



# PDQ

## Quarterly

### Policy Development Services

Ohio School Boards Association

August 2009

## The skinny on sexting

by Julia A. Bauer  
staff attorney

It's in the news, it's in our schools. Students across the country are sending an average of 80 text messages a day, according to *The New York Times*. One study suggests 22% of teenage girls and 18% of teenage boys are engaging in a behavior frequently termed "sexting." What is sexting? Well, like it sounds: sending sexually explicit messages via text message or e-mail through a cell phone.

In addition to this behavior being morally objectionable, in many states it's illegal. Students are sending text messages of themselves or others, only to be charged with a variety of crimes ranging from misdemeanor telecommunications offenses to felony sex crimes. For high schoolers, especially those who are 18, this can have major consequences, including mandatory minimum sentences and sex offender registration requirements.

In Ohio, prosecutors in different counties have taken different approaches. The trend seems to be requiring community service or education projects in exchange for reduced charges for minors. For adults and students over 18, the prosecutors seem to have taken a more aggressive approach. Why the varying approaches? Prosecutors have broad discretion based on the facts and circumstances involved to decide what crime to charge and to make plea agreements. They consider

the age of the perpetrator; the age of the victim; the nature of the pictures; whether the pictures were further disseminated; and any other factors they deem relevant.

The criminal issues do not stop with the students. One administrator in the Washington, D.C., area was criminally charged after he had a student send explicit pictures to his BlackBerry so he could keep them as evidence. He was charged with possession of child pornography and endured a two-year criminal battle before the charges were eventually dropped. While a very unusual case, it serves as a reminder to handle these situations with care.

Legislatures across the country are considering how to handle these cases. In Ohio, companion bills Senate Bill 103 and House Bill 132 have been introduced. The bills create the misdemeanor crime "illegal use of a telecommunications device involving a minor in the state of nudity." The crime, treated like other juvenile crimes through the delinquency process, is for a minor to "recklessly create, receive, exchange, end or possess a photograph, video or other material that shows a minor in a state of nudity." It is not a defense under the bill that the minor created the picture or video of himself or herself. Both bills are pending in the criminal justice committees of their respective houses, and their future is not currently known. The Ohio Prosecuting Attorneys Association voted to oppose the bills in April, making it

less likely they will become law.

You may have heard about these cautionary tales and wondering what to do about it. The first thing schools can do is to aggressively and consistently enforce cell phone regulations.

Discipline for sexting is usually possible under the district's existing code of conduct. Most codes of conduct prohibit activities that violate state or federal law. Some codes may prohibit the distribution of obscene or pornographic material. Either of these permits disciplining a student who sends or possesses obscene photos via a phone at school. Districts that want to acknowledge sexting may include sample language such as:

"The taking, disseminating, transferring or sharing of obscene, pornographic, lewd or otherwise

### Sample policies available online

OSBA offers an enhanced service. PDQ subscribers can access PDQ sample policies electronically. This enables districts to easily review and edit sample policies to fit their needs. See the back page for instructions on using this feature designed to streamline your policy development process.

illegal images or photographs, whether by electronic data transfer or otherwise (commonly called texting, e-mailing or sexting, etc.) may constitute a crime under state and/or federal law. Any person taking, disseminating or sharing obscene, pornographic, lewd or otherwise illegal images or photographs may be punished under this code of conduct and will be reported to law enforcement and/or other

appropriate state or federal agencies, which may result in arrest, criminal prosecution and lifetime inclusion on sexual offender registries.”

When an administrator finds out about a photo, the reasonable suspicion standard applies to searching a cell phone. The administrator should have reasonable suspicion that the student has violated the school’s code of conduct in order to search a phone. The search must be justified at its inception and be

reasonable in scope. For example, searching for a picture text ordinarily would not require listening to voice mails. The administrator should consult with the police upon finding a photograph. Depending on the facts and circumstances, a child abuse report may be necessary as well.

As always, education about the proper use of technology is key. Districts may want to develop resources to help educate students and parents about the dangers of sexting.

	Address	City	State	Zip	Phone	Fax	Cell
1	3333 Central Expressway	San Jose	CA	95128	408-250-1000		
2	3333 Central Expressway	San Jose	CA	95128	408-250-1000		
3	3333 Central Expressway	San Jose	CA	95128	408-250-1000		
4	3333 Central Expressway	San Jose	CA	95128	408-250-1000		
5	3333 Central Expressway	San Jose	CA	95128	408-250-1000		
6	3333 Central Expressway	San Jose	CA	95128	408-250-1000		
7	3333 Central Expressway	San Jose	CA	95128	408-250-1000		
8	3333 Central Expressway	San Jose	CA	95128	408-250-1000		
9	3333 Central Expressway	San Jose	CA	95128	408-250-1000		
10	3333 Central Expressway	San Jose	CA	95128	408-250-1000		