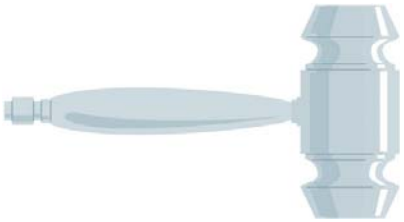
Legal Corner



By Michael I. Levin, Esq., PAESSP General Counsel

Sexting --Technology Gone Wild

1) What is Sexting?

Of all of the issues that confront principals on a day-to-day basis, sexting may be among the most perplexing. It is reflective of technology gone wild, finds its roots in teenage experimentation or rebellion and implicates both criminal law and the protections of the First Amendment Free Speech Clause. Not handled correctly, it can put a principal's job at risk.[1] My recommendation is that if there is an allegation of sexting, take a sick day and let your assistant deal with it.

Although sexting is receiving a lot of attention in the media,[2] it has not received much attention in the courts. According to Westlaw search results, there are only a scant two cases in state appellate courts and in the federal trial and appellate courts in the nation where the word "sexting" appears.[3] One thing is certain after reading about sexting in both the popular media and in the cases — there is no hard and fast definition of the word and it means different things to different people. According to the on-line Urban dictionary, sexting is defined as follows: "v: the act of text messaging someone in the hopes of having a sexual encounter with them later; initially casual, transitioning into highly suggestive and even sexually explicit." **http://www.urbandictionary.com/define.php?term=sexting**. However, this definition does not capture what many people think of when hearing the term "sexting"—i.e., the digital transmission of nude images, generally by teenagers.

A significantly different definition or description of the term was set forth by the plaintiffs in a Pennsylvania case named *Miller vs. Skumanick, supra,* when the plaintiffs described the concept as follows:

> At issue in this case is the practice of "sexting," which has become popular among teenagers in recent years. (Complaint (Doc. 1) (hereinafter "Complt.") at ¶ 7). According to the plaintiffs, this is "the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet." (Id.). Typically, the subject takes a picture of him- or herself with a digital camera or cell phone camera, or asks someone else to take that picture. (Id. at ¶ 8). That picture is stored as a digitized image and then sent via the text-message or photo-send function on a cell phone, transmitted by computer through electronic mail or posted to an Internet web site like Facebook or MySpace. (Id. ¶ 9). This practice is widespread among American teenagers; studies show approximately 20% of Americans age 13-19 have done it. (Id. ¶ 10).

As the two definitions quoted above set forth, there is no agreement as to what sexting is—it may be prose, it may be pictures. The pictures may be nude or semi-nude. The communication, whether expressive or pictorial, may be fairly innocent, may be for purposes of sexual gratification or for purposes of propositioning sex. In light of this reality, the first thing that must be said is that there is no simple answer as to what a principal should or could do when confronted with an allegation that a student has engaged in sexting. The principal must determine precisely what was done by the student in order to make a determination as to what needs to be done.

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Some people apparently believe that the digital transmission of a picture of a teenage girl posing provocatively in a bathing suit constitutes sexting.[4] However, whether or not the transmission of such a picture falls within the definition of sexting, I suggest that there is nothing inherently wrong with taking, possessing, sending, receiving or viewing such a picture.[5]

2) Sexting as Child Pornography

At its extreme, sexting may constitute the crime of child pornography. However, only certain kinds of pictures constitute child pornography. If a picture does not meet the statutory definition, it is not child pornography and should not be called child pornography. The relevant criminal statute in Pennsylvania provides, in pertinent part, as follows:

> **(d)** Child pornography—
> **(1)** Any person who intentionally views or knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.
> **(2)** A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.
> **(g)** Definitions—As used in this section, the following words and phrases shall have the meanings given to them in this subsection:
> "Intentionally views." The deliberate, purposeful, voluntary viewing of material depicting a child under 18 years of age engaging in a prohibited sexual act or in the simulation of such act. The term shall not include the accidental or inadvertent viewing of such material.
> "Prohibited sexual act." Sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.
> 18 Pa.C.S.A. § 6312.

There are a number of lessons that principals can learn from these provisions. First, not all photographs of teenagers that depict nudity constitute child pornography. If a photograph does not depict a sex act as enumerated and includes only nudity, the picture does not constitute child pornography unless the nudity involves "lewd exhibition of the genitals or nudity if . . . depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." A nude depiction that is done for the sake of "art," for example, would not constitute child pornography. I was involved in a case a number of years ago where a male student convinced female classmates in a photography class to pose nude for him in order to prepare his portfolio that was required for his class. Such pictures, being taken for the sake of art, obviously are not child pornography. Therefore, principals must not leap to the conclusion that child pornography is involved just because a nude or semi-nude photograph of a student has been sent digitally or "sexted."

A second lesson to take from the foregoing statutory provisions is that a "sexted" nude depiction of a minor student must be handled with the utmost care. It may be a criminal offense to intentionally view or to possess such a picture if the picture meets the definition of child pornography. If a principal receives information that a cell phone or a laptop computer contains a nude depiction of a student, it is highly recommended that the picture not be "opened" and viewed. On the contrary, it is recommended that the cell phone, laptop, zip drive or other electronic device be placed in a sealed envelope and turned over to the police for evaluation. It is also recommended that a note or label

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be affixed to the sealed envelope with a statement that might state something like the following:

> "Notice: Evidence. This envelope contains evidence that might contain unlawful images. No conclusions are being made by the school district or any of its employees or officials whether any of the depictions are unlawful, but in light to the possibility that one or more images may be unlawful, the contents remain under seal to be turned over to the police."

Part of the rationale for disclaiming any conclusions whether the depictions are child pornography is to eliminate the risk of a defamation law suit. Generally, it constitutes defamation to accuse someone of engaging in an unlawful act. It is beyond the scope of this article to review in any depth the law of defamation and the defenses and immunities that schools and school officials have with respect to such cases. Suffice it to say that principals ought to be careful before accusing anyone of engaging in an unlawful act, especially one that is as profound as an accusation of engaging in "child pornography."

3) Sexting as Public Lewdness

If sexting involves digital depiction of nudity, it is arguable that the crime of "public lewdness" has been committed. However, as this crime is defined, the isolated fact that a nude picture has been created and sent digitally is not necessarily a crime. Public lewdness is defined as follows:

> A person commits a misdemeanor of the third degree if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed. 18 Pa.C.S.A. § 5901.

First, taking and/or sending a nude picture does not necessarily constitute the completion of a lewd act. Further, in many instances, the recipients of the picture are not "affronted" or "alarmed." As with the situation involving child pornography, whether a student commits a crime is a question that is dependent upon the specific facts.

4) Sexting as Constitutionally Protected Activity

The composition of sexually graphic prose or the creation of a picture depicting partial or total nudity typically constitutes protected constitutional conduct or expression. A student's composition and sending of a sexually explicit message may or may not be

protected by the First Amendment. Similarly, the U.S. Supreme Court has held that an adult's right to possess pornography is protected so long as the pornography is not obscene. *Miller vs. California,* 413 U.S. 15 (1973). The Supreme Court also upheld the ability of states to enact legislation to protect minors and to outlaw the depiction of minors in sex acts, even if the depiction was not obscene. *New York vs. Ferber*, 458 U.S. 747 (1982). But the court noted: "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retain First Amendment protection." *Miller,* at 765.

The only lesson to be learned from this information is that if action is contemplated to be taken against a student for sexting, one must determine if the First Amendment is being implicated. Naturally, the school's legal counsel will need to be consulted to obtain a legal opinion whether the activity and conduct of the student is protected.

Conclusion

Sexting is a recent, but widespread activity of young and old. There is significant debate in learned journals whether the existing criminal laws, such as the laws outlawing child pornography, should apply to this technologically advanced activity. However, there are numerous issues that principals need to consider before taking any adverse action against students.

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Endnotes

[1] If a principal illegally possesses or looks at child pornography, that may be a crime. The commission of a crime generally constitutes "immorality" under Section 1122 of the School Code and constitutes a basis for dismissal. *See* 24 P.S. §11-1122; *e.g., Neshaminy Federation of Teachers vs. Neshaminy School District,* 501 Pa. 534, 462 A.2d 629 (1983). In a little known provision in the Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S.A. § 5701 *et seq.,* any employee who violates the Act can be discharged from employment, not by the employer, but by the victim of an illegal interception of a communication. The Act provides: (a) Cause of action.—Any aggrieved person shall have the right to bring an action in Commonwealth Court against any investigative or law enforcement officer, public official or public employee seeking the officer's, official's or employee's removal from office or employment on the grounds that the officer, official or employee has intentionally violated the provisions of this chapter. If the court shall conclude that such officer, official or employee has in fact intentionally violated the provisions of this chapter, the court shall order the dismissal or removal from office of said officer, official or employee." 18 Pa.C.S.A. § 5726. It is beyond the scope of this article to analyze the Wiretapping and Electronic Surveillance Control Act; suffice it to say that a principal's search of the contents of an electronic device, such as a cell phone, has a potential of violating the Act. *See Klump vs. Nazareth Area School District*, 425 F.Supp.2d 622 (E.D.Pa.2006) (finding that accessing the contents of data in a student's cell phone might be an unconstitutional search).

[2] Googling the word "sexting," there were approximately 7.2 million results. The very first result was an advertisement from AARP, with an article that sexting is not just for the kids. Wikipedia reported, "Sexting was reported as early as 2005 in the *Sunday Telegraph Magazine*, and has since been described as taking place worldwide. It has been reported in the U.K., Australia, New Zealand, the U.S. and Canada. In a 2008 survey of 1,280 teenagers and young adults of both sexes on **Cosmogirl.com,** sponsored by The National Campaign to Prevent Teen and Unplanned Pregnancy, 20% of teens (13-19) and 33% of young adults (20-26) had sent nude or semi-nude photographs of themselves electronically. Additionally, 39% of teens and 59% of young adults had sent sexually explicit text messages. A sociologist at Colorado College interviewed 80 children and believes this claim is overblown; she claims 'I had them go through their last 10 messages, their last 10 photos and I never saw it.' A 2009 UK survey of 2,094 teens aged 11 to 18 found that 38% had received an "offensive or distressing" sexual image via text or email."

[3] *Miller vs. Skumanick*, 605 F. Supp.2d 634 (M.D.Pa.2009); *State vs. Canal,* 773 N.W. 2d 528 (Iowa, 2009). Although the word "sexting" appears in only two cases nationwide at this point in time, there are many cases that have dealt with conduct that most would think of as constituting "sexting." *See, Sexting and the First Amendment,* John Humbach, Pace University School of Law, at **DigitalCommons@Pace**, **http://digitalcommons.pace.edu/lawfaculty/596**.

[4] In *Miller s. Skumanick,* the court decision reports that the District Attorney in Wyoming County, Pennsylvania, threatened criminal prosecution of a girl who posed provocatively in a bathing suit. As reported by the court: "Skumanick [i.e., the District Attorney] held the meeting on February 12, 2009 at the Wyoming County Courthouse. (Id. at ¶ 26). At that meeting, Skumanick reiterated his threat to prosecute unless the children submitted to probation, paid a $100 program fee and completed the program successfully. (Id. at ¶ 27). When asked by a parent at the meeting why his daughter-who had been depicted in a photograph wearing a bathing suit-could be charged with child pornography, Skumanick replied that the girl was posed "provocatively," which made her subject to the child pornography charge. (Id. at ¶ 29). When the father of Marissa Miller asked Skumanick who got to decide what "provocative" meant, the District Attorney replied that he refused to argue the question and reminded the crowd that he could charge all the minors that night. (Id. at ¶ 30). Instead, Skumanick asserted, he had offered them a plea deal. (Id.). He told Mr. Miller that "these are the rules. If you don't like them, too bad." (Id.)."