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Students Sue Prosecutor in Cellphone Photos Case

By SEAN D. HAMILL

When a high school cheerleader in northeastern Pennsylvania learned that she might face criminal charges after investigators reported finding a nude photo of her on someone else's cellphone, she was more confused than frightened at being caught up in a case of "sexting": the increasingly popular phenomenon of nude or seminude photos sent over wireless phones.

"They said they had a full-bodied naked picture of me, but I knew I'd never had any naked picture taken of me," the student, Marissa Miller, 15, recalled of the Feb. 10 telephone call to her mother as the two were having lunch together at Tunkhannock Area High School. Marissa is a freshman at the school, where her mother, MaryJo, works with special education students.

The picture that investigators from the office of District Attorney George P. Skumanick of Wyoming County had taken two years earlier at a slumber party. It showed Marissa and a friend from the waist up. Both were wearing bras.

Mr. Skumanick said he considered the photo "provocative" enough to tell Marissa and the friend, Grace Kelly, that if they did not attend a 10-hour class dealing with pornography and sexual violence, he was considering filing a charge of sexual abuse of a minor against both girls. If convicted, they could serve time in prison and would probably have to register as sex offenders.

It was the same deal that 17 other students — 13 girls and 4 boys — accepted by the end of February. All of them either been caught with a cellphone containing pictures of nude or seminude students, or were identified in one or more such photos.

But three students, Marissa, Grace and a third girl who appeared in another photo, along with their mothers, felt the deal was unfair and illegal. On Wednesday, they filed a lawsuit in federal court in Scranton, Pa., against Mr. Skumanick.

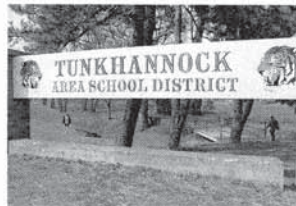
They asked the court to stop the district attorney from filing charges against them, contending that his threat to do so was "retaliation" for the families asserting their First and Fourth Amendment rights to oppose his deal.

"Prosecutors should not be us-



JESSICA KOURKOUNIS FOR THE NEW YORK TIMES

Marissa Miller and two other Tunkhannock, Pa., high school students say a prosecutor retaliated when they rejected his deal in a case over cellphone photos he called "provocative."



ing a nuclear-weapon-type charge like child pornography against kids who have no criminal intent and are merely doing stupid things," said Witold J. Walczak, a lawyer with the American Civil Liberties Union of Pennsylvania, which represents the families.

Mr. Skumanick said Wednesday that he would oppose the lawsuit and that he did not consider the deal he offered retaliatory.

"I'm simply giving them an option," said Mr. Skumanick, a Republican who has been district attorney for 20 years and faces reelection again in November. "We're not forcing anybody to do anything. Frankly, it's sad to me that their parents don't realize this is wrong and they should be encouraging them to take the classes."

Almost unheard of a year or two ago, sexting cases are popping up with more frequency across the country.

A survey of 1,280 teenagers and young adults released in December by the National Cam-

paign to Prevent Teenage and Unplanned Pregnancy and CosmoGirl.com found that 20 percent of teenagers and 33 percent of young adults ages 20 to 26 said they had sent or posted nude or seminude photos of themselves.

"Is this today's example of the sky is falling?" said Bill Albert, a spokesman for the campaign, a nonprofit group in Washington. "No, and I don't think we need to overreact."

But since the survey also showed that teenagers who engage in sexting were more likely to have causal sex, Mr. Albert said: "I think it is something else to address and have a conversation about between teens and parents. Is there a role for law enforcement here? That's an open question."

In large part because sexting cases are so new, local communities across the country vary greatly in their handling, from filing child pornography charges against the teenagers involved to alerting parents and letting them deal with it.

Lee Tien, a senior staff lawyer for the Electronic Frontier Foundation, a nonprofit group in San Francisco that studies technology issues, said such cases also raise thorny legal issues around

the searching of students' cellphones, many of which are seized when they are used during class.

"If they confiscate the phone, that's reasonable to hold it for the day and return it," Mr. Tien said. "But there's a serious question of whether that justifies going through the cellphone."

The lawsuit filed Wednesday does not address those issues, or the role Tunkhannock Area High School might have played in the investigation, but Mr. Walczak said the A.C.L.U. was "assessing possible legal action against the school."

"Those cellphones contain highly personal information protected by the Fourth Amendment," he said.

A Tunkhannock lawyer, Gerald Grimaud, said a majority of the district's 10-member school board informally supports the increased scrutiny of students' cellphones, but Mr. Grimaud faulted school officials for contacting the district attorney after the first photos were found last fall.

"We're talking about naïve kids getting caught up in these draconian penalties," Mr. Grimaud said. "That seems pretty extreme to me." Other board members did not return calls or could not be reached.