

Kids and Technology: Sexting

Taking the bull by the horns regarding the cleverly named phenomenon among teenagers, the new fad of “sexting” is more common than some might think. Some estimates place participation in sexting as high as one in five students, which represents twenty percent of the student population. This number is often repeated; however, it is only documented in a single survey.

Although the media has treated this number as an established fact, it has not been thoroughly documented to establish that the issue is as common as being reported in the media. This is not to suggest that this is not an important issue for Districts to be out in front of; however, there may be some media exaggeration and hysteria surrounding this phenomenon.

There have been several publicized incidents of students who have been caught engaging in sexting. This is a serious matter because prosecutors are treating this behavior as a felony. Although sexting itself does fit the strict definition of child pornography, there is a debate in the legal, political, and school communities regarding whether or not the punishment fits the crime. Therefore, communities, Districts, prosecutors, and legislators are tasked with cooperating, debating, and working to address this emerging issue in a productive manner.

Opinions regarding these incidents have varied. Some have argued that is very dangerous behavior that should be punished severely. Others argue that the prosecution of these offenses as child pornography does not comport with the spirit of the law, even if supported by the strict language of the law. In

Pennsylvania, child pornography convictions carry very serious implications, and although they have no minimum sentence, individuals convicted of these crimes must register as sex offenders for at least ten years and perhaps for the rest of their lives.

One of the concerns of prosecutors, parents, and School Districts is the ease with which these images can be placed on the internet and distributed widely once on a cell phone. Students need to be aware that what they intend to send to their girlfriend or boyfriend may ultimately end up being viewed by many other individuals. There are horror stories, such as the story of one thirteen year old girl who sent flirtatious pictures to her fourteen year old boyfriend, who then distributed those images around the school. Ultimately, the girl hung herself as a result of the embarrassment she suffered through that incident.

There have been at least two incidents reported across the state of Pennsylvania, one in the western portion of the State and another in the eastern portion of the State. The case in the western portion of the State resulted in the student’s pleading to a misdemeanor offense. The case in the eastern portion of the state was brought before the Federal Court for the Eastern District of Pennsylvania and has had a much more interesting life. The three female students implicated in this case have obtained legal representation and are fighting the District Attorney in this matter. The students are represented by the ACLU, which recently moved for a temporary restraining order. preventing the District Attorney from filing charges against them in an effort to force them to submit to a re-education program (*Sexting - continued on page 2*).

Sexting

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The photos at issue in this case are of two girls from the waist up in white bras and another girl from the waist up wrapped in a towel with her breasts exposed. The District Attorney did not threaten to prosecute the male students who had received or traded these images; however, he did threaten the female students with prosecution, which raises issues in and of itself.

The ACLU has objected to the District Attorney's actions on a number of grounds and a Federal District Court agreed and issued a temporary restraining order preventing the District Attorney from using felony charges against these young women as a weapon. One of the contentions is that the case revolves around the nature of the images. The girls and their parents contend that the images are not child pornography and do not fit the definition of any images forbidden under the Pennsylvania law banning child pornography.

The girls and their parents argue that because the images are not illegal, the District Attorney is retaliating against them for exercising their free speech rights. Their argument is further bolstered when one considers the District Attorney's demand that the girls write essays regarding how their actions were wrong and how they harmed their victims. Obviously, the parents object and state that the girls, whose images were distributed without their approval, are the victims here; an argument that seems to have a great deal of merit.

The District Attorney's actions also force the girls to either engage in compulsory speech or face criminal prosecution. The First Amendment clearly prevents the state from requiring that an individual advocate, engage in, or endorse any speech against their will. The District Attorney's demands require that the girls do just that, state that their speech was wrong, especially where they, and their parents, do not agree that their behavior was legally or morally wrong.

The District Court agreed with the girls' analysis

and determined that they had a substantial certainty of success on the merits. As a result, the District Court took the uncommon and dramatic measure of issuing a Temporary Restraining Order against the District Attorney preventing him from filing criminal charges against these girls if they did not comply with his demands. It is no understatement to describe this as a shocking remedy, as federal courts are loathe to enjoin state criminal actions except in the most egregious of circumstances.

The challenge here has now been identified; Districts and communities must establish policies which discourage students from taking unnecessary risks and subjecting themselves to potential embarrassment through the sharing of risqué images. Students must be made aware there can be legal consequences to these actions, that they may face potential embarrassment if these images are shared, and that once digital material is created it is very difficult to control or destroy.

Students should also be made aware that they need to think twice before engaging in these activities. It is a challenge to law enforcement and School Districts to create policies and laws which respond to these acts in a reasonable and sensible manner, utilizing them as learning tools for young and immature decision-makers. Districts should seek to protect students from poor decision making through education, which hopefully prevents tragedies from occurring, similar to the one described earlier in this article. This is a fresh issue that will only become more pertinent as ease of access to technology increases and as our daily lives become more and more immersed in these technologies.

Ethics Commission Alters Landscape of Negotiating Committees

Prior to the State Ethic's Commission decision in advice of counsel 08-006 and 08-0008, the Ethics Commission previously barred School Directors with immediate family members in a District Bargaining Unit from participating in negotiations with that Bargaining Unit. Under the previous interpretation, the Ethics Act did permit these directors to vote on a final agreement, but it did not allow for their participation in the negotiating process.

The Ethics Act prohibits a public official from using the authority of his or her public office, public employment, or confidential information received through the holding of such an office or employment to be used for the pecuniary benefit of the public official, public employee, any member of his immediate family, his business, or business of which he is a member, or of which his immediate family is associated. The Ethics Act includes a de Minimus exclusion and a class/subclass exclusion.

The class/subclass exclusion applies when the affected public official or public employee, an immediate family member, or business of which the public official, employee, or immediate family member is associated with; must be a member of a class consisting of the general public or a true subclass consisting of more than one member, and the public official; employee, immediate family member; or business with which the public official, employee or immediate family member is associated must be affected to the same degree as the other members of the class or subclass.

The Ethics Commission concluded that the Act allows public officials or public employees to participate on the negotiating team for a collective bargaining agreement where their spouse or immediate family member or an associated business is involved so long as the class/subclass exclusion applies. The Ethics Commission reversed its prior distinction between voting and participating in negotiations as baseless.

Therefore, a school director who is married to, related to, or in business with a bargaining unit member may participate in the negotiations.

Although this is now legally permissible, the question still remains whether or not impacted board members will feel that it is appropriate to participate in these negotiations. From a political standpoint it may still be untenable for the individual to participate.

It is now up to the individual director as to whether or not he or she feels it is politically tenable and ethically permissible to participate in the negotiations. The Ethics Commission's opinion is a complete one-eighty from its prior position and makes substantial changes to the potential composition of District negotiation teams.

Uncorroborated Hearsay Fails to Satisfy Substantial Evidence Standard In Student Expulsion

A student at Midd-West High School, who was allegedly smoking marijuana while participating in a school sponsored overnight camp for fifth grade students as a counselor, was expelled by the District based upon the statements of two other students. The expelled student was tested for marijuana; however, there was no presence of any illegal drugs in his system. At the student's expulsion hearing, the Superintendent testified that two students told him that the other student had used marijuana at the camp. The School Board expelled the student based upon the Superintendent's testimony. On appeal, a Pennsylvania Trial Court concluded that there was not enough substantial evidence to support the School Board's finding because it was based upon the Superintendent's hearsay testimony.

Other than this hearsay testimony, there was no record to support the Superintendent's assertions. In fact, there was substantial evidence to support that the student did not, in fact, use illegal drugs.

(Student Expulsion - continued on page 5.)

Columbine Reference Enough to Support Ten-Day Suspension

Johnson v. New Brighton Area School District
2008 WL 4204718 (W.D. Pa. 2008)

In this case, a student was called upon during a motivational assembly in which the speaker addressed the affect of labels upon individuals. The label placed upon this student by the guest-speaker at the assembly was “Osama Bin Laden.” The next day, several students and one teacher referred to the student as “Osama.”

Later that same day, in the library, the student approached a friend, who all parties agree addressed the student as “Osama.” However, none of the parties agreed upon the student’s responsive statement. The student admitted that he responded to his friend’s statement with a reference to the Columbine massacre; however, the context and content of this statement as in dispute.

When the student was questioned about this incident, he admitted that he had made a reference to the Columbine massacre in his response but insisted that he was only joking and that the reference was clearly a joke. However, a nearby teacher contended that the student was, in fact, making a threat or at a minimum the joke was wholly inappropriate. Upon presentation of this evidence to the Superintendent, he suggested a ten-day suspension. The student had no other disciplinary record, but he had been arrested on a firearms and assault charge in town.

The student contradicted none of the District’s evidence, which clearly demonstrated that the District believed that the student’s statement was a threat. The student simply attempted to create an issue of fact regarding his exact statement and its meaning. The District Court held that the record demonstrated that the Administration met the requirements of *Tinker v. DesMoines* by acting upon what they reasonably believed to be a substantial disruption or material interference with school activities, not simply acting to avoid a mere controversy.

The District Court held that referencing Columbine was not “pure speech” as protected by *Tinker*. The record unequivocally demonstrated that school officials believed this reference to be a threat and acted to prevent and protect other students from potential violence. The District Court compared the reference to Columbine to the use of “fighting words” or “true threats.” This type of language has routinely gone unprotected under the First Amendment.

The District Court recognized that in modern parlance, the term “Columbine” connotes the death of students, teacher, and staff through shooting violence. As a result, the use of that term, from the school’s perspective can be viewed as a “fighting word” or a “true threat” that advocates conduct harmful to other students. Ultimately, the District Court found no First Amendment protections for the Columbine reference. Therefore, the Western District recognizes the connotation that references to true events, such as the Columbine massacre, carries in our modern culture and denies First Amendment protections to speech of this type.

Tax Information Not Subject to Right-To-Know Law

McElfresh v. Department of Transportation
2008 WL 5487870 (Pa. Cmwlth. 2009)

Under the new Right-To-Know Law, the Pennsylvania Department of Transportation denied a request for the disclosure of protected tax information. This case illustrates what may be a common Right-To-Know request and provides an excellent example of the lack of access which the public may have to protected tax information. The Plaintiff, Edna McElfresh, visited a Toyota dealership and left her car at that dealership while she test-drove the vehicle overnight. The next day, McElfresh returned to the dealership and had decided not to purchase the vehicle; however, the dealership had already sold her vehicle to another buyer. McElfresh brought a civil suit against the dealership and in order to determine the sale price of her car, she had requested the price records of the dealership regarding the sale of her vehicle. Interestingly, the dealership claimed to have lost those records. McElfresh filed a Right-To-Know request with the Department of Transportation in order to determine the price her vehicle was sold for by the dealership. The Department of Transportation provided McElfresh with the requested records; however, the Department of Transportation redacted the car purchase price and sales tax figures from the report.

McElfresh objected and the matter was put before a hearing officer. That hearing officer determined that Section 731 of the Fiscal Code and Section 274 of the Tax Reform Code authorize the Department of Transportation to deny a request for sales tax information through the redaction in the reports. Section 274 of the Tax Reform Code mandates that tax records shall not be disclosed unless otherwise provided by law. Section 731 of the Fiscal Code also provides for confidentiality in certain fiscal records. McElfresh claimed that the Right-To-Know Law counted as an exception under the “otherwise provided by law” clause in Section 274 of the Tax Reform Code.

The Commonwealth Court considered this matter and admitted that McElfresh’s interests in justice may outweigh the privacy interest of the dealership in this matter. That being said, the Commonwealth Court

disagreed with McElfresh that a Right-To-Know request was the proper avenue through which to gain the information she needed to pursue her civil suit. This information could have been obtained through a proper judicial order.

McElfresh’s request was not valid under the Right-To-Know Law. If McElfresh required the tax and sale information, it could have been obtained through a court order, which at no point had been requested. This case instructs us that the Right-To-Know Law does not require a District or other public entities to release protected tax information. Therefore, a District may redact any tax information before releasing records to the public or may deny a blanket request for any protected tax information.

Student Expulsion

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The Trial Court put great weight upon the negative drug test and reversed the student’s expulsion and ordered his reinstatement.

At the expulsion hearing, no party objected to the introduction of the Superintendent’s hearsay evidence. Where a party properly objects to hearsay evidence, such evidence is not competent to support a finding of fact. Whereas, in a situation such as this, where hearsay evidence is admitted without objection, the evidence will be given appropriate weight provided that it is corroborated by any competent evidence in the record. No finding of fact based solely upon hearsay evidence without other corroborating evidence in the record will be permitted to stand.

This opinion has not been printed and cannot be cited as authority; however, it does illustrate an important point for Districts to follow regarding the conduct of expulsion hearings. Districts should not expel students on hearsay evidence without corroboration; otherwise, they can surely expect the expulsion to be overturned upon appeal.

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Subsequent Issues

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