

# Inquiry & ANALYSIS

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## SEXTING AT SCHOOL: LESSONS LEARNED THE HARD WAY

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A 16-year-old boy asks his 15-year-old girlfriend to send him a naked photo of herself. She does so via text message, thinking that the photo will remain private and will show him how much she cares about him. Three weeks later, the couple breaks up, and her boyfriend forwards the text message to his friends, who quickly spread the image throughout the school. The girl is teased for months afterward, her grades plummet; and the formerly sunny teen refuses to go to school or to socialize with other students.

As many school attorneys and administrators know, this case is far from isolated. "Sexting," the practice by which teens forward sexually explicit images of themselves or their peers via text messaging,<sup>1</sup> has become increasingly common nationwide. According to a frequently cited survey from the National Campaign to Prevent Teen and Unplanned Pregnancy,<sup>2</sup> one in five teens have sent or posted nude or semi-nude photos of themselves online or via text message. Twenty-two percent of teens have received a nude or semi-nude photo of someone else. The study found that while most of the images are exchanged between boyfriends or girlfriends, 15 percent of teens have forwarded images to someone they only know online.

The potential detrimental effects that sexting can have on students are vast. Educators, child psychologists, and pros-

ecutors agree that most teens do not understand the implications that sexting may have on their futures. While sexting often originates as a private exchange between a teen and his or her love interest, relationships can quickly deteriorate. Before long, the seemingly private images can be distributed throughout the school. These incidents can be highly embarrassing for students and, in some extreme cases, can have deadly consequences. At least two female students have committed suicide after the sexually explicit photos of themselves sent to a boy were disseminated to classmates.<sup>3</sup> As discussed below, criminal prosecution—including being required to register as a sex offender—is another possible long-term negative consequence of sexting.<sup>4</sup>

This article discusses a number of legal and practical issues related to sexting in schools. Specifically, this article discusses searching cell phones, what steps administrators can and should take upon discov-



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Formed in 1967, the NSBA Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

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ering sexting, anti-sexting policies, and preventing sexting through education.

## **Searching Cell Phones**

School administrators typically find out about sexting through the rumor mill. Of course, the only way administrators can determine if sexting actually has happened and who is involved is to ask students or to "see for themselves." In the ideal world, students will readily admit to being involved in sexting upon being questioned by administrators. In the real world, administrators may feel they need to search cell phones as part of a sexting investigation. Depending on the facts, searching a student's cell phone without a warrant may violate the Fourth Amendment. Likewise, it is at least arguable that searching open text messages on a cell phone without consent violates the Stored Communications Act. To avoid Fourth Amendment and Stored Communications Act issues, school administrators may always seek consent of a student and his or her parents<sup>5</sup> before searching a cell phone as part of a sexting investigation.

## **Fourth Amendment Concerns**

The U.S. Supreme Court held in *New Jersey v. T.L.O.*,<sup>6</sup> that school officials may search students as long as the search is reasonable; that is, the search must be justified at its inception and reasonable in scope. According to the Court:

Under ordinary circumstances, a search of a student by a teacher or other school official will be "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. Such a search will be permissible in its 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.<sup>7</sup>

In no reported cases to date has a student challenged administrators searching his or her cell phone in a sexting investigation.<sup>8</sup> However, in *Klump v. Nazareth Area School District*,<sup>9</sup> a federal district court denied a school district's motion to dismiss on the basis of qualified immunity in a case involving a search of a student's cell phone. A teacher confiscated Christopher Klump's

cell phone because he displayed the phone in violation of a school policy that prohibited the display or use of cell phones during school hours. The teacher and the assistant principal called other students in Christopher's phone directory to see if they were also violating district policy and accessed his text messages and voicemail.

Christopher asserted that these actions constituted an unreasonable search in violation of his Fourth Amendment rights. The court found that confiscation of the cell phone was justified because Christopher was caught violating the district's policy prohibiting the use or display of cell phones during school hours. However, the search of the cell phone violated Christopher's Fourth Amendment rights because: "They had no reason to suspect at the outset that such a search would reveal that Christopher Klump himself was violating another school policy; rather, they hoped to utilize his phone as a tool to catch other students' violations."<sup>10</sup> The search of the cell phone, therefore, was not reasonable in scope.

It is not too difficult to imagine a fact pattern involving sexting where a school district could argue persuasively that an administrator's search of a student's text messages and pictures was justified at its inception and reasonable in scope. For example, let's say Christopher Klump showed an administrator an inappropriate picture a classmate texted him. As part of an investigation, the administrator should determine whether the named classmate actually sent Christopher the picture. It would seem a search of the classmate's text messages sent to Christopher Klump would be justified at its inception and reasonable in scope. Likewise, simply asking the classmate to present his cell phone to the administrator and calling the number in Christopher's phone associated with the text probably would be all the proof an administrator would need.

School administrators can take a few steps to make it more likely that searches of cell phones in sexting investigations pass Fourth Amendment muster. First, as described in the paragraph above, in some instances administrators can rely on information provided by technology—rather than just rumors—to determine whose phone to search and where to look. Second, while common sense indicates that sexting is a violation of school rules, explicitly prohibiting it in a school district policy or a student code of conduct will make it clear. Third, providing notice in the

school district's cell phone policy that the administration may search cell phones if it has reasonable suspicion that a search will reveal that school rules have been violated, may also support a district's argument that a search was reasonable.<sup>11</sup>

If school administrators ask school resource officers (SROs) to search a student's cell phone, the more demanding probable cause standard may apply.<sup>12</sup> Likewise, if school administrators ask the police to search the student's phone the probable cause standard likely will apply to the search.<sup>13</sup>

In some instances administrators may need to search to find a cell phone; for example, let's say Christopher's classmate in the example above denies having a cell phone at school. The time Christopher received the text message or a call to the student's parents about whether he generally brings a cell phone to school may cast doubt on the student's claim that his phone is not with him. If administrators search for the phone they should consider *T.L.O.*'s requirement that the search be permissible in scope when determining where to look.

### Stored Communications Act Concerns

In *Klump v. Nazareth Area School District*, Christopher Klump also argued that the school district violated Pennsylvania's version of the federal Stored Communications Act (SCA) by accessing his text messages, phone numbers, and call records. It is a violation of the federal SCA (which is very similar to Pennsylvania's statute) to: "(1) intentionally access without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceed an authorization to access that facility; and thereby obtain, alter, or prevent authorized access to a wire or electronic communication while it is in electronic storage in such system."<sup>14</sup>

The district court concluded that a call log and phone number directory are not "communications" under the statute so searching them did not violate Pennsylvania's SCA. However, concluding that Christopher's "voice mail at least would have been stored by his cell phone provider and not in the cell phone itself,"<sup>15</sup> the court did not dismiss the unlawful access claims related to the voicemail or text messages.

While not argued in this case, under the federal SCA courts have held that open emails of which a recipient maintains a copy do not meet the definition of "electronic storage."<sup>16</sup> "Electronic storage"

is defined as: "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication."<sup>17</sup> An open email is not in "temporary, intermediate storage;" instead it is in "post-transmission storage."<sup>18</sup> Open emails that users store on an Internet Service Provider's (ISP) system are not backup copies; backup copies are made by ISPs to protect the email from technical problems before it is transmitted.<sup>19</sup>

Under this rationale, Christopher's opened text messages contained on his phone would not be in "electronic storage." Instead, they would be in post-transmission storage and are not "backups" maintained by his cell phone company to protect its system integrity. In other words, had the court analyzed this case by applying the definition of "electronic storage" it likely would have concluded Christopher's open text messages did not fall under the SCA.

The federal SCA allows users to authorize access to communications otherwise protected by the statute.<sup>20</sup> To avoid possibly violating the SCA school districts may seek authorization from the student and his or her parents before searching a student's cell phone. If consent is denied, the federal SCA allows the government to compel the content of electronic communications from providers of "electronic communication service" and "remote computing service," which includes cell phone companies, after obtaining a search warrant, subpoena, etc.<sup>21</sup>

### Sexting has Been Discovered . . . Now What?

When sexting arises in the school setting it can have broad practical and legal implications. When school administrators discover sexting they should consider at least the following: (1) telling the parents of all the students involved; (2) reporting the sexting to the police; (3) reporting the sexting as suspected abuse or neglect; (4) minimizing exposure to child pornography charges (5) whether, who, and how to discipline the students involved and (6) preventing the



harassment and bullying of students involved in sexting. The rather dramatic story of a Virginia assistant principal charged with possession of child pornography and failure to report suspected child abuse after he asked a student to send him a semi-nude picture in the student's cell phone as part of a sexting investigation, illustrates what can happen when a school administrator fails to take the steps listed above.<sup>22</sup>

Assistant principal Ting-Yi Oei explained that after he viewed an inappropriate picture contained in a student's cell phone, he showed the picture to the principal who instructed him to transfer it to Oei's computer "in case we needed it later." Oei did not know how to do this, so the teen texted the picture to Oei's cell phone and told Oei how to forward it to his work email address. Oei could not identify the person in the photograph, concluded it was probably not a student at the school,<sup>23</sup> told the principal what happened, and assumed the matter was closed.

Two weeks later, the boy caught with the photo was suspended for pulling down a girl's pants in class. Oei told the boy's mother about the sexting when he told her about the suspension. She was outraged that he had not informed her of the picture earlier and complained to the police. They conducted an investigation, and Oei showed them the photograph on his cell phone after he could not find it on his computer.

A month later, Oei was charged with failure to report suspected child abuse. The commonwealth (district) attorney dropped that charge but later charged him with possession of child pornography. The circuit court dismissed the child pornography charge finding that the picture—which at worst maybe showed a nipple—did not meet the definition of "sexually explicit visual material," pursuant to Virginia's child pornography statute.<sup>24</sup>



### Tell the Parents of All Students Involved

School administrators should notify parents promptly upon discovering that their child is the subject of, is in possession of, or has sent inappropriate pictures for many reasons. First, contacting parents immediately should demonstrate that the pictures were viewed for investigative purposes only, dissuading parents from pursuing child pornography charges. Second, as the Ting-Yi Oei incident illustrates, some parents want to know about sexting as soon as possible. Any concern regarding a parent's potential overreaction is outweighed by the district's duty to act in place of the parents while their children are at school. Parents should be told of this dangerous behavior, and administrators should follow abuse and neglect reporting statutes if they fear a parent's reaction might be violent.

### Tell the Police

State law or school district policy may require school districts to report to the police certain crimes that have happened on school grounds. It may come as a surprise to school administrators that sexting in some states in some instances may be a crime. In fact, students in a number of states have been charged criminally and convicted of violating child pornography laws by sexting. For example, students likely could be prosecuted for sexting under Ohio's Illegal Use of Minor in Nudity-oriented Material or Performance statute which prohibits "[p]hotograph[ing] any minor . . . in a state of nudity, or creat[ing], direct[ing], produc[ing], or transfer[ing] any material or performance that shows the minor in a state of nudity . . ." <sup>25</sup> Under the Ohio statute it appears that both the girlfriend and the boyfriend from the example at the beginning of this article could be convicted. The girlfriend photographed herself nude and transferred the picture; the boyfriend further transferred the picture. As described in the box on page five, the Ohio Legislature is considering adopting a statute specifically aimed at minors' sexting.

Prosecutors across the country have taken various approaches to sexting. Parties who have been charged include the "victim," <sup>26</sup> the recipient, <sup>27</sup> and the disseminator. <sup>28</sup> Prosecutors in some instances may not charge anyone at all <sup>29</sup> or may

In *Miller v. Skumanick*, school district officials discovered images of several nude, semi-nude, and scantily-clad female students when they confiscated the cell phones of several male students. The school district turned the phones over to the district attorney. After an investigation, the district attorney sent letters to 20 students—including the girls in the photos and the students on whose cell phones the pictures were stored (but not those who disseminated the images)—informing them that charges for possession and/or dissemination of child pornography would be dropped only if they participated in a six to nine month education and counseling program.

While the other students agreed to the prosecutor's conditions, the parents of the three girls in the photos refused because they did not believe their daughters violated the distribution of child pornography statute. The parents pointed out the photographs in question did not involve sexual activity or genitalia and that someone other than the girls disseminated the pictures "to a large group of people" without permission. The parents claimed they were being threatened with a meritless criminal prosecution as retaliation for refusing to agree to a "reeducation" program that violated their First and Fourteenth Amendment rights.

The district court granted the parents' motion for a temporary restraining order and enjoined the prosecutor from charging their daughters criminally. The court emphasized that because the girls and their parents did not feel the girls had violated a law, the education and counseling program could violate the girls' First Amendment right to be free from compelled speech and would interfere with the parents' Fourteenth Amendment right to direct their children's education. The court also concluded that it was reasonably likely that the prosecutor was not genuinely trying to enforce the law but instead was trying to force the girls to participate in the education and counseling program. The court pointed out that the statute under which the girls were being prosecuted prohibited the distribution of images of prohibited sexual acts. The images of the girls did not likely contain any of the prohibited sexual acts, and the girls claimed that they did not disseminate the photographs.

recommend that those charged participate in a diversion program. <sup>30</sup> Few reported cases discuss whether, and under what circumstances, students can be criminally prosecuted for sexting. The box above discusses *Miller v. Skumanick*. <sup>31</sup> In this case a school district discovered sexting and informed the district attorney. The parents' of the girls depicted in the photographs successfully challenged the district attorney's threat to criminally prosecute them unless they participated in an education and counseling program. This case has been appealed to the Third Circuit.

District attorneys have been heavily criticized for prosecuting children engaged in sexting—particularly when the result is the child prosecuted being required to register as a sex offender. As one district attorney points out, child pornography laws were intended to prosecute child sexual predators, not minors who may not even know what child pornography is. <sup>32</sup> *Miller* is a great example of backlash against district attorneys prosecuting sexting cases.

To respond to myriad concerns raised by sexting, in 2009, lawmakers in at least

11 states have introduced legislation addressing the issue, according to the National Conference of State Legislatures. <sup>33</sup> At least two other states—Kentucky and Virginia—are expected to consider legislation in 2010. <sup>34</sup> The box on the next page briefly describes what sexting legislation each state has proposed or adopted in 2009. To summarize, a number of states have adopted (Vermont, North Dakota) or proposed (Ohio, Pennsylvania) legislation that specifically addresses sexting as a crime separate from child pornography with lesser penalties. Other states have created (Nebraska) or proposed to create (New York) an affirmative defense to child pornography statutes for sexting in some circumstances. Two states have proposed to create (New Jersey, Pennsylvania) educational diversionary programs for students charged or convicted of sexting. Two other states (Colorado, Oregon) have amended their internet sexual exploitation of a minor statutes to include texting. Finally, two states have proposed to educate students about sexting (New York, New Jersey).

Given that sexting is a new phenomenon and that most child pornography

## In 2009, these states adopted or proposed the following legislation regarding sexting.

### COLORADO

Adopted revisions to a number of child internet sex crimes to include using text messages.

### INDIANA

The Senate passed a Resolution urging the legislative council to assign to the sentencing policy study committee issues concerning children sexting, among other topics.

### NEBRASKA

Revised the state's possession of child pornography statute to include a number of affirmative defenses relevant to minors' sexting in some circumstances.

### NEW JERSEY

The Assembly and Senate have proposed requiring school districts annually to explain the legal, psychological, and sociological implications of sexting to students in grades six through 13 and their parents. The Assembly and Senate also have proposed creating a diversionary program for juveniles criminally charged with sexting that involves being educated about the consequences of sexting.

### NEW YORK

An Assembly Bill directs the office of children and family services to establish an education outreach program to raise awareness about sexting and its long term harms. The Assembly Bill also creates an affirmative defense to child pornography statutes for young persons sexting where the defendant was less than four years older than the other person involved, the other person acquiesced to the defendant's conduct, and the defendant did not intend to profit from the sexting.

### NORTH DAKOTA

A House Bill would make it a misdemeanor to distribute or publish, electronically or otherwise, sexually expressive images with the intent to cause emotional harm or humiliation after notice is given by an individual or their parent that they do not consent to the distribution.

### OHIO

A House and Assembly bill would make it a misdemeanor for a minor to create, receive, exchange, send, or possess photos of minors in a state of nudity—including themselves.

### OREGON

Revised the state's definition of online sexual corruption of a child to include communication by text message.

### PENNSYLVANIA

A Senate Bill would prohibit minors from distributing photos of minors in a state of nudity to persons four years older or younger than the person distributing the photos. If convicted, a minor could be ordered to participate in an educational diversionary program.

### UTAH

Amended its sexual exploitation of a minor statute to ensure that no criminal or civil liability is imposed on any employee, director, officer, or agent when reporting or preserving data required by law, or when implementing a policy attempting to prevent, detect, or report child pornography, or upon any law enforcement officer acting within the scope of a criminal investigation.

### VERMONT

Created a new crime specifically aimed at minors sexting. Minors may not electronically transmit indecent visual images of themselves. First time offenders shall not be prosecuted under the sexual exploitation of children statute or be required to register as sex offenders and may be referred to a juvenile diversion program.

statutes were adopted before cell phones were widely used and sexting was a national problem, school attorneys in most instances will not be able to determine definitely whether a crime has been committed. For this reason, school districts are well-advised to inform the police of sexting so that they can conduct a criminal investigation. However, any school administrator who knows the facts of *Miller v. Skumanick* as described by the district court—where the district attorney threaten to charge the girls depicted in the photographs with felonies that could result in a long prison term, a permanent record, and registration as sex offenders—would think twice before telling the police about sexting. School administrators should not assume all district attorneys will prosecute all sexting cases or that school administrators will be unable to influence the district attorney. Sexting is a new crime. For this reason many district attorneys likely would welcome input from school district officials on how to handle these cases. Particularly if the district is going to discipline the students involved, the district attorney may be amenable to not charging the students criminally depending on facts of the case.

It is always a good idea for school district officials to try to foster cooperation with local police and the prosecutors. The best time to approach the district attorney's office about this issue is before sexting occurs on campus and before a district attorney has had the chance to decide that prosecuting sexting cases will be the new "tough on crime" tactic. Likewise, part of building a good relationship with the district attorney's office may be asking for input on how the district should punish sexting and inviting the district attorney to participate in the district's sexting education and prevention efforts.

### Report Sexting as Suspected Child Abuse and Neglect

A sexted image may constitute child abuse or neglect, depending on the state's definition of these terms and what is exactly depicted in the photograph. All states have child abuse and neglect reporting statutes which apply to school districts.<sup>35</sup> Most, if not all, statutes include in the definition of child abuse and neglect sexual crimes against a child. For example, Virginia's definition of an abused or neglected child include one: "[w]hose parents or other

person responsible for his care commits or allows to be committed any act of sexual exploitation or any sexual act upon a child in violation of the law."<sup>36</sup> Virginia's Department of Social Services states that child abuse occurs when a parent: "[c]ommits or allows to be committed any illegal sexual act upon a child including incest, rape, fondling, indecent exposure, prostitution, or allows a child to be used in any sexually explicit visual material."<sup>37</sup>

Ting-Yi Oei admitted that he did not think about the sexting incident in terms of whether it violated Virginia's child abuse and neglect reporting statute. It is unlikely Oei could have been successfully prosecuted under this statute for at least three reasons. First, he did not know the identity of the girl, though her identity was determined later. Second, he did not know she was only 16. Third, the circuit court ruled in Oei's possession of child pornography case that the picture was not "sexually explicit visual material." Had Oei known the girls' identity and age and had the picture been more revealing, Oei likely would have had a reporting obligation under Virginia law.

In short, depending on the state's definition of abuse and neglect and depending on the visual depiction in the sexted photograph, school districts may have an obligation to report sexting under child abuse and neglect reporting statutes.

### Minimize Exposure to Child Pornography Charges

School administrators should take steps to avoid being accused of possession of child pornography by prosecutors or disgruntled parents. This may simply involve turning over confiscated evidence of sexting to the police immediately. In fact, Oei may have avoided being charged altogether had he taken possession of the boy's phone and turned it over to the police promptly, like the school officials in *Miller*, instead of receiving and maintaining the photo on his own phone.

School administrators should also take steps to avoid charges of disseminating child pornography. As described later in this article, a lawsuit has been filed against a Washington state school district which rather cryptically accuses school officials of showing sexted photographs of a student to "other adults" in violation of Washington's dissemination of child pornography

statute.<sup>38</sup> The district denies doing so in its answer.<sup>39</sup> Regardless of what actually happened in this case, it illustrates that a school administrator who discovers sexting should not share the images with other school employees much less non-employees.

The Utah legislature, likely in response to the Ting-Yi Oei incident, has passed a law to ensure that school employees and others cannot be liable "when reporting or preserving data" in a child pornography investigation. For more information about the new Utah statute see the box on page five.

### Discipline the Students Involved

As the case described below illustrates, school districts should consider disciplining all students involved in the sexting—the student featured in the image, students who received the image (unless they deleted it immediately), and students who disseminated the image—equally if possible.

The parents of a Washington State high school student are suing the school district for violating Washington's sexual equality statute for only punishing their daughter in a sexting incident.<sup>40</sup> The parents admit in their complaint that their daughter took a naked picture of herself which was circulated among other students. The school district suspended her for one year from the cheer squad for violating the athletic code. Her parents alleged that the school district violated Washington's sexual equality statute by punishing only her and not the football players who possessed and viewed the picture of her. The school district responded that it did not discipline the football players because it did not know who sent, received, or forwarded the pictures. The daughter refused to tell the district because she did not "want to get anyone in trouble."<sup>41</sup>

Whether the sexual equality claim is successful, plaintiffs do have a fair point that the boys who received and did not immediately delete the photograph of their daughter—or worse yet forwarded it—also should have received punishment. While a court likely will not be sympathetic to the daughter's refusal to inform the district of the football players who received and forwarded the picture of her, it likewise might not be sympathetic to the school district's failure to investigate further without her help.

## Preventing Bullying and Harassment

Eighteen-year-old Jessica Logan committed suicide after being bullied and harassed after her ex-boyfriend forwarded to other students nude photos she took of herself and sent to him. Her parents are suing the school district, who was aware of the sexting, claiming that the district did not do enough to stop her from being harassed.<sup>42</sup> Whether their claim against the district will be successful, it illustrates that districts should take measures to prevent harassment before and following a sexting incident.

Preventing bullying and harassment at school generally is a difficult task. At minimum, those involved in a sexting incident should be specifically instructed not to harass the "victims" of sexting. Likewise, before a sexting incident occurs, parents and school staff should be informed that sexting may occur, discipline will result, and that harassment is prohibited. If an incident occurs these messages might have to be reiterated. Finally, if harassment or bullying related to a sexting incident occurs, the district's anti-harassment/bullying policy should be followed and harassers should be disciplined.

## Anti-sexting Policies

Adopting anti-sexting policies may be one approach school districts can take to prevent sexting. Obviously, no anti-sexting policy will stop sexting altogether, no matter how carefully written or widely circulated. However, an anti-sexting policy will put students and their parents on notice that sexting is unacceptable and has serious consequences.

School districts may take a variety of policy approaches to prevent sexting. Districts may revise existing policies addressing acceptable use, student codes of conduct,<sup>43</sup> cell phones, harassment and bullying, or other similar subject areas, to prohibit sexting. School districts may ban cell phone use during school or cell phone possession at school altogether<sup>44</sup> to prevent sexting. Some boards may decide that they need a separate policy addressing sexting.

Districts adopting a comprehensive anti-sexting policy should consider including the following elements. First, an anti-sexting policy should clearly state that the mere possession of sexually explicit digital pictures on any device is prohibited regard-

less of whether the state's child pornography law is violated. Second, the policy should state that all involved in sexting, unless they deleted images right away, will be punished. For example, student handbook language should prohibit "sending, sharing, viewing, or possessing pictures, text messages, emails or other material of a sexual nature in electronic or any other form on a computer, cell phone, or other electronic device." Third, the policy should inform students that their parents and the police may be contacted and sexting may be reported as suspected child abuse or neglect. Fourth, the policy should put students on notice that administrators may search their cell phones if they have reasonable suspicion a student has been involved in sexting. Fifth, the consequences for sexting should be clearly stated but should include discretionary wording that allows administrators to adjust punishments up or down as appropriate. Finally, the policy should prohibit harassment and bullying related to sexting incidents and should punish nonconforming behavior.

## Education as Prevention

Education professionals—including school lawyers—should make parents, staff, and students aware of the existence of and dangers of sexting. School districts should consider a variety of actions to raise awareness of and increase education about sexting. Districts may partner with other community organizations or public offices to provide staff trainings on bullying, cyberbullying, and computer/internet safety, including sexting and safety on social networking sites. This can include in-school assemblies for students, professional development for staff, training for school board members, distribution of school rules and policies through student handbooks, newsletters/correspondence to the community, meeting with parent groups, and resources on the school webpage and public forums.

Any education around sexting can and should be aimed at the whole community when possible.<sup>45</sup> This means including students, board members, and staff as well as parents and community members. While the majority of recent press has involved middle and high school students, education regarding computer/internet/technology safety should include younger children as appropriate. A variety of websites and documents provide information about sexting for students, parents, and educators.<sup>46</sup>

## Conclusion

The world of social interaction through new technologies is evolving at break-neck speed. Because young people are trend-setters—particularly when technology is involved—schools are affected by these changes. Disturbing, new technology trends like sexting have significant legal implications for school districts that may not be immediately obvious even to an experienced school administrator or school lawyer. However, sexting has been a growing problem long enough to give us the Ting-Yi Oei incident, Washington state case, and the Jessica Logan case, all of which are full of lessons learned about sexting. School attorneys must pass these lessons learned on to their clients. **I&A**

## ENDNOTES

- 1 Although sexting usually occurs via a text message sent between cell phones, students also exchange digital pictures of sexually explicit subjects using email, I-pods, pagers, and social networking websites, such as Facebook and MySpace.
- 2 NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH, RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS (Oct. 2008), available at [http://www.thenation-alcampaign.org/SEXTECH/PDF/SexTech\\_Summary.pdf](http://www.thenation-alcampaign.org/SEXTECH/PDF/SexTech_Summary.pdf). Until recently, the National Campaign's survey was the only substantial survey on the frequency of teens' sexting. Two more recent surveys from the Pew Research Center's Internet & American Life Project and MTV/Associated Press confirm that sexting is prevalent among teens. In all three surveys the number of teens reporting they have received nude photos is higher than those reporting that they have sent such messages. See Amanda Paulson, *Sexting: At Least 15% of Teens Take Part*, CHRISTIAN SCIENCE MONITOR, Dec. 16, 2009, available at <http://www.csmonitor.com/USA/Society/2009/1216/Sexting-at-least-15-percent-of-teens-take-part>.
- 3 For example, after her ex-boyfriend forwarded nude photographs to her classmates at a Cincinnati high school, 18-year-old Jessica Logan hung herself in her parents' home. Mike Celizi, *Her Teen Committed Suicide Over "Sexting"*, TODAY, Mar. 6, 2009, available at <http://today.msnbc.msn.com/id/29546030/>. Similarly, 13-year-old Hope Witsell of Florida hung herself after she "sent a photo of her breasts to a boy she liked, and the picture went viral at her school." Emily Bazelon, *Hope Witsell Sexting Suicide*, SLATE, Dec. 8, 2009, available at <http://www.slate.com/id/2237706/>.
- 4 See Deborah Feyerick & Sheila Steffen, "Sexting" Lands Teen on Sex Offender List, CNN, Apr. 8, 2009, available at <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html>.
- 5 The question of who the district should seek consent from to search a phone under the Fourth Amendment or the Stored Communications Act does not have a clear answer. It may depend on who the phone belong to *i.e.* who paid for the phone and who pays the phone bill.



- Even if the student paid for the phone and pays the phone bill, an argument could be made that consent from parents plus *in loco parentis* overrides a student's refusal to consent to the phone being searched. To avoid this difficult question, districts can try to obtain consent from both students and their parents to search a cell phone.
- 6 469 U.S. 325, 341 (1985).
  - 7 469 U.S. at 341-42.
  - 8 See also *G.C. v. Owensboro Public Schs.*, No. 4:09CV-102-JHM, 2009 WL 3834096 (W.D. Ky. Nov. 16, 2009) (concluding nonresident student had no property interest in attending the district where he was removed for violating the district's cell phone; he also challenged district's confiscation and search of text messages on his cell phone on constitutional grounds but the court did not rule on those issues).
  - 9 425 F. Supp. 2d 622 (E.D. Pa. 2006).
  - 10 425 F. Supp. 2d at 640.
  - 11 See *In re Michael R.*, 662 N.W.2d 632 (Neb. Ct. App. 2003) (the search of a student's car for drugs after he talked about having "big bags" was reasonable based in part on the fact that the student had driven to school after being informed by the student handbook that his car could be searched if school officials reasonably suspected it contained contraband).
  - 12 *Interest of Angelia D.B.*, 564 N.W.2d 682 (Wis. 1997) (SRO needs reasonable suspicion to search a student); *S.A. v. State*, 654 N.E.2d 791 (Ind. App. 1995) (same); but see *A.J.M. v. State*, 617 So. 2d 1137 (Fla. App. 1993) (SRO needs probable cause to search a student).
  - 13 See, e.g., *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996).
  - 14 18 U.S.C. § 2701(a).
  - 15 425 F. Supp. 2d at 634-35.
  - 16 To say that the Stored Communications Act and the case law it has produced is confusing is an understatement. For those brave souls interested in tackling this statute the following are recommended: U.S. DEPT OF JUSTICE, *The Stored Communication Act*, in SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE MANUAL (Sept. 2009), available at <http://www.justice.gov/criminal/cybercrime/ssmanual/03ssma.html> and Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, GEORGE WASHINGTON LAW REVIEW (Aug. 2004).
  - 17 18 U.S.C. § 2510(17).
  - 18 *Fraser v. Nationwide Mutual Insurance Co.*, 352 F.3d 107, 114 (3d Cir. 2004) (employer's search of employee's emails were not "stored communications" under the SCA because they were not in "temporary, immediate storage").
  - 19 *United States v. Weaver*, 636 F. Supp. 2d 769 (C.D. Ill. 2009) (a web-based email system like Hotmail that by default saves messages only on its remote system "is not storing that user's opened messages for backup purposes"). See also *Fraser v. Nationwide Mutual Insurance Co.*, 135 F. Supp. 2d 623, 636 (E.D. Penn. 2001) ("Part (B) . . . refers to . . . back-up protection storage, which protects the communication in the event the system crashes before transmission is complete. The phrase 'for purposes of backup protection of such communication' in the statutory definition makes clear that messages that are in post-transmission storage, after transmission is complete, are not covered by part (B) of the definition of 'electronic storage.'"). The appeals court in *Fraser*, however, questioned whether opened emails were not in backup storage but did not resolve the question. *Fraser*, 352 F.3d at 114. But see *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075 (9th Cir. 2004) (holding that a previously accessed email fell within the definition of backup because such a message "functions as a 'backup' for the user").
  - 20 18 U.S.C. § 2701(c)(2) ("Subsection (a) of this section does not apply with respect to conduct authorized by a user of that service with respect to a communication of or intended for that user.").
  - 21 18 U.S.C. § 2703.
  - 22 For a description of the ordeal in the assistant principal's own words, see Ting-Yi Oei, *My Students. My Cellphone. My Ordeal.*, WASHINGTON POST, Apr. 19, 2009.
  - 23 Rather remarkably, the student claimed he did not know who sent him the picture or who was depicted in it.
  - 24 *Commonwealth v. Oei*, CR. No. 21212, 20523, 2009 Va. Cir. LEXIS 115 (Loudoun County Circuit Court-Criminal Division Mar. 31, 2009).
  - 25 OHIO REV. CODE ANN. § 2907.323 (West 1988).
  - 26 See *Miller v. Skumanick*, 605 F. Supp. 3d 634 (M.D. Pa. 2009), appeal docketed, No. 09-2144 (3d Cir. Apr. 21, 2009) (girls depicted in inappropriate pictures successfully challenged district attorney's attempt to prosecute them for possession and/or dissemination of child pornography).
  - 27 Female high school students who sent nude or semi-nude photographs of themselves face manufacturing, disseminating, or possessing of child pornography charges. The male recipients face possession of child pornography charges. See Mike Bruner, "Sexting" Surprise: Teens Face Child Porn Charges," MSNBC.com, Jan. 15, 2009.
  - 28 An 18-year-old high school student was convicted of sending child pornography after he sent a nude cell phone picture of his 16-year-old girlfriend to his friends and family after the couple had a fight. He must now register as a sex offender until he is 43. See Anne Szustek, *Authorities Treat those Accused of "Sexting" as Sex Offenders*, findingdulcinea.com, Apr. 9, 2009, <http://www.findingdulcinea.com/news/Americas/2009/April/Authorities-Treat-Those-Accused-of-Sexting--as-Sex-Offenders.html>.
  - 29 See Mark Bowes, *Henrico Won't Charge Middle Schoolers in "Sexting" Case*, RICHMOND TIMES-DISPATCH, May 13, 2009, available at [http://www2.timesdispatch.com/rtd/news/local/article/SEXT13\\_20090512-214623/267335/](http://www2.timesdispatch.com/rtd/news/local/article/SEXT13_20090512-214623/267335/).
  - 30 For example, a prosecutor in Dayton, Ohio, screens juveniles charged with sexting for a diversion program which includes supervision and community service.
  - Mathias H. Heck, Jr., *Sexting and Charging Juveniles—Balancing the Law and Bad Choices*, PROSECUTOR (Jan./Feb./Mar. 2009).
  - 31 605 F. Supp. 3d 634 (M.D. Pa. 2009).
  - 32 See Mark Bowes, *Henrico Won't Charge Middle Schoolers in "Sexting" Case*, RICHMOND TIMES-DISPATCH, May 13, 2009, available at [http://www2.timesdispatch.com/rtd/news/local/article/SEXT13\\_20090512-214623/267335/](http://www2.timesdispatch.com/rtd/news/local/article/SEXT13_20090512-214623/267335/).
  - 33 National Conference of State Legislatures, 2009 Legislation Related to "Sexting," Dec. 9, 2009, <http://www.ncsl.org/?tabid=17756>.
  - 34 See *id.*; Dena Potter, *Crime Commission Refuses "Sexting" Recommendation*, wtop.com, Dec. 15, 2009, available at <http://www.wtop.com/?nid=25&sid=1840931>.
  - 35 Education Commission of the States, Recent State Policies/Activities: Child Abuse, <http://www.ecs.org/ecs/ecscat.nsf/WebTopicView?OpenView&count=-1&RestriictToCategory=Child+Abuse> (last visited Jan. 8, 2010).
  - 36 VA. CODE ANN. § 63.2-100.
  - 37 VIRGINIA DEPT OF SOCIAL SERVICE, RECOGNIZING, REPORTING AND PREVENTING CHILD ABUSE AND NEGLECT IN VIRGINIA, <http://www.dss.virginia.gov/files/division/dfs/cps/publications/B032-01-0036-01-eng.pdf>.
  - 38 Complaint at 3, *B.N. v. Northshore Sch. Dist.*, No. C08-1704 JLR (W.D. Wash. Nov. 25, 2008).
  - 39 Answer at 4, *B.N. v. Northshore Sch. Dist.*, No. C08-1704 JLR (W.D. Wash. Dec. 9, 2008).
  - 40 Complaint at 6-7, *B.N. v. Northshore Sch. Dist.*, No. C08-1704 JLR (W.D. Wash. Nov. 25, 2008).
  - 41 Answer at 5-6, *B.N. v. Northshore Sch. Dist.*, No. C08-1704 JLR (W.D. Wash. Dec. 9, 2008).
  - 42 Complaint at 3-4, *Logan v. Salyers*, No. A094647 (Ct. Common Pleas, Hamilton Co., Ohio, May 8, 2009).
  - 43 *HISD Votes to Punish Kids for "Sexting,"* HOUSTON CHRONICLE, July 16, 2009, available at <http://www.chron.com/disp/story.mpl/breaking/6533307.html>.
  - 44 Barbara Czura, *DeKalb County Schools Cracking Down on Cell Phone Abuse*, Aug. 10, 2009, WAAF48News.com, <http://www.waff.com/Global/story.asp?S=10880827>.
  - 45 Kathleen McGrory, *Sexting 101: Miami-Dade Schools May Be First to Teach Danger*, MIAMI HERALD, July 10, 2009.
  - 46 See, e.g., Reece Manley, *Sexting Prevention, Education and Intervention*, PARENTING TEENS, Apr. 5, 2009, <http://teen-discipline.suite101.com/article.cfm/effective-intervention-for-teens-caught-sexting>; Institute for Responsible Online and Cell Phone Communication, <http://www.iroc2.org/> (last visited Jan. 14, 2010); VIRGINIA DEPARTMENT OF EDUCATION, DIVISION OF TECHNOLOGY & CAREER EDUCATION, *SEXTING: IMPLICATIONS FOR SCHOOLS* (Oct. 2009), [http://www.doedev.vi.virginia.gov/support/technology/info\\_briefs/sexting.pdf](http://www.doedev.vi.virginia.gov/support/technology/info_briefs/sexting.pdf); ConnectSafely, *Tips to Prevent Sexting*, [http://www.connectsafely.org/pdfs/sexting\\_tips.pdf](http://www.connectsafely.org/pdfs/sexting_tips.pdf); NetSmartz.org, *Tips to Prevent Sexting*, [http://ncmec.vo.llnwd.net/o15/downloads/special/Sexting\\_Prevention.pdf](http://ncmec.vo.llnwd.net/o15/downloads/special/Sexting_Prevention.pdf).



### NSBA's Office of General Counsel Welcomes Sonja H. Trainor

The NSBA Office of General Counsel is pleased to announce that **Sonja H. Trainor** has joined the NSBA legal team as our newest Senior Staff Attorney. Sonja joins NSBA after practicing school law at Hodges, Loizzi, Eisenhammer, Rodick & Kohn in Arlington Heights, Illinois. While at *Hodges*, Sonja specialized in student-related matters, employment discrimination, board governance issues, and litigation. Sonja is the new editor of *Legal Clips* and *Leadership Insider*. In addition, Sonja will work with issues regarding school finance litigation, the First Amendment, and special education. Sonja graduated with honors from Washington University with a B.A. in English and Educational Studies. She received her law degree from the University of Illinois College of Law in Champaign-Urbana. Before starting her career in school law, Sonja practiced insurance defense litigation in Chicago. Sonja can be reached at (703) 838-6155 or via email at [strainor@nsba.org](mailto:strainor@nsba.org).

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Wednesday, February 3, 2010, 1:00-2:15 P.M. Eastern Time

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