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Sexting and Title IX

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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

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.

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 a Sexting Complaint

A. Preserve the evidence.

- 1. Put the cell phone in a plastic bag and call the police immediately.
- 2. Do not inspect the contents of the phone to confirm the presence of child pornography.
- 3. Do not look at the images to determine which students may be involved.

4. Do not copy, distribute or share the images with anyone (including a parent) other than law enforcement.

B. Call the authorities.

1. You must contact either your local law enforcement agency or Children Services.
 - 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.

C. 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.”¹
 - b. Trauma affects the way the brain responds to what is happening.
 - 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.”²

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

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

- 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.
 - (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.³
- 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,

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

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.⁴

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.

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.⁵

4. Your policies will likely dictate what you must do in terms of an investigation and a report. Follow them!

D. 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.

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

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

- 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.

III. 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. Does your prosecutor or law enforcement have resources to access for this purpose?
 - 2. If not, can you work together to come up with something appropriate?
 - 3. Can you provide programming for students? Passive educational materials?
 - 4. What kinds of resources can you provide to parents? Would an evening training be helpful for parents?
 - 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?