

SENATE No. 3167

The Commonwealth of Massachusetts

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

SENATE, December 29, 2022.

The committee on Senate Ways and Means, to whom was referred the House Bill relative to transmitting indecent visual depictions by teens and the unlaw [sic] distribution of explicit images (House, No. 4498); reports, recommending that the same ought to pass with an amendment striking out all after the enacting clause and inserting in place thereof the text of Senate document numbered 3167.

For the committee,
Michael J. Rodrigues

The Commonwealth of Massachusetts

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

1 SECTION 1. Chapter 18C of the General Laws is hereby amended by adding the
2 following section:-

3 Section 15. The office of the child advocate, in consultation with the department of
4 elementary and secondary education, the department of youth services and the attorney general,
5 shall develop and implement a comprehensive educational diversion program. The program shall
6 be designed to provide adolescents with information about: (i) the legal consequences of and the
7 penalties for transmitting visual material in violation of section 43A of chapter 265 or section
8 29D of chapter 272, also known as “sexting”, or posting such visual material online, including an
9 explanation of other applicable federal and state law; (ii) the non-legal consequences of sexting
10 or posting such visual material online, including, but not limited to, the effect on relationships,
11 loss of educational and employment opportunities and being barred or removed from school
12 programs and extracurricular activities; (iii) how the unique characteristics of the internet can
13 produce long-term and unforeseen consequences for sexting and posting such visual material
14 online, including the impact on healthy relationships and the risk of trafficking; and (iv) the
15 connection between bullying and cyber-bulling, sexual assault and dating violence and juveniles
16 sexting or posting such visual material online. The child advocate shall consult the best available
17 research on effective educational diversion programs, including programs on sexting, in

18 designing the curriculum and shall regularly review the program design and make updates to
19 improve efficacy. The child advocate shall solicit public comment prior to the development of
20 the curriculum or the implementation of any significant changes to the curriculum or program.
21 The child advocate may establish the program, or any aspect of the program, in partnership with
22 a state institution, state agency or a public or private institution of higher education. The
23 educational diversion program shall be used as part of any diversion program required pursuant
24 to section 39N of chapter 119 and shall be made available to school districts for use in
25 educational programs on the topic. Law enforcement, clerk magistrates and district attorneys
26 may refer youth alleged to be a juvenile delinquent by reason of violating section 29B, 29C or
27 29D of chapter 272 to the educational diversion program.

28 SECTION 2. Chapter 71 of the General Laws is hereby amended by adding the following
29 section:-

30 Section 99. The department shall encourage school districts to: (i) implement instruction
31 in media literacy skills at all grade levels, including life skills programming, and in any of the
32 core subjects under section 1D of chapter 69 or other subjects, to equip students with the
33 knowledge and skills for accessing, analyzing, evaluating and creating all types of media; and (ii)
34 use the content of the educational diversion program established pursuant to section 15 of
35 chapter 18C for educational programs on the topic of transmitting visual material in violation of
36 section 43A of chapter 265 or section 29D of chapter 272 or posting such visual material online.

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

39 Section 39N. (a) If a child is alleged to be a juvenile delinquent by reason of violating
40 sections 29B, 29C or 29D of chapter 272, the court shall divert the child from further court
41 processing prior to arraignment unless the court finds that failure to proceed with the arraignment
42 would result in the substantial likelihood of serious harm to a member of the community. If
43 arraignment has already occurred, the court may, if the child consents, stay the proceedings and
44 divert the child in the same manner as a child diverted prior to arraignment under this section.
45 The court shall direct a child diverted under this section to enter and complete the educational
46 diversion program established pursuant to section 15 of chapter 18C.

47 (b) A child who is alleged to be a juvenile delinquent by reason of violating sections 29B,
48 29C or 29D of chapter 272 may, upon the request of the child, undergo an assessment prior to
49 arraignment to enable the judge to consider the suitability of the child for diversion to the
50 educational diversion program established pursuant to section 15 of chapter 18C. If a child
51 chooses to request a continuance for the purpose of such an assessment, the child shall notify the
52 judge prior to arraignment. Upon receipt of such notification, the judge may grant a 14-day
53 continuance. The department of probation may conduct such assessment prior to arraignment to
54 assist the judge in making that decision. If the judge determines it is appropriate, a determination
55 of eligibility by the personnel of the educational diversion program may substitute for an
56 assessment. If a case is continued pursuant to this subsection, the child shall not be arraigned,
57 and an entry shall not be made into the criminal offender record information system, until a
58 judge issues an order to resume the ordinary processing of a delinquency proceeding. A judge
59 may order diversion without first ordering an assessment in any case in which the court finds that
60 sufficient information is available without an assessment; provided, however, that the judge shall

61 provide an opportunity for both the commonwealth and counsel for the child to be heard
62 regarding diversion of the child.

63 (c)(1) After the completion of the assessment, the probation officer or the director of the
64 educational diversion program established pursuant to section 15 of chapter 18C shall submit to
65 the court and to counsel for the child a recommendation as to whether the child would benefit
66 from diversion. Upon receipt of the recommendation, the judge shall provide an opportunity for
67 both the commonwealth and counsel for the child to be heard regarding diversion of the child.
68 The judge shall then make a final determination as to the eligibility of the child for diversion.
69 The proceedings of a child who is found eligible for diversion shall be stayed for 90 days unless
70 the judge determines that the interest of justice would best be served by a lesser period of time or
71 unless extended under subsection (f).

72 (2) A stay of proceedings shall not be granted under this section unless the child consents
73 in writing to the terms and conditions of the stay of proceedings and, after consultation with legal
74 counsel, knowingly executes a waiver of the child's right to a speedy trial on a form approved by
75 the chief justice of the juvenile court department of the trial court of the commonwealth. Consent
76 shall be given only upon the advice of counsel.

77 (3) The following shall not be admissible against the child in any proceedings: (i) a
78 request for assessment; (ii) a decision by the child not to enter the educational diversion
79 program; (iii) a determination by the department of probation or by the educational diversion
80 program that the child would not benefit from diversion; (iv) any statement made by the child or
81 the child's family during the course of assessment; and (v) circumstances regarding the child's
82 failure to complete the educational diversion program. Any consent by a child to a stay of

83 proceedings or any act done or statement made in fulfillment of the terms and conditions of a
84 stay of proceedings shall not be admissible as an admission, implied or otherwise, against the
85 child if the stay of proceedings was terminated and proceedings were resumed on the original
86 complaint. A statement or other disclosure or a record thereof made by a child during the course
87 of an assessment or during the stay of proceedings shall not be disclosed at any time to a
88 commonwealth or other law enforcement officer in connection with the investigation or
89 prosecution of any charges against the child or a codefendant.

90 (4) If a child is found eligible for diversion pursuant to this section, the child shall not be
91 arraigned and an entry shall not be made into the criminal offender record information system
92 unless a judge issues an order to resume the ordinary processing of a delinquency proceeding. If
93 a child is found eligible pursuant to this section, the eligibility shall not be considered an
94 issuance of a criminal complaint for the purposes of section 37H1/2 of chapter 71.

95 (d) A district attorney may divert any child for whom there is probable cause to issue a
96 complaint, either before or after the assessment procedure set forth in subsection (b), with or
97 without the permission of the court. A district attorney who diverts a case pursuant to this
98 subsection may request a report from the educational diversion program established pursuant to
99 section 15 of chapter 18C regarding the child's status in and completion of the program.

100 (e) If during the stay of proceedings a child is charged with a subsequent offense under
101 sections 29B, 29C or 29D of chapter 272, a judge in the court that entered the stay of
102 proceedings may issue such process as is necessary to bring the child before the court. When the
103 child is brought before the court, the judge shall afford the child an opportunity to be heard. If
104 the judge finds probable cause to believe that the child has committed such a subsequent offense,

105 the judge may order that the stay of proceedings be terminated and that the commonwealth be
106 permitted to proceed on the original complaint as provided by law.

107 (f)(1) Upon the expiration of the initial 90-day stay of proceedings, the probation officer
108 or the director of the educational diversion program, established pursuant to section 15 of chapter
109 18C, shall submit to the court a report indicating the successful completion of diversion by the
110 child or recommending an extension of the stay of proceedings for not more than an additional
111 90 days so that the child may complete the diversion program successfully.

112 (2) If the probation officer or the director of the educational diversion program,
113 established pursuant to section 15 of chapter 18C, indicates the successful completion of
114 diversion by a child, the judge shall dismiss the original complaint pending against the child. If
115 the report recommends an extension of the stay of proceedings, the judge may, on the basis of
116 the report and any other relevant evidence, take such action as the judge deems appropriate,
117 including the dismissal of the complaint, the granting of an extension of the stay of proceedings
118 or the resumption of proceedings.

119 (3) If the conditions of diversion have not been met, the child's attorney shall be notified
120 prior to the termination of the child from diversion and the judge may grant an extension to the
121 stay of proceedings if the child provides good cause for failing to comply with the conditions of
122 diversion.

123 (4) If the judge dismisses a complaint under this subsection, the court shall, unless the
124 child objects, enter an order directing expungement of any records of the complaint and related
125 proceedings maintained by the clerk, the court, the department of criminal justice information
126 services and the court activity record index.

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

130 SECTION 5. Said section 43A of said chapter 265, as so appearing, is hereby further
131 amended by striking out subsection (b) and inserting in place thereof the following 2
132 subsections:-

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

135 “Distribute”, give, sell, transfer, disseminate, publish, upload, circulate, broadcast or
136 engage in any other form of transmission, electronic or otherwise.

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

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

141 “Publish”, (i) disseminate with the intent that an image be made available by any means
142 to any person or other legal entity; (ii) disseminate with the intent that an image be sold by
143 another person or legal entity; (iii) post, present, display, exhibit, circulate, advertise or allow
144 access by any means, so as to make an image available to the public; or (iii) disseminate with the
145 intent that an image be posted, presented, displayed, exhibited, circulated, advertised or made
146 accessible by any means and to make the image available to the public.

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

150 (2) Whoever knowingly distributes visual material depicting another person, either
151 identifiable in the visual material or identified by the distributing person, who is nude, partially
152 nude or engaged in sexual conduct, when the distribution causes physical or economic injury to
153 the person depicted in the visual material or causes the person depicted in the visual material to
154 suffer substantial emotional distress, and does so with the intent to harm, harass, intimidate,
155 threaten, coerce or cause substantial emotional distress and with reckless disregard for the
156 depicted person’s lack of consent to the distribution of the visual material and reasonable
157 expectation that the visual material would remain private, imprisonment in a house of correction
158 for not more than 2½ years, by a fine of not more than \$10,000 or by both such fine and
159 imprisonment.

160 (3) For the purposes of this subsection, a person’s consent to the creation of visual
161 material shall not constitute consent to the distribution of the visual material.

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

165 (5) Visual material that is part of any court record arising from a prosecution under this
166 subsection shall not be open to public inspection and, unless otherwise ordered in writing by the
167 court or required by law, shall only be made available for inspection by court personnel to a
168 prosecuting attorney, a defendant’s attorney or the attorney’s agent, a defendant or a victim

169 connected to such prosecution; provided, however, that this paragraph shall not prohibit
170 disclosure, inspection or other use of the visual material in the underlying prosecution or any
171 related court proceeding in accordance with applicable evidentiary and procedural rules or court
172 orders.

173 (6) This subsection shall not apply to: (i) visual material involving nudity, partial nudity
174 or sexual conduct that is voluntary or consensual and occurring (A) in a commercial setting or
175 for commercial gain; or (B) in a place where a person does not have a reasonable expectation of
176 privacy; (ii) distribution made in the public interest, including the reporting of unlawful conduct;
177 (iii) criminal reporting, corrections, legal proceedings or medical treatment, including
178 telemedicine; (iv) interactive computer services, as defined in 47 U.S.C. 230(f)(2), for content
179 solely provided by another person; or (v) information services or telecommunications services,
180 as defined in 47 U.S.C. 153, for content solely provided by another person.

181 (c) Whoever, after having been convicted of an offense under this section, commits a
182 second or subsequent offense under this section, or whoever, after having been convicted of a
183 violation of section 43, commits an offense under this section shall be punished by imprisonment
184 in a house of correction for not more than 2½ years or in a state prison for not more than 10
185 years, by a fine of not more than \$15,000 or by both such fine and imprisonment.

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

188 Section 29D. (a) Whoever, while under the age of criminal majority, possesses or
189 disseminates to another person any visual material in violation of section 29B or section 29C or

190 uploads such visual material of another person to an internet website may be punished in
191 accordance with section 58 of chapter 119.

192 (b) Knowingly disseminating visual material by reporting the matter to a law enforcement
193 agency, parent, foster parent, guardian or teacher, principal or other relevant school personnel, or
194 by affording a law enforcement agency, parent, foster parent, guardian or teacher, principal or
195 other relevant school personnel access to the visual material for purposes within the agency's or
196 person's professional capacity shall not constitute dissemination for the purposes of this section.

197 (c) A person who has been adjudicated under this section shall not be required to register
198 with the sex offender registry board and no data relating to such adjudication shall be transmitted
199 to the board pursuant to section 178E of chapter 6; provided further, that said adjudication shall
200 be eligible for expungement and shall not be considered ineligible under section 100J of chapter
201 276.

202 (d) The juvenile court department of the trial court of the commonwealth shall have
203 exclusive jurisdiction of proceedings under this section.

204 (e) It shall be an affirmative defense for any crime alleged under section 29A, section
205 29B, section 29C or this section that: (i) the visual material portrays no person other than the
206 defendant; or (ii) the defendant was under the age of criminal majority, the visual material
207 portrays only an individual age 16 or older and was knowingly and voluntarily created and
208 provided to the defendant by the individual in the image and the defendant has not provided or
209 made available the material to another person except the individual depicted who originally sent
210 the material to the defendant.