



Ohio Legislative Service Commission

Bill Analysis

Andrea Holmes

H.B. 80

129th General Assembly
(As Introduced)

Reps. Pillich, Antonio, Fende, Murray, Phillips, Yuko

BILL SUMMARY

Sexting

- Generally prohibits a minor, by use of a telecommunications device, from knowingly sending, posting, exchanging, or sharing a photograph, video, or other material that shows the minor or another minor in a state of nudity.
- Specifies that a minor who violates the above prohibition is guilty of sexting and may be adjudicated as an unruly child (material involves the minor) or delinquent child (material involves another minor) depending on the circumstances of the offense.

Illegal use of a minor in a nudity-oriented material or performance

- Limits the existing offense of illegal use of a minor in a nudity-oriented material or performance to acts committed by persons who are 18 years of age or older but establishes new prohibitions against a minor's use of a minor in a nudity-oriented material or performance as set forth below.
- With certain exceptions, prohibits a minor, by means other than the use of a telecommunications device, from knowingly photographing the minor in a state of nudity or knowingly creating, directing, producing, or transferring any material or performance that shows the minor in a state of nudity.
- With certain exceptions, prohibits a minor from knowingly sharing or viewing, by means other than a telecommunications device, any material or performance that shows the minor in a state of nudity.
- Specifies that a minor who violates either of the two prohibitions discussed in the preceding two dot points is guilty of delinquent use of a minor in a nudity-oriented

material or performance and must be adjudicated as an unruly child, with such disposition of the case as may be appropriate under the Juvenile Court Law.

- With certain exceptions, prohibits a minor, by means other than the use of a telecommunications device, from knowingly photographing another minor who is not the minor's child or ward in a state of nudity or knowingly creating, directing, producing, or transferring any material or performance that shows another minor who is not the minor's child or ward in a state of nudity.
- With certain exceptions, prohibits a minor from knowingly sharing or viewing, by means other than a telecommunications device, any material or performance that shows another minor who is not the minor's child or ward in a state of nudity.
- With an exception, prohibits a minor from knowingly consenting to the photographing of the minor's minor child or ward, or photographing the minor's child or ward, in a state of nudity, consenting to the use of the minor's child or ward in a state of nudity in any material or performance, or using or transferring a material or performance of that nature.
- Specifies that a minor who violates any of the prohibitions discussed in the three preceding dot points is guilty of delinquent use of a minor in a nudity-oriented material or performance and must be adjudicated as a delinquent child, with such disposition of the case as may be appropriate under the Delinquent Child Law.

TABLE OF CONTENTS

Sexting prohibition and penalties	3
Background	3
Operation of the bill	4
Limiting the prohibition regarding illegal use of minor in nudity-oriented material or performance to adults	4
Current law	4
Operation of the bill	6
Minor's use of a minor in a nudity-oriented material or performance	6
Adjudication as an unruly child	6
Adjudication as a delinquent child	6
Exceptions	7
Definitions	9
Definitions in the bill	9
Existing definitions relevant to the bill	9
Unruly and delinquent child dispositions	11

CONTENT AND OPERATION

Sexting prohibition and penalties

Background

The term "sexting" commonly is used to describe a series of practices that involve the taking, sending, or possession of nude or seminude photographs of a person, generally involving persons under 18 years of age, including the following practices: (1) a person under 18 years of age takes nude or seminude photographs of himself or herself and sends them electronically by e-mail or through a cell phone to another person under 18 years of age (such as a boyfriend or girlfriend), (2) a person under 18 years of age takes nude or seminude photographs of another person under 18 years of age (such as a boyfriend or girlfriend) with the other person's consent and retains them on a cell phone, or (3) a person under 18 years of age possesses nude or seminude photographs of himself or herself or nude or seminude photographs of another person under 18 years of age (such as a boyfriend or girlfriend) that were taken with the other person's consent and sent by the other person electronically by e-mail or through a cell phone.

In many cases, one or more existing criminal prohibitions could apply to the type of conduct described in the preceding paragraph. The existing prohibitions that could apply, depending upon the facts and circumstances present, include "disseminating matter harmful to juveniles"¹ (first degree misdemeanor or fourth or fifth degree felony); "pandering obscenity involving a minor"² and "pandering sexually oriented matter involving a minor"³ (second, third, or fourth degree felony); "illegal use of a minor in a nudity-oriented material or performance"⁴ (second, fourth, or fifth degree felony; see "**Limiting the prohibition regarding illegal use of minor in nudity-oriented material or performance to adults**," below, for more detail); "contributing to the unruliness or delinquency of a child"⁵ (first degree misdemeanor); and "endangering children"⁶ (second degree felony).

¹ R.C. 2907.31.

² R.C. 2907.321.

³ R.C. 2907.322.

⁴ R.C. 2907.323.

⁵ R.C. 2919.24.

⁶ R.C. 2919.22.

Operation of the bill

The bill prohibits a minor, by use of a "telecommunications device" (see "**Definitions**," below), from knowingly doing either of the following:

- (1) Sending, posting, exchanging, or sharing a photograph, video, or other "material" that shows the minor in a "state of nudity" (see "**Definitions**," below);
- (2) Sending, posting, exchanging, or sharing a photograph, video, or other material that shows another minor in a state of nudity.⁷

The bill specifies that the above prohibitions do not apply to a minor who sends, posts, exchanges, or shares a photograph, video, or other material that shows the minor or another minor in a state of nudity in connection with a criminal investigation or prosecution, civil action, or other proper purpose.⁸

Anyone who violates either of the above prohibitions is guilty of sexting. A minor who violates the first prohibition discussed above must be adjudicated as an unruly child, with such disposition of the case as may be appropriate under the Juvenile Court Law (see "**Definitions**," below). A violation of the second prohibition discussed above is a delinquent act that would be a third degree misdemeanor on the first offense and a first degree misdemeanor on each subsequent offense if it could be committed by an adult. A minor found to have committed a delinquent act is adjudicated a delinquent child, with such disposition of the case as may be appropriate under the Delinquent Child Law (see "**Definitions**," below).⁹ The bill modifies the definitions of "unruly child" and "delinquent child," as described in "**Definitions**," below, to conform them to the special penalties that the bill provides for a violation of either of the above prohibitions or the other prohibitions in the bill discussed below.¹⁰

Limiting the prohibition regarding illegal use of minor in nudity-oriented material or performance to adults

Current law

Current law prohibits a person from doing any of the following:¹¹

⁷ R.C. 2907.324(A)(1).

⁸ R.C. 2907.324(A)(2).

⁹ R.C. 2907.324(E).

¹⁰ R.C. 2151.022(D) and 2152.02(F)(3).

¹¹ R.C. 2907.324(B)(1) and (D)(1).

(1) Photographing any minor who is not the person's child or ward in a state of "nudity," or creating, directing, producing, or transferring any "material" or "performance" that shows the minor in a state of nudity (see "**Definitions**," below);

(2) Consenting to the photographing of the person's minor child or ward, or photographing the person's minor child or ward, in a state of nudity or consenting to the use of the person's minor child or ward in a state of nudity in any material or performance, or using or transferring a material or performance of that nature;

(3) Possessing or viewing any material or performance that shows a minor who is not the person's child or ward in a state of nudity.

The prohibitions described in paragraphs (2) and (3) above do not apply if the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into Ohio, or presented for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material. The prohibition described in paragraph (1) above does not apply if the factor described in the preceding sentence is satisfied and if the minor's parents, guardian, or custodian consents in writing to the photographing of the minor, the use of the minor in the material or performance, or the transfer of the material and the specific manner in which the material or performance is to be used. The prohibition described in paragraph (3) above does not apply if the person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred. A violation of the prohibition is the offense of "illegal use of a minor in a nudity-oriented material or performance."

A violation of the prohibition described in paragraph (1) or (2) above is a second degree felony. If the offender is convicted of a specification described in R.C. 2941.1422, the court must sentence the offender to a mandatory prison term and order the offender to make restitution. A violation of the prohibition described in paragraph (3) above is a fifth degree felony or if the offender previously has been convicted of illegal use of a minor in a nudity-oriented material or performance or a violation of R.C. 2907.321 or 2907.322 a fourth degree felony.

Operation of the bill

The bill limits the offense of illegal use of a minor in a nudity-oriented material or performance to acts committed by persons who are 18 years of age or older. The bill also includes attorneys in the exceptions to the prohibitions that are discussed above.¹²

Minor's use of a minor in a nudity-oriented material or performance

As described above, the bill limits the offense of illegal use of a minor in a nudity-oriented material or performance to acts committed by persons who are 18 years of age or older. Related to that change, it establishes five new prohibitions against a minor's use of a minor in a nudity-oriented material or performance. With respect to two of the prohibitions, a minor is required to be adjudicated as an unruly child if a violation is committed. With respect to the remaining three prohibitions, a minor is required to be adjudicated as a delinquent child if a violation is committed.

Adjudication as an unruly child

With specified exceptions (see "**Exceptions**," below), the bill prohibits a minor, by means other than the use of a "telecommunications device" (see "**Definitions**," below), from doing either of the following:¹³

(1) Knowingly photographing the minor in a state of nudity or knowingly creating, directing, producing, or transferring any material or performance that shows the minor in a state of nudity;

(2) Knowingly sharing or viewing any material or performance that shows the minor in a state of nudity.

Under the bill, a minor who violates these prohibitions is guilty of delinquent use of a minor in a nudity-oriented material or performance. A minor who violates either of the prohibitions must be adjudicated as an unruly child (see "**Definitions**," below), with such disposition of the case as may be appropriate under the Juvenile Court Law.¹⁴

Adjudication as a delinquent child

With specified exceptions (see "**Exceptions**," below), the bill prohibits a minor, by means other than the use of a telecommunications device, from knowingly photographing another minor who is not the minor's child or ward in a state of nudity

¹² R.C. 2907.323.

¹³ R.C. 2907.324(B)(1) and (D)(1).

¹⁴ R.C. 2907.324(E).

or knowingly creating, directing, producing, or transferring any material or performance that shows another minor who is not the minor's child or ward in a state of nudity. A minor who violates this prohibition is guilty of delinquent use of a minor in a nudity-oriented material or performance, a delinquent act that would be a third degree misdemeanor on the first offense and a first degree misdemeanor on each subsequent offense if it could be committed by an adult, and must be adjudicated a delinquent child (see "**Definitions**," below) with such disposition of the child as may be appropriate under the Delinquent Child Law.¹⁵

With specified exceptions (see "**Exceptions**," below), the bill also prohibits a minor from knowingly sharing or viewing, by means other than a telecommunications device, any material or performance that shows another minor who is not the minor's child or ward in a state of nudity. A minor who violates this prohibition is guilty of delinquent use of a minor in a nudity-oriented material or performance, a delinquent act that would be a first degree misdemeanor if it could be committed by an adult.¹⁶

Finally, with a specified exception (see "**Exceptions**," below), the bill prohibits a minor from knowingly doing any of the following:¹⁷

(1) Consenting to the photographing of the minor's minor child or ward, or photographing the minor's child or ward, in a state of nudity;

(2) Consenting to the use of the minor's child or ward in a state of nudity in any material or performance; or

(3) Using or transferring a material or performance of that nature.

A minor who violates this prohibition is guilty of delinquent use of a minor in a nudity-oriented material or performance, a delinquent act that would be a third degree misdemeanor if it could be committed by an adult, and must be adjudicated a delinquent child (see "**Definitions**," below) with such disposition of the case as may be appropriate under the Delinquent Child Law.¹⁸

Exceptions

The bill establishes exceptions to each of the prohibitions discussed above:

¹⁵ R.C. 2907.324(B)(2) and (E).

¹⁶ R.C. 2907.324(D)(2) and (E).

¹⁷ R.C. 2907.324(C).

¹⁸ R.C. 2907.324(C) and (E).

(1) With regard to the prohibition described in paragraph (1) under "**Adjudication as an unruly child**," discussed above, and the prohibition described in the first paragraph under "**Adjudication as a delinquent child**," discussed above, the bill specifies that those prohibitions do not apply if *both* of the following apply:¹⁹

(a) The material or performance is, or is to be, sold, disseminated, displayed, shared, controlled, brought or caused to be brought into this state, or presented for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, attorney, prosecutor, judge, or other person having a proper interest in the material or performance; and

(b) The minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used.

(2) With regard to the prohibition described in paragraph (2) under "**Adjudication as an unruly child**" discussed above and the prohibition described in the second paragraph under "**Adjudication as a delinquent child**" discussed above, the bill specifies that those prohibitions do not apply if *either* of the following applies:

(a) The material or performance is sold, disseminated, displayed, shared, controlled, brought or caused to be brought into this state, or presented for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, attorney, prosecutor, judge, or other person having a proper interest in the material or performance; or

(b) The minor knows that the minor's or other minor's parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.²⁰

(3) With regard to the prohibition described in the third paragraph under "**Adjudication as a delinquent child**," the bill specifies that the prohibition does not

¹⁹ R.C. 2907.324(B)(3).

²⁰ R.C. 2907.324(D)(3).

apply if the material or performance is sold, disseminated, displayed, shared, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies or research, librarian, member of the clergy, attorney, prosecutor, judge, or other person having a proper interest in the material or performance.²¹

Definitions

Definitions in the bill

For purposes of the bill, "telecommunications device" means any instrument, equipment, machine, or other device that facilitates telecommunication, including, but not limited to, a computer, computer network, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem.²² Further, "state of nudity" means a state of "nudity" (see below) that involves a lewd exhibition or graphic focus on the genitals.²³

Existing definitions relevant to the bill

The following existing definitions apply throughout R.C. Chapter 2907., including the provisions of the bill:²⁴

"Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch and includes an image or text appearing on a computer monitor, television screen, liquid crystal display, or similar display device or an image or text recorded on a computer hard disk, computer floppy disk, compact disk, magnetic tape, or similar data storage device.

"Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a

²¹ R.C. 2907.324(C).

²² R.C. 2907.324(F)(2), by reference to R.C. 2913.01, which is not in the bill.

²³ R.C. 2907.342(F)(1).

²⁴ R.C. 2907.01, not in the bill.

female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

"Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

"Unruly child" includes a child who does any of the following:²⁵

(a) Violates a law that is applicable only to a child, other than giving false information to enter an adult entertainment establishment, underage purchasing of a firearm, certain pseudoephedrine-related offenses, or certain tobacco-related offenses;

(b) Does not submit to the reasonable control of the child's parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient;

(c) Is an habitual truant from school and previously has not been adjudicated an unruly child for being an habitual truant;

(d) Behaves in a manner as to injure or endanger the child's health or morals or the health or morals of others.

"Delinquent child" includes a child who does any of the following:²⁶

(a) Violates any law that would be a crime if committed by an adult, except traffic laws;

(b) Violates any lawful order of the court;

(c) Shows or gives false information or identification to gain entrance to an adult entertainment establishment;

(d) Purchases or attempts to purchase a firearm;

(e) Purchases, receives, or acquires a pseudoephedrine product that is not pursuant to a prescription or gives false identification information to acquire a pseudoephedrine product;

(f) Is an habitual truant and previously has been adjudicated an unruly child for being an habitual truant; or

(g) Is a chronic truant.

²⁵ R.C. 2151.022.

²⁶ R.C. 2152.02(F).

Unruly and delinquent child dispositions

Current law, unchanged by the bill, provides that, if a child is adjudicated an unruly child, the court may make any of the following dispositions:²⁷

(a) Any disposition authorized under R.C. 2151.353 relative to an abused, neglected, or dependent child;

(b) Place the child on community control under any sanctions, services, and conditions that the court prescribes, as described in R.C. 2152.19(A)(3), provided that, if the court imposes a period of community service upon the child, the period of community service shall not exceed 175 hours (note that R.C. 2152.19(A)(3) pertains to placement of a delinquent child in a detention facility and not to community control – R.C. 2152.19(A)(4) pertains to community control for delinquent children);

(c) Suspend the driver's license, probationary driver's license, or temporary instruction permit issued to the child for a period of time prescribed by the court and suspend the registration of all motor vehicles registered in the name of the child for a period of time prescribed by the court;

(d) Commit the child to the temporary or permanent custody of the court;

(e) Make any further disposition the court finds proper that is consistent with R.C. 2151.312 and 2151.56 to 2151.61;

(f) If, after making a disposition under a provision described above in (a), (b), or (c), the court finds upon further hearing that the child is not amenable to treatment or rehabilitation under that disposition, make a disposition otherwise authorized under R.C. 2152.19(A)(1), (3), (4), and (7) for delinquent children that is consistent with R.C. 2151.312 and 2151.56 to 2151.61.

Current law, unchanged by the bill, provides numerous dispositions that a juvenile court may make when a child is adjudicated a delinquent child. If the child's delinquent act would be a felony if committed by an adult, the court may commit the child to the Department of Youth Services for secure confinement.²⁸ In any case in which a child is adjudicated a delinquent child, relevant to the bill, the court may make

²⁷ R.C. 2151.254, not in the bill; the summarized dispositions are those that might be relevant to the bill.

²⁸ R.C. 2152.16 to 2152.18.

any of the following orders of disposition, in addition to any other disposition authorized or required by the Delinquent Child Law:²⁹

(a) Any order authorized by R.C. 2151.353 for the care and protection of an abused, neglected, or dependent child;

(b) Commit the child to the temporary custody of any school, camp, institution, or other facility operated for the care of delinquent children that is authorized and qualified to provide the care, treatment, or placement required;

(c) Place the child in a detention facility or district detention facility operated under R.C. 2152.41, for up to 90 days;

(d) Place the child on community control under any sanctions, services, and conditions that the court prescribes, including, but not limited to, the following sanctions and conditions: (i) a period of basic probation supervision or intensive probation supervision, (ii) a period of day reporting, (iii) a period of community service of up to 500 hours, (iv) a requirement that the child obtain a high school diploma, a certificate of high school equivalence, vocational training, or employment, (v) a period of drug and alcohol use monitoring, alcohol or drug assessment or counseling, or a period in an alcohol or drug treatment program, (vi) a curfew period, (vii) a requirement that the child serve monitored time, or (viii) a period of house arrest, electronic monitoring, continuous alcohol monitoring, or any combination thereof;

(e) Commit the child to the custody of the court;

(f) Require the child to not be absent without legitimate excuse from the public school the child is supposed to attend for five or more consecutive days, seven or more school days in one school month, or 12 or more school days in a school year;

(g) Make any further disposition that the court finds proper, except that the child shall not be placed in a state correctional institution, a county, multicounty, or municipal jail or workhouse, another place in which an adult convicted of a crime, under arrest, or charged with a crime is held, or in most cases, a community corrections facility;

(h) Impose a fine not to exceed \$250;

(i) Require the child to pay costs;

²⁹ R.C. 2152.19 and 2152.20, not in the bill; the summarized dispositions are those that might be relevant to the bill.

(j) Require the child to make restitution to the victim of the child's delinquent act or, if the victim is deceased, to a survivor of the victim in an amount based upon the victim's economic loss caused by or related to the delinquent act or juvenile traffic offense;

(k) Require the child to reimburse any or all of the costs incurred for services or sanctions provided or imposed, including, but not limited to, all or part of the costs of implementing any community control imposed as a disposition under R.C. 2152.19 or all or part of the costs of confinement in a residential facility described in R.C. 2152.19.

HISTORY

ACTION	DATE
Introduced	02-01-11

h0080-i-129.docx/ks