

HOUSE No. 4498

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, May 25, 2022.

The committee on Ways and Means, to whom was referred the Bill relative to transmitting indecent visual depictions by teens (House, No. 1859), reports recommending that the accompanying bill (House, No. 4498) ought to pass.

For the committee,

AARON MICHLEWITZ.

HOUSE No. 4498

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Second General Court
(2021-2022)**

An Act relative to transmitting indecent visual depictions by teens and the unlaw [sic] distribution of explicit images.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 12 of the General Laws is hereby amended by inserting after
2 section 35 the following section:-

3 Section 36. The attorney general, in consultation with the department of elementary and
4 secondary education, shall develop and implement a comprehensive educational diversion
5 program. The attorney general may solicit input from the Massachusetts Aggression Reduction
6 Center at Bridgewater State University. The program shall be designed to provide teenagers with
7 information about the legal consequences of and the penalties for transmitting indecent visual
8 depictions known as, “sexting”, or posting indecent visual depictions online, including the
9 applicable federal and state statutes; the non-legal consequences of sexting or posting such
10 pictures, including, but not limited to, the effect on relationships, loss of educational and
11 employment opportunities, and being barred or removed from school programs and
12 extracurricular activities; how the unique characteristics of cyberspace and the internet can
13 produce long-term and unforeseen consequences for sexting and posting such photographs; and

14 the connection between bullying and cyber-bulling and juveniles sexting or posting sexual
15 images. The educational diversion program shall be used as part of any diversion program
16 required pursuant to section 39N of chapter 119 and shall be made available to school districts
17 for use in educational programs on the topic.

18 SECTION 2. Chapter 71 of the General Laws is hereby amended by inserting after
19 section 98 the following section:-

20 Section 99. The department shall encourage school districts to implement instruction in
21 media literacy skills at all grade levels, and in any of the core subjects or other subjects, to equip
22 students with the knowledge and skills for accessing, analyzing, evaluating, and creating all
23 types of media and use the educational diversion program established pursuant to section 35 of
24 chapter 12 for educational programs on the topic.

25 SECTION 3. Chapter 119 of the General Laws is hereby amended by inserting after
26 section 39M the following section:-

27 Section 39N. (a) If a child is alleged to be a juvenile delinquent by reason of violating
28 sections 29B, 29C, or 29D of chapter 272 the court shall, prior to arraignment, indefinitely stay
29 arraignment and direct that the child enter and complete the educational diversion program
30 established pursuant to section 35 of chapter 12; provided, however, that the district attorney
31 may object in writing to the stay of arraignment. If the district attorney so objects, the court shall
32 consider the district attorney's objections in its decision to direct a child to enter and complete
33 said education diversion program. If the court finds, on its own motion or at the request of the
34 district attorney, that the child has failed to complete the diversion program, the court shall bring

35 the case forward, arraign the child and restore the delinquency complaint to the docket for further
36 proceedings.

37 (b) If a child is alleged to be a juvenile delinquent by reason of violating sections 29B,
38 29C, or 29D of chapter 272 and if arraignment has already occurred, the court shall place the
39 child on pretrial probation under section 87 of chapter 276. The conditions of such probation
40 shall include, but not be limited to, completion of the educational diversion program established
41 in section 35 of chapter 12; provided, however, that the district attorney may object in writing to
42 pretrial probation. If the district attorney so objects, the court shall consider the district attorney's
43 objections in its decision to place the child on pretrial probation. If the court finds, on its own
44 motion or at the request of the district attorney, that the child has failed to comply with the
45 conditions of probation, the court shall restore the delinquency complaint to the docket for trial
46 or further proceedings.

47 SECTION 4. Section 43A of chapter 265 of the General Laws, as appearing in the 2020
48 Official Edition, is hereby amended by striking out, in line 7, the figure "\$1,000" and inserting in
49 place thereof the following figure:- \$5,000.

50 SECTION 5. Said section 43A of said chapter 265, as so appearing, is hereby further
51 amended by striking out subsection (b) and inserting in place thereof the following subsections:-

52 (b)(1) As used in this subsection the following words shall, unless the context clearly
53 requires otherwise have the following meanings:

54 "Distribute", give, sell, transfer, disseminate, publish, upload, circulate, broadcast, or
55 engage in any other form of transmission, electronic or otherwise.

56 “Identifiable”, identifiable from the visual material itself or information offered in
57 connection with the visual material.

58 “Partially nude”, the exposure of fully uncovered buttocks, or all or part of the human
59 genitals or the female nipple-areolar complex.

60 “Publish”, disseminate with the intent that such image or images be made available by
61 any means to any person or other legal entity; disseminate with the intent that such images be
62 sold by another person or legal entity; post, present, display, exhibit, circulate, advertise or allow
63 access by any means, so as to make an image or images available to the public; or disseminate
64 with the intent that an image or images be posted, presented, displayed, exhibited, circulated,
65 advertised or made accessible by any means, and to make such images available to the public.

66 “Visual material”, any photograph, film, video, or digital image or recording, whether
67 produced by electronic, mechanical or other means or any part, representation or reproduction
68 thereof.

69 (2) Whoever knowingly distributes visual material depicting another person, either
70 identifiable in the visual material or identified by the distributing person, who is nude, partially
71 nude or engaged in sexual conduct, when the distribution causes physical or economic injury to
72 the person depicted in the visual material or causes the person depicted in the visual material to
73 suffer substantial emotional distress, and does so with the intent to harm, harass, intimidate,
74 threaten, coerce or cause emotional distress, or does so with reckless disregard for the depicted
75 person’s lack of consent to the distribution of the visual material and reasonable expectation that
76 the visual material would remain private, shall be guilty of the crime of criminal harassment and

77 shall be punished by imprisonment in a house of correction for not more than 2½ years, by a fine
78 of not more than \$10,000, or by both such fine and imprisonment.

79 (3) For purposes of this subsection, consent to the creation of visual material shall not
80 constitute consent to the distribution of the visual material.

81 (4) This subsection shall not preclude other remedies available at law or in equity,
82 including, but not limited to, the issuance by a court with proper jurisdiction of appropriate
83 orders to restrain or prevent the distribution of visual material in violation of this subsection.

84 (5) Visual material that is part of any court record arising from a prosecution under this
85 subsection shall not be open to public inspection and, unless otherwise ordered in writing by the
86 court, shall only be made available for inspection by court personnel to a prosecuting attorney, a
87 defendant's attorney, a defendant or a victim connected to such prosecution. This does not
88 prohibit disclosure, inspection or other use of the visual material in the underlying prosecution or
89 any related court proceeding in accordance with applicable evidentiary and procedural rules or
90 court order.

91 (6) This subsection shall not apply to: (i) visual material involving nudity, partial nudity
92 or sexual conduct that is: (A) voluntary or consensual and occurring in a commercial setting, or
93 (B) voluntary or consensual and occurring in a place where a person does not have a reasonable
94 expectation of privacy; (ii) distribution made in the public interest, including the reporting of
95 unlawful conduct; (iii) lawful and common practices of law enforcement, criminal reporting,
96 corrections, legal proceedings or medical treatment, including telemedicine; (iv) distribution of
97 visual material that constitutes a matter of public concern; (v) interactive computer services, as
98 defined in 47 U.S.C. section 230(f)(2), for content solely provided by another person; or (vi)

99 information services or telecommunications services, as defined in 47 U.S.C. section 153, for
100 content solely provided by another person.

101 (c) Whoever, after having been convicted of the crime of criminal harassment, commits a
102 second or subsequent offense, or whoever commits the crime of criminal harassment having
103 previously been convicted of a violation of section 43, shall be punished by imprisonment in a
104 house of correction for not more than 2½ years or by imprisonment in a state prison for not more
105 than 10 years, by a fine of not more than \$15,000, or by both such fine and imprisonment.

106 SECTION 6. Chapter 272 of the General Laws is hereby amended by inserting after
107 section 29C the following section:-

108 Section 29D. (a) Whoever, while under 18 years of age, (i) possesses or disseminates to
109 another person any visual material in violation of section 29B or section 29C, or (ii) whoever,
110 while under 18 years of age, uploads visual material of another person in violation of this section
111 to an internet website, shall be punished by commitment to the department of youth services for
112 not more than 6 months, by a fine of not less than \$50.00 and not more than \$500.00, or by both
113 such fine and commitment.

114 (b) A person does not knowingly disseminate the material in violation of this section by
115 reporting the matter to a law enforcement agency, parent, teacher, principal, or other relevant
116 school personnel, or by affording a law enforcement agency, parent, teacher, principal or other
117 relevant school personnel access to the material.

118 (c) A person who has been adjudicated under this section shall not be required to register
119 with the sex offender registry board and no data relating to such adjudication shall be transmitted
120 to the board pursuant to section 178E of chapter 6.

121 (d) The juvenile court department shall have exclusive jurisdiction of proceedings under
122 this section.

123 (e) It shall be an affirmative defense for any crime alleged under sections 29A, 29B, 29C,
124 or under this section that: (i) the visual material portrays no person other than the defendant; or
125 (ii) the defendant was under 18 years of age, the visual material portrays only an individual age
126 16 or older and was knowingly and voluntarily created and provided to the defendant by the
127 individual in the image, and the defendant has not provided or made available the material to
128 another person except the individual depicted who originally sent the material to the defendant.

129 (f) Nothing in this section shall be construed to prohibit a prosecution for disorderly
130 conduct, public indecency, child pornography, or any other applicable provision of law.