

*OSBA Cyberlaw Workshop*  
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## **Sexting and Title IX**

Presented by

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## I. What is Sexting?

A. Sexting is not defined by Ohio law. Colloquially, it can refer to a variety of suggestive communications via cellphone.

1. For purposes of our discussion today, “sexting” will be defined as sending nude photographs through text messaging or apps like Facebook or Snapchat.
2. “Studies have shown that roughly one-third of 16- and 17-year olds share suggestive images on their cellphones. Among young adults, rates are above 50 percent.”  
*Teenage Sexting is Not Child Porn*, Opinion, New York Times, April 4, 2016.
3. When the subject of the photographs is a minor (anyone under the age of 18), or when a recipient is a minor, criminal laws come into play.

## B. Criminal Statutes Prohibit Sexting Involving **Minors (under age 18)**

1. **Pandering Obscenity Involving a Minor – R.C. § 2907.321(A)(1) – Felony**
  - a. “No person, with knowledge of the character of the material or performance involved, shall ... [c]reate, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers.”
2. **Pandering Sexually Oriented Matter Involving a Minor – R.C. § 2907.322(A)(1) – Felony**
  - a. “No person, with knowledge of the character of the material or performance involved, shall ... [c]reate, record, photograph, film, develop, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.”
3. **Illegal Use of Minor in Nudity-Oriented Material or Performance – R.C. § 2907.323 (A)(1) and (3) – Felony**
  - a. “No person shall ... [p]hotograph any minor who is not the person’s child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity....”
  - b. “No person shall ... [p]ossess or view any material or performance that shows a minor who is not the person’s child or ward in a state of nudity....”
4. **Disseminating Matter Harmful to Juveniles -- R.C. § 2907.31 – Felony or Misdemeanor**
  - a. “No person, with knowledge of its character or content, shall recklessly ... [d]irectly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile [or] a group of juveniles ... any material or performance that is obscene or harmful to juveniles.”

5. Attempted Illegal Use of Minor in Nudity-Oriented Material or Performance – R.C. § 2923.02 as it relates to R.C. § 2907.323(A)(3) – **Misdemeanor or Felony**
  - a. “No person shall ... [attempt to] possess or view any material or performance that shows a minor who is not the person’s child or ward in a state of nudity...”
  - b. Note: “Attempt” of other crimes is also a crime under R.C. § 2923.02.
6. Note: While pictures of nude adults (age 18 and older) do not constitute child pornography, the distribution of such pictures to minors can be a concern also, particularly if the pictures are obscene. See R.C. § 2907.31.

C. School Policies can also affect sexting.

1. Your student code of conduct probably has provisions regarding the possession of nude pictures on school property. But what about addressing the behaviors that may be directed toward the subject of the photograph?
2. Harassment, intimidation, and bullying policies required by R.C. § 3313.666 prohibit bullying by electronic act, as long as there is a nexus to school property or a school activity.
  - a. This law was specifically updated in 2012 to include cyberbullying due to the suicide of Jessica Logan, a high school student whose nude photograph was widely distributed among her peers.
3. Title IX can also affect the way schools respond to sexting.
  - a. 20 U.S.C. § 1681 – “No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”
  - b. Sexual harassment is unwelcome conduct of a sexual nature that can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. (January 2001 Guidance from OCR)
    - i. Two types of sexual harassment:
      - (a) “Quid Pro Quo” – Sexual favors demanded in exchange for some benefit, or service.
      - (b) “Hostile environment” – Unwelcome sexual advances, requests for sexual favors, or verbal or physical conduct of a sexual nature that unreasonably interferes with an individual’s performance or creates an intimidating, hostile, or offensive educational environment.

- (1) Must be sufficiently severe, pervasive, and objectively offensive that it can be said to deprive the student of access to educational opportunities or benefits.
- ii. Your policy (5517 or ACA) probably defines it more extensively and offers examples.
- c. Off-campus conduct may create a hostile environment for purposes of a Title IX analysis.
  - i. In April 2011, OCR opined that “Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school’s education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was [sexually] assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator’s friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.”
  - ii. Keep in mind your policies on discipline for off-campus misconduct, which is limited under Ohio law.
- d. Under Title IX, the school has an obligation to eliminate the harassment, prevent its recurrence, and address its effects. For purposes of lawsuits, the school cannot be “deliberately indifferent” to claims of sexual harassment.
- 4. Remember that the misconduct you are addressing may fall under your bullying policy, your Title IX/anti-harassment policy, other provisions of the code of conduct, or some combination of these three sources. Make sure your district is following the appropriate policies to conduct its investigation and make a determination as to whether sanctions are appropriate.

## **II. Handling Evidence**

- A. Write down the steps you take, the people you contact, the people you receive instructions from.
- B. Preserve the evidence – Photographs involving minors.

1. If the photographs may or do involve a nude minor, turn the phone off, put the cell phone in a manila envelope, seal it, sign and date across the seal, and call the police immediately.
    - a. Lock the phone in a secure location until it can be turned over to the police, or keep it with you until you can turn it over to the police. You must maintain the chain of custody.
    - b. This advice also applies with computers, laptops, or other technological equipment that you believe contains nude images of minors.
  2. Do not inspect the contents of the phone to confirm the presence of child pornography, even if you have the owner's consent.
  3. Do not look at the images to determine which students may be involved.
  4. Do not look at the images to count how many there are.
  5. Do not copy, distribute, or share the images with anyone other than law enforcement. Specifically, sharing the images with a parent, building administrator, district official, etc. **could create potential criminal liability for you and the person with whom you share the images.**
  6. Notify appropriate administrators of the situation.
- C. Call the authorities.
1. You must contact either your local law enforcement agency or Children Services if minors are involved.
    - a. Your county may have a plan for communicating between agencies with regard to reports of abuse, neglect, or dependency. Consider asking your county agencies whether this is the case, and if so, how you can cooperate.
    - b. Tip: Because these cases often create publicity and grow quickly, consider calling both agencies to ensure that they have the ability to take action right away. Make sure the two agencies know that you have contacted each other so that they can connect the right people to handle the situation.
  2. Let law enforcement take the lead on searches and seizures due to the potentially criminal nature of the situation.
- D. Preserve the evidence – Photographs not involving minors.
1. If you aren't sure whether a photograph involves a minor, contact the police for further instructions.

2. If you are sure that a photograph is of an adult (and was taken when the adult was over the age of 18), you may download, print, or save a copy of the photograph if necessary, but that doesn't necessarily mean you should do it.
  - a. Example of Necessary Preservation: Photograph is of a nude employee that has distributed his or her own picture to a student.
  - b. Preserving evidence, particularly in situations that may involve termination of employment, may require the assistance of a computer forensics expert who can testify at a termination hearing if necessary. Consult with legal counsel to determine what is appropriate in a given situation.

E. Preserving Social Media Postings (not involving child pornography)

1. Snapchat

- a. You can take a screenshot of Snapchat messages, but it will notify the sender that a screenshot was made. Consider carefully whether that is desirable, and consult with law enforcement if they are conducting a concurrent investigation.
- b. You can take a photograph of a Snapchat message with another phone.

2. Facebook

- a. Expand all comments that are necessary to preserve before printing.
- b. Consider printing to PDF so that you have a digital copy of the information in addition to a hard copy.

3. Twitter

- a. Originally, all tweets were being archived by the Library of Congress. This project has since been suspended.
- b. Tweets may be printed. Make sure to preserve the date that the printing was done so that dates and times can be interpreted.

4. Texts

- a. Take screenshots that can be preserved digitally.
- b. Texts may be retrievable from the phone company, particularly if the texts are recent.

### III. School District's Investigation

#### A. Title IX Policy and Investigation

1. Put in place interim measures that may be necessary to protect the alleged victim(s) and other members of the school community. Examples, which may or may not be appropriate:
  - a. No-contact order
  - b. Offer counseling – to all that appear to need it, but especially to the student(s) depicted in the picture(s)
  - c. Change seating, schedules, bus routes, etc.
  - d. Supervise complainant and/or respondent(s) to ensure safety
  - e. Emergency removal of perpetrator if appropriate
  - f. Academic accommodations (i.e. allow to make up work, move tests)
2. Cooperate with law enforcement and Children Services, but note that you must conduct your own investigation if you believe that misconduct may have occurred according to your code of conduct and/or Title IX policy.
  - a. If law enforcement and/or children services are conducting an investigation, get permission before you speak with witnesses or collect evidence.
  - b. Write down in your investigation log the date, to whom you spoke, and what they said you could (or could not) do.
3. Those handling the case should be trauma-informed, which means they should receive training on how trauma affects the responses of individuals involved in a given situation. Why? Because the experience may have traumatized your students, because trauma can cause both short-term and long-term effects that you may want to consider in educating your students, because OCR requires it, and because it's the right thing to do.
  - a. According to Dr. Marilyn Augustyn, trauma is the sum of the “3Es” – “Individual trauma results from an *event*, series of events, or set of circumstances that is *experienced* by an individual as physically or emotionally harmful or threatening and that has lasting adverse *effects* on the individual's functioning and physical, social, emotional, or spiritual well-being.”<sup>1</sup>
  - b. Trauma affects the way the brain responds to what is happening.

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<sup>1</sup> [\*Trauma Informed Care of Children and Families in 2015 – What Have We Learned?\*](#), Dr. Marilyn Augustyn, Boston University School of Medicine (April 17, 2015).

- c. Trauma affects the way the brain encodes and decodes the memories of what occurred.
  - i. Hormone release during trauma can cause memories to become disorganized and difficult to retrieve.
  - ii. Think of a puzzle, where the pieces are all over the floor. Some of them may be missing or misplaced. Some of them are put together already, but in the wrong order.
  - iii. It will take time for the survivor to find all the pieces and reassemble them in an order that makes sense.
  - iv. When the memories are retrieved, they are accurate – but the chronology may be broken. “I must have...” “I don’t remember \_\_\_\_\_ but the next thing I knew...” Those “blanks” may be filled in if the investigator gives the complainant time to process.
- d. Long-term effects of trauma:
  - i. Broadly, the effects of trauma can have a “dual influence” on development:
    - (a) “*Overdevelopment* of skills, behaviors, adaptations which help the child survive their environment and meet physical, emotional, and relational needs”;
    - (b) “*Underdevelopment* of domains of development which are less immediately relevant to survival.”<sup>2</sup>
  - ii. According to U.S. Department of Education’s Office of Safe and Healthy Students (“OSHS”), over time the impacts of complex trauma can include:
    - (a) Smaller brain size and structures.
    - (b) Fewer neural connections.
    - (c) Heightened baseline level of arousal.
    - (d) Difficulties with learning, memory, and emotional regulation.
    - (e) Difficulty trusting others and forming healthy relationships.
    - (f) Increased behavioral issues.
    - (g) Dissociative responses.

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<sup>2</sup> [\*Impact of Trauma at Different Developmental Ages\*](#), Massachusetts Department of Elementary & Secondary Education (April 17, 2015).

- (h) Increased risk for mental health issues.
- (i) Lower self-esteem.
- (j) Focus on survival vs. future orientation.
- (k) Impacts on school functioning:
  - (1) Difficulty learning and paying attention.
  - (2) Trouble building relationships with teachers and peers.
  - (3) More time out of class.
  - (4) Increased risk of failing, poor test scores.
  - (5) More likely to be suspended or expelled.
  - (6) Higher rates of referral to special education.<sup>3</sup>
- e. The effects of trauma may manifest in a number of signs and symptoms you may witness in the educational environment. According to the National Child Traumatic Stress Network, these include the following:
  - i. Fear and anxiety.
  - ii. Changes in behavior (e.g., decreased ability to concentrate, increased or decreased activity levels, regressive behaviors, withdrawal from family, peers, or extracurricular activities, anger and irritability, and changes in school performance).
  - iii. Increased complaints about headaches, stomach aches, and other somatic complaints.
  - iv. Difficulty responding to redirection and authority.<sup>4</sup>
- f. Previous trauma can cause students to be “triggered” in subsequent stressful situations. According to OSHS, triggers can include the following:
  - i. Loud, chaotic environments.
  - ii. Physical touch.
  - iii. Authority figures.

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<sup>3</sup> [Integrating Trauma-Sensitive Practices in Schools](#), U.S. Department of Education Office of Safe and Healthy Students (October 2015).

<sup>4</sup> [Child Trauma Toolkit for Educators](#), National Child Traumatic Stress Network Schools Committee (2008).

- iv. Limit-setting.
  - v. Uncertainty about expectations or transitions.
  - vi. Emergency responders or police.
  - vii. Situations that generate feelings of helplessness, vulnerability, or lack of control.<sup>5</sup>
4. Your policies will likely dictate what you must do in terms of an investigation and a report. Follow them!

B. The Aftermath – What to do when your investigation is finished.

1. Once your investigation and report is done or nearing completion, think harder about your obligations to **eliminate the harassment, prevent its recurrence, and address its effects**. Consider:
  - a. Discipline if policies/code of conduct were violated.
    - i. Be careful that you do not have a gender bias towards one “side” of a sexting matter or another. Treat students who committed similar misconduct similarly.
    - ii. Consider whether discipline is the appropriate response, or whether educational goals would be better met through other options.
  - b. Follow-up training with students (teams, groups, grades, entire school) to disrupt a hostile culture and help to prevent future incidents. Conduct follow-up surveys to check the climate for improvements.
  - c. Follow-up training for staff to address things that may have been done better.
  - d. Continuing no-contact order, reassignment, scheduling changes, etc.
  - e. Continue to offer counseling to the complainant (and, potentially, the respondent).
  - f. Academic accommodations if there are court dates associated with a concurrent criminal case.
  - g. Are there any policy or procedural tweaks that might be appropriate for the future?
2. Consider conducting climate surveys to assess whether a hostile environment exists.

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<sup>5</sup> [Integrating Trauma-Sensitive Practices in Schools](#), U.S. Department of Education Office of Safe and Healthy Students (October 2015)

#### IV. How to Be Proactive

- A. Communicate with law enforcement before the complaint.
  - 1. How does your local law enforcement wish to be contacted? Is there a specially trained detective that can assist with these cases?
  - 2. How does your prosecutor handle these cases?
- B. Set up training to inform your community about the potentially life-altering nature of a seemingly innocent, fleeting moment.
  - 1. Can you provide programming for students? Passive educational materials?
    - a. Does your school district participate in E-Rate? If so, your Internet Safety Policy is required to provide for the education of minors about appropriate online behavior, including interacting with other individuals on social networking websites/chat rooms, and cyberbullying awareness and response. See 47 U.S.C. § 254. Consider whether sexting training would assist in meeting this requirement.
  - 2. Does your prosecutor or law enforcement have resources to access for this purpose?
  - 3. If not, can you work together to come up with something appropriate?
  - 4. What kinds of resources can you provide to parents? Would an evening training be helpful for parents? What about a video to view over the internet?
  - 5. Can you integrate sexting into a bullying prevention program to help disrupt a sexually hostile environment?
- C. Make sure your student code of conduct and policies are up-to-date and reflect the standards you wish to uphold.
  - 1. Student codes of conduct should contain information about bullying and sexual harassment.
  - 2. What provisions of the student code of conduct might apply to sexting? Are they easily understandable to the students? Do they allow your district the flexibility to discipline when it is appropriate to do so?
  - 3. Do your policies regarding bullying and Title IX investigations work together, or do they use conflicting procedures and deadlines?
- D. Train your staff!
  - 1. Make sure staff members are trauma-informed and have an understanding of how to approach sexting cases.
  - 2. Do they know what interim measures of protection may be appropriate?

3. Do they feel appropriately empowered to take steps necessary to eliminate the harassment, prevent its recurrence, and address its effects?
4. Do they know when to preserve, how to preserve, and what not to disseminate?