

# STUDENTS & THEIR DEVICES

Presented By:

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## CELL PHONE SEARCHES

### • REASONABLE CAUSE STANDARD

- (1) Searches must be justified at their inception:
  - Prior to the initiation of search, does the administrator have a reasonable basis for his/her belief that the student has engaged in wrongdoing?
- (2) Searches must be reasonably related to the circumstances:
  - Could the evidence or contraband be hidden in that location?
  - How serious is the potential harm if the search is not conducted?
  - Is the nature of the place excessively intrusive into personal privacy?

**Reasonable cause requires the administrator possess a reasonable belief that evidence of wrongdoing will be found on the cell phone.**

# CELL PHONE SEARCHES

## • Riley v. California, U.S. Supreme Court (2014)

- This case involved two incidents in California in which police searched an individual's cell phone "incident to arrest." A cell phone was in the individual's possession at time of arrest and taken into custody. The police searched the phone without a warrant or the owner's consent.
- Prior Supreme Court decisions held that the search of an arrestee's person and property in the immediate vicinity of their arrest (a search "incident to arrest") ensured officer safety and evidence preservation, and as such did not require a warrant.
- Do the same justifications exist for the search of a cell phone "incident to arrest"?
- School administrators are NOT required to obtain a warrant before searching a student's cell phone, BUT the Court's decision includes important language distinguishing between the search of a cell phone and the search of a person or physical object or space.

# CELL PHONE SEARCHES

## Riley v. California, U.S. Supreme Court (2014)

- "One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy."
- "...many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives-from the mundane to the intimate. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case."

The reasonableness of a school administrator's search could now be analyzed based on the treatment of a cell phone search as a greater intrusion on personal privacy than previously thought.

"According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower."

## CELL PHONE SEARCHES

- *Gallimore v. Henrico County School Board, U.S. District Court, Eastern District of Virginia (2014)*

- Report received → high school student smoked marijuana on the school bus.
- Search of student's pockets, person, backpack, shoes, cell phone → no evidence found.
- Student filed suit alleging violation of Fourth Amendment, unreasonable search.
- Court Ruling: Cell phone search was not "reasonably related" to the objective of the search, *i.e.* finding evidence of drug use on the school bus. There was no evidence that the administrators had reason to believe that proof of wrongdoing would be found on the student's cell phone.

An assumption that a student may have used a cell phone to commit wrongdoing is not sufficient, without more, to justify a search of the cell phone.

## CELL PHONE SEARCHES

- *Use caution when searching student cell phones!*
- You must have a reasonable belief that evidence of wrongdoing will be found on the cell phone.
  - An unfounded assumption that a student probably communicated about the wrongdoing via cell phone is not enough.
- Be sure to limit your search of the cell phone only to those areas of the phone where the evidence is likely to be maintained.
  - If you are looking for a photo, do not check the call log.
- When searching a student's cell phone, always have another administrator/staff member present as a witness.
- Document the search conducted in your investigation records:
  - Witnesses present;
  - Areas of phone accessed;
  - Evidence discovered.

# Snapchat Threats



# Snapchat Threats

- **Is it a crime?**
  - Terroristic Threat (Tex. Penal Code 22.07) – Title 5 Felony
  - False Alarm or Report (Tex. Penal Code 42.06) – State Jail Felony
  - Disruption of Lawful Assembly (Tex. Educ. Code 37.123) – Class B Misdemeanor
- **Can you discipline if it occurred outside of school?**
  - If it is a crime recognized by Chapter 37 as eligible for discipline despite occurring off school property.
  - If it caused or could reasonably be forecast to cause a material and substantial disruption to school operations

## THE EVIDENCE

Screen shots

Statements of students who received snap

Response from students, parents, employees & community

School & law enforcement response

Evidence of sincerity, including student statements made to others & prior similar incidents

## Terroristic Threat, TPC 22.07

### Elements of the Offense:

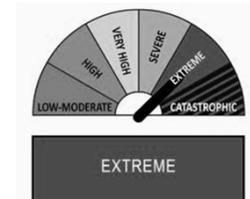
- Threatens to commit any offense involving violence to any person or property;
- With the **INTENT** to:
  - (1) cause a reaction by an official/volunteer agency organized to deal with emergencies;
  - (2) place any person in fear of imminent serious bodily injury;
  - (3) prevent/interrupt the occupation or use of a building, room, place of assembly, place to which the public has access, place of employment or occupation, aircraft, automobile, or other form of conveyance, or other public place;
  - (4) cause impairment/interruption of public communications, public transportation, public water, gas, or power supply or other public service;
  - (5) place the public or a substantial group of the public in fear of serious bodily injury; or
  - (6) influence the conduct or activities of a branch or agency of the federal government, state, or a political subdivision of the state.

## Terroristic Threat, TPC 22.07

### Evidence of intent:

- Content of the threat
- Intended recipients of the threat
- Unintended recipients of the threat – was it reasonably foreseeable that others would also receive, view or learn of the threat?
- Method of transmittal
- Prior relationship between those involved, including sender and recipient(s)
- Stated intent of student – was this intended to be a joke?
- Perception/interpretation of recipient(s) – did they believe it was a joke?
- Response by school officials, law enforcement, other agencies
- Response of students, parents, school community

Remember, the school administrator has the ultimate discretion to determine whether the student committed the elements of the offense. Even if law enforcement does not treat it as such.



## “Like” it or Leave it?

Can or should school consider a student “liking” a post to be equivalent to a student posting the material him or herself? What about commenting on a post?



**2017:** A California school suspended students for “liking” racist posts on another student’s Instagram account that showed nooses drawn around the necks of a black student and coach.



- The racist posts sparked protests in the community.
- Students have filed suit alleging:
  - Violation of 1<sup>st</sup> Amendment freedom of speech
  - No authority to discipline for posts on private account with no connection to school activity.



## “Like” it or Leave it?

### • AT SCHOOL / SCHOOL EVENTS / USING SCHOOL RESOURCES

- Can enforce SCC and school rules against use of cell phones or access of certain sites, apps or programs.



### • OUTSIDE SCHOOL HOURS & EVENTS / USING PRIVATE RESOURCES

- Is the act of “liking” a post protected by the First Amendment freedom of speech? *Maybe.*
- If it is, can the mere act of “liking” someone else’s threatening post be enough to cause a material and substantial disruption to school operations?



- “Likes” are often ambiguous and may not be intended as support of a post. It may be also difficult to prove that was the intent.



# Sexting

Tex. Penal Code § 43.261 - Electronic Transmission of Certain Visual Material Depicting Minor

(b) A **person who is a minor** commits an offense if the person **intentionally or knowingly**

- 1) By electronic means **promotes to another minor** visual material depicting a minor, including the actor, engaging in sexual conduct, **if the actor produced the visual material or knows that another minor produced the visual material;**  
or
- 2) **Possesses** in an electronic format visual material depicting another minor engaging in sexual conduct, if the actor produced the visual material or knows that another minor produced the visual material.

# Sexting

Tex. Penal Code § 43.261 - Electronic Transmission of Certain Visual Material Depicting Minor

(e) It is an **affirmative defense** to prosecution under this section that the visual material:

- 1) Depicted only the actor or another minor:
  - a) who is **not more than 2 years older or younger** than the actor **and** with whom the actor had a **dating relationship at the time** of the offense; or
  - b) Who was the spouse of the actor at the time of the offense; **and**
- 2) Was promoted or received **only to or from the actor and the other minor.**

# Sexting

Tex. Penal Code § 43.261 - Electronic Transmission of Certain Visual Material Depicting Minor

(f) It is a **defense** to prosecution [for possession of material] that the actor:

- 1) Did not produce or solicit the visual material;
- 2) Possessed the visual material only after receiving the visual material from another minor; **and**
- 3) Destroyed the visual material within a reasonable amount of time after receiving the material from another minor.

# Investigating Sexting

- When a school becomes aware of sexting allegations involving minor student(s), the school should **report the allegations to local law enforcement**.
- If the allegations involve an employee or other individual serving as a caregiver to the minor victim, a report to CPS is required.
- **The school may have an obligation to investigate the allegations directly if there is reason to believe that any part of the act took place on school property, using school resources, or at a event or school activity.**
  - Evidences of student-student or employee-student sexual harassment, prohibited by Title IX.
  - Constitutes a violation of the Student Code of Conduct.
  - Causes or results in harassment or bullying of involved students.
- A school likely does not have an obligation to investigate sexting that occurs wholly outside of the school context.

# Investigating Sexting

Tex. Penal Code § 43.26 – Possession or Promotion of Child Pornography

(h) It is a **defense** to prosecution [under this section] that the actor is a law enforcement officer or **school administrator who**:

- 1) Possessed or accessed the visual material **in good faith solely as a result of an allegation of a violation of Section 43.261**;
- 2) Allowed other law enforcement or school administrative personnel to possess or access the material only as appropriate based on the allegation; **and**
- 3) **Took reasonable steps to destroy the material within an appropriate period** following the allegation.

# Investigating Sexting

- At least two school officials should review/observe the visual material simultaneously to ensure two witnesses to the handling and content of the material.
- Do not retain the photos or videos, and take steps to destroy the material once it is no longer necessary for purposes of the investigation.
- The visual material in question is not necessary for, and should not be used as, evidence to support disciplinary action.
  - A written statement from the school officials who viewed the visual material, including the discovery, location and general nature/content of the visual material is sufficient evidence.

## RECENT LEGISLATION

### Senate Bill 7 – Inappropriate Educator-Student Relationships

- Expands prohibitions on inappropriate relationships **to include any district employee** engaging in an inappropriate relationship with a student who the employee knows is **enrolled in any public or private K-12 school**, not just the employee's school.
- Expands **reporting requirements for superintendents, principals, and directors**, with possible action against the administrator's own SBEC certificate for failure to report.
- Creates a **criminal offense for certain administrators who fail to report an inappropriate relationship** with intent to conceal teacher misbehavior, and makes this failure punishable as a state jail felony.

**Investigate and address inappropriate employee-student communications promptly.**

**Document actions taken and consider your obligation to report the conduct to SBEC.**

## RECENT LEGISLATION

### Senate Bill 179 – Bullying & Cyberbullying

- **Expands the school's responsibility to investigate and react to cyberbullying that occurs off campus.**
- School obligations in relation to **cyberbullying** apply to cyberbullying that occurs:
  - Off school property or outside of a school-sponsored or school-related activity; **and**
  - Only if the cyberbullying interferes with a student's educational opportunities or substantially disrupts the orderly operation of a classroom, school, or school-sponsored or school-related activity.

## RECENT LEGISLATION

### Senate Bill 179 – Bullying & Cyberbullying

- Authorizes student removal, DAEP, or expulsion for bullying that:
  - Encourages a minor to commit or attempt to commit suicide;
  - Incites violence against a minor through group bullying; or
  - **Releases or threatens to release intimate visual material of a minor, or of a student 18+ without student's consent.**
- Allows a court to issue a temporary restraining order to prevent further cyberbullying of a minor, including an **order or injunction requiring a parent of a minor bully to take reasonable actions to cause their child to cease engaging in cyberbullying.**

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