SENATE DOCKET, NO. 724 FILED ON: 1/18/2023

SENATE . . . . . No. 1012

The Commonwealth of Massachusetts

PRESENTED BY:

John F. Keenan

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to transmitting indecent visual depictions by teens and the unlawful distribution of explicit images.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	
John F. Keenan	*Norfolk and Plymouth*	
James K. Hawkins	*2nd Bristol*	*2/7/2023*
Walter F. Timilty	*Norfolk, Plymouth and Bristol*	*2/8/2023*
Kay Khan	*11th Middlesex*	*2/9/2023*
Patrick M. O'Connor	*First Plymouth and Norfolk*	*2/9/2023*
Michelle M. DuBois	*10th Plymouth*	*2/13/2023*
Steven S. Howitt	*4th Bristol*	*2/17/2023*
Anne M. Gobi	*Worcester and Hampshire*	*2/21/2023*
Michael O. Moore	*Second Worcester*	*2/23/2023*
Paul R. Feeney	*Bristol and Norfolk*	*3/3/2023*
Bruce E. Tarr	*First Essex and Middlesex*	*3/23/2023*
Ryan C. Fattman	*Worcester and Hampden*	*4/5/2023*

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SENATE . . . . . No. 1012

By Mr. Keenan, a petition (accompanied by bill, Senate, No. 1012) of John F. Keenan, James K. Hawkins, Walter F. Timilty, Kay Khan and other members of the General Court for legislation relative to transmit indecent visual depictions by teens and the unlawful distribution of explicit images. The Judiciary.

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Third General Court
(2023-2024)

An Act relative to transmitting indecent visual depictions by teens and the unlawful 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:

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

Section 15. The office of the child advocate, in consultation with the department of elementary and secondary education, the department of youth services and the attorney general, shall develop and implement a comprehensive educational diversion program. The program shall be designed to provide adolescents with information about: (i) the legal consequences of and the penalties for transmitting visual material in violation of section 43A of chapter 265 or section 29D of chapter 272, also known as “sexting”, or posting such visual material online, including an explanation of other applicable federal and state law; (ii) the non-legal consequences of sexting or posting such visual material online, including, but not limited to, the effect on relationships, loss of educational and employment opportunities and being barred or removed from school

programs and extracurricular activities; (iii) how the unique characteristics of the internet can produce long-term and unforeseen consequences for sexting and posting such visual material online, including the impact on healthy relationships and the risk of trafficking; and (iv) the connection between bullying and cyber-bulling, sexual assault and dating violence and juveniles sexting or posting such visual material online. The child advocate shall consult the best available research on effective educational diversion programs, including programs on sexting, in designing the curriculum and shall regularly review the program design and make updates to improve efficacy. The child advocate shall solicit public comment prior to the development of the curriculum or the implementation of any significant changes to the curriculum or program. The child advocate may establish the program, or any aspect of the program, in partnership with a state institution, state agency or a public or private institution of higher education. The educational diversion program shall be used as part of any diversion program required pursuant to section 39N of chapter 119 and shall be made available to school districts for use in educational programs on the topic. Law enforcement, clerk magistrates and district attorneys may refer youth alleged to be a juvenile delinquent by reason of violating section 29B, 29C or 29D of chapter 272 to the educational diversion program.

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

Section 99. The department shall encourage school districts to: (i) implement instruction in media literacy skills at all grade levels, including life skills programming, and in any of the core subjects under section 1D of chapter 69 or other subjects, to equip students with the knowledge and skills for accessing, analyzing, evaluating and creating all types of media; and (ii) use the content of the educational diversion program established pursuant to section 15 of

chapter 18C for educational programs on the topic of transmitting visual material in violation of section 43A of chapter 265 or section 29D of chapter 272 or posting such visual material online.

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

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

(b) A child who is alleged to be a juvenile delinquent by reason of violating sections 29B, 29C or 29D of chapter 272 may, upon the request of the child, undergo an assessment prior to arraignment to enable the judge to consider the suitability of the child for diversion to the educational diversion program established pursuant to section 15 of chapter 18C. If a child chooses to request a continuance for the purpose of such an assessment, the child shall notify the judge prior to arraignment. Upon receipt of such notification, the judge may grant a 14–day continuance. The department of probation may conduct such assessment prior to arraignment to assist the judge in making that decision. If the judge determines it is appropriate, a determination of eligibility by the personnel of the educational diversion program may substitute for an assessment. If a case is continued pursuant to this subsection, the child shall not be arraigned,

and an entry shall not be made into the criminal offender record information system, until a judge issues an order to resume the ordinary processing of a delinquency proceeding. A judge may order diversion without first ordering an assessment in any case in which the court finds that sufficient information is available without an assessment; provided, however, that the judge shall provide an opportunity for both the commonwealth and counsel for the child to be heard regarding diversion of the child.

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

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

(3) The following shall not be admissible against the child in any proceedings: (i) a request for assessment; (ii) a decision by the child not to enter the educational diversion

program; (iii) a determination by the department of probation or by the educational diversion program that the child would not benefit from diversion; (iv) any statement made by the child or the child's family during the course of assessment; and (v) circumstances regarding the child's failure to complete the educational diversion program. Any consent by a child to a stay of proceedings or any act done or statement made in fulfillment of the terms and conditions of a stay of proceedings shall not be admissible as an admission, implied or otherwise, against the child if the stay of proceedings was terminated and proceedings were resumed on the original complaint. A statement or other disclosure or a record thereof made by a child during the course of an assessment or during the stay of proceedings shall not be disclosed at any time to a commonwealth or other law enforcement officer in connection with the investigation or prosecution of any charges against the child or a codefendant.

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

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

(e) If during the stay of proceedings a child is charged with a subsequent offense under sections 29B, 29C or 29D of chapter 272, a judge in the court that entered the stay of proceedings may issue such process as is necessary to bring the child before the court. When the child is brought before the court, the judge shall afford the child an opportunity to be heard. If the judge finds probable cause to believe that the child has committed such a subsequent offense, the judge may order that the stay of proceedings be terminated and that the commonwealth be permitted to proceed on the original complaint as provided by law.

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

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

(3) If the conditions of diversion have not been met, the child's attorney shall be notified prior to the termination of the child from diversion and the judge may grant an extension to the

stay of proceedings if the child provides good cause for failing to comply with the conditions of diversion.

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

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

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

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

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

"Identifiable", identifiable from the visual material itself or information offered in connection with the visual material.

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

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

"Visual material", any photograph, film, video or digital image or recording, whether produced by electronic, mechanical or other means or any part, representation or reproduction thereof.

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

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

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

(5) Visual material that is part of any court record arising from a prosecution under this subsection shall not be open to public inspection and, unless otherwise ordered in writing by the court or required by law, shall only be made available for inspection by court personnel to a prosecuting attorney, a defendant's attorney or the attorney's agent, a defendant or a victim connected to such prosecution; provided, however, that this paragraph shall not prohibit disclosure, inspection or other use of the visual material in the underlying prosecution or any related court proceeding in accordance with applicable evidentiary and procedural rules or court orders.

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

(c) Whoever, after having been convicted of an offense under this section, commits a second or subsequent offense under this section, or whoever, after having been convicted of a violation of section 43, commits an offense under this section shall be punished by imprisonment

in a house of correction for not more than 2½ years or in a state prison for not more than 10 years, by a fine of not more than $15,000 or by both such fine and imprisonment.

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

Section 29D. (a) Whoever, while under the age of criminal majority, possesses or disseminates to another person any visual material in violation of section 29B or section 29C or uploads such visual material of another person to an internet website may be punished in accordance with section 58 of chapter 119.

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

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

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

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

SECTION 7. This act shall take effect six months after enactment.