

Pennsylvania District Attorneys Association: Pennsylvania District Attorneys respond to ACLU's opposition to commonsense changes in "sexting" law.

Press release – February 4, 2010

Footnoted by Juvenile Law Center and American Civil Liberties Union of Pennsylvania

HARRISBURG, PA – The Pennsylvania District Attorneys Association (PDAA) today expressed disappointment in the American Civil Liberties Union's (ACLU) decision to oppose commonsense changes to Pennsylvania's "sexting" laws and issued the following statement by PDAA President and Dauphin County District Attorney Edward M. Marsico, Jr.:

"Current law makes teenage sexting a felony.¹ Pennsylvania's prosecutors are trying to create a fix² that would reduce the severity of the crime of sexting for teens and allow those who engage in the activity the opportunity to have their records expunged³ should a teenager be charged with this new offense

"It's hard to understand the ACLU's position, when the legislative intent of this fix is to make sure that teens don't run into long-term legal and social consequences as a result of sexting.⁴ The

¹ Currently, there are a few district attorneys in Pennsylvania who are charging teens under the child pornography statute, which would make the offense a felony. Importantly, no Pennsylvania court has yet upheld a felony child pornography conviction for teen sexting, and in fact the United States District Court for the Middle District of Pennsylvania found sexted images failed to meet the legal standard for child pornography. *See Miller v. Skumanick*, 605 F. Supp. 2d 624 (M.D. Pa. 2009). Child pornography law is limited to depictions of sexual activity or lewd or lascivious display of genitals. Most sexting scenarios depict simple nudity or even partial nudity which is protected speech under the First Amendment. HB 2189 specifically does not cover any depictions of sexual activity and unconstitutionally targets simple nudity.

² Although HB 2189 has been purportedly introduced to encourage district attorneys to charge youth with misdemeanors rather than felony child pornography charges, nothing in the law would actually prohibit a district attorney from using his discretion to charge a youth with a felony child pornography offense, just as some district attorneys are improperly doing now.

³ It is true that record expungement is available to juveniles. However, regardless of whether the child was charged with a misdemeanor or felony, the expungement law requires that a juvenile wait until age 18 or after five years have passed from their discharge from court supervision before petitioning for expungement. For most teens, this means that their transition from youth to adulthood is made more difficult – juvenile records can be a barrier to successful entry to college, obtaining a job or financial aid, and enlisting in the military. Even if they are eligible for expungement after a certain amount of time has passed, the conviction of a misdemeanor can result in placement in a detention center or juvenile correctional facility, which can be very traumatic for a child. Removal from home, school, parents and friends is a severe event for an adolescent.

⁴ This bill does not prevent long-term negative consequences for teens. Bringing *any* criminal charges against a juvenile – whether felony or misdemeanor – brings long-term legal and social consequences. Under the Juvenile Act, conviction of a misdemeanor for sexting is technically no different from a conviction under the Act for a homicide. For purposes of disposition ('sentencing' under the Act), there are no mandatory sentences, no minimum/maximum, and no sentencing guidelines. Judges are free to impose any sentence up to four years initially and may retain jurisdiction over the juvenile until age 21 -- regardless of the offense for which the juvenile was actually adjudicated delinquent. Whether a felony or misdemeanor, either charge under the Juvenile Act could result in out-of-home placement, and lead to the social stigma attached with being in detention, and barriers to successful reintegration into society.

ACLU is essentially advocating Pennsylvania does nothing at all,⁵ which means kids could still be charged with a felony and wind up dealing with long-term consequences,⁶ including the potential of being listed as a sex offender for up to ten years.⁷ That's simply not right for anyone in Pennsylvania.

"It's also important to understand that sexting, under certain circumstances, is a crime. District Attorneys need to be able to apply the law in a clear and consistent manner and hand down appropriate legal consequences."⁸

"The Pennsylvania District Attorneys Association has responded with educational programs⁹ to help educate teens on the social and legal consequences, but we would also like to see a commonsense legislative change¹⁰ that catches up with technology."

With sexting incidents on the rise, district attorneys throughout Pennsylvania have advocated making appropriate changes to the state's sexting laws while simultaneously conducting local outreach programs to help educate young people, parents and communities regarding the social

⁵ The ACLU and Juvenile Law Center are not proposing that Pennsylvania ignore the risky behavior of sexting. Rather than criminalizing the behavior, however, they advocate the introduction of educational programming so that teens are made aware of the negative consequences of sexting and the harmful effects of having their photographs fall into the wrong hands. This response is supported by experts in adolescent development and consistent with research on adolescent development.

⁶ Again, nothing in HB 2189 limits a district attorney's discretion to bring felony child pornography charges against a juvenile - this bill simply creates an *additional* charge for prosecutors to use against youth. Youth only "wind up" dealing with felony charges if prosecutors fail to exercise reasonable discretion and wrongly charge them with the punitive offense of child pornography.

⁷ Under current law, there is *no* sex offender registration for juveniles in Pennsylvania.

⁸ Sexting is a new and vague term that is applied to a broad and differing range of imagery, depending on whose definition is in play. Most sexting scenarios involve only simple nudity, or even semi-nude images like those seen in a J.C. Penney lingerie catalog - this would all be protected under the First Amendment. The legal definition of obscenity is much more narrow. Sexting is not a crime simply because the district attorneys declare it is. Indeed, this legislation is their attempt to create a crime where none currently exists. District Attorneys must also exercise commonsense when it comes to normative adolescent behavior and resist charging teens with inappropriate, draconian child pornography statutes.

⁹ Juvenile Law Center and the ACLU-PA commend the district attorneys for taking measures to educate youth about the potential negative effects of sexting. Education programs may *prevent* youth from putting themselves in reckless situations. However, criminal prosecutions of such behavior will not deter youth from engaging in sexting. Research shows that young people are not deterred by the threat of potential future prosecutions. Rather, the threat of prosecution will only result in discouraging youth who are actually being abused and exploited from reporting the harm they have suffered for fear of being prosecuted themselves. Moreover, it is unclear whether placing the responsibility for education in the hands of the district attorney is appropriate. Sexting is a home and school problem, not a law enforcement problem.

¹⁰ A commonsense legislative change would be to prohibit the criminalization of sexting entirely in acknowledgment that sexting is merely the convergence of new technology with the long-recognized adolescent need to experiment with their sexuality and sexual expression. The 'technology' does not make this conduct a crime; it is simply the newest way for adolescents to explore and express their sexual identity.

dangers and legal consequences of sexting.

House Bill 2189, introduced by York County state Representative Seth Grove (R-Dover), would make the charge for a minor transmitting or distributing a sexting image to another minor considered a misdemeanor of the second degree.¹¹ PDAA has expressed its support for the legislative change, as current law makes sexting a felony offense.¹² A sexting conviction could result in a permanent record and registration as a sex offender for a period of 10 years or more.

To help educate young people, parents and communities about the social dangers and legal consequences of sexting, PDAA has developed the public outreach program,¹³ “Let’s Talk About Sexting”. The program is available to schools and communities through their local district attorney’s office or by contacting PDAA at www.pdaa.org or (717) 238-5416.

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¹¹ This would include charging an individual who takes a photo of herself and sends it to her intimate partner with a misdemeanor. Also, because the definition of nudity in HB 2189 is overbroad and covers any depiction of nudity, a teenager who sends via email a photo of a Renoir nude painting would be subject to criminal prosecution.

¹² Current law does not make sexting a felony. In fact, misapplication of child pornography charges to sexting scenarios have already been successfully challenged in Pennsylvania courts. Few prosecutors interpret the current child pornography law to cover sexting scenarios, and most district attorneys have properly reached out to youth through education means rather than jumping to senseless prosecution.

¹³ *Talking* to our young people is the key – locking them up and destroying their future employability by saddling them with juvenile records only harms the youth we are charged with protecting. Juvenile Law Center & ACLU-PA would support the legislature providing funding for these and other education and prevention programs.