



SEXTING AND THE SCHOOLS— A SOCIAL MEDIA EXPLOSION!

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I. Introduction

“YOUR BRA IS RINGING: STUDENTS DEFY BAN”

A recent N.Y. Daily News article details how students are defying school cell phone bans and are still sexting.¹ With teen sexting on the rise, schools are now faced with another difficult set of legal, technology and discipline issues.

- ◆ What is Sexting? It is the act of sending sexually explicit images electronically, usually of oneself, and usually via cell phone. See www.thenationalcampaign.org/sextech/PDF.
- ◆ What do the Surveys say? One new survey shows that 21% of teen girls and 18% of teen boys have sent/posted nude or semi-nude images of themselves. *Id.*
- ◆ Can Schools Ban Cell Phones? Legally—yes. See e.g., *Price v. NY City Bd. of Ed.* (N.Y. App. Div. 2008).
- ◆ Can I stop students from sexting? Probably not. See “YOUR BRA IS RINGING: STUDENTS DEFY BAN” at FN 1.
- ◆ What is a “Mediatrician”? The phenomenon of sexting has even spurred a new medical position. At the Harvard Medical School they call it a “Mediatrician” or one who deals with and answers parental media-related child-health-related questions. See www.netfamilynews.org.

II. What Legal Issues are Involved?

- ◆ *Student Rights: Free Speech*—A student who created or is caught with explicit images on his phone may claim that the images are protected free speech and that any discipline violates his constitutional rights. The 2nd Circuit (*Doninger 2d Cir. Conn. 2008*) has stated that “a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct ‘would foreseeably create a risk of substantial disruption within the school environment,’ at least when it was similarly foreseeable that the off-campus expression might also reach campus.” But, what if the punishment is not based on the disruptive effect? Under the (*Fraser U.S. 1986*) standard, a student may be disciplined for engaging in “offensively lewd and indecent speech.” Cts. have not yet determined whether the *Fraser* standard applies to off-campus speech, but a ct. recently noted that “off-campus speech can become on-campus speech with the click of a mouse.” But see §79-267, R.R.S. (Nebraska Student Discipline Act—may discipline for conduct “on school grounds”).
- ◆ *Student Rights: Search and Seizure*—In (*TLO U.S. 1985*), the Sup. Ct. established the reasonable suspicion standard for school searches. This test raises difficulties in searching cell phones. For example, if a student violates policy by simply bringing a phone to class, is an administrator justified in searching the phone? The answer appears

to be “no.” In a case handed down in February of 2009, (*Lacroix Mass. Super. Ct. 2009*) the Superior Court of Mass. noted that “other courts have found that there is a constitutionally protected expectation of privacy in cellular phone memory . . .” The *TLO* reasonable suspicion standard for school searches was recently reaffirmed in *Safford Unified Sch. Dist. #1 v. Redding*, (U.S. June 25, 2009) (the strip search case).

- ◆ *Is it Criminal Activity? Legislation: LB 97*—Sexting gained national attention in part due to felony prosecutions of minors and an administrator for sex crimes. See “School Administrator Accused Of Child Porn Because He Investigated Sexting At School” at <http://www.techdirt.com/articles/20090403/1934134386.shtml>. But see *Miller v. Skumanick*, (M.D. Pa. 2009) (enjoining prosecution of minor for sexting). The Unicameral also recently addressed the matter in LB 97 providing certain affirmative defenses to prosecuting minors for sexting.
- ◆ *Wiretapping laws*—Nebraska has a relatively strict set of laws that prohibit, among other things, the intentional interception of electronic communications. There is very little case law interpreting the statutes. Pennsylvania has a similar set of statutes, and a 2006 federal case (*Klump E.D. Pa. 2006*) offered some guidance on how the statutes apply to searches of cell phones finding that the laws provided broad protections to information stored on cell phones in addition to any other rights of privacy.

III. Practical Considerations

- ◆ *Work with parents.* Seminars, webinars, handouts, etc. For sample parent sexting letters see <http://dswashington.org/index.php?id=917&L=1>; and <http://csla2008.pbworks.com/Parent-Education>.
- ◆ *Review cell phone policies*, including any policies regarding searches of confiscated phones. Mere possession or use of phones in contravention of district rules is likely insufficient to justify a search. See *Doe v. Little Rock* (8th Cir. 2004) (holding essentially that handbook rule prohibiting book bags, backpacks, purses and similar containers on school property DOES NOT waive a students’ expectations of privacy in suspicionless searches.)
- ◆ *Review disciplinary policies regarding this conduct.* Is it covered? Is the potential punishment fair and even-handed?
- ◆ *Contact law enforcement officials.* Felony prosecutions/sex offender status for students is unlikely. But, sexting is a potential crime; law enforcement involvement is likely a deterrent.

¹ See www.nydailynews.com/archives.