

BILL ANALYSIS

Senate Research Center

S.B. 407
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Criminal Justice
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Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Under current law, the act of sending a sexually explicit text message, otherwise known as "sexting," can be prosecuted under adult pornography laws which can lead to felony convictions and possible lifelong registration requirements with the Texas Sex Offender Registration Program. As a result, some prosecutors may feel that they have only two options for dealing with minors who engage in "sexting"—charge juveniles with crimes that have overly harsh penalties, or enter no charges at all.

S.B. 407 creates a new offense of "sexting" in state law, to establish a "tiered" approach to prosecuting "sexting" by minors so the punishment truly matches the crime, and to prevent "sexting" from occurring by educating students about the criminal, emotional, psychological, and other consequences associated with this crime.

S.B. 407 also requires the Texas School Safety Center, in consultation with the Office of the Attorney General, to develop programs for use by school districts that address psychological, social, and legal consequences associated with this crime and bullying.

S.B. 407 amends current law relating to the creation of the offense of electronic transmission of certain visual material depicting a minor and to certain educational programs concerning the prevention and awareness of that offense.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends 37.09, Penal Code, by adding Subsection (c-1), to provide that it is a defense to prosecution under Subsection (a) (relating to committing an offense if a person tampers with or fabricates physical evidence) or (d)(1) (relating to providing that a person commits an offense if a person tampers with or fabricates physical evidence) that the record, document, or thing was visual material prohibited under Section 43.261 that was destroyed as described by Subsection (f)(3)(B) of that section.

SECTION 2. Amends Section 43.26, Penal Code, by adding Subsection (h), as follows:

(h) Provides that it is a defense to prosecution under Subsection (a) (relating to providing that a person commits an offense if the person possesses child pornography) or (e) (relating to providing that a person commits an offense if the person possesses child pornography) that the actor is a law enforcement officer or a school administrator who:

(1) possessed 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 access the material only as appropriate based on the allegation described by Subdivision (1); and

(3) took reasonable steps to destroy the material within an appropriate period following the allegation described by Subdivision (1).

SECTION 3. Amends Subchapter B, Chapter 43, Penal Code, by adding Section 43.261, as follows:

Sec. 43.261. ELECTRONIC TRANSMISSION OF CERTAIN VISUAL MATERIAL DEPICTING MINOR. (a) Defines, in this section, "dating relationship," "minor," "produce," "promote," "sexual conduct," and "visual material."

(b) Provides that 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.

(c) Provides that an offense under Subsection (b)(1) is a Class C misdemeanor, except that the offense is:

(1) a Class B misdemeanor if it is shown on the trial of the offense that the actor:

(A) promoted the visual material with intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another; or

(B) except as provided by Subdivision (2)(A), has previously been convicted one time of any offense under this section; or

(2) a Class A misdemeanor if it is shown on the trial of the offense that the actor has previously been:

(A) convicted one or more times of an offense punishable under Subdivision (1)(A); or

(B) convicted two or more times of any offense under this section.

(d) Provides that an offense under Subsection (b)(2) is a Class C misdemeanor, except that the offense is:

(1) a Class B misdemeanor if it is shown on the trial of the offense that the actor has previously been convicted one time of any offense under this section; or

(2) a Class A misdemeanor if it is shown on the trial of the offense that the actor has previously been convicted two or more times of any offense under this section.

(e) Provides that 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 two 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.

(f) Provides that it is a defense to prosecution under Subsection (b)(2) that the actor:

(1) did not produce or solicit the visual material;

(2) possessed the visual material only after receiving the material from another minor; and

(3) destroyed the visual material within a reasonable amount of time after receiving the material from another minor.

(g) Authorizes the defendant, if conduct that constitutes an offense under this section also constitutes an offense under another law, to be prosecuted under this section, the other law, or both.

(h) Provides that notwithstanding Section 51.13 (Effect of Adjudication or Disposition), Family Code, a finding that a person has engaged in conduct in violation of this section is considered a conviction for the purposes of Subsections (c) and (d).

SECTION 4. Amends Section 51.03(b), Family Code, to set forth conduct indicating a need for supervision, including conduct that violates Section 43.261, Penal Code.

SECTION 5. Amends the heading to Chapter 6, Code of Criminal Procedure, to read as follows:

**CHAPTER SIX. PREVENTING OFFENSES BY THE ACT OF MAGISTRATES AND
OTHER OFFICERS; EDUCATION CONCERNING CONSEQUENCES OF CERTAIN
OFFENSES**

SECTION 6. Amends Chapter 6, Code of Criminal Procedure, by adding Article 6.09, as follows:

Art. 6.09. EDUCATIONAL PROGRAMS CONCERNING CERTAIN OFFENSES COMMITTED BY MINORS; MANDATORY COURT ATTENDANCE. (a) Defines, in this article, "parent." Provides that the term does not include a parent whose parental rights have been terminated.

(b) Provides that this article applies to a defendant who has not had the disabilities of minority removed and has been charged with an offense under Section 43.261, Penal Code.

(c) Requires the judge of a county court to take the defendant's plea in open court, and to issue a summons to compel the defendant's parent to be present during the taking of the defendant's plea, and all other proceedings relating to the case.

(d) Authorizes the court, if a county court finds that a defendant has committed an offense under Section 43.261, Penal Code, to enter an order requiring the defendant to attend and successfully complete an educational program described by Section 37.218, Education Code, or another equivalent educational program.

(e) Requires a court that enters an order under Subsection (d) to require the defendant or the defendant's parent to pay the cost of attending an educational program under Subsection (d) if the court determines that the defendant or the defendant's parent is financially able to make payment.

SECTION 7. Amends the heading to Article 38.45, Code of Criminal Procedure, to read as follows:

Art. 38.45. EVIDENCE DEPICTING OR DESCRIBING ABUSE OF OR SEXUAL CONDUCT BY CHILD OR MINOR.

SECTION 8. Amends Article 38.45(a), Code of Criminal Procedure, to prohibit the court, during the course of a criminal hearing or proceeding, from making available or allow to be made available for copying or dissemination to the public property or material that constitutes child pornography, as described by Section 43.26(a)(1), Penal Code; the promotion or possession of which is prohibited under Section 43.261, Penal Code; or that is described by Section 2 (relating to admissibility of the recording of the oral statement of a child as evidence) or 5 (relating to certain conditions under which the recording of an oral statement of a child made before a complaint has been filed or an indictment returned is admissible), Article 38.071 (Testimony of Child Who is Victim of Offense), of this code.

SECTION 9. Amends the heading to Article 39.15, Code of Criminal Procedure, to read as follows:

Art. 39.15. DISCOVERY OF EVIDENCE DEPICTING OR DESCRIBING ABUSE OF OR SEXUAL CONDUCT BY CHILD OR MINOR.

SECTION 10. Amends Article 39.15(a), Code of Criminal Procedure, to require a court, in the manner provided by this article, to allow discovery under Article 39.14 (Discovery) of property or material that constitutes child pornography, as described by Section 43.26(a)(1), Penal Code; the promotion or possession of which is prohibited under Section 43.261, Penal Code; or that is described by Section 2 or 5, Article 38.071, of this code.

SECTION 11. Amends Article 42.12, Code of Criminal Procedure, by adding Section 13H, as follows:

Sec. 13H. DEFENDANTS PLACED ON COMMUNITY SUPERVISION FOR ELECTRONIC TRANSMISSION OF CERTAIN VISUAL MATERIAL. (a) Defines, in this section, "parent." Provides that the term does not include a parent whose parental rights have been terminated.

(b) Authorizes the judge, if a judge grants community supervision to a defendant who is convicted of or charged with an offense under Section 43.261, Penal Code, to require as a condition of community supervision that the defendant attend and successfully complete an educational program described by Section 37.218, Education Code, or another equivalent educational program.

(c) Requires the court to require the defendant or the defendant's parent to pay the cost of attending an educational program under Subsection (b) if the court determines that the defendant or the defendant's parent is financially able to make payment.

SECTION 12. Amends Article 45.0215, Code of Criminal Procedure, by amending Subsection (a) and adding Subsection (a-1), as follows:

(a) Provides that this article applies to a defendant who has not had the disabilities of minority removed and has been charged with an offense other than an offense under Section 43.261, Penal Code, if the defendant is younger than 17 years of age, or charged with an offense under Section 43.261, Penal Code, if the defendant is younger than 18 years of age.

(a-1) Creates this subsection from existing text. Provides that the judge or justice:

(1) is required to take the defendant's plea in open court; and

(2) is required to issue a summons to compel the defendant's parent, guardian, or managing conservator to be present during the taking of the defendant's plea; and all other proceedings relating to the case.

Deletes existing text providing that the judge or justice is required to take the defendant's plea in open court, and is required to issue a summons to compel the defendant's parent, guardian, or managing conservator to be present during the taking of the defendant's plea, and all other proceedings relating to the case if a defendant is younger than 17 years of age and has not had the disabilities of minority removed.

SECTION 13. Amends the heading to Article 45.0216, Code of Criminal Procedure, to read as follows:

Art. 45.0216. EXPUNCTION OF CERTAIN CONVICTION RECORDS.

SECTION 14. Amends Article 45.0216, Code of Criminal Procedure, by amending Subsections (b), (d), and (f) and adding Subsection (f-1), as follows:

(b) Authorizes a person to apply to the court in which the person was convicted to have the conviction expunged as provided by this article on or after the person's 17th birthday if:

(1) the person was convicted of not more than one offense described by Section 8.07(a)(4) (relating to prohibiting a person from being prosecuted for or convicted of any offense that the person committed when younger than 15 years of age except a misdemeanor punishable by fine only) or (5) (relating to prohibiting a person from being prosecuted for or convicted of any offense that the person committed when younger than 15 years of age except a violation of a penal ordinance of a political subdivision), Penal Code, while the person was a child; or

(2) the person was convicted only once of an offense under Section 43.261, Penal Code.

Deletes existing text authorizing a person convicted of not more than one offense described by Section 8.07(a)(4), or (5), Penal Code, while the person was a child, on or after the person's 17th birthday, to apply to the court in which the child was convicted to have the conviction expunged as provided by this article.

(d) Requires that the request contain the person's statement that the person was not convicted of any additional offense or found to have engaged in conduct indicating a need for supervision as described by Subsection (f)(1) or (2), as applicable.

Deletes existing text requiring that the request contain the person's statement that the person was not convicted while the person was a child of any offense described by Section 8.07(a)(4) or (5), Penal Code, other than the offense the person seeks to have expunged.

(f) Requires the court to order the conviction, together with all complaints, verdicts, sentences, and prosecutorial and law enforcement records, and any other documents relating to the offense, expunged from the person's record if the court finds that:

(1) for a person applying for the expunction of a conviction for an offense described by Section 8.07(a)(4) or (5), Penal Code, the person was not convicted

of any other offense described by Section 8.07(a)(4) or (5), Penal Code, while the person was a child; and

(2) for a person applying for the expunction of a conviction for an offense described by Section 43.261, Penal Code, the person was not found to have engaged in conduct indicating a need for supervision described by Section 51.03(b)(7), Family Code, while the person was a child.

Deletes existing text providing that if the court finds that the person was not convicted of any other offense described by Section 8.07(a)(4) or (5), Penal Code, while the person was a child, the court is required to order the conviction, together with all complaints, verdicts, sentences, and prosecutorial and law enforcement records, and any other documents relating to the offense, expunged from the person's record.

(f-1) Provides that after entry of an order under Subsection (f), the person is released from all disabilities resulting from the conviction and the conviction is prohibited from being shown or made known for any purpose.

SECTION 15. Amends Subchapter B, Chapter 45, Code of Criminal Procedure, by adding Article 45.061, as follows:

Art. 45.061. PROCEEDINGS CONCERNING ELECTRONIC TRANSMISSION OF CERTAIN VISUAL MATERIAL DEPICTING MINOR. (a) Defines, in this article, "parent." Provides that the term does not include a parent whose parental rights have been terminated.

(b) Authorizes the court, if a justice or municipal court finds that a defendant has committed an offense under Section 43.261, Penal Code, to enter an order requiring the defendant to attend and successfully complete an educational program described by Section 37.218, Education Code, or another equivalent educational program.

(c) Requires a court that enters an order under Subsection (b) to require the defendant or the defendant's parent to pay the cost of attending an educational program under Subsection (b) if the court determines that the defendant or the defendant's parent is financially able to make payment.

SECTION 16. Amends Sections 51.08(b) and (d), Family Code, as follows:

(b) Provides that a court in which there is pending a complaint against a child alleging a violation of a misdemeanor offense punishable by fine only other than a traffic offense or a violation of a penal ordinance of a political subdivision other than a traffic offense except as provided by Subsection (d), shall waive its original jurisdiction and refer the child to juvenile court if the complaint pending against the child alleges a violation of a misdemeanor offense under Section 43.261, Penal Code, that is punishable by fine only; or the child has previously been convicted of two or more misdemeanors punishable by fine only other than a traffic offense, two or more violations of a penal ordinance of a political subdivision other than a traffic offense, or one or more of each of the types of misdemeanors described in Subparagraph (i) or (ii), rather than Paragraph (A) or (B); and may waive its original jurisdiction and refer the child to juvenile court if the child has not previously been convicted of a misdemeanor punishable by fine only other than a traffic offense or a violation of a penal ordinance of a political subdivision other than a traffic offense, or has previously been convicted of fewer than two misdemeanors punishable by fine only other than a traffic offense or two violations of a penal ordinance of a political subdivision other than a traffic offense.

(d) Authorizes, but does not require, a court that has implemented a juvenile case manager program under Article 45.056 (Authority to Employ Juvenile Case Managers; Reimbursement), Code of Criminal Procedure, to waive its original jurisdiction under Subsection (b)(1)(B), rather than Subsection (b)(1).

SECTION 17. Amends Section 51.13, Family Code, by amending Subsection (a) and adding Subsection (e), as follows:

(a) Provides that, except as provided by Subsections (d) and (e), rather than Subsection (d), an order of adjudication or disposition in a proceeding under this title is not a conviction of crime.

(e) Provides that a finding that a child engaged in conduct indicating a need for supervision as described by Section 51.03(b)(7) is a conviction only for the purposes of Sections 43.261(c) and (d), Penal Code.

SECTION 18. Amends Chapter 54, Family Code, by adding Section 54.0404, as follows:

Sec. 54.0404. ELECTRONIC TRANSMISSION OF CERTAIN VISUAL MATERIAL DEPICTING MINOR: EDUCATIONAL PROGRAMS. (a) Authorizes the juvenile court, if a child is found to have engaged in conduct indicating a need for supervision described by Section 51.03(b)(7), to enter an order requiring the child to attend and successfully complete an educational program described by Section 37.218, Education Code, or another equivalent educational program.

(b) Requires a juvenile court that enters an order under Subsection (a) to require the child or the child's parent or other person responsible for the child's support to pay the cost of attending an educational program under Subsection (a) if the court determines that the child, parent, or other person is financially able to make payment.

SECTION 19. Amends Section 58.003, Family Code, by adding Subsections (c-3) and (c-4) and amending Subsection (d), as follows:

(c-3) Authorizes a juvenile court, notwithstanding Subsections (a) (relating to entitling certain schools to receive funds appropriated by the legislature) and (c) (relating to resident physician compensation) and subject to Subsection (b) (relating to resident physician compensation), to order the sealing of records concerning a child found to have engaged in conduct indicating a need for supervision that violates Section 43.261, Penal Code, or taken into custody to determine whether the child engaged in conduct indicating a need for supervision that violates Section 43.261, Penal Code, if the child attends and successfully completes an educational program described by Section 37.218, Education Code, or another equivalent educational program. Authorizes the court to:

(1) order the sealing of the records immediately and without a hearing; or

(2) hold a hearing to determine whether to seal the records.

(c-4) Authorizes a prosecuting attorney or juvenile probation department to maintain until a child's 17th birthday a separate record of the child's name and date of birth and the date on which the child successfully completed the educational program, if the child's records are sealed under Subsection (c-3). Requires the prosecuting attorney or juvenile probation department, as applicable, to send the record to the court as soon as practicable after the child's 17th birthday to be added to the child's other sealed records.

(d) Authorizes the court to grant the relief authorized in Subsection (a), (c-1) (relating to authorizing a juvenile court to order the sealing of records concerning a child), or (c-3) at any time after final discharge of the person or after the last official action in the case if there was no adjudication, subject, if applicable, to Subsection (e) (relating to requiring the court to hold a hearing before sealing a person's records unless waived).

SECTION 20. Amends Section 59.004(a), Family Code, to authorize the juvenile court or probation department, for a child at sanction level one, to perform certain actions, including

require the child to attend and successfully complete an educational program described by Section 37.218, Education Code, or another equivalent educational program.

SECTION 21. Amends Section 61.002(a), Family Code, to provide that this chapter applies to a proceeding to enter a juvenile court order, except as provided by Subsection (b) (relating to providing that this subchapter does not apply to the entry and enforcement of a child support order under Section 54.06) under certain circumstances, including for payment of the cost of attending an educational program under Section 54.0404.

SECTION 22. Amends Subchapter G, Chapter 37, Education Code, by adding Section 37.218, as follows:

Sec. 37.218. PROGRAMS ON DANGERS OF STUDENTS SHARING VISUAL MATERIAL DEPICTING MINOR ENGAGED IN SEXUAL CONDUCT. (a) Defines, in this section "bullying," "cyberbullying," "harassment," and "sexual conduct."

(b) Requires the center, in consultation with the office of the attorney general (OAG), to develop programs for use by school districts that address:

(1) the possible legal consequences, including criminal penalties, of sharing visual material depicting a minor engaged in sexual conduct;

(2) other possible consequences of sharing visual material depicting a minor engaged in sexual conduct, including negative effects on relationships; loss of educational and employment opportunities; and possible removal, if applicable, from certain school programs or extracurricular activities;

(3) the unique characteristics of the Internet and other communications networks that could affect visual material depicting a minor engaged in sexual conduct, including search and replication capabilities; and a potentially worldwide audience;

(4) the prevention of, identification of, responses to, and reporting of incidents of bullying; and

(5) the connection between bullying, cyberbullying, harassment, and a minor sharing visual material depicting a minor engaged in sexual conduct.

(c) Requires each school district to annually provide or make available information on the programs developed under Subsection (b) to parents and students in a grade level the district considers appropriate. Requires each district to provide or make available the information by any means the district considers appropriate.

SECTION 23. (a) Requires the Texas School Safety Center, not later than January 1, 2012, to develop the program required under Section 37.218(b), Education Code, as added by this Act.

(b) Provides that Section 37.218(c), Education Code, as added by this Act, applies beginning with the 2012-2013 school year.

SECTION 24. Provides that the change in law made by this Act to Section 43.26, Penal Code, applies only to an offense committed on or after the effective date of this Act. Provides that an offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. Provides that for purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

SECTION 25. Effective date: September 1, 2011.

