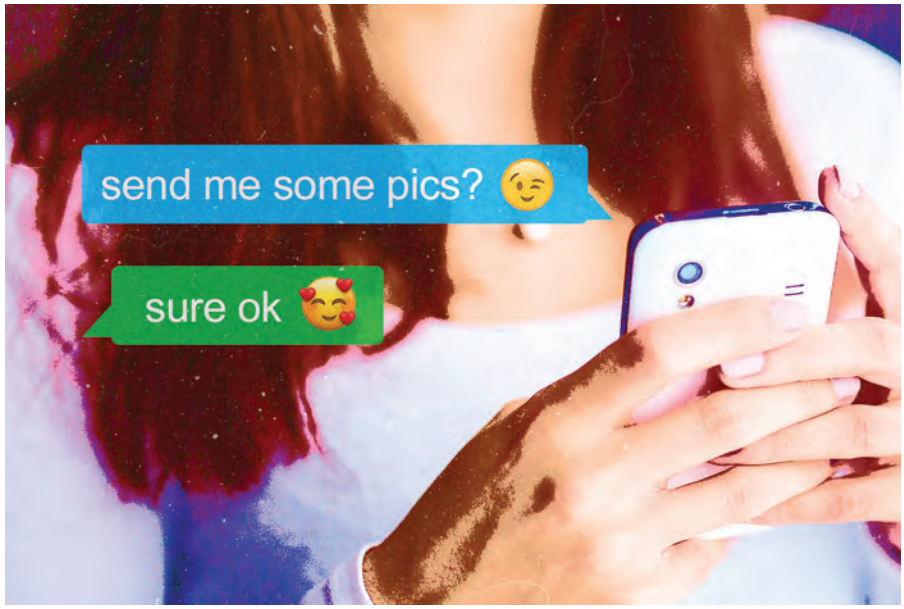
By Daniel Pollack

Sexting, Schools, and Law Enforcement: Where Does Child Protective Services Fit In?

Sexting. You won't find the word in any 20th century dictionary. A combination of "sex" and "texting," sexting is the exchange of explicit pictures via cell phone. Sometimes the photographs are shared voluntarily. Often, an element of coercion is present. In either case, once the photographs are sent, they can subsequently be used to embarrass, intimidate, or bully.



Rate of Sexting Among Youth

Particularly among adolescents and even pre-teenagers, sexting is a relatively recent phenomenon. In a 2017 study of a private high school, researchers found that 15.8 percent of males and 13.6 percent of females sent sexts; 40.5 percent of males and 30.6 percent of females received them.[1] A 2016 study in the *Journal of the American Academy of Psychiatry and the Law* found that the rate of "minors who have sent sexual images range from 4 to 25 percent, depending on the age of the youths surveyed, the content of the messages and other factors."[2]

Legal Implications

From a legal vantage point, sexting may violate child pornography laws, possession and distribution laws, obscenity statutes, and other offenses.[3] The resulting severe penalties may include prison terms, fines, require the offender to formally register indefinitely as a sex offender, and cause the offender future high employment hurdles. Sexting may also trigger issues regarding the rights of parents to raise their children as they see fit, and may implicate other First Amendment free speech and free expression concerns.

Depending on many factors, sexting can simultaneously be an issue for parents, schools, law enforcement, and child protective services (CPS). For instance, exactly what was the nature of the material or text message that was sent or received? How well did the sender and receiver know each other? How many sexting messages were sent? Over what period of time were the messages sent? Did one party indicate they wanted the sexting to cease? Is there clear evidence or even an inference of sexual offending?

Certainly there is no sense in prosecuting every consensual sharing of a photograph between two children of a similar age. That said, at what point does a child's normal curiosity and desire for sexual experimentation lead to societal intervention? Should every report of sexting to school authorities necessarily involve law enforcement and CPS? If not, are there clear protocols that offer guidance? In many states there may be legal defenses for minors charged with possessing or transmitting sexual depictions of other minors. For instance, if the visual image was shown only to the defendant or if the minor depicted in the image was no more than two years older or younger than the defendant and they were in a dating relationship at the time of the offense, there may be an absolute defense.

Many states still have no specific law regarding sexting as it applies to minors. Others have addressed it. One state that has is Nevada. Its statute,

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Illustration by Chris Campbell

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NV Rev Stat § 200.737 (2017), provides that:

"1. A minor shall not knowingly and willfully use an electronic communication device to transmit or distribute a sexual image of himself or herself to another person.

2. A minor shall not knowingly and willfully use an electronic communication device to transmit or distribute a sexual image of another minor who is older than, the same age as or not more than 4 years younger than the minor transmitting the sexual image.

3. A minor shall not knowingly and willfully possess a sexual image that was transmitted or distributed as described in subsection 1 or 2 if the minor who is the subject of the sexual image is older than, the same age as or not more than 4 years younger than the minor who possesses the sexual image. It is an affirmative defense to a violation charged pursuant to this subsection if the minor who possesses a sexual image:

(a) Did not knowingly purchase, procure, solicit or request the sexual image or take any other action to cause the sexual image to come into his or her possession; and

(b) Promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency or a school official, to access any sexual image:

(1) Took reasonable steps to destroy each image; or

(2) Reported the matter to a law enforcement agency or a school official and gave the law enforcement agency or school official access to each image.

4. A minor who violates subsection 1:

(a) For the first violation:

(1) Is a child in need of supervision, as that term is used in title 5 of NRS, and is not a delinquent child; and

(2) Is not considered a sex offender or juvenile sex offender and is not subject to registration or community notification as a juvenile sex offender pursuant to title 5 of NRS, or as a sex offender pursuant to NRS 179D.010 to 179D.550, inclusive.

(b) For the second or a subsequent violation:

(1) Commits a delinquent act, and the court may order the detention of the minor in the same manner as if the minor had committed an act that would have been a misdemeanor if committed by an adult; and

(2) Is not considered a sex offender or juvenile sex offender and is not subject to registration or community notification as a juvenile sex offender pursuant to title 5 of NRS, or as a sex offender pursuant to NRS 179D.010 to 179D.550, inclusive.

5. A minor who violates subsection 2:

(a) Commits a delinquent act, and the court may order the detention of the minor in the same manner as if the minor had committed an act that would have been a misdemeanor if committed by an adult; and

(b) Is not considered a sex offender or juvenile sex offender and is not subject to registration or community notification as a juvenile sex offender pursuant to title 5 of NRS, or as a sex offender pursuant to NRS 179D.010 to 179D.550, inclusive.

6. A minor who violates subsection 3:

(a) Is a child in need of supervision, as that term is used in title 5 of NRS, and is not a delinquent child; and

(b) Is not considered a sex offender or juvenile sex offender and is not subject to registration or community notification as a juvenile sex offender pursuant to title 5 of NRS, or as a sex offender pursuant to NRS 179D.010 to 179D.550, inclusive.

7. As used in this section:

(a) "Electronic communication device" means any electronic device that is capable of transmitting or distributing a sexual image, including, without limitation, a cellular phone, personal digital assistant, computer, computer network and computer system.

(b) "Minor" means a person who is under 18 years of age.

(c) "School official" means a principal, vice principal, school counselor or school police officer.

(d) "Sexual conduct" has the meaning ascribed to it in NRS 200.700.

(e) "Sexual image" means any visual depiction, including, without limitation, any photograph or video, of a minor simulating or engaging in sexual conduct or of a minor as the subject of a sexual portrayal.

(f) "Sexual portrayal" has the meaning ascribed to it in NRS 200.700."

Conclusion

Is adolescent sexting a prank or is it pornography? Is it youthful indiscretion or criminal predatory behavior? Clear CPS policies can ensure that gray area situations are addressed consistently, which is particularly critical when dealing with complicated civil rights issues.

New York attorney James Marsh advises: "The real harm to children from sexting is not the creation of the images, but the distribution of the images to peers and to others unknown, especially on the Internet. Sexting should be analyzed more like bullying than sex.

A careful consideration of the power dynamics is essential. Is one teen blackmailing the other? Are the images being used to harass, intimidate, or shame the other person? Is the victim at risk of self-harm or psychological damage? The primary role for CPS is supporting victims. It's critically important that victims are not shamed in the process. Bad judgment is the hallmark of adolescence and sexting is just one more example of seemingly inexplicable teen decision making.

There are reputable professionals who see sexting as a safe form of sexual activity without the risk of disease, pregnancy, or alcohol and drug-induced behavior. On the negative side, victims often experience shaming, guilt, bullying, self-harm, and even suicide. By focusing on the harms, and not the activity itself, CPS and other child welfare professionals can best support victims while placing the real focus on perpetrators and their enablers."

CPS employees, in conjunction with law enforcement and school officials, are the key officials making tough legal and ethical calls. And, as we know very well, citizen, legislative, and legal oversight is, and should be, omnipresent. Particularly from a legal perspective, making the right call on a consistent basis is a matter of understanding, training, and attention to detail.

Our primary concern is to protect children, not prosecute them. One hasty decision to click the "send" button by a child—or a CPS employee—can ruin many lives.

***Daniel Pollack** is a professor at Yeshiva University's Wurzweiler School of Social Work in New York City. He can be reached at dpollack@yu.edu; (212) 960-0836.*

Reference Notes

1. Strassberg, D. S., Cann, D., & Velarde, V. (2017). Sexting by High School Students. *Archives of Sexual Behavior, 46*(6), 1667–1672. *https://doi.org/10.1007/s10508-016-0926-9*
2. Lorang, M., McNiel, D., & Binder, R. (2016). Minors and sexting: Legal implications. *Journal of the American Academy of Psychiatry and the Law, 44*(1) 73–81.
3. Numerous states have enacted specific laws that address sexting by minors: Arizona, Arkansas, Connecticut, Florida, Georgia, Hawaii, Illinois, Louisiana, Nebraska, Nevada, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, West Virginia. See *http://bit.ly/2OWzWYh*

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7. Your child should only receive texts from team officials that are part of a group chat. The coach, trainer, or doctor should never individually text your child.

8. Do not allow your child to be forced into a radical diet. Yes, sports can be demanding, especially at the elite level, but that is no excuse to condone your child being on a starvation diet.

9. Team coaches, trainers, and doctors are not your child's friend. They can be friendly, but they are not your child's (or your!) friend. Outside activities with coaches, trainers, and doctors unrelated to the team and sport are inappropriate.

10. Maintain maximum honest and open communication with your child. Genuinely listen to what your child is saying. Nothing will foster mutual respect and help to keep your child safe more than open communication.

It is hoped that Congress and the formal international and national sports governing bodies will adopt a similar set of directives soon. Even then, parents, you are the first line of defense for your child's safety.

***Daniel Pollack** is a professor at Yeshiva University's School of Social Work in New York City. He is also a Commissioner of Game Over: Commission to Protect Youth Athletes. He can be reached at dpollack@yu.edu; (212) 960-0836.*

Key components of **Game Over: Commission to Protect Youth Athletes**

- Fact-Finding, Data Collection
- Creation of Publicly Available, Searchable Database of All Information
- Legal and Policy Review by Legal Experts in the United States
- Public Participation and Transparency

Upon completion of the fact finding, data collection, and public hearings, the commission will compose and release its findings to the public and policymakers. All materials gathered and testimony obtained will be archived and made available to the public.

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Teresa Huizar, Executive Director, National Children's Alliance

Jennie Noll, PhD, Professor for Healthy Children, Department of Human Development and Family Studies, Penn State; Director, Child Maltreatment Solutions Network

Daniel Pollack, MSW, JD, Professor at Yeshiva University's School of Social Work and a frequent expert witness in child welfare lawsuits

Monica Rowland, Former President, Athletes Advisory Council to the U.S. Olympic Committee, Pentathlon Coach

Philip Scribano, DO, MSCE, Director of Safe Place: The Center for Child Protection and Health at The Children's Hospital of Philadelphia; Program Director of the Child Abuse Pediatrics Fellowship Program

Joyanna Silberg, PhD, Senior Child Trauma Consultant, Sheppard Pratt Health System; Owner, Childhood Recovery Resources; President, Leadership Council on Child Abuse and Interpersonal Violence

James R. Marsh, Esq., Founder, Children's Law Center, Washington, DC