

BILL ANALYSIS

S.B. 407
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Criminal Jurisprudence
Committee Report (Amended)

BACKGROUND AND PURPOSE

Under current law, the act of sending a sexually explicit text message, commonly known as sexting, may be prosecuted under adult pornography laws, which can lead to felony convictions and possible lifelong registration under the sex offender registration program. As a result, some prosecutors reportedly believe that they can either charge the juveniles with crimes that carry overly harsh penalties or enter no charges at all.

S.B. 407 seeks to create a new offense involving the electronic transmission of certain visual material depicting a minor, to establish a tiered approach to prosecuting the offense so the punishment truly matches the crime, and to prevent occurrences of the offense by educating students about the criminal, emotional, psychological, and other consequences associated with the crime.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

S.B. 407 amends the Penal Code to establish a defense to prosecution for the offense of tampering with or fabricating physical evidence if the record, document, or thing was visual material prohibited under the bill's provisions creating the offense of electronic transmission of certain visual material depicting a minor that was destroyed within a reasonable amount of time after receipt of the material from another minor.

S.B. 407 creates the Class C misdemeanor offense of electronic transmission of certain visual material depicting a minor. The bill makes it an offense for a minor to intentionally or knowingly by electronic means promote 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. The bill enhances the penalty for such offense to a Class B misdemeanor if it is shown on the trial of the offense that the actor promoted the visual material with intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another or has been previously convicted one time of any offense of electronic transmission of certain visual material depicting a minor. The bill enhances the penalty for such offense to a Class A misdemeanor if it is shown on the trial of the offense that the actor has been previously convicted of the previously described offense enhanced to a Class B misdemeanor or convicted two or more times of any offense of electronic transmission of certain visual material depicting a minor. The bill makes it a Class C misdemeanor to intentionally or knowingly possess 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. The bill enhances the penalty for a subsequent conviction of such offense to 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 of electronic transmission of certain visual material depicting a minor and to a Class A misdemeanor if it is

shown on trial that the actor has previously been convicted two or more times of any such offense.

S.B. 407 establishes an affirmative defense to prosecution for electronic transmission of certain visual material depicting a minor if the visual material depicted only the actor or another minor 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 who was the spouse of the actor at the time of the offense and the visual material was promoted or received only to or from the actor and the other minor. The bill establishes a defense to prosecution for such offense involving the possession in an electronic format of certain visual material depicting another minor if the actor did not produce or solicit the visual material, possessed the visual material only after receiving the material from another minor, and destroyed the visual material within a reasonable amount of time after receiving the material from another minor.

S.B. 407 specifies that if a defendant's conduct constitutes the offense of electronic transmission of certain visual material depicting a minor under the bill's provisions and also constitutes an offense under another law, the defendant may be prosecuted under the bill's provisions, the other law, or both. The bill establishes that a finding that a person has engaged in conduct constituting the offense of electronic transmission of certain visual material depicting a minor is considered a conviction for enhancement purposes under the bill's provisions. The bill defines "minor" and "produce," provides for the meanings of "promote," "sexual conduct," and "visual material" by reference, and provides for the meaning of "dating relationship" by reference to the Family Code.

S.B. 407 amends the Family Code to specify that a violation of the offense of electronic transmission of certain visual material depicting a minor constitutes conduct indicating a need for supervision under the juvenile justice code.

S.B. 407 amends the Code of Criminal Procedure to require the judge of a county court to take in open court the plea of a defendant charged with an offense of electronic transmission of certain visual material depicting a minor who has not had the disabilities of minority removed 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 related to the case. The bill authorizes a county court, justice court, or municipal court, if the appropriate court finds that a defendant has committed an offense of electronic transmission of certain visual material depicting a minor, to enter an order requiring the defendant to attend and successfully complete an educational program on the dangers of students sharing visual material depicting a minor engaged in sexual conduct or another equivalent educational program. The bill requires a court that enters such an order to require the defendant or defendant's parent to pay the cost of attending such an educational program if the court determines that the defendant or the parent is financially able to make payment. The bill defines "parent" and specifies that term does not include a parent whose parental rights have been terminated.

S.B. 407 expands the prohibition against a court making available or allowing to be made available, during the course of a criminal hearing or proceeding, property or material that constitutes child pornography for copying or dissemination to the public to include property and material the promotion or possession of which is prohibited under the offense of electronic transmission of certain visual material depicting a minor. The bill expands the applicability of provisions of law relating to discovery of evidence that constitutes child pornography to include discovery of property or material the promotion or possession of which is prohibited under the offense of electronic transmission of certain visual material depicting a minor.

S.B. 407 authorizes a judge who grants community supervision to a defendant who is convicted of or charged with an offense of electronic transmission of certain visual material depicting a minor to require as a condition of community supervision that the defendant attend and successfully complete an educational program on the dangers of students sharing visual material

depicting a minor engaged in sexual conduct or another equivalent educational program. The bill requires a court to require the defendant or defendant's parent to pay the cost of attending such an educational program if the court determines that the defendant or the parent is financially able to make payment. The bill defines "parent" and specifies that term does not include a parent whose parental rights have been terminated.

S.B. 407 makes provisions of law relating to a plea by a minor defendant younger than 17 years of age and the appearance of the defendant's parent apply also to a defendant who is younger than 18 years of age and has been charged with an offense of electronic transmission of certain visual material depicting a minor.

S.B. 407 extends the eligibility of a person to apply on or after the person's 17th birthday to the appropriate convicting court for expunction of certain conviction records to a person convicted of not more than one offense of electronic transmission of certain visual material depicting a minor. The bill requires a request for expunction by such a person to contain the person's statement that the person was not convicted of any additional offense of electronic transmission of certain visual material depicting a minor or found to have engaged in conduct indicating a need for supervision that constitutes such an offense while the person was a child and requires a court to order the conviction, together with all complaints, verdicts, sentences, and prosecutorial and law enforcement records, and any other documents relating to the applicable offense, expunged if the court finds that the person was not found to have engaged in such conduct indicating a need for supervision while the person was a child. The bill makes conforming and nonsubstantive changes.

S.B. 407 amends the Family Code to require 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 to 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 of electronic transmission of certain visual material depicting a minor that is punishable by fine only. The bill makes conforming changes.

S.B. 407 establishes that a finding that a child engaged in conduct indicating a need for supervision that constitutes an offense of electronic transmission of certain visual material depicting a minor is a conviction only for penalty enhancement purposes for that offense and makes a conforming change. The bill authorizes a juvenile court, if a child is found to have engaged in such conduct indicating a need for supervision, to enter an order requiring the child to attend and successfully complete an educational program on the dangers of students sharing visual material depicting a minor engaged in sexual conduct or another equivalent educational program. The bill requires a juvenile court that enters such an order to require the child or the child's parent or other person responsible for the child's support to pay the cost of attending the educational program if the court determines that the child, parent, or other person is financially able to make payment.

S.B. 407 authorizes a juvenile court to order the sealing of records concerning a child found to have engaged in conduct indicating a need for supervision that constitutes an offense of electronic transmission of certain visual material depicting a minor or taken into custody to determine whether the child engaged in such conduct, if the child attends and successfully completes an educational program on the dangers of students sharing visual material depicting a minor engaged in sexual conduct or another equivalent educational program. The bill authorizes the court to order the sealing of the records immediately and without a hearing or to hold a hearing to determine whether to seal the records. The bill 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 in the previously described manner. The bill 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 and makes conforming changes.

S.B. 407 authorizes a juvenile court or the juvenile probation department, for a child at sanction level one of the progressive sanctions model, to require the child to attend and successfully complete an educational program on the dangers of students sharing visual material depicting a minor engaged in sexual conduct or another equivalent educational program.

S.B. 407 makes provisions of law relating to the rights and responsibilities of parents and other eligible persons apply to a proceeding to enter a juvenile court order for payment of the cost of attending an educational program on the dangers of students sharing visual material depicting a minor engaged in sexual conduct or another equivalent educational program.

S.B. 407 amends the Education Code to require the Texas School Safety Center, in consultation with the office of the attorney general and not later than January 1, 2012, to develop programs for use by school districts that address certain legal and other consequences and effects, specified by the bill's provisions, of sharing visual material depicting a minor engaged in sexual conduct and that address bullying and the connection between bullying, cyberbullying, harassment, and a minor sharing that visual material. The bill requires each school district, beginning with the 2012-2013 school year, to annually provide or make available information on the programs developed by the center to parents and students in a grade level the district considers appropriate and to provide or to make available the information by any means the district considers appropriate. The bill defines "cyberbullying," provides for the meanings of "bullying" and "harassment" by reference, and provides for the meaning of "sexual conduct" by reference to the Penal Code.

EFFECTIVE DATE

September 1, 2011.

EXPLANATION OF AMENDMENTS

Committee Amendment No. 1

Committee Amendment No. 1 amends the Penal Code to establish a defense to prosecution for the offense of possession or promotion of child pornography if the actor is a law enforcement officer or a school administrator who possessed the visual material in good faith solely as a result of an allegation of a violation of the offense of electronic transmission of certain visual material depicting a minor, 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. The amendment adds a saving provision.