

**“SEXTING” – CODE OF CONDUCT VIOLATION OR MORE?**

**STUDENT USE OF CELL PHONES AND OTHER  
ELECTRONIC DEVICES: THE EMERGING  
LEGAL AND TECHNOLOGICAL ISSUES**

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## INTRODUCTION

The emerging use of technology by students to transmit sexual images of themselves and others via cell phone and the internet has created new legal challenges for school officials, including how to address off-campus misconduct, First and Fourth Amendment concerns, and how school staff gathering evidence for student disciplinary proceedings might subject themselves to charges of child pornography and other sex crimes. School Districts' student codes of conduct will need to be updated to allow for corrective discipline addressing incidents of "sexting"<sup>1</sup>.

This presentation will address New York State and federal legal issues and policy implications regarding sexting.

## CONSTITUTIONAL LAW

**The First Amendment – Free Speech Issues:** Recent case law from the United States Supreme Court and the Second Circuit Federal Court of Appeals supports the notion that a First Amendment free speech claim would not be a barrier to implementing code of conduct penalties for sexting violations. Not only would a prohibition against sexting be consistent with a school district's mission to avoid the distribution of pornographic or obscene materials among its students (*Morse v. Frederick*, 127 S. Ct. 2618 [2007]), but sexting would also likely be unprotected speech under the *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 [1986] "plainly offensive" standard and the "materially and substantially disruptive of the educational process" standard of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 [1969] (also see *Guiles v. Marineau*, 461 F.3d 320 [2d Cir. 2006]).

**The Fourth Amendment – Search and Seizure Issues:** The ability of school officials to search students' private cell phones, iPods, netbooks and other portable devices capable of displaying an image is constrained by the Fourth Amendment's *reasonable individualized suspicion* standard for conducting a warrantless administrative search, as first announced in the United States Supreme Court decision, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Thus, before such property may be seized on an involuntary basis and a search for sexual images conducted, school officials must have sufficient evidence to lawfully conduct the search at its inception (e.g., an admission by the student, information from a reliable informant who has seen the images on the property to be searched or an admission against interest by the other person who transmitted their sexually explicit image to the student whose property will be searched) (*Phaneuf v. Fraikin*, 448 F.3d 591 [2d Cir. 2006]). Once the search proceeds, it must likewise be reasonable in its scope (see *New Jersey v.*

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<sup>1</sup> "Sexting," a word formed by combining the words "sex" and "texting," is the act of sending sexually explicit or sexually provocative photos or video electronically, primarily between cell phones, using the cell phone carrier's multimedia messaging service ("MMS"). Such photos and videos are often taken by the cell phone's own camera. The photos may also thereafter be transmitted by computer through electronic mail, and/or posted to a website like Facebook or MySpace.

*T.L.O., supra*). To the extent that evidence of sexting exists in the form of pictures or video on a school computer, the school authorities may have the legal right to review attachments to emails on student network accounts without having to satisfy the *reasonable individualized suspicion* standard under the legal theory applicable to locker searches (*People v. Overton*, 20 N.Y.2d 360, aff'd on reh'g 24 N.Y.2d 522 [1969]). It should be noted that a search without reasonable suspicion under the *Overton* standard requires placing the students on written notice that their student network accounts are not private and may be subject to inspection at any time by school officials.

**Case Note:** In *Klump v. Nazareth Area School District*, 425 F. Supp. 2d 622 (E.D. Pa. 2006), a student brought a lawsuit against the school district, superintendent, assistant principal, and a teacher, asserting various causes of action arising from defendants' confiscation of the student's cell phone, calling classmates listed in the student's phone number directory, accessing the student's text messages and voice mail, and holding instant messaging conversation with student's younger brother without identifying themselves.

The court found that the teacher's seizure of the student's cell phone was not an unreasonable search or seizure, since the student had apparently violated school's policy prohibiting use or display of cell phones during school hours. However, the court also concluded that the search of the caller ID's, text and voice mail messages on the phone was a "fishing expedition" that violated the student's Fourth Amendment rights. The court concluded that, while the district had reasonable suspicion that the display/use policy was violated, it did not have reasonable suspicion that the search of the phone would turn up further evidence of any other violations. In addition, the court found that stored voicemail was retrieved in violation of a Pennsylvania state law prohibiting unauthorized access to stored communications but dismissed claims based on defendants' accessing plaintiff's phone number directory and call log because his phone number directory and call log were not stored communications.

Finally, however, the alleged actions of the assistant principal and teacher, of calling other students from the student's cell phone after seizing it because of the student's violation of rule prohibiting display of cell phones in school, if proven, constituted unreasonable search, inasmuch as assistant principal and teacher had **no reason to suspect** that such search would reveal that **student himself** was violating another school policy, and instead hoped to use his phone **to catch other students' violations**.

**The Fourteenth Amendment – Due Process Clause:** The Due Process Clause of the 14<sup>th</sup> Amendment assures, procedurally, notice and the opportunity to be heard before educational property rights may be suspended and, substantively, that only laws (student code of conduct infractions) which are rational will be enforceable. (*Goss v. Lopez*, 419 U.S. 565 [1975] and *Board of Educ. v. McCluskey*, 458 U.S. 966 [1982])

## OFF-CAMPUS MISCONDUCT

A school district's student code of conduct may provide for discipline for off-campus misconduct based upon a legal principle first enunciated by the Commissioner of Education in *Matter of Rodriguez*, 8 Ed. Dept. Rep. 214 (1969) wherein it is stated:

Whether discipline is to be meted out to such students and the measure thereof, is within the discretion of the school authorities. The mere fact that such conduct occurs or such conditions exist outside the school situation or the school official pupil relationship does not preclude the possibility that such conduct or condition may adversely affect the educative process or endanger the health, safety or morals of pupils within the education system for which the school authorities are responsible. The school authorities are in the best position to determine whether the education system for which they are responsible has been or could be so affected, and their determination will not be upset absent some showing that they have abused their discretion in making it. (at 216-17).

The Commissioner and the courts have consistently applied the rationale of *Rodriguez* to uphold discipline in matters involving off-campus criminal conduct that reasonably could have a spill-over effect on the campus that may adversely affect the educative process or would endanger the health, safety or morals of students in the schools. (*Pollnow v. Glennon*, 594 F. Supp. 220 [S.D.N.Y. 1984], aff'd 757 F.2d 496 [2d Cir. 1985]). The *Rodriguez* standard may also be applied in cases that do not involve off-campus criminality but, nevertheless, may adversely affect the educative process or endanger the health, safety or morals of students within the schools. (*Matter of Coughlan v. Board of Education*, 262 A.D.2d 949 [4<sup>th</sup> Dept. 1999]).

In *Appeal of Ravick*, 40 Ed. Dept. Rep. 262, Decision No. 14,477 (2000), off-campus student-to-student emails that constituted threatening and discriminatory statements aimed at Jewish students and an implicit on-campus threat by referencing the "Trench Coat Mafia" coming to their school, subjected its author to discipline under the school's student Code of Conduct based upon the *Rodriguez* standard. The Commissioner also dismissed the student's First Amendment free speech defense, notwithstanding the fact that the communications took place off-campus, referencing the *Tinker* standard regarding speech that could be subject to student discipline.

In *Wisniewski v. Board of Educ. of Weedsport C.S.D.*, 494 F.3d 34 (2d Cir. 2007), an off-campus computer threat to "kill Mr. VanderMolen", an English teacher, accompanied by an icon of a bullet splattering blood from a head, sent among 15 students that was reported to the teacher was not First Amendment protected speech. It was sanctionable under the student Code of Conduct as speech that "crosses the boundary of protected speech and . . . poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that [by their forecast] would 'materially and substantially disrupt the work and discipline of the school.'" *Id.* at 39. Referring to previous case law, the Court noted that it has long been held that off-campus misconduct can create

a foreseeable risk of substantial disruption within a school (*Thomas v. Board of Education*, 607 F.2d 1052, n.17 [2d Cir. 1979]).

### **CHILD PORNOGRAPHY LAWS**

- **Federal Law – Selected Provisions:**

- The general prohibition against the possession of child pornography is codified at 18 U.S.C. §§ 2251 et seq.
  - “Child pornography” is defined as “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where - (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.” 18 U.S.C. § 2256(8).
  - “Minor” is defined as “means any person under the age of eighteen years.” 18 U.S.C. § 2256(1).
- The federal PROTECT Act of 2003 (also known as the Amber Alert Law), codified at 18 U.S.C. § 1466A, criminalizes material that has “a visual depiction of any kind, including a drawing, cartoon, sculpture or painting,” that “depicts a minor engaging in sexually explicit conduct and is obscene” or “depicts an image that is, or appears to be, of a minor engaging in ... sexual intercourse ... and lacks serious literary, artistic, political, or scientific value.” By its own terms, the law does not make all simulated child pornography illegal, only that found to be obscene or lacking in serious value.
  - Controversial provisions of PROTECT Act ban virtual child pornography, which it defines as any “digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.”

- **State Law – Selected Provisions:**

- Penal Law Section 263.16 outlaws “Possessing a Sexual Performance by a Child.” It states, “A person is guilty of possessing a sexual performance by a child when, knowing the character and content thereof, he knowingly has in his possession or control any performance which includes sexual conduct by a child less than sixteen years of age. Possessing a sexual performance by a child is a class E felony.”
- Penal Law Section 235.21 outlaws “Disseminating Indecent Material to Minors in the Second Degree.” It states that a person is guilty of disseminating indecent material to minors in the second degree when:
  - With knowledge of its character and content, he sells or loans to a minor for monetary consideration:
    - Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or
    - Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors; or
  - Knowing the character and content of a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he:
    - Exhibits such motion picture, show or other presentation to a minor for a monetary consideration; or
    - Sells to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation; or
    - Admits a minor for a monetary consideration to premises whereon there is exhibited or to be exhibited such motion picture show or other presentation; or
  - Knowing the character and content of the communication which, in whole or

in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor.

- Disseminating indecent material to minors in the second degree is a class E felony.

### **SEXTING CASES IN THE NEWS**

**Administrator charged as child pornographer while investigating sexting offense.** An assistant principal in Loudoun County, Virginia named TingYi Oei was arrested on charges of “failure to report suspected child abuse” and later, “possessing child pornography” and “contributing the delinquency of minors” (all of which were later dismissed) because, as part of an investigation of sexting by students at his school, he had received on his phone and then saved to his school computer a digital image of the “headless” torso of a female wearing underpants, with her arms crossed over her chest. The student who MMS’ed him the photo claimed not to know who the female was, but it turned out to be a 16-year old student at the school. The high school principal had instructed the assistant principal to transfer the photo to his office computer, in case they needed it later. When the student was later disciplined on unrelated misconduct charges, the student and his parent complained to the police that the assistant principal had child pornography on his phone and computer.

**Student sexting and blackmail.** According to a series of articles published online by the Milwaukee Journal-Sentinel, a Milwaukee-area boy posing as a female on Facebook, persuaded at least 31 boys to send him pictures of themselves in the nude and then blackmailed some of the boys into performing sex acts by threatening to release the pictures to schoolmates. Criminal charges against the boy are still pending.

*Available at:* <http://www.jsonline.com/news/wisconsin/51533882.html>

**Nineteen year old boyfriend charged as a sex offender for sexting girlfriend’s nude photographs.** According to an article in the March 8, 2009 online edition of the Orlando Sentinel, 19-year-old Philip Alpert will remain on the Florida Department of Law Enforcement’s Sexual Offender Registry until he is 43 because he sent several dozen people a nude picture of his 16-year-old ex-girlfriend -- a photo she sent to him first. See:

*Available at:* <http://www.orlandosentinel.com/news/local/orl-asec-sexting-030809.0,1493554.story>

**Student charged as child pornographer.** Tunkhannock, Pennsylvania School District officials confiscated a number of students' cell phones for violations of the district's cell phone policy, and upon examining them discovered photos of several female students in "scantily clad, semi-nude and nude" poses. The school district turned the phones over to local police, who sought the District Attorney's advice on the matter.

- The DA met with the students on whose phones the photos were found, and also with the girls pictured in the photos. He gave them an ultimatum: take classes in safe use of cell phones or face child pornography charges.
- A federal judge in Pennsylvania has enjoined the District Attorney from prosecuting three teenage high school girls who refused to participate in the education program because they refused to write a paper about "how their actions were wrong." They claimed that they did not know they were being photographed. This arguably was retaliation for the exercise of their First and Fourteenth Amendment rights for refusing to participate in the education program. See *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009).

## **POLICY DEVELOPMENT**

### **Regulating Student Cell Phone Use on School Grounds.**

- **Section 2801 of the New York Education Law** grants Boards of Education the power and duty to establish Code of Conduct containing rules and regulations concerning the order and discipline of the schools "as they may deem necessary to secure the best educational results."
- ADOPT A POLICY, such as the following policies offered through the New York State School Boards Association's policy service:
  - Policy Number 4526 – Computer Use in Instruction and 4526-R, the implementing regulations for the Computer Use in Instruction policy.
  - Policy Number 5695 – Students and Personal Electronic Devices.
    - Policy No. 4526, Regulation No. 4526-R & Policy No. 5695 are included in the Appendix, annexed hereto.
- Address cell phone use restrictions or ban in the Code of Conduct.
- Be clear in defining what is/is not permissible use, and when it is/is not permissible to use a cell phone.

- Code of Conduct should define impermissible cell phone use (if not banned) to include use for any purpose during prohibited times or activities, including, but not limited to, text messaging, taking digital photographs or videos without advance permission.
- Communicate restrictions or ban to students and parents at all grade levels.

### **Options to Address Cell Phones:**

- **Ban all cell phones / electronic communication devices.**
  - Original bans intended to reduce drug dealing and gang activity.
  - National School Safety and Security Services opposes allowing students to have cell phones in school because it believes that, on balance, cell phones detract from safety and security.
    - Used for making bomb threats.
    - Use could potentially detonate a real bomb.
    - Can impede safety by accelerating parental response to a crisis scene when safety officers are trying to evacuate or lock down students.
    - Can overload phone systems during a real crisis.
  - New York City Board of Education forbids possession of cell phones in public schools without authorization of building principal.
    - A challenge to this rule was rejected in *Price v. N.Y.C. Board of Educ.*, 16 Misc. 3d 543 (N.Y. Co. Sup. Ct., 2007), affirmed 51 A.D.3d 277 (1st Dept., 2008), leave to appeal denied by 11 N.Y.3d 702 (2008).
    - The District successfully argued that a total ban was a rational response to the problems posed by cell phone usage. An enforcement system focused on use, rather than possession, would require teachers (rather than security personnel at the front door) to enforce the ban, thus reducing their time teaching.
    - There is no “express ‘constitutional right to bear cell phones.’”
- **Restrictions (Rather than Outright Ban) of Cell Phone Use.**

- This accommodates parents’ “peace of mind” and recognizes usefulness of appropriate cell phone use.
- But, what restrictions?
  - No use during instructional activities?
  - No use during the school day?
- How to enforce?
  - Collect cell phones at the beginning of the school day?
  - At the beginning of class?
  - Prior to a test?
  - Require that all cell phones be off?
  - Teachers to inspect?
  - Require that all cell phones be stored in locker?

### **WHAT WE KNOW ABOUT CELL PHONE USE BY YOUTHS**

**Who Has a Cell Phone? According to a study by the Pew Internet & American Life Project that was released in August of 2009:**

- In 2004, 45% of teenagers (defined as those 12-17 years of age) had a cell phone. Since then mobile phone use has climbed steadily among teens, to 63% in 2006 and 71% in 2008. According to a June, 2009 study by Common Sense Media, more than eight in ten kids (83%) have cell phones; 53% have had them since they were 12 or younger.
- In comparison, 77% of all adults (and 88% of parents) had a cell phone or other mobile device at a similar point in 2008.
- Older teens are much more likely to own cell phones than younger teens, and the largest increase occurs at age 14, right at the transition between middle and high school.
- Among 12-13 year olds, 52% had a cell phone in 2008.

- Mobile phone ownership jumped to 72% at age 14 in that survey.
- By the age of 17, more than eight in ten teens (84%) had the use of their own cell phone.
- Girls and boys are equally likely to own a cell phone.
- There are no differences by race or ethnicity in cell phone ownership.
- However, there are small differences in phone ownership by socio-economic status; in families with the highest levels of income and education, teens are more likely than in less well-off families to have a cell phone.

**How Are Phones Used? When we look specifically at teen cell phone owners (71% of the teen population in the 2008 Pew survey):**

- 94% of them have used their mobile phones to call friends.
- 76% have sent text messages.
- For daily activities, cell phone-based communication is dominant, with nearly two in five teens sending text messages every day.
- Voice calling on cell phones is nearly as prevalent, as more than a third (36%) of all teens (and 51% of those with cell phones) talk to their friends on the cell phone every day.
- In contrast, slightly more than a quarter (26%) of all teens send other types of electronic messages (emails, instant messages, group messages) through social networking sites such as Face book or MySpace -- and 43% of teens who use social networks send messages daily.
- Similarly, another 26% of teens send and receive instant messages on a daily basis and 16% send email every day.
- The older the teen, the more likely he/she uses his/her cell phone frequently. Older teens use them to talk to friends on a daily basis; younger teens tend to use mobile phones to call pals a few times or less per week.
- More than seven in ten 17-year-olds with phones talk to friends on their cell phones daily; just 28% of 12-year-olds with phones say the same thing.

- Use of text messaging by teens has increased since 2006, both in overall likelihood of use and in frequency of use.
  - In 2006, 51% of all teens, regardless of cell phone ownership, had ever sent a text message, while 58% had done so by 2008.
  - Similarly, daily use of text messaging is up, from 27% of teens using text messaging daily in 2006 to 38% texting daily in 2008.
- According to a 2007 survey by M:Metrics, 47 percent of teenagers take photos with their mobile device - twice the industry average.
- According to M:Metrics, 33.2% of 18-24 year-olds post photos to Web sites via mobile phones.
- The LG US National Texting Champion, 15-year old Kate Moore from Des Moines, Iowa, averages 14,000 messages a month with bills just under 300-pages long. She prevailed in the nationwide competition after several elimination rounds that included a text obstacle course, texting while blindfolded and texting while being badgered by 3 opponents. See: <http://www.lgtexter.com>.
- According to a 2008 survey by Harris, 42 % of teens say they can even text blindfolded.  
See: <http://www.harrisinteractive.com/NEWS/allnewsbydate.asp?NewsID=1334>
- According to a June, 2009 study by Common Sense Media:
  - More than 35% of teens admitted to using their cell phones to cheat, but only 3% of parents believed their own teen had ever used a cell phone to cheat;
  - 52% of teens admitted to some form of cheating involving the Internet;
  - 38% of teens said they copied text from websites and turned it in as their own work;
  - 65% of students with cell phones say they use them during school, but only 23% of parents think their kids are using them during school;
  - 69% of schools have cell phone policies that don't permit cell phone use, but more than half of all kids ignore them.
 See: <http://www.usatoday.com/news/education/2009-06-17-cellphones-in-classN.htm>

- Other Electronic Communications Devices
  - Other mobile devices that connect them to other people and other networks. The most prevalent of these devices are mobile gaming devices like the Nintendo DS and DSi and the Sony PlayStation Portable (PSP).
  - Mobile gaming devices are owned predominantly by younger teens (those ages 12-14). Two-thirds (67%) of 12-14 year olds own a portable gaming device, compared with 44% of teens ages 15 to 17. The most notable drop occurs at age 14, typically a time of transition between middle and high school for many teens.
  - What can teens do on these devices, beyond local game play?
    - The Sony PSP offers internet connectivity (generally through WiFi).
    - There is a PSP version of Skype, a free Voice Over IP (VOIP) application that allows users to make calls, often for free, over the Internet.
    - Skype also has an embedded instant messaging client, meaning that PSP users can IM others from their device.
    - The Nintendo DS(i) is somewhat more limited, but has a local area wireless network tool that allows users to interact with others also on a DS(i) within 30-100 feet of them, via a visual chatting interface called pictochat.
    - The DS(i) also allows gaming over the local network as well as WiFi-based internet gaming.
    - These mobile gaming devices are also more likely to be owned by boys, with 61% of boys owning one of these devices compared with just under half (49%) of all girls.
    - There are no differences in ownership by race or ethnicity or by family income or education -- all groups are equally likely to have portable gaming devices.

## Sexual Uses of Technology by Teenagers:

- The National Campaign to Prevent Teen and Unplanned Pregnancy and CosmoGirl.com commissioned a survey of teens (ages 13-19) and young adults (ages 20-26) in the fall of 2008.
- A significant number of teens have electronically sent, or posted online, nude or semi-nude pictures or video of themselves.
  - How many teens say they have sent/posted nude or seminude pictures or video of themselves?
    - 20% of teens overall
    - 22% of teen girls
    - 18% of teen boys
    - 11% of young teen girls (ages 13-16)
  - The prevalence of such behavior increases with age. How many young adults are sending or posting nude or seminude images of themselves?
    - 33% of young adults overall
    - 36% of young adult women
    - 31% of young adult men
  - Sexually suggestive messages (text, email, IM) are even more prevalent than sexually suggestive images. How many teens are sending or posting sexually suggestive messages?
    - 39% of all teens
    - 37% of teen girls
    - 40% of teen boys
    - 48% of teens say they have received such messages
  - The prevalence of such behavior also increases with age. How many young adults are sending or posting sexually suggestive messages?

- 59% of all young adults
  - 56% of young adult women
  - 62% of young adult men
  - 64% of young adults say they have received such messages
- Who are these sexually suggestive messages and images being sent to?
- 71% of teen girls and 67% of teen boys who have sent or posted sexually suggestive content say they have sent/posted this content to a boyfriend/girlfriend.
  - 21% of teen girls and 39% of teen boys say they have sent such content to someone they wanted to date or hook up with.
  - 15% of teens who have sent or posted nude/seminude images of themselves say they have done so to someone they only knew online.
  - 83% of young adult women and 75% of young adult men who have sent sexually suggestive content say they have sent/posted such material to a boyfriend/ girlfriend.
  - 21% of young adult women and 30% of young adult men who have sent/posted sexually suggestive content have done so to someone they wanted to date or hook up with.
  - 15% of young adult women and 23% of young adult men who have sent sexually suggestive material say they have done so to someone they only knew online.
- How do teens and young adults feel about sending/posting sexually suggestive content?
- 75% of teens and 71% of young adults say sending sexually suggestive content “can have serious negative consequences.”
  - Yet, 39% of teens and 59% of young adults have sent or posted sexually suggestive emails or text messages -- and 20% of teens and 33% of young adults have sent/posted nude or semi-nude images of themselves.
- How common is it to share sexy messages and images with those other than the intended recipient?

- 44% of both teen girls and teen boys say it is common for sexually suggestive text messages to get shared with people other than the intended recipient.
  - 36% of teen girls and 39% of teen boys say it is common for nude or semi-nude photos to get shared with people other than the intended recipient.
  - 44% of young adult women and 50% of young adult men say it is common for sexually suggestive text messages to get shared with people other than the intended recipient.
  - 48% of young adult women and 46% of young adult men say it is common for nude or semi-nude photos to get shared with people other than the intended recipient.
- Young people who receive nude/semi-nude images and sexually suggestive texts and emails are sharing them with other people for whom they were never intended. How many teens and young adults say they have been shown nude/semi-nude content originally meant for someone else?
- 38% of teen girls and 39% of teen boys say they have had sexually suggestive text messages or emails -- originally meant for someone else -- shared with them.
  - 25% of teen girls and 33% of teen boys say they have had nude or semi-nude images -- originally meant for someone else -- shared with them.
  - 37% of young adult women and 47% of young adult men have had sexually suggestive text messages or emails -- intended for someone else -- shared with them.
  - 24% of young adult women and 40% of young adult men say they have had nude or semi-nude images -- originally meant for someone else -- shared with them.
- Teens and young adults admit that sending/posting sexually suggestive content has an impact on their behavior. Does sending sexually suggestive text and images affect what happens in real life?
- 22% of teens and 28% of young adults say they are personally more forward and aggressive using sexually suggestive words and images than they are in “real life.”
  - 38% of teens and 40% of young adults say exchanging sexually suggestive

content makes dating or hooking up with others more likely.

- 29% of teens and 24% of young adults believe those exchanging sexually suggestive content are “expected” to date or hook up.
- Teens and young adults give many reasons for sending/posting sexually suggestive content. Most say it is a “fun and flirtatious” activity. Why do teens and young adults send or post sexually suggestive content?
  - 51% of teen girls say pressure from a guy is a reason girls send sexy messages or images; only 18% of teen boys cited pressure from female counterparts as a reason.
  - 23% of teen girls and 24% of teen boys say they were pressured by friends to send or post sexual content.
- Among teens who have sent sexually suggestive content:
  - 66% of teen girls and 60% of teen boys say they did so to be “fun or flirtatious: -- the most common reason for sending sexy content.
  - 52% of teen girls did so as a “sexy present” for their boyfriend.
  - 44% of both teen girls and teen boys say they sent sexually suggestive messages or images in response to such content they received.
  - 40% of teen girls said they sent sexually suggestive messages or images as “a joke.”
  - 34% of teen girls say they sent/posted sexually suggestive content to “feel sexy.”
  - 12% of teen girls felt “pressured” to send sexually suggestive messages or images.
- Among young adults who have sent sexually suggestive content:
  - 72% of young adult women and 70% of young adult men say they did so to be “fun or flirtatious.”
  - 59% of young adult women sent/posted sexually suggestive content as a “sexy present” for their boyfriend.
  - 41% of young adult women and 51% of young adult men say they sent sexy

messages or images in response to such content they received.

- The survey is available online at:

[http://www.thenationalcampaign.org/sextech/PDF/SexTech\\_Summary.pdf](http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf)

- A growing number of teenagers are ending up in serious trouble for sending racy photos with their cell phones.
  - According to a March, 2009 story in USA Today, police have investigated more than two dozen teens in at least six states this year for sending nude images of themselves in cell phone text messages, which can bring a charge of distributing child pornography.
  - Of the 2,100 children that have been identified by the National Center for Missing & Exploited Children as victims of online porn, one-fourth initially sent the images themselves. Some did it for “fun,” and others were tricked into doing it by adults or others they met online.

### **ACTIONS TO CONSIDER**

- Review policies and procedures (e.g., Code of Conduct, Acceptable Use Policy).
- Consult with counsel on speech/discipline issues before taking action.
- Consider alternatives to discipline.
- Teachable moments and curricular considerations.
- Parental notification and meetings.
- Criminal/Civil actions by individuals.

## APPENDIX

### NYSSBA Sample Policy 4526

#### COMPUTER USE IN INSTRUCTION

The Board of Education is committed to optimizing student learning and teaching. The Board considers student access to a computer network, including the Internet, to be a powerful and valuable educational and research tool, and encourages the use of computers and computer-related technology in district classrooms solely for the purpose of advancing and promoting learning and teaching.

The computer network can provide a forum for learning various software applications and through online databases, bulletin boards and electronic mail, can significantly enhance educational experiences and provide statewide, national and global communication opportunities for staff and students.

All users of the district's computer network and the Internet must understand that use is a privilege, not a right, and that use entails responsibility.

The Superintendent of Schools shall establish regulations governing the use and security of the district's computer network. All users of the district's computer network and equipment shall comply with this policy and those regulations. Failure to comply may result in disciplinary action as well as suspension and/or revocation of computer access privileges.

The Superintendent shall be responsible for designating a computer network coordinator to oversee the use of district computer resources. The computer coordinator will prepare in-service programs for the training and development of district staff in computer skills, and for the incorporation of computer use in appropriate subject areas.

The Superintendent, working in conjunction with the designated purchasing agent for the district, the computer network coordinator and the instructional materials planning committee, will be responsible for the purchase and distribution of computer software and hardware throughout district schools. They shall prepare and submit for the Board's approval a comprehensive multi-year technology plan which shall be revised as necessary to reflect changing technology and/or district needs.

Adoption date:

## COMPUTER USE IN INSTRUCTION REGULATION

The following rules and regulations govern the use of the district's computer network system and access to the Internet.

### I. Administration

- The Superintendent of Schools shall designate a computer network coordinator to oversee the district's computer network.
- The computer network coordinator shall monitor and examine all network activities, as appropriate, to ensure proper use of the system.
- The computer network coordinator shall be responsible for disseminating and interpreting district policy and regulations governing use of the district's network at the building level with all network users.
- The computer network coordinator shall provide employee training for proper use of the network and will ensure that staff supervising students using the district's network provide similar training to their students, including providing copies of district policy and regulations governing use of the district's network.
- The computer network coordinator shall ensure that all disks and software loaded onto the computer network have been scanned for computer viruses.
- All student agreements to abide by district policy and regulations and parental consent forms shall be kept on file in the district office.
- 

### II. Internet Access

*[Note: The School Board should amend these access provisions as appropriate]*

- Students will be provided access: *during class time only; during the school day when the students are not in class; before or after school hours, or only during instructional time in a controlled environment.(select as many as apply)*
- Students will be provided with individual accounts (*students will share a classroom accounts*).
- Students may (*may not*) browse the World Wide Web:
- Students are (*are not*) to participate in chat rooms.
- Students may (*may not*) read news groups.
- Students may (*may not*) construct their own web pages using district computer resources.
- Students will have individual (*group*) e-mail address.
- Students are (*are not*) allowed to belong to mailing lists
- A staff member will be required to monitor all (*a combination*) of these activities.

**III. Acceptable Use and Conduct**

- Access to the district's computer network is provided solely for educational purposes and research consistent with the district's mission and goals.
- Use of the district's computer network is a privilege, not a right. Inappropriate use may result in the suspension or revocation of that privilege.
- Each individual in whose name an access account is issued is responsible at all times for its proper use.
- All network users will be issued a login name and password. Passwords must be changed periodically.
- Only those network users with written permission from the principal or computer network coordinator may access the district's system from off-site (e.g., from home).
- All network users are expected to abide by the generally accepted rules of network etiquette. This includes being polite and using only appropriate language. Abusive or sexual language or images, vulgarities and swear words are all inappropriate.
- Network users identifying a security problem on the district's network must notify the appropriate teacher, administrator or computer network coordinator. Under no circumstance should the user demonstrate the problem to anyone other than to the district official or employee being notified.
- Any network user identified as a security risk or having a history of violations of district computer use guidelines may be denied access to the district's network.

**IV. Prohibited Activity and Uses**

The following is a list of prohibited activity concerning use of the district's computer network. Violation of any of these prohibitions may result in discipline or other appropriate penalty, including suspension or revocation of a user's access to the network.

- Using the network for commercial activity, including advertising.
- Infringing on any copyrights or other intellectual property rights, including copying, installing, receiving, transmitting or making available any copyrighted software on the district computer network.
- Using the network to receive, transmit or make available to others obscene, offensive, or sexually explicit material.
- Using the network to receive, transmit or make available to others messages that are racist, sexist, abusive or harassing to others.
- Using another user's account or password.
- Attempting to read, delete, copy or modify the electronic mail (e-mail) of other system users and deliberately interfering with the ability of other system users to send and/or receive e-mail.

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- Forging or attempting to forge e-mail messages.
- Engaging in vandalism. Vandalism is defined as any malicious attempt to harm or destroy district equipment or materials, data of another user of the district's network or of any of the entities or other networks that are connected to the Internet. This includes, but is not limited to, creating and/or placing a computer virus on the network.
- Using the network to send anonymous messages or files.
- Using the network to receive, transmit or make available to others a message that is inconsistent with the district's Code of Conduct.
- Revealing the personal address, telephone number or other personal information of oneself or another person.
- Using the network for sending and/or receiving personal messages.
- Intentionally disrupting network traffic or crashing the network and connected systems.
- Installing personal software or using personal disks on the district's computers and/or network without the permission of the appropriate district official or employee.
- Using district computing resources for commercial or financial gain or fraud.
- Stealing data, equipment or intellectual property.
- Gaining or seeking to gain unauthorized access to any files, resources, or computer or phone systems, or vandalize the data of another user.
- Wastefully using finite district resources.
- Changing or exceeding resource quotas as set by the district without the permission of the appropriate district official or employee.
- Using the network while access privileges are suspended or revoked.
- Using the network in a fashion inconsistent with directions from teachers and other staff and generally accepted network etiquette.

### V. No Privacy Guarantee

Students using the district's computer network should not expect, nor does the district guarantee privacy for electronic mail (e-mail) or any use of the district's computer network. The district reserves the right to access and view any material stored on district equipment or any material used in conjunction with the district's computer network.

### VI. Sanctions

All users of the district's computer network and equipment are required to comply with the district's policy and regulations governing the district's computer network. Failure to comply with the policy or regulation may result in disciplinary action as well as suspension and/or revocation of computer access privileges.

In addition, illegal activities are strictly prohibited. Any information pertaining to or implicating illegal activity will be reported to the proper authorities. Transmission of any material in violation of any federal, state and/or

## NYSSBA Sample Regulation 4526-R

local law or regulation is prohibited. This includes, but is not limited to materials protected by copyright, threatening or obscene material or material protected by trade secret. Users must respect all intellectual and property rights and laws.

### VII. District Responsibilities

The district makes no warranties of any kind, either expressed or implied, for the access being provided. Further, the district assumes no responsibility for the quality, availability, accuracy, nature or reliability of the service and/or information provided. Users of the district's computer network and the Internet use information at their own risk. Each user is responsible for verifying the integrity and authenticity of the information that is used and provided.

The district will not be responsible for any damages suffered by any user, including, but not limited to, loss of data resulting from delays, non-deliveries, misdeliveries, or service interruptions caused by its own negligence or the errors or omissions of any user. The district also will not be responsible for unauthorized financial obligations resulting from the use of or access to the district's computer network or the Internet.

Further, even though the district may use technical or manual means to regulate access and information, these methods do not provide a foolproof means of enforcing the provisions of the district policy and regulation.

Adoption date:

### STUDENTS AND PERSONAL ELECTRONIC DEVICES

*NOTE: This policy serves as guideline for the Board of Education's position with respect to personal electronic devices. It has been developed in light of the constant evolution of technology and it should encompass future technological advances as well as current technologies. Should the Board decide to adopt either a more permissive or more restrictive policy, it is important that the students be made aware of these policies through the student handbook and code of conduct.*

*Some personal electronic devices may have educational applications such as (but not limited to) calculators, voice recorders, digital cameras and music listening devices like the ipod. School boards may wish to adopt language to allow for personal electronic devices within the realm of an educational setting. There are also negative uses for personal electronic devices such as cheating, organization of gang related activities, drug deals, and with the advent of photo capable cellular phones – taking and distributing of unwanted/illicit photos. The Board should also consider adopting language reflecting the Board's position on the negative applications as well.*

*In Price v. New York City Board of Education, the Supreme Court of New York State ruled that the Board of Education does have the legal right to establish a policy regarding the possession of cell phones on school grounds. In this particular case the Board had instituted a policy banning cell phones on school grounds with very special allowances made where needed. (Price v. New York City Board of Education, 2007 WL 1518302 (2007).) Note that the decision reached in this case was for New York County and other jurisdictions may reach a different conclusion.*

The Board of Education recognizes that there are personal electronic devices that have educational applications such as calculators, voice recorders, digital cameras and music listening devices. These devices shall be allowed to be used in classrooms only when they are included as part of a lesson under the direction of a teacher.

The Board acknowledges that cellular phones, pagers, and 2-way communication systems can be a positive means to facilitate communication; however, the display and/or use of such devices can cause disruption to the educational process.

Therefore, to prevent such disruption, the display and/or use by students of cellular phones, pagers, and 2-way communication systems and/or other electronic devices shall be prohibited from the time students arrive at school

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until the end of the regular school day. Such devices must be turned off and stored out of sight during this time period.

In emergency situations, exceptions to the prohibition of the use of cellular phones, pagers, and 2-way communication systems may be granted by teachers or administrators.

Misuse of any of these electronic devices will result in its confiscation until **[insert time frame and condition of return i.e. end of the school day]**, as outlined in the code of conduct. Some uses of personal electronic devices constitute violation of the school district code of conduct and in some instances, the law. The school district will cooperate with law enforcement officials as appropriate.

Cross-ref: 5300, Code of Conduct

Ref: *Price v. New York City Board of Education*, 2007 WL 1518302 (2007).

Adoption date: