

SUBJECT: Creating the offense of sexting and establishing educational programs

COMMITTEE: Criminal Jurisprudence — favorable, with amendment

VOTE: 6 ayes — Gallego, Burkett, Carter, Christian, Y. Davis, Zedler

0 nays

3 absent — Hartnett, Aliseda, Rodriguez

SENATE VOTE: On final passage, April 14 — 29-1 (Nichols)

WITNESSES: For — None

Against — Tracey Hayes, ACLU of Texas

On — Shannon Edmonds, Texas District and County Attorneys Association; Sharon Pruitt, Office of the Attorney General

DIGEST: **Sexting promotion and possession.** SB 407, as amended, would create for minors a new offense in the Penal Code for what is commonly known as “sexting.” It would be an offense for a minor to intentionally or knowingly:

- *promote* by electronic means to another minor visual material depicting a minor, including the actor, engaging in sexual conduct, if the actor produced the visual material or knew that another minor produced it; or
- *possess* in electronic format visual material depicting another minor engaging in sexual conduct, if the actor produced the visual material or knew that another minor produced the visual material.

“Sexual conduct” would mean sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

**Promotion penalties for 17-year-old.** For a 17-year-old minor, a promotion offense would be a class C misdemeanor (maximum fine of \$500), but would be a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000) if the minor:

- promoted the visual material with intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another; or
- had been convicted once before for promotion or possession.

Promotion would be a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000), if the minor had been convicted one or more times of promotion with the intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another or if previously convicted two or more times for promotion or possession.

**Possession penalties for a 17-year-old.** For a 17-year-old minor, a possession offense would be a class C misdemeanor, but would be a class B misdemeanor if the minor had previously been convicted once of possession or promotion, and would be a class A misdemeanor if the minor had previously been convicted two or more times of possession or promotion.

**Defenses.** An affirmative defense to prosecution would be created for sexting between minor spouses or between minors within two years of age of each and were dating at the time of the offense.

It would be a defense to prosecution for sexting possession if the actor did not produce or solicit the visual material, possessed the visual material only after receiving it from another minor, and destroyed the visual material within a reasonable amount of time after receiving it from another minor. It also would be a defense to prosecution for the offense of tampering with or fabricating physical evidence if the actor destroyed the visual materials according to this section.

It would be a defense to prosecution for possession or promotion of child pornography, for offenses committed after the effective date, if the actor was a law enforcement officer or a school administrator who:

- possessed the visual material in good faith solely as a result of an allegation of sexting;

- allowed other law enforcement or school administrative personnel to access the material only as appropriate based on the allegation; and
- took reasonable steps to destroy the material within an appropriate period following the allegation of sexting.

**Possession and promotion penalties for a minor under 17 years old.**

For minors under 17, SB 407 would expand the definition of “conduct in need of supervision” in the Family Code to include possession and promotion sexting. A finding of possession or promotion sexting for a minor under 17 would be considered a conviction for the purposes of the enhanced penalties for this sexting offense.

**Jurisdiction.** A court would be required to waive its original jurisdiction of a misdemeanor sexting case punishable by fine only and transfer the case to juvenile court.

**Parental attendance at proceedings.** The judge would be required to take the defendant minor’s plea in open court on a charge of sexting and would be required to issue a summons to compel the defendant’s parent to be present during this and during all other proceedings relating to the case under most circumstances.

**Educational programs.** SB 407 would require the Texas School Safety Center, in consultation with the Office of the Attorney General, to develop programs for use by school districts by January 1, 2012, that addressed:

- the possible legal consequences of sexting;
- other possible consequences of sexting, including the negative effects on relationships, the loss of education and employment opportunities, and the possible removal from certain school programs or activities;
- the unique characteristics of the Internet and other networks that could affect sexting, including search and replication capabilities and a potential worldwide audience;
- the prevention of, identification of, response to, and reporting of incidents of bullying; and
- the connection shared by bullying, cyberbullying, harassment, and sexting.

Each school district would be required to make these programs available on a yearly basis, beginning with the 2012-2013 school year, by any means the district considered appropriate, to parents and students in a grade level the district considered appropriate.

If a court found that a defendant had committed a sexting offense or engaged in conduct indicating a need for supervision on the basis of sexting, the court could require the defendant to attend and successfully complete an educational program. The court would be required to have the defendant or defendant's parent pay for the educational program if the court determined they were financially able. The same provision would apply if a judge granted community supervision to a defendant for sexting.

**Expunction and sealing of records.** A minor convicted of a sexting offense only once, and not found to have engaged in conduct indicating a need for supervision based on sexting, could apply on or after the person's 17th birthday to have the conviction record expunged.

A juvenile court would be allowed to order the sealing of records for a child who engaged in conduct indicating a need for supervision based on sexting if the child attended and completed an educational program. The court could order the sealing of the records immediately and without a hearing or hold a hearing to determine whether to seal the records.

**Criminal evidence.** A court would have to allow discovery of property and material on the basis of sexting in the same way discovery of materials related to child pornography was allowed. A court could not disclose evidence to the public that was the basis of a sexting criminal proceeding.

**Effective date.** The bill would take effect September 1, 2011.

**SUPPORTERS  
SAY:**

SB 407 would create a new legal response to sexting that would not carry the life-altering consequences of a felony conviction and would help prevent sexting through education. The educational requirements of SB 407 would emphasize the criminal, emotional, and psychological consequences associated with the crime before kids engaged in the harmful activity. A school district would retain maximum flexibility in getting this information to parents and students in grade levels the school district deemed appropriate.

The act of sending a sexually explicit text message currently can be prosecuted under adult pornography laws, which can lead to felony

convictions and sex offender registration for life. Expanding the definition of conduct in need of supervision to include sexting for a child under 17 would make sexting a noncriminal offense within the original jurisdiction of the juvenile court. This would allow for a proactive judicial approach that included parental involvement, curfew restraints, and educational and probation requirements.

For a 17-year-old, both possession and promotion sexting would be capped at a class A misdemeanor. The penalty would be a C misdemeanor unless the minor promoted the content with the intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another, which would make the penalty a class B misdemeanor. The penalties would be enhanced for repeat offenses.

An affirmative defense would be created for sexting between minor spouses or between minors within two years of age that were dating at the time of the offense. This mirrors an existing defense under the pornography statute, which is necessary because without the defense two minors could legally have sex, but could not “sext.” A defense also would be created to protect the innocent recipient of an unsolicited sext. This defense to prosecution would apply if the minor did not produce or solicit the sext, possessed the sext only after receiving it from another minor, and destroyed the sext within a reasonable amount of time after receiving it. A defense to prosecution would also be created for law enforcement officers or school administrators in possession of a sext as a result of a sexting allegation.

SB 407 also would make sure sexting did not leave a stigma that prevented a young person from going to college or finding meaningful employment. The bill would allow people convicted of sexting to have their criminal records expunged and would allow certain minors under 17 to immediately seal their sexting records.

SB 407 is a timely and thoughtful response to a growing problem that must be met head on with both appropriate consequences and educational remedies.

**OPPONENTS  
SAY:**

Sexting reflects poor judgment, but a better response would be education, not criminalization. During adolescence, children have problems controlling their impulses and problems understanding the long-term consequences of their actions. Developmentally normal behaviors, such as

sexting, should not be criminalized just because the evidence of that behavior can now be recorded using today's technology. Very few minors are charged with child pornography now, because it is such a serious charge. This bill actually would criminalize behavior that is rarely prosecuted now.

SB 407 is well meaning, but the criminal justice system is just not equipped to handle the number of sexting cases necessary to fairly enforce the new law. According to the American Civil Liberties Union, at least 20 percent of youth have engaged in sexting, meaning that 1.5 million additional Texas youth would be subjected to the criminal justice system. This would be unworkable. Even more disturbing would be the possibility of selective enforcement against minorities and youth with special needs, which is possible given that the system already is under scrutiny for disproportionate treatment of those groups. Laws already exist to protect kids from harassment, bullying, child pornography, and obscenity. SB 407 would not protect children any better than those laws already do.

Sexting also could be considered a "free speech" activity, so criminalizing it likely would result in costly litigation for local communities. Youth also would have to abandon their privacy rights and share their phones just to prove their innocence. SB 407 would create more problems than it solved.

Education would be the best tool for preventing sexting. Parents and educators should inform teens about the need to respect their peers, privacy, and the potential long-term negative consequences of using electronic media for sexting. The State Board of Education's upcoming review of health curriculum would offer a good chance to address the issue.

**OTHER  
OPPONENTS  
SAY:**

While SB 407 is a step in the right direction, a class C misdemeanor is too low a punishment for a 17-year-old. This is child pornography, so the equivalent of a traffic ticket is grossly inappropriate given the content of some of these images. In addition, class C misdemeanor records usually are not used for enhancement purposes. A minor also would not be entitled to a court-appointed lawyer for a class C misdemeanor charge, which would be problematic for fair enforcement.

NOTES:

The committee amendment would add the defense to prosecution for law enforcement officers and school administrators who possessed a sext related to an alleged sexting offense.