

Student Cell Phones and “Sexual Conduct” under Child Exploitation and Child Pornography Laws

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[Written in response to legal queries from the ISBA membership.]

Issue: Just why exactly are “nude” cell phone pictures of fellow students unlawful and why do we have a duty to report the existence of such to law enforcement or child protective services? Also, what specific language could be added to student handbook grounds for suspension and expulsion of students who possess, transmit, or display such material on their cell phones at school or a school activity?

Response: Not all “nudity” is unlawful under the Indiana criminal statute pertaining to child exploitation and child pornography, I.C. 35-42-4-4. Under the definition of “sexual conduct,” in addition to intercourse and touching or fondling with intent to satisfy sexual desires, it includes the “exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person.” Therefore, as long as said noted items are covered, even if nothing else is, no “sexual conduct” has occurred per this definition.

The legal duty to report “child exploitation” and “child pornography” is required by the Child Abuse/Neglect Statute at I.C. 31-33-5-4, which makes it a Class B misdemeanor for a school employee to fail to make an immediate oral report to the building principal or designee, who then must immediately contact law enforcement or child services, or face the misdemeanor charge. Actually, the duty is to report a “child in need of services,” who under I.C. 31-34-1-3(a)(1)(D) is a person under the age of 18 who is a victim of “child exploitation” and/or “child pornography.”

“Child exploitation,” a Class C felony under I.C. 35-42-4-4(b), is committed when (emphasis most relevant to school situations in italics):

A person who knowingly or intentionally:

- (1) manages, produces, sponsors, presents, *exhibits, photographs, films, videotapes, or creates a digitized image of any performance or incident that includes sexual conduct by a child under eighteen (18) years of age;*
- (2) *disseminates, exhibits to another person, offers to disseminate or exhibit to another person, or sends or brings into Indiana for dissemination or exhibition matter that depicts or describes sexual conduct by a child under eighteen (18) years of age....*

“Child pornography,” a Class D felony under I.C. 35-42-4-4(c), is committed when (emphasis most relevant to school situations in italics):

A person who knowingly or intentionally possesses:

- (1) a *picture;*
 - (2) a *drawing;*
 - (3) a *photograph;*
 - (4) a *negative image;*
 - (5) *undeveloped film;*
 - (6) a *motion picture;*
 - (7) a *videotape;*
 - (8) a *digitized image;* or
 - (9) *any pictorial representation;*
- that *depicts or describes sexual conduct* by a child who the person knows is less than sixteen (16) years of age or who appears to be less than sixteen (16) years of age, and that lacks serious literary, artistic, political, or scientific value....

A practical example of “child exploitation” involving a cell phone would be a student of any age who used the phone to (1) take a picture, (2) show a picture, (3) send a picture, or even offer to show or send the picture of any person under the age of 18 engaged in “sexual conduct,” defined as intercourse, touching

or fondling with intent to satisfy sexual desires of any person, and/or the display of uncovered genitals in such manner that evidence an intent to “satisfy or arouse the sexual desires of any person.”

A practical example of “child pornography” in connection with a cell phone would be a student of any age who used the phone to *possess* a picture/image of any person under the age of 16 engaged in “sexual conduct,” defined as intercourse, touching or fondling with the intent to satisfy or arouse sexual desires of any person, and/or the display of uncovered genitals so as to indicate an intent to “satisfy or arouse the sexual desires of any person.”

Sample language related to sexual content in connection with cell phone possession and use that may be considered as a ground for suspension or expulsion in the student handbook is:

Sending, sharing, viewing, or possessing pictures, text messages, emails, or other material of a sexual nature in electronic or any other form, including the contents of a cell phone or other electronic device.

Lastly, for purposes of deterrence, it is wise to place language in the student handbook to inform parents and students of the serious criminal implications involved in such activities, as well as the duty of school staff to inform law enforcement or child services of certain student violations. Even more importantly, the notice needs to state that if a student is convicted of child exploitation or adjudicated of such as a juvenile delinquent, state statute requires the student to register as a sex offender pursuant to I.C. 35-42-4-11(a)(2)(C) and I.C. 11-8-8-7. A sample notice could read:

Important Notice to Students and Parents Regarding Cell Phone Content and Display

- The Child Abuse/Neglect Law requires school personnel to report to law enforcement or child protective services whenever there is reason to believe that any person/student is involved with “child exploitation” or “child pornography” as defined by Indiana Criminal Statutes.
- It is “child exploitation,” a Class C felony under I.C. 35-42-4-4(b), for any person/student (1) to exhibit, photograph or create a digitalized image of any incident that includes “sexual conduct” by a child under the age of 18; or (2) to disseminate, exhibit to another person, or offer to so disseminate or exhibit, matter that depicts or describes “sexual conduct” by a child under the age of 18.
- It is “child pornography,” a Class D felony under I.C. 35-42-4-4(c), for any person/student to *possess* a photograph, motion picture, digitalized image, or any pictorial representation that depicts or describes “sexual conduct” by a child who the person knows is less than 16 years of age or who appears less than age 16.
- “Sexual conduct” is defined by I.C. 35-42-4-4(a) to include sexual intercourse, exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, or any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of the child or other person.
- The Indiana Sex Offender Registration Statute at I.C. 11-8-8-7 and the Sex Offender Registry Offense Statute at I.C. 35-42-4-11, as of May 2009, require persons convicted of or adjudicated as a juvenile delinquent for violating the Child Exploitation Statute at I.C. 35-42-4-4(b) to register as a sex offender.
- Because student cell phones have been found in a number of Indiana school districts to have contained evidence of “sexual conduct” as defined above, it is important for parents and students to be aware of the legal consequences should this occur in our school system.