

# Sexting Guidance for School Leaders

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Sexting, sending nude sexy images and messages electronically, is a major new challenge faced by school officials. This commentary will provide educational guidance on these issues. Districts should consult with their local counsel on the legal aspects discussed.

## Tiered Response and Approved Protocol

Sexting appears to be the result of new technologies that foster impulsive behavior that leaves an electronic trail, raging hormones, and teen's biological inability to predict potentially harmful consequences. Most often, images are sent between partners or where there is a desire for a relationship. Sometimes, the images are sent to attract attention or as a form of sexual harassment. Coercion by a partner, prospective partner, or peers to create an image may be involved. An image provided may be used for blackmail or sent widely to others. In rarer situations, teens appear to be sending images as a form of sexual trafficking. Also at times, sexual exploitation is evident. Because of this range of behaviors, some more harmful than others, a tiered approach to response is obviously necessary.

Only in rare incidents should this behavior be considered child pornography or exploitation of minors. These laws were enacted to protect minors from sexual abuse by adults. If teens are told that they face prosecution for creating these images, they may fear reporting if they are being abused or blackmailed. However, it is essential that all school staff realize that adult possession of nude images of minors is a crime. Of significant concern is the status of those students who have turned 18, who are being registered as sex offenders for engaging in sexting with like-age peers. Laws that create a misdemeanor for distributing a nude image without consent and malicious acquisition of a nude image are advised.

Some police officers and prosecutors are adopting a "tough on crime" approach to these situations - arresting students for felonies and hauling them from school in handcuffs. These excessive actions can cause severe emotional trauma and can be extremely disruptive to the school community.

*Guidance:* Develop a well-defined protocol with the local district attorney for school officials and police officers to follow for reporting, investigation, and handling of the incidents come to school attention. Ensure that all investigations are quietly conducted by an officer who has expertise in sex abuse concerns. Ensure all staff have a full understanding of what they should - and should not - do. Reinforce the need for a balanced tiered response to these situations - using education and mild rehabilitation-based criminal consequences to stop harmful behavior and reserving significant criminal consequences for those rare cases where appropriate.

## Search and Seizure

A review of cell phone records requires balancing student's constitutional rights to privacy, the need of administrators to address concerns, as well as considering the potential criminal aspects. There are more questions than answers here. The answers will be different based on the case law in different states.

It is highly improbable that it would be considered appropriate for a school official to search the records of a cell phone simply because a student used that cell phone at school. The "reasonable suspicion" standard requires that the search be reasonable in relation to the suspected violation of a rule.

Viewing nude images of students could be considered as highly intrusive as a strip search, thus requiring a high degree of suspicion and potential danger. Federal and state laws related to stored electronic communications are criminal laws that protect the privacy of these communications. How these laws may impact this situation is not known - and could vary depending on the language of state laws. If these images are criminal in nature and administrators face some degree of personal risk if looking at these images, the search should likely be conducted by a police officer, which would require probable cause. A student or parent may consent to a search. But consent is not valid unless it is voluntary, with knowledge of the ability to withhold consent.

Given the combined factors that for an adult to view nude images of a minor is a crime, the statutory protections to ensure the privacy of electronic communications, and the categorically extreme intrusiveness of a search that could result in viewing a nude image, it is probable that the only actions an administrator should take are to confiscate suspected cell phones, contact the parents, and contact the police.

*Guidance:* Make sure the protocol is in accord with state and federal search and seizure standards and stored electronic communications laws.

## **Hostile Environment**

The manner in which adults respond may affect the degree of sexual harassment the student depicted will receive. In two nationally reported stories of youth suicides associated with sexting, it appears there was significant peer harassment likely stimulated by the attention adults made to the incident. Schools have a legal obligation to take steps to prevent sexual harassment and a hostile environment. Administrators must also consider how viewing a nude image of a student will impact their ability to interact with this student.

*Guidance:* Strive for confidentiality in any investigation. Make it clear that students who engage in harassment will be disciplined. Provide emotional support for the student depicted and ensure responsiveness. Assess whether there is ever a need for someone in the school environment - administrator or school resource officer - to view full images. Likely this is not necessary.

## **Appropriate Discipline**

District sexting policies must be in accord with constitutional law regarding the boundaries of school authority. School officials have authority if there is or could be a substantial disruption at school or significant interference with the rights of a student. Private possession or private consensual sharing, without more, likely cannot be considered to create a substantial disruption at school.

However, when an image is being used for sexual harassment that is causing a disruption or significantly interfering with the well-being of a student at school, school discipline can be justified. This could include sending images of self in a manner that constitutes harassment, maliciously distributing an image of another, maliciously obtaining an image, or using an image for blackmail.

Additionally, it is important that discipline be fair and balanced. A district in Virginia has been sued because it allegedly imposed an excessive suspension on a boy student who sent an image that was being widely disseminated by the boys in school to a girl student. This student allegedly received a harsher punishment than a student who brought a handgun to school. A district in Washington is being sued because it allegedly banned a cheerleader from the squad for sending an image, but did not ban the football players who were distributing her image without her consent.

*Guidance:* Make sure district policies are legally justified, grounded in the prevention of sexual harassment that has caused a significant interference with the rights of students, and implemented in a fair and gender-balanced manner.

## **Prevention**

Prevention efforts are clearly essential. Threatening discipline or criminal prosecution has not generally been shown to prevent risk behavior. Often times, students are coerced into providing these images by partners, prospective partners, or peers or willingly participate in the behavior because it is perceived as normal. Sexting is frequently impulsive - done with a lack of recognition of the potential harmful consequences.

*Guidance:* Ground prevention education in the teen's strong desire to retain their own personal power. Make sure they realize that the minute a nude image leaves their device they have given someone the power to destroy their reputation. Address the negative influence of entertainment, advertising, and merchandizing that is clearly fueling this behavior. Address how abusive partners are now using technologies for control and abuse. Specifically educate students who could be prosecuted as adults about the dangers. Avoid adult lecturing. Set up situations where students are talking with their peers.

## **Multidisciplinary Approach**

This is a complicated challenge that will require a multidisciplinary prevention and intervention approach.

*Guidance:* At the district and school level, establish a multidisciplinary team to address prevention and intervention that includes administrators, counselors, school resource officers, and health teachers.

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