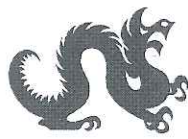




Colorado District Attorneys' Council (CDAC) - 303-830-9115

SUPPORT HB 1058 – MISUSE OF ELECTRONIC IMAGES BY A JUVENILE

- HB 1058 provides this legislature with the unique opportunity to proactively address trending behavior that is harmful to juveniles and puts their personal safety at risk by enacting a low-level offense that both deters the conduct and provides a measured level of accountability.
- A recent study out of Drexel University “found a significant relationship between awareness of legal consequences and sexting behavior as minors, such that those who were aware of the potential legal consequences reported sexting as a minor significantly less than those who were not aware of the legal consequences.” *“Youth Sexting: Prevalence Rates, Driving Motivations, and the Deterrent Effect of Legal Consequences.”* Strohmaier, Murphy, DeMatteo. Sexuality Research and Social Policy, pp. 252 (June 4, 2014).
- This study further “provides evidence that anti-sexting legislation may be at least somewhat effective in reducing the incidence of underage sexting – particularly egregious forms involving harassment and other aggravating circumstances.” *“Youth Sexting: Prevalence Rates, Driving Motivations, and the Deterrent Effect of Legal Consequences.”* Strohmaier, Murphy, DeMatteo. Sexuality Research and Social Policy, pp. 252 (June 4, 2014).
- The bill creates a new low-level, Class 2 misdemeanor, juvenile offense for the sending, possession, displaying, distribution or publication of any sexually explicit image of a juvenile and by a juvenile through electronic means. This new offense will NOT be a sex offense and will NOT require registration as a sex offender.
- Under current law, this conduct may only be charged as a high-level, Class 3 felony, sex offense that requires sex offender registration: Sexual Exploitation of a Child.
- Currently, it is extremely rare that a DA will file a case for this conduct. Rather, in the overwhelming number of cases DAs refer these incidents to pre-filing (no charges filed) diversion programs that result in education programs for the juvenile.
- The bill provides a low-level offense in lieu of only the felony option in the event that charging is warranted and/or this is a second or third or subsequent offense where something more than diversion becomes necessary. The bill retains the ability to charge the felony in the most egregious of situations.
- The bill provides an affirmative defense for a juvenile who receives an image from another when they: 1) did not request it; 2) did not encourage the making of it; 3) did not transmit or share it; and 4) deleted the image and notified a school official or law enforcement within 72 hours.
- Opponents of this bill assert that this is normal and healthy teen behavior, and that for those kids who consider themselves in a romantic relationship, there should be no legal prohibition whatsoever. To adopt the premise that because this is “just what kids do these days” and it is really “a parenting issue” as the rationale for a legislative declaration and policy that legalizes and condones the electronic exchange of sexually explicit photos between juveniles, is both irresponsible and dangerous.
- If the argument of the opposition were valid or remotely sound, it would then hold true that we should have no legal accountability for minors who use alcohol, minors who use drugs, minors who drive too fast, minors who smash mailboxes, minors who steal, or if taken to its extreme conclusion – minors should never be held accountable under the law for something their parents can tell them not to do. This is nonsensical.
- HB 1058 carefully balances the potential dangers and harms that may result from the creation and transfer of sexually explicit images of juveniles taken and shared between minors by establishing a low level non-sex offense and by enacting a measured level of accountability that allows and promotes the continued use of diversion and education programs while removing the concern over the potential for felony sex offender consequences for nearly all of these cases.



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**Written Testimony Provided to the State of Colorado House Judiciary Committee
by David DeMatteo, JD, PhD, ABPP (Forensic)**

To the distinguished members of the House Judiciary Committee, thank you for the opportunity to provide written testimony regarding House Bill (HB) 16-1058. By way of background, I am an Associate Professor of Law and Psychology at Drexel University, and Director of Drexel University's Law-Psychology (JD/PhD) Program. Some of my research has focused on sexting among minors, and I appreciate the opportunity to offer my thoughts regarding the merits of HB 16-1058 and some of the opposition that has been expressed against the bill.

Prevalence: Although reliable statistics regarding the prevalence of sexting are difficult to obtain, empirical and anecdotal evidence suggest that a large proportion of minors are engaging in sexting (typically defined as transmitting sexually explicit messages or images). In a recent study that I supervised/conducted, 54% of a sample of 175 undergraduate students reported sexting as a minor.¹ The average age of these individuals when they sent their first sext was 15.9 years, with a range of 13 to 17 years. Disturbingly, 61% of those who reported sexting as a minor were not aware that they could be charged with laws relating to child pornography in some jurisdictions.

¹ Strohmaier, H., Murphy, M., & DeMatteo, D. (2014). Youth sexting: Prevalence rates, driving motivations, and the deterrent effect of legal consequences. *Sexuality Research and Social Policy*, 11, 245-255.

Need: Given the apparent prevalence of sexting among minors, several states have enacted laws that are “sexting specific” as a way to avoid imposing overly harsh penalties in certain circumstances. HB 16-1058 is an example of such legislation. As someone who has reviewed sexting legislation from every state as part of my research, I believe that HB 16-1058 is well-crafted and appropriately targeted. There is a tremendous need for this type of targeted legislation. In states without sexting-specific legislation, minors engaged in sexting can be prosecuted under laws designed for child pornography (e.g., creation, possession, distribution). The penalties associated with violations relating to child pornography would be highly disproportionate if applied to the great majority of minors who engage in sexting. By creating the crime of misuse of electronic images by a juvenile, HB 16-1058 provides prosecutors with a way to hold the offender accountable, but without the imposition of harsh penalties that could have long-lasting negative effects and collateral consequences on the offender (e.g., lengthy incarceration, registration as a sex offender).

Normative Behavior: The argument that “this is just what kids do today” is not persuasive for three reasons. First, simply because many minors engage in sexting does not mean lawmakers should ignore the issue and treat sexting as normative. By comparison, it would be nonsensical not to have laws relating to drunk driving just because “this is just what people do today.” Second, if anything, the apparent high prevalence of sexting is a primary reason why sexting-specific legislation like HB 16-1058 is needed. Otherwise, as noted, minors engaged in sexting may be subject to overly harsh penalties under laws not that were not intended to target sexting. Third, sexting can lead to negative social consequences for the individuals involved. In my previously referenced research, we found that 28% of minors with camera-equipped phones reported sending sexually explicit images of themselves or others, and females were twice as likely as males to send sexually explicit pictures as opposed to sexually explicit messages. Of note, study participants reported several negative side effects from sexting, including humiliation, embarrassment, and “getting in trouble” with parents or school administrators. As such, there is a need for targeted laws that simultaneously (a) protect perpetrators of sexting from receiving overly harsh and disproportionate punishments and (b) recognize that some incidents of sexting (e.g., “revenge porn,” sexting with the intent to intimidate, humiliate, or harass) indeed call

for harsher penalties. HB 16-1058 will protect the public while also ensuring that sexting is not met with disproportionate legal consequences.

Relationship Exception: With due respect, the creation of an affirmative defense for individuals in a “boyfriend-girlfriend” relationship seems misguided and not appropriately conceptualized for three reasons. First, it is not clear to me how “girlfriend-boyfriend” would be defined. For example, does going on one date suffice to establish a relationship? Also, what if one party thinks that they are in a relationship, but the other party disagrees. Second, relationships among young people typically end, which would leave the ex-couple in possession of potentially damaging sexts. I realize that sexting at that point would not fall under the proposed exception, but the problem of “revenge porn” could be exacerbated because the exception could encourage sexting (which is the wrong message) and lead to a higher volume of sexts. Third (and related to the second reason), if aware of this exception, it is possible that a predator might use it to persuade/convince his partner to engage in sexting, which would then leave that individual in possession of potentially damaging sexts.

First Alleged Violation: In many jurisdictions, the penalties associated with violating sexting laws are escalating. For example, a first alleged violation of a sexting law may be met with minimal punishment, such as educational classes regarding the dangers of sexting or a pre-file diversion program. Subsequent violations of a sexting law are met with increasingly more severe penalties. This step approach is consistent with established principles of behavior modification, which suggest that escalating punishments are an effective way to positively shape someone’s behavior.

Summary: HB 16-1058 is a well-crafted piece of legislation that addresses an issue of considerable social importance. This legislation will protect minors engaged in sexting from receiving overly harsh and disproportionate punishments, provide prosecutors with a means to impose harsher penalties for those who engage in more predatory sexting behavior, and generally discourage sexting among minors. I offer my full support of HB 16-1058 and believe it would put Colorado at the forefront of this important societal issue.