

By: Watson, Hinojosa
(Craddick, Gallego, et al.)

S.B. No. 407

A BILL TO BE ENTITLED

AN ACT

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.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 37.09, Penal Code, is amended by adding Subsection (c-1) to read as follows:

(c-1) It is a defense to prosecution under Subsection (a) or (d)(1) 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. Subchapter B, Chapter 43, Penal Code, is amended by adding Section 43.261 to read as follows:

Sec. 43.261. ELECTRONIC TRANSMISSION OF CERTAIN VISUAL MATERIAL DEPICTING MINOR. (a) In this section:

(1) "Dating relationship" has the meaning assigned by Section 71.0021, Family Code.

(2) "Minor" means a person younger than 18 years of age.

(3) "Produce" with respect to visual material includes any conduct that directly contributes to the creation or manufacture of the material.

(4) "Promote" has the meaning assigned by Section

1 43.25.

2 (5) "Sexual conduct" has the meaning assigned by
3 Section 43.25.

4 (6) "Visual material" has the meaning assigned by
5 Section 43.26.

6 (b) A person who is a minor commits an offense if the person
7 intentionally or knowingly:

8 (1) by electronic means promotes to another minor
9 visual material depicting a minor, including the actor, engaging in
10 sexual conduct, if the actor produced the visual material or knows
11 that another minor produced the visual material; or

12 (2) possesses in an electronic format visual material
13 depicting another minor engaging in sexual conduct, if the actor
14 produced the visual material or knows that another minor produced
15 the visual material.

16 (c) An offense under Subsection (b)(1) is a Class C
17 misdemeanor, except that the offense is:

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

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

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

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

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

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

5 (d) An offense under Subsection (b)(2) is a Class C
6 misdemeanor, except that the offense is:

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

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

13 (e) It is an affirmative defense to prosecution under this
14 section that the visual material:

15 (1) depicted only the actor or another minor:

16 (A) who is not more than two years older or
17 younger than the actor and with whom the actor had a dating
18 relationship at the time of the offense; or

19 (B) who was the spouse of the actor at the time of
20 the offense; and

21 (2) was promoted or received only to or from the actor
22 and the other minor.

23 (f) It is a defense to prosecution under Subsection (b)(2)
24 that the actor:

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

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

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

3 (g) If conduct that constitutes an offense under this
4 section also constitutes an offense under another law, the
5 defendant may be prosecuted under this section, the other law, or
6 both.

7 (h) Notwithstanding Section 51.13, Family Code, a finding
8 that a person has engaged in conduct in violation of this section is
9 considered a conviction for the purposes of Subsections (c) and
10 (d).

11 SECTION 3. Subsection (b), Section 51.03, Family Code, is
12 amended to read as follows:

13 (b) Conduct indicating a need for supervision is:

14 (1) subject to Subsection (f), conduct, other than a
15 traffic offense, that violates:

16 (A) the penal laws of this state of the grade of
17 misdemeanor that are punishable by fine only; or

18 (B) the penal ordinances of any political
19 subdivision of this state;

20 (2) the absence of a child on 10 or more days or parts
21 of days within a six-month period in the same school year or on
22 three or more days or parts of days within a four-week period from
23 school;

24 (3) the voluntary absence of a child from the child's
25 home without the consent of the child's parent or guardian for a
26 substantial length of time or without intent to return;

27 (4) conduct prohibited by city ordinance or by state

1 law involving the inhalation of the fumes or vapors of paint and
2 other protective coatings or glue and other adhesives and the
3 volatile chemicals itemized in Section 485.001, Health and Safety Code;

4 (5) an act that violates a school district's
5 previously communicated written standards of student conduct for
6 which the child has been expelled under Section 37.007(c),
7 Education Code; ~~or~~

8 (6) conduct that violates a reasonable and lawful
9 order of a court entered under Section 264.305; or

10 (7) conduct that violates Section 43.261, Penal Code.

11 SECTION 4. The heading to Chapter 6, Code of Criminal
12 Procedure, is amended to read as follows:

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

16 SECTION 5. Chapter 6, Code of Criminal Procedure, is
17 amended by adding Article 6.09 to read as follows:

18 Art. 6.09. EDUCATIONAL PROGRAMS CONCERNING CERTAIN
19 OFFENSES COMMITTED BY MINORS; MANDATORY COURT ATTENDANCE. (a) In
20 this article, "parent" means a natural or adoptive parent, managing
21 or possessory conservator, or legal guardian. The term does not
22 include a parent whose parental rights have been terminated.

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

26 (c) The judge of a county court:

27 (1) must take the defendant's plea in open court; and

1 (2) shall issue a summons to compel the defendant's
2 parent to be present during:

3 (A) the taking of the defendant's plea; and

4 (B) all other proceedings relating to the case.

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

10 (e) A court that enters an order under Subsection (d) shall
11 require the defendant or the defendant's parent to pay the cost of
12 attending an educational program under Subsection (d) if the court
13 determines that the defendant or the defendant's parent is
14 financially able to make payment.

15 SECTION 6. The heading to Article 38.45, Code of Criminal
16 Procedure, is amended to read as follows:

17 Art. 38.45. CERTAIN VISUAL MATERIAL DEPICTING SEXUAL
18 CONDUCT BY [EVIDENCE THAT CONSTITUTES] CHILD OR MINOR
19 [PORNOGRAPHY].

20 SECTION 7. Subsection (a), Article 38.45, Code of Criminal
21 Procedure, is amended to read as follows:

22 (a) During the course of a criminal hearing or proceeding,
23 the court may not make available or allow to be made available for
24 copying or dissemination to the public property or material that:

25 (1) constitutes child pornography, as described by
26 Section 43.26(a)(1), Penal Code; or

27 (2) the promotion or possession of which is prohibited

1 under Section 43.261, Penal Code.

2 SECTION 8. The heading to Article 39.15, Code of Criminal
3 Procedure, is amended to read as follows:

4 Art. 39.15. DISCOVERY OF CERTAIN VISUAL MATERIAL DEPICTING
5 SEXUAL CONDUCT BY [~~EVIDENCE THAT CONSTITUTES~~] CHILD OR MINOR
6 [~~PORNOGRAPHY~~].

7 SECTION 9. Subsection (a), Article 39.15, Code of Criminal
8 Procedure, is amended to read as follows:

9 (a) In the manner provided by this article, a court shall
10 allow discovery under Article 39.14 of property or material:

11 (1) that constitutes child pornography, as described
12 by Section 43.26(a)(1), Penal Code; or

13 (2) the promotion or possession of which is prohibited
14 under Section 43.261, Penal Code.

15 SECTION 10. Article 42.12, Code of Criminal Procedure, is
16 amended by adding Section 13H to read as follows:

17 Sec. 13H. DEFENDANTS PLACED ON COMMUNITY SUPERVISION FOR
18 ELECTRONIC TRANSMISSION OF CERTAIN VISUAL MATERIAL. (a) In this
19 section, "parent" means a natural or adoptive parent, managing or
20 possessory conservator, or legal guardian. The term does not
21 include a parent whose parental rights have been terminated.

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

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

5 SECTION 11. Article 45.0215, Code of Criminal Procedure, is
6 amended by amending Subsection (a) and adding Subsection (a-1) to
7 read as follows:

8 (a) This article applies to [If] a defendant who has not had
9 the disabilities of minority removed and has been:

10 (1) charged with an offense other than an offense
11 under Section 43.261, Penal Code, if the defendant is younger than
12 17 years of age; or

13 (2) charged with an offense under Section 43.261,
14 Penal Code, if the defendant is younger than 18 years of age.

15 (a-1) The ~~[and has not had the disabilities of minority~~
16 ~~removed, the]~~ judge or justice:

17 (1) must take the defendant's plea in open court; and

18 (2) shall issue a summons to compel the defendant's
19 parent, guardian, or managing conservator to be present during:

20 (A) the taking of the defendant's plea; and

21 (B) all other proceedings relating to the case.

22 SECTION 12. The heading to Article 45.0216, Code of
23 Criminal Procedure, is amended to read as follows:

24 Art. 45.0216. EXPUNCTION OF CERTAIN CONVICTION RECORDS ~~[OF~~
25 ~~CHILDREN]~~.

26 SECTION 13. Article 45.0216, Code of Criminal Procedure, is
27 amended by amending Subsections (b), (d), and (f) and adding

Subsection (f-1) to read as follows:

(b) A person may ~~[convicted of not more than one offense described by Section 8.07(a)(4) or (5), Penal Code, while the person was a child may, on or after the person's 17th birthday,]~~ apply to the court in which the person ~~[child]~~ 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) or (5), 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.

(d) The request must contain the person's statement that the person was not convicted ~~[while the person was a child]~~ 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 ~~[Section 8.07(a)(4) or (5), Penal Code, other than the offense the person seeks to have expunged]~~.

(f) The ~~[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 shall 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.

(f-1) After entry of an [the] order under Subsection (f), the person is released from all disabilities resulting from the conviction and the conviction may not be shown or made known for any purpose.

SECTION 14. Subchapter B, Chapter 45, Code of Criminal Procedure, is amended by adding Article 45.061 to read as follows:

Art. 45.061. PROCEEDINGS CONCERNING ELECTRONIC TRANSMISSION OF CERTAIN VISUAL MATERIAL DEPICTING MINOR. (a) In this article, "parent" means a natural or adoptive parent, managing or possessory conservator, or legal guardian. The term does not include a parent whose parental rights have been terminated.

(b) If a justice or municipal court finds that a defendant has committed an offense under Section 43.261, Penal Code, the court may 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) A court that enters an order under Subsection (b) shall require the defendant or the defendant's parent to pay the cost of attending an educational program under Subsection (b) if the court

1 determines that the defendant or the defendant's parent is
2 financially able to make payment.

3 SECTION 15. Subsections (b) and (d), Section 51.08, Family
4 Code, are amended to read as follows:

5 (b) A court in which there is pending a complaint against a
6 child alleging a violation of a misdemeanor offense punishable by
7 fine only other than a traffic offense or a violation of a penal
8 ordinance of a political subdivision other than a traffic offense:

9 (1) except as provided by Subsection (d), shall waive
10 its original jurisdiction and refer the child to juvenile court if:

11 (A) the complaint pending against the child
12 alleges a violation of a misdemeanor offense under Section 43.261,
13 Penal Code, that is punishable by fine only; or

14 (B) the child has previously been convicted of:

15 (i) [(A)] two or more misdemeanors punishable by fine only
16 other than a traffic offense;

17 (ii) [(B)] two or more violations of a
18 penal ordinance of a political subdivision other than a traffic
19 offense; or

20 (iii) [(C)] one or more of each of the types
21 of misdemeanors described in Subparagraph (i) or (ii) [Paragraph
22 (A) or (B)]; and

23 (2) may waive its original jurisdiction and refer the
24 child to juvenile court if the child:

25 (A) has not previously been convicted of a
26 misdemeanor punishable by fine only other than a traffic offense or
27 a violation of a penal ordinance of a political subdivision other

1 than a traffic offense; or

2 (B) has previously been convicted of fewer than
3 two misdemeanors punishable by fine only other than a traffic
4 offense or two violations of a penal ordinance of a political
5 subdivision other than a traffic offense.

6 (d) A court that has implemented a juvenile case manager
7 program under Article 45.056, Code of Criminal Procedure, may, but
8 is not required to, waive its original jurisdiction under
9 Subsection (b)(1)(B) [~~(b)(1)~~].

10 SECTION 16. Section 51.13, Family Code, is amended by
11 amending Subsection (a) and adding Subsection (e) to read as
12 follows:

13 (a) Except as provided by Subsections (d) and (e)
14 [~~Subsection (d)~~], an order of adjudication or disposition in a
15 proceeding under this title is not a conviction of crime. Except as
16 provided by Chapter 841, Health and Safety Code, an order of
17 adjudication or disposition does not impose any civil disability
18 ordinarily resulting from a conviction or operate to disqualify the
19 child in any civil service application or appointment.

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

24 SECTION 17. Chapter 54, Family Code, is amended by adding
25 Section 54.0404 to read as follows:

26 Sec. 54.0404. ELECTRONIC TRANSMISSION OF CERTAIN VISUAL
27 MATERIAL DEPICTING MINOR: EDUCATIONAL PROGRAMS. (a) If a child

1 is found to have engaged in conduct indicating a need for
2 supervision described by Section 51.03(b)(7), the juvenile court
3 may enter an order requiring the child to attend and successfully
4 complete an educational program described by Section 37.218,
5 Education Code, or another equivalent educational program.

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

12 SECTION 18. Section 58.003, Family Code, is amended by
13 adding Subsections (c-3) and (c-4) and amending Subsection (d) to
14 read as follows:

15 (c-3) Notwithstanding Subsections (a) and (c) and subject
16 to Subsection (b), a juvenile court may order the sealing of records
17 concerning a child found to have engaged in conduct indicating a
18 need for supervision that violates Section 43.261, Penal Code, or
19 taken into custody to determine whether the child engaged in
20 conduct indicating a need for supervision that violates Section
21 43.261, Penal Code, if the child attends and successfully completes
22 an educational program described by Section 37.218, Education Code,
23 or another equivalent educational program. The court may:

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

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

(c-4) A prosecuting attorney or juvenile probation department may 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). The prosecuting attorney or juvenile probation department, as applicable, shall 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) The court may grant the relief authorized in Subsection (a), ~~or~~ (c-1), 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). If the child is referred to the juvenile court for conduct constituting any offense and at the adjudication hearing the child is found to be not guilty of each offense alleged, the court shall immediately and without any additional hearing order the sealing of all files and records relating to the case.

SECTION 19. Subsection (a), Section 59.004, Family Code, is amended to read as follows:

(a) For a child at sanction level one, the juvenile court or probation department may:

(1) require counseling for the child regarding the child's conduct;

(2) inform the child of the progressive sanctions that may be imposed on the child if the child continues to engage in delinquent conduct or conduct indicating a need for supervision;

1 (3) inform the child's parents or guardians of the
2 parents' or guardians' responsibility to impose reasonable
3 restrictions on the child to prevent the conduct from recurring;

4 (4) provide information or other assistance to the
5 child or the child's parents or guardians in securing needed social
6 services;

7 (5) require the child or the child's parents or
8 guardians to participate in a program for services under Section
9 264.302, if a program under Section 264.302 is available to the
10 child or the child's parents or guardians;

11 (6) refer the child to a community-based citizen
12 intervention program approved by the juvenile court; ~~and~~

13 (7) release the child to the child's parents or
14 guardians; and

15 (8) require the child to attend and successfully
16 complete an educational program described by Section 37.218,
17 Education Code, or another equivalent educational program.

18 SECTION 20. Subsection (a), Section 61.002, Family Code, is
19 amended to read as follows:

20 (a) Except as provided by Subsection (b), this chapter
21 applies to a proceeding to enter a juvenile court order:

22 (1) for payment of probation fees under Section
23 54.061;

24 (2) for restitution under Sections 54.041(b) and
25 54.048;

26 (3) for payment of graffiti eradication fees under
27 Section 54.0461;

- 1 (4) for community service under Section 54.044(b);
- 2 (5) for payment of costs of court under Section
- 3 54.0411 or other provisions of law;
- 4 (6) requiring the person to refrain from doing any act
- 5 injurious to the welfare of the child under Section 54.041(a)(1);
- 6 (7) enjoining contact between the person and the child
- 7 who is the subject of a proceeding under Section 54.041(a)(2);
- 8 (8) ordering a person living in the same household
- 9 with the child to participate in counseling under Section
- 10 54.041(a)(3);
- 11 (9) requiring a parent or guardian of a child found to
- 12 be truant to participate in an available program addressing truancy
- 13 under Section 54.041(f);
- 14 (10) requiring a parent or other eligible person to
- 15 pay reasonable attorney's fees for representing the child under
- 16 Section 51.10(e);
- 17 (11) requiring the parent or other eligible person to
- 18 reimburse the county for payments the county has made to an attorney
- 19 appointed to represent the child under Section 51.10(j);
- 20 (12) requiring payment of deferred prosecution
- 21 supervision fees under Section 53.03(d);
- 22 (13) requiring a parent or other eligible person to
- 23 attend a court hearing under Section 51.115;
- 24 (14) requiring a parent or other eligible person to
- 25 act or refrain from acting to aid the child in complying with
- 26 conditions of release from detention under Section 54.01(r);
- 27 (15) requiring a parent or other eligible person to

1 act or refrain from acting under any law imposing an obligation of
2 action or omission on a parent or other eligible person because of
3 the parent's or person's relation to the child who is the subject of
4 a proceeding under this title; ~~[or]~~

5 (16) for payment of fees under Section 54.0462; or

6 (17) for payment of the cost of attending an
7 educational program under Section 54.0404.

8 SECTION 21. Subchapter G, Chapter 37, Education Code, is
9 amended by adding Section 37.218 to read as follows:

10 Sec. 37.218. PROGRAMS ON DANGERS OF STUDENTS SHARING VISUAL
11 MATERIAL DEPICTING MINOR ENGAGED IN SEXUAL CONDUCT. (a) In this
12 section:

13 (1) "Bullying" has the meaning assigned by Section
14 25.0342.

15 (2) "Cyberbullying" means the use of any electronic
16 communication device to engage in bullying or intimidation.

17 (3) "Harassment" has the meaning assigned by Section
18 37.001.

19 (4) "Sexual conduct" has the meaning assigned by
20 Section 43.25, Penal Code.

21 (b) The center, in consultation with the office of the
22 attorney general, shall develop programs for use by school
23 districts that address:

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

27 (2) other possible consequences of sharing visual

1 material depicting a minor engaged in sexual conduct, including:

2 (A) negative effects on relationships;

3 (B) loss of educational and employment
4 opportunities; and

5 (C) possible removal, if applicable, from
6 certain school programs or extracurricular activities;

7 (3) the unique characteristics of the Internet and
8 other communications networks that could affect visual material
9 depicting a minor engaged in sexual conduct, including:

10 (A) search and replication capabilities; and

11 (B) a potentially worldwide audience;

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

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

17 (c) Each school district shall annually provide or make
18 available information on the programs developed under Subsection
19 (b) to parents and students in a grade level the district considers
20 appropriate. Each district shall provide or make available the
21 information by any means the district considers appropriate.

22 SECTION 22. (a) Not later than January 1, 2012, the Texas
23 School Safety Center shall develop the program required under
24 Subsection (b), Section 37.218, Education Code, as added by this
25 Act.

26 (b) Subsection (c), Section 37.218, Education Code, as
27 added by this Act, applies beginning with the 2012-2013 school

S.B. No. 407

1 year.

2 SECTION 23. This Act takes effect September 1, 2011.

COMMITTEE AMENDMENT NO. 1

Amend S.B. No. 407 (senate engrossed version) by adding the following appropriately numbered SECTIONS to the bill and renumbering subsequent SECTIONS of the bill accordingly:

SECTION _____. Section 43.26, Penal Code, is amended by adding Subsection (h) to read as follows:

(h) It is a defense to prosecution under Subsection (a) or (e) 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 _____. 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. 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. 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.

Gallego