

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

- outline of remarks by -

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**I. WHAT WE KNOW ABOUT CELL PHONE USE BY YOUTHS**

- A. Reports indicate more than 60% of students in grades 3 through 12 have a cell phone.
- B. Cell phone and wireless technology has expanded the issue beyond nuisance telephone rings to text messaging, MP3 players, digital photographs and videos, and Internet usage.
- C. Cell phones have memory into which information, e.g., photos and videos, can be stored.
- D. According to a 2007 survey by M:Metrics, 47 percent of teenagers take photos with their mobile device - twice the industry average.
- E. According to M:Metrics, 33.2% of 18- to 24-year-old Americans post photos to Web sites via mobile phones.

F. And, 43% of students ages 12 to 17 were reported in 2003 to use text messaging. Certainly, it would be a higher percentage today.

G. The Benefits of Teenagers' Cell Phone Use -- The "Pros"

1. Students can take pictures of class projects to e-mail or show parents.
2. Students can text message missed assignments to classmates that are absent.
3. Cell phones may that have a calculator function that is useful.
4. Cell phones can be used to photograph notes from the board if a student has difficulty copying or writing them down.
5. Students can use cell phones to arrange rides home from after-school activities or to have parents bring left-home assignments to school.
6. Students can listen to music during non-instructional time.

H. The Downside of Teenagers' Cell Phone Use -- The "Cons"

1. Cell phones can he used to arrange a drug deal, plot a bomb threat, set up others to fight.
2. Cell phones can be used to send test answers to friends or cheat in school.
3. Cell phones can be used to record information to he used as "cheat sheets."
4. Cell phones can he used to record (and upload) teachers teaching.
5. Cell phones can be used to photogiaph (and upload) inappropriate pictures of students.
6. Cell phones can he used to harass and bully.
7. Cell phone use in class/assembly is at least distracting, if not disruptive.

## II. STEPS TO CONSIDER

### A. New York Statutory Authority to Act

1. 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.”
2. ADOPT A POLICY!
3. Address cell phone use or ban in the Code of Conduct.
4. Be clear in defining what is/is not permissible use, and when it is/is not permissible to use a cell phone.
  - a. 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.
5. Communicate restrictions or ban to students and parents at all grade levels.

B. Options to Address Cell Phones

1. Ban all cell phones / electronic communication devices.
  - a. Original bans intended to reduce drug dealing and gang activity.
  - b. National School Safety and Security Services opposes allowing cell phones in school because it believes cell phones detract from safety and security.
    - (1) Used for calling in bomb threats.
    - (2) Use could potentially detonate a real bomb.
    - (3) Can impede safety by accelerating parental response to a crisis scene when safety officers are trying to evacuate students.
    - (4) Can overload phone systems during a real crisis.
  - c. New York City forbids possession of cell phones in public schools without authorization of building principal.
    - (1) Parents claimed that banning possession violated their children's Constitutional rights. (Price v. N.Y.C. Board of Educ., 16 Misc.3d 543 (NY Supreme Court, County of New York, 5/7/07), recently affirmed by Appellate Division, \_\_\_ A.D.3d \_\_\_, 2008 WL 1793006 (1st Dept., 4/22/08).
    - (2) School claimed that a total ban was 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, reducing their time teaching.
    - (3) There is no "express 'constitutional right to bear cell phones.'"

2. Restrictions (Rather than Outright Ban) of Cell Phone Use
  - a. This accommodates parents' "peace of mind" and recognizes usefulness of appropriate cell phone use.
  - b. But, what restrictions?
    - (1) No use during instructional activities?
    - (2) No use during the school day?
  - c. How to enforce?
    - (1) Collect cell phones at the beginning of the school day?
    - (2) At the beginning of class? —
    - (3) Prior to a test?
    - (4) Require that all cell phones be off?
    - (5) Teachers to inspect?
    - (6) Require that all cell phones be stored in locker?
3. Search and Seizure Issues
  - a. Student searches to determine impermissible possession and /or use of cell phone.
  - b. Reasonable suspicion needed to justify the search
    - (1) Search must be reasonable in scope
  - c. Search and seizure of the phone itself?
  - d. Search of cell phone memory?
    - (1) recent communications?

- (2) calls, text messages, and e-mails
  - (3) voice mail?
  - (4) media content?
  - (5) internet inquiries?
- e. Klump v. Nazareth Area School District, 425 F.Supp.2d 622 (E.D. Pa., 2006).
- (1) student brought lawsuit against school district, superintendent, assistant principal, and teacher, asserting various causes of action arising from defendants' confiscating student's cell phone, calling classmates listed in student's phone number directory, accessing student's text messages and voice mail, and holding instant messaging conversation with student's younger brother without identifying themselves.
  - (2) Teacher's alleged action of seizing student's cell phone, if proven, was not unreasonable search or seizure, if student had violated school's policy prohibiting use or display of cell phones during school hours.
  - (3) Defendants' motion to dismiss plaintiffs' claim based on defendants accessing plaintiff's phone number directory and call log because Christopher's phone number directory and call log are not communications.
  - (4) However, the alleged actions of assistant principal and teacher, of calling other students from student's cell phone after seizing it because of 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**.

- f. Can school establish that speech materially interfered with school operations or created a substantial disruption, or that it was reasonably foreseeable that it would? (Tinker v. Des Moines Independent Community School District, U.S. Supreme Court [1969])
- g. Was speech offensive, lewd, or indecent, undermining school mission to inculcate civility and propriety? (Bethel School District No. 403 v. Fraser, U.S. Supreme Court [1986])
- h. Was speech part of a school-sponsored activity such that it could be seen as bearing the imprimatur of the school? (Hazelwood v. Kuhlmeier, U.S. Supreme Court [1988])
- i. Was speech reasonably believed to promote illegal drug use? (Morse v. Frederick, U.S. Supreme Court [2007]).
- j. Was speech a true threat? Watts v. United States, 394 U.S. 705 (1969).

### III. INTERNET ISSUES

#### A. Internet capabilities that students regularly use to communicate

- 1. Instant Messaging
- 2. Blogs
- 3. Social Networks
- 4. Photographs/Videos
  - a. New York's "video voyeur law" (also known as "Stephanie's Law") prohibits a practice commonly known as "up-skirting."
  - b. Up-skirting occurs when someone uses a cell phone camera or other type of camera to photograph or record a woman's sexual or other intimate body parts, e.g., by holding it under a woman's skirt.

- c. Penal Law §250.45(4) makes “up-skirting” a Class E felony. Specifically, it makes it a type of “Unlawful Surveillance in the Second Degree when someone, “[w]ithout the knowledge or consent of a person ... intentionally uses ... an imaging device to surreptitiously ... record, under the clothing being worn by such person, the sexual or other intimate parts of such person.”
- d. Penal Law §§250.55 and 250.60 make it a crime to disseminate photographs or videos taken in violation of §250.45, e.g., by posting them on YouTube.
- e. Penal Law §§250.00 and 250.05 and the federal Wiretap Law make it a crime to engage in wiretapping, mechanical over-hearing of a conversation, or intercepting or accessing of an electronic communication, without the consent of at least one party to the conversation. Making a surreptitious audio recording with a cell phone would be covered by these laws.

B. Areas of concern regarding Internet communications:

- 1. threats
- 2. cyber-bullying
- 3. disruption of school activities
- 4. disrespectful content regarding students/staff
- 5. student self-disclosure and predators

C. The Problem

- 1. Most Internet content is protected speech



D. Internet Speech Cases

1. Layshock v. Hermitage School District, 496 F.Supp.2d 587 (W.D. Pa., 2007), certificate of appealability denied by \_\_\_ F.Supp.2d \_\_\_, 2007 WL 3120192 (W.D.Pa. 10/23/07). Parody profile created by student (on his grandmother's computer) of his principal on MySpace.com was lewd and crude.
  - a. Student was charged with disruption of school process, disrespect, harassment of school administrator via computer/internet with remarks that have demeaning implications, gross misbehavior, obscene, vulgar and profane language, computer policy violation, and use of school picture without authorization.
  - b. \_\_\_ at least five teachers reported that students wanted to discuss the profile (and three others) during class
  - c. 20 students had to be interviewed
  - d. efforts were made to block MySpace from school computers and eventually MySpace contacted and pulled profiles
  - e. computer usage limited throughout school for 4 days
  - f. student was given a 10 day suspension, alt. ed. placement, social suspension including graduation ceremony
  - g. Though the student accessed the profile from school at least twice and showed it to other students, Court concluded that discipline violated student's speech rights, since insufficient nexus existed between creation of parody of principal and substantial disruption of school environment. After full development of record, Court found:
  - h. Tinker, not Fraser, applies
  - i. no substantial disruption was shown, no classes were cancelled, there was no widespread disorder, no violence or student disciplinary action required

- k. There was a reasonably foreseeable risk that the icon would come to the attention of school authorities and the teacher whom the icon depicted
- l. And, once school officials were aware of the icon, it was reasonably foreseeable that it would “materially and substantially disrupt the work and discipline of the school.”

#### **IV. ACTIONS TO CONSIDER**

- A. Review policies and procedures (e.g., Code of Conduct, Acceptable Use Policy)
- B. Consult with counsel on speech/discipline issues before taking action
- C. Consider alternatives to discipline
- D. Teachable moments and curricular considerations
- E. Parental notification and meetings
- F. Contact the site sponsor (e.g., MySpace.com)
- G. Criminal/Civil actions by individuals.