials while they are conducting an investigation is not a total solution. For example, without a policy that announces the school's right to conduct an investigation of possible violations of school policy or possible criminal conduct, a school official's demand for a student's phone or computer could lead to civil liability for invasion of privacy. It is critical that you take advantage of the coverage strong policies can provide and that everyone on your investigation team understand how to preserve evidence without creating worse problems in doing so.

Investigation of incidents of sexting is a vital part of the school's duty to protect students. It must be approached thoughtfully, in cooperation with appropriate state and law enforcement authorities, and with an eye to gathering the information in an appropriate way while not becoming electronic Peeping Toms. Even though there may be many challenges to conducting a solid investigation – including possible destruction or deletion of evidence, non-cooperative witnesses or complaining parties, and angry parents, to name a few – this is still the best way to resolve the issue *and* to protect the school from liability that could arise if ineffective or no steps are taken. Planning ahead can help minimize the bumps in the road, but

determination to conduct an appropriate and thoughtful investigation will carry the day.

IMPOSE APPROPRIATE DISCIPLINE

If, at the end of your investigation, you find that sexting in violation of your policy occurred, it will be important to evaluate the appropriate disciplinary response by carefully considering the unique facts of the particular situation. While each incident is different, the following are examples of factors that may impact your analysis:

How many students were involved in the incident – including the subject of the image, the person who created and initially sent the image, the person who initially received (and did not immediately delete) the image, and anyone who was forwarded the image.

Is this a one-time situation or have there been other events – this could be discovered through a review of the phone, information provided during the investigation, or prior incidents brought to school officials.

What is the content – from a child abuse and criminal conduct standpoint, the more graphic or sexually charged the image, the more serious the consequences. It may be important to make a similar assessment of the seriousness of the material in evaluating the school's response, as well as whether there is sufficient conduct connected to the school to bring the incident under the school policy.

What is the context – were the students involved in a romantic relationship, what is the age or power difference, did the subject know the image was created and/or sent, did the subject ask to have the image deleted, and when and why was the image forwarded.

Is there any connection between the incident and the school – was the image taken on school property, during a school event, or as part of hazing or other behavior associated with a school activity, is there reason to believe a teacher, coach or school official knew or should have been aware of the sext or image, and how long was the rumor about the sext circulating before officials acted on it.

What are the preferences of the subject and the parents – while this should not control the decision about what level of discipline is appropriate, it may be appropriate to seek this information and consider it as part of the overall analysis.

Are there aggravating circumstances – was there any element of coercion or threat involved in the creation or original transmission of the image, were school operations or student safety compromised as a result of this incident, and has there been any bullying toward the subject of the image.

When the answers to these questions are known, it will be easier to approach discipline thoughtfully and identify the appropriate level of discipline for each of the individuals involved.

BE PREPARED FOR POSSIBLE FALLOUT

Just as with any crisis, the aftermath is often the most difficult to deal with. For the subject of the image, there may be shame, embarrassment, or anger that can be best resolved through counseling or parental support. There may also be social consequences in the school community, such as the formal or informal exclusion from groups or activities, and possibly even bullying or harassment. Watching for these issues and planning ahead is critical.

As part of the wind up of a sexting incident, all students involved should be reminded of the school's bullying policy and the serious consequences that can result if the policy is violated. The subject of the image should be reminded about the reporting mechanism and the importance of sharing concerns if they arise. In addition, teachers, coaches and other school officials should be reminded about their role in monitoring student interactions, and intervening in or reporting bullying should it occur.

Similarly, parents should be reminded about the policy and invited to contact the school if the student begins to act in ways that are concerning or discloses possible incidents of bullying. Finally, if an incident of bullying is reported, it should be investigated quickly and confidentially, and if substantiated, addressed through appropriate disciplinary consequences.

CONCLUSION

As technology evolves, so do the challenges of protecting students and keeping them focused on being engaged and contributing members of the school community. Sexting cannot be entirely resolved through school policy and culture, but these forces can make a meaningful difference and serve as useful tools in the event a sexting incident arises at your school. Thoughtful preparation, investigation and resolution are possible ... and worth the effort.