

NEW MEXICO SCHOOL BOARDS ASSOCIATION Thirty-Seventh Annual School Law Conference

SMART POLICIES ON SMART PHONES: Navigating Free Speech, Cyberbullying and Search and Seizure in the Digital Age

Presented by
Andrew M. Sanchez
and
Laura E. Sanchez-Rivét
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CUDDY & MCCARTHY, LLP
Attorneys at Law

Texting?

WTF?

IDK!

LMAO

TTYL



Sexting?

Sexting, v: (a combination of sex and texting) is the act of sending sexually explicit messages or photos electronically, primarily between cell phones.

Sexting?

Material can be distributed via:


- Text messages
- Downloads onto laptops/computers
- E-mail
- Downloads onto
 - iTouch
 - iPhones
 - Smart Phones
 - MP-3 players
 - Social Networking Sites




How Common is Sexting?

- ✍ Sexually suggestive photos sent:
 - 20% overall (1 in 5 students)
 - 22% girls
 - 11% young teen girls (ages 13-16)
 - 18 % boys

How Common is Sexting?

 Sexually suggestive messages sent:

- 39% of all teens
- 37% girls
- 40% boys

 48% of teens say they have received sexting photos or messages.

HEY!

WHAT
DID YOU
DO?

PAINTED HIS
CELLPHONE SCREEN
BLACK. HE CAN
STILL USE THE
SPEED-DIAL.



Serious Consequences: Hope Witsell



She had "sexted" a picture of her breasts to her boyfriend. Another girl from school got her hands on the photo and sent it to students at six different schools in the area.

Because of that photo, Hope had become a target for 11-, 12-, and 13-year-old bullies. The bullies started a "Hope Hater Page" on Myspace.

She used her favorite scarves to hang herself from her canopy bed. She was 13.

Serious Consequences: Jessica Logan



She sent nude pictures of herself to a boyfriend. When they broke up, he sent them to other high school girls. The girls were harassing her, calling her a slut and a whore. She was miserable and depressed, afraid even to go to school.

Two months later, Jessica Logan hanged herself in her bedroom. She was 18.

Where was the school district?

- In both suicides, there are other students who claim to have been engaged in protecting the victim at school.
- Can bullying and cyber-bullying be detected by staff?



CHANGE THE CULTURE

- Make the change in culture and enforce all student discipline rules on bullying and cyberbullying.



STOP!
BLOCK!
TELL!

Serious Consequences: Sexting

In the news...

- Sixteen-year-old Brooke Nielsen and a friend took pictures of themselves naked in the shower.
- The picture was sent around until eventually the entire senior class had seen it.
- Brooke and her friend were suspended from the cheerleading squad.
- Brooke's parents sued the school district.



Serious Consequences: Sexting

Also in the news...

- Florida teen must register as a sex offender until he is 43 for transmitting child pornography.
- Three Pennsylvania female teens charged with manufacturing, disseminating or possessing child pornography. Male recipients of the nude photos charged with possession.
- Two Virginia teens charged with solicitation and possession with intent to distribute child pornography after soliciting nude photos from minors.



Serious Consequences: Sexting Cases

Mary Jo Miller v. George Skumanick, Jr., 605 F.Supp.2d 634 (M.D. Pa. 2009)

- School confiscated students' cell phones with images of young teens in their bras and turned phones over to the district attorney.
- District attorney said he would charge girls in the pictures with child pornography unless they attended a "re-education program." Two girls refused.
- Court granted the parents' motion for a temporary restraining order (enjoining the district attorney from bringing criminal charges) in part on First Amendment grounds:
 - plaintiffs demonstrated reasonable likelihood of success on the merits regarding retaliation in violation of teens' right to be free from compelled expression
 - even temporary violation of First Amendment rights constitutes irreparable harm



Serious Consequences: Sexting Cases

Mary Jo Miller v. Jeff Mitchell, 598 F. 3d 139 (3rd Cir. 2010)


- The remaining student and her mother had shown a reasonable likelihood of establishing that coercing the student's participation in the education program violated the mother's right to parental autonomy and the student's right against compelled speech.
- The district attorney could not coerce parents into permitting him to impose on the students his ideas of morality and gender roles.
- Compelled speech would have arisen from the program's requirement that the student explain how her actions were wrong.
- A lack of evidence of probable cause suggested a retaliatory motive.



Criminal Implications of Sexting

- ✍ Adults prosecuted for possession of child pornography, solicitation and child abuse
- ✍ Children can be prosecuted as well
 - *Miller v. Skumanick*
 - *A.H. v. Florida*
 - *Washington v. Vezzona*

Criminal Implications Under New Mexico Law

 **N.M. Stat. Ann. § 30-6A-3 (2007): It is a felony to:**

- Possess sexually explicit pictures or video of minors
- Manufacture sexually explicit pictures or video of minors
- Distribute sexually explicit pictures or video of minors



AAAWWWWWA



STAHLER.

THE COLUMBUS DISPATCH
2009

Legal Implications for Public Schools



Legal Implications for Public Schools

✍ Prosecution of School Administrators for Possession of Child Pornography — *Commonwealth v. Ting-Yi Oei*



Legal Implications for Public Schools

- Oei (an AP in Virginia) was charged in 2008 for a photo he obtained while investigating a sexting issue at his high school.
- Oei's principal tasked him with investigating rumors that students were exchanging sexually explicit photos of a teenage girl.
- When confronted by Oei, male student admitted he had a photo, so principal instructed Oei to get a copy of the photo for the investigation.
- Oei then had the student e-mail the photo to his cell phone, as well as transfer it to Oei's desktop computer.
- Image: torso of a young women in underwear with her arms draped over her breasts.

Legal Implications for Public Schools

- Prosecutors deemed it child pornography and threatened Oei with criminal charges unless he resigned. When he refused, they charged him with felony possession of child porn as well as with 2 misdemeanor counts of contributing to the delinquency of a minor for instructing the male student to send him the photo.
- Local school board reimbursed Oei \$167,000 for his legal fees in defending the criminal charges.

Legal Implications for Public Schools

Litigation over Punishment of Students for Sexting

- *Neilson v. Northshore School District*
- *Quiblan v. Northshore School District*



OH, GREAT...NOW IT'S
SEXTING, DRUGS AND
ROCK 'N' ROLL...



Practical Steps in Dealing with Sexting in Schools

Education

- a. Students
- b. Staff
- c. Parents
- d. Community



Practical Steps in Dealing with Sexting in Schools

Questions to ask your school district:

- Does your district have an anti-harassment policy?
 - May be general or may include specific reference to sexting
 - Does the policy comply with First Amendment principles?
 - Does the policy comply with state laws?
- Has your school district considered banning cell phones, or banning activities on cell phones?
- Does your school district have a working relationship with law enforcement authorities and the district attorney?
- Does your school district have a search and seizure policy?
- Is your school district aware of evolving state laws?
- Does your school district educate students on the dangers of sexting?



Practical Steps in Dealing with Sexting in Schools

When You Catch Kids Sexting

- a. Impose Equal Consequences
- b. Inform Parents
- c. Call the Cops



Practical Steps in Dealing with Sexting in Schools

Questions to ask when there is an incident involving a student:

- Does the First Amendment apply?
- What is the age of the student(s) involved?
 - What action is appropriate, given the age of the student(s)?
- Is there a potential criminal law violation such that the school district has a responsibility to report the violation to local law enforcement?
- Does the speech violate any applicable state law requirements?



Practical Steps in Dealing with Sexting in Schools

How should districts respond to student behavior that is not harassing, lewd, disruptive but is nonetheless inappropriate in a school environment?

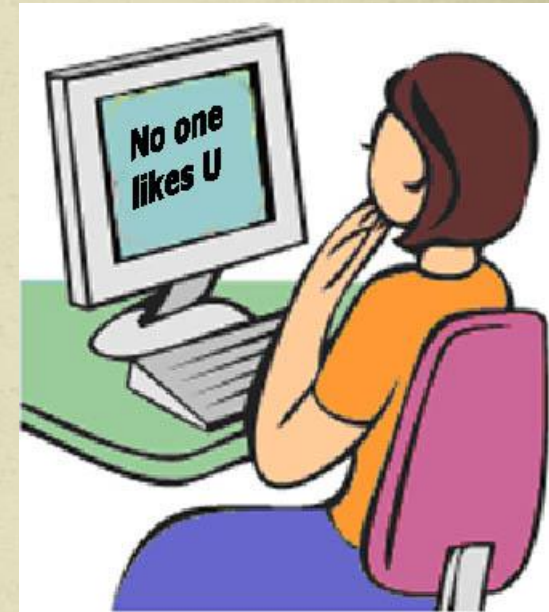


Schools have many options in situations where discipline may not be constitutionally permissible:

- Talk to the student
- Talk to the parents
- Set up a meeting with the student, parents and the principal
- Refer the student to counseling
- Restrict student's participation in extracurricular activities

Cyber-Speech by Students: Cyberbullying Overview

- Cyberbullying - defined by Center for Safe and Responsible Internet Use as “sending or posting harmful or cruel text or images using the Internet or other digital communication devices.”
- Surveys show that anywhere from 9% to 43% of teens have been the victims of cyberbullying in the past year.
- A significant percentage of cyberbullying occurs at school or involves someone a child knows from school.



Cyber-Speech by Students: Cyberbullying Overview

- PED's Bullying prevention regulation § 6.12.7 NMAC
 - Defines “bullying” as “any repeated and pervasive written, verbal or electronic expression, physical act or gesture, or a pattern thereof, that is intended to cause distress upon one or more students in the school, on school grounds, in school vehicles, at a designated bus stop, or at school activities or sanctioned events.”

Cyber-Speech by Students: Cyberbullying Overview

§ 6.12.7.8 NMAC

- Cyberbullying and Bullying policies and programs must be in effect beginning in 2013-14.
- Anti-bullying policy must include:
 - Procedures for reporting incidents of cyber/bullying
 - Consequences for knowingly making false reports
 - Staff required to report incidences
 - Anti-bullying required to be included as part of the health education curriculum
 - Must investigate
 - Must train staff to recognize cyber/bullying



Cyber-Speech by Students: Cyberbullying Overview

Wisniewski v. Board of Education, 494 F.3d 34 (2nd Cir. 2007)



- An eighth-grade student used his parents' computer to create an instant message (IM) icon depicting "a pistol firing a bullet at a person's head" underneath, the words "Kill Mr. VanderMolen [the student's English teacher]" were written.
494 F.3d at 38.
- The student sent his IM icon to 15 members of his "buddy list." Another student found out about the icon, and showed a copy to the English teacher.
- The school suspended the student for five days.

Cyber-Speech by Students: Cyberbullying Overview

Wisniewski v. Board of Education (cont.)



- The court found that the fact that the conduct occurred off-campus “d[id] not necessarily insulate [the student] from school discipline.”

Id. at 39.

- The court applied *Tinker* and found that it was:
 - Reasonably foreseeable that the school would find out about the IM icon
 - Reasonably foreseeable that the IM icon would create a risk of substantial disruption.
- The student’s intent was irrelevant to the court’s analysis.

Cyber-Speech by Students: Practical tips

Questions to ask when there is an incident involving a student:



- Is there a credible threat of violence?
- Is there disruption? Is so, how substantial is the disruption?
- Is the speech lewd and offensive?
- Is there a nexus between the speech and the school?
- Does the speech violate any applicable state law requirements?

Search & Seizure

- The U.S. Constitution, through the Fourth Amendment, protects people from unreasonable searches and seizures by the government.



- The Fourth Amendment, however, is not a guarantee against all searches and seizures, but only those that are deemed unreasonable under the law.

Search & Seizure

REASONABLE INDIVIDUALIZED SUSPICION

- *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)
 - Adopted the “**Reasonable Suspicion**” standard for searches in public schools.
 - Search must be:
 - Justified at inception – *Reasonable grounds* for believing that search will reveal evidence of violation of law or school rules
 - Not excessively intrusive in light of age and sex of the student and the nature of the infraction.
 - A mere “hunch” is not a proper basis for a search.



Search & Seizure Regulations

- NM PED Regulations on Search & Seizure
NMAC § 6.11.2.10 (B)
 - *Search and seizure:* School property assigned to a student and a student's person or property while under the authority of the public schools are subject to search, and items found are subject to seizure, in accordance with the requirements below.
 - *Notice of search policy.* Students shall be given reasonable notice, through distribution of written policies or otherwise, of each school's policy on searches at the beginning of each school year or upon admission for students entering during the school year.



Search & Seizure

What about searching student's cell phones?



Questions



Thank you!

Contact Information:



CUDDY & McCARTHY, LLP

Attorneys at Law

Andrew M. Sanchez

asanchez@cuddymccarthy.com

Laura E. Sanchez-Rivét

Lsanchez-rivet@cuddymccarthy.com

(505) 888-1335