OHIO LEGISLATIVE SERVICE COMMISSION

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# Fiscal Note & Local Impact Statement

**Bill:** H.B. 355 of the 132nd G.A. **Status:** As Reported by House Criminal Justice

**Sponsor:** Reps. Hill and Rezabek **Local Impact Statement Procedure Required:** Yes

**Subject:** Prohibits sexting by a person under age 19

## State Fiscal Highlights

- The bill could produce a minimal annual savings effect on the Department of Rehabilitation and Corrections' and the Department of Youth Services' institutional operating costs, as it is possible that a relatively small number of persons that might otherwise have been incarcerated in a state correctional facility will instead be sanctioned locally.
- The bill may result in additional state court cost revenue being collected from certain cases and less state court cost revenue being collected from certain other cases, the net of which is likely to be a negligible annual revenue gain for two state funds: the Indigent Defense Support Fund (Fund 5DY0) and the Victims of Crime/Reparations Fund (Fund 4020).

## Local Fiscal Highlights

- The bill may simultaneously: (1) create costs for county criminal and juvenile justice systems, as well as municipal criminal justice systems, to charge, adjudicate, and sanction additional persons, and (2) reduce county juvenile justice system costs in cases that will be treated as a misdemeanor instead of a felony. These local justice systems may also gain a likely minimal amount of revenue in the form of fines and court costs and fees.
- The bill may result in additional expenses for local courts and affiliated entities to utilize sexting educational diversion programs and to manage persons sentenced to community service.

## Detailed Fiscal Analysis

### Sexting frequency

In February 2018, the Journal of the American Medical Association (JAMA) Pediatrics published online a study of the prevalence of sexting behavior among youth. The study, coauthored by Sheri Madigan and others, was a review of 39 studies

identified in a review of research literature from 1990 to 2016. Three of the notable findings include:

1. There is a lack of consensus on the frequency of sexting among young people;
2. A sizable number of people under 18 engage in sexting, with an estimate of one in seven sending sexts and one in four receiving them; and
3. The prevalence of sexting has increased in recent years and increases as youth age.

## Criminal prohibition

The bill prohibits any person less age 19 from creating, producing, distributing, presenting, transmitting, posting, exchanging, disseminating, or possessing any sexually explicit digital material through a telecommunications device.[1] This conduct is commonly referred to as "sexting." A person who violates the bill's prohibition may be charged with possession of sexually explicit material, a violation of which is a first degree misdemeanor.

Under current law, such conduct could be subject to existing prohibitions for certain sex offenses. Some of these prohibitions, and the degree of the offense if violated, are summarized in the table below.

| Certain Existing Prohibitions Potentially Applicable to "Sexting" | |
|---|---|
| **Offense** | **Degree of Offense** |
| Disseminating matter harmful to juveniles | Misdemeanor 1st degree/Felony 5th or 4th degree |
| Pandering obscenity involving a minor | Felony of the 4th, 3rd, or 2nd degree |
| Pandering sexually-oriented matter involving a minor | Felony of the 4th, 3rd, or 2nd degree |
| Illegal use of a minor in nudity-oriented material or performance | Felony of the 5th, 4th, or 2nd degree |

Because the behavior prohibited by the bill involves a person under age 19 sending material electronically to another person or persons under age 19, there appears to be anecdotal evidence suggesting that it is problematic for some local prosecutors and law enforcement officials to determine an appropriate charge and disposition under circumstances involving sexting conduct. This reflects the concern of some that, although the circumstances present may fit the definition of felonious conduct, it is generally more appropriate to adjudicate as a misdemeanor given it involves persons under age 19 exchanging material between one another.

[1] As defined in the bill, "sexually explicit digital material" means any photograph or other visual depiction of a minor (at least 13 years of age) in any condition of nudity or involved in any sexual activity prohibited in R.C. Chapter 2907.

## Penalty

The bill requires each municipal court, county court, juvenile court, and court of common pleas to utilize a sexting educational diversion program for certain qualified persons. The court is permitted to allow such persons to enter the program as an alternative to prosecution. Satisfactory completion of the program requires the court dismiss the charge(s). A person who violates the prohibition described above and either does not enter or does not successfully complete the program may be brought to trial or before the court. If the person is convicted or adjudicated delinquent, the court generally is required to sentence the person to eight hours of community service.

## Charging outcomes

As a result of the bill's prohibition, at least two outcomes seem plausible as follows:

1. It is possible that some local jurisdictions will find the new prohibition more appropriate to the conduct, and as a result, may be more likely to charge and sanction a person in certain situations. This outcome means new misdemeanor cases for local criminal and juvenile justice systems to dispose of; and
2. There could be situations wherein a person might have been charged and sanctioned for felonious conduct under current law and practice, but may be more likely to be charged and sanctioned for the misdemeanor conduct specified by the bill. This outcome means criminal cases shift out of the subject matter jurisdiction of common pleas courts and into municipal and county courts.

### Expenditures

The possibility that new misdemeanor cases will be created (outcome 1. above) means that annual costs for local criminal and juvenile justice systems to prosecute, adjudicate, defend (if indigent), and sanction persons may rise. The amount of the annual increase in any given local jurisdiction will depend on the number of new misdemeanor cases generated.

However, it is also possible that some persons that could have previously been tried or adjudicated for felonious conduct, and ultimately resulted in a being sentenced to a term of incarceration in a state juvenile or adult correctional facility will instead be tried or adjudicated as a misdemeanant and sanctioned locally (outcome 2. above). Such an outcome could result in: (1) a savings effect for county criminal and juvenile justice systems (in that misdemeanors are generally less expensive to adjudicate and sanction than felonies), and (2) a cost increase for municipal criminal justice systems as new misdemeanor cases will have to be disposed of.

The use of diversion programming and community service may result in additional expenses for local courts to identify and maintain such programs. Costs to the court will vary based on the number charged with a violation of the bill's

prohibition, and whether the court already has the appropriate programs in place. If a court is able to partner with an agency, school, or another court, then the costs to operate a sexting educational diversion program may be minimal at most. If a court has to create and operate such a program without partners, then the costs could be problematic – especially for a court in which there are very few cases. Diversion programs are generally considered to be a cost savings for local criminal and juvenile justice systems over more restrictive residential sanctions.

As noted, it is possible that some persons that may have been sentenced to a term of incarceration in a state facility for felonious conduct may instead be sanctioned locally. The number of such persons appears to be relatively small. This means that the state's departments of Youth Services and Rehabilitation and Correction could realize a minimal annual savings in their respective institutional operating costs.

**Revenues**

Counties, municipalities, and the state could gain revenue (fines, court costs and fees) if additional cases are created as a result of violations of the bill's prohibition. However, the opposite could occur (revenue lost) if cases are handled as misdemeanors rather than felonies. This is because fines are generally less for misdemeanors than felonies. The net of these two outcomes on annual revenue is likely to be gains of: (1) no more than minimal for counties and municipalities, and (2) negligible for the state. Fines are generally credited to a county's general fund, while local court costs and fees can be deposited for a mix of general and special purposes. State court costs are collected by local jurisdictions and forwarded for crediting to the Indigent Defense Support Fund (Fund 5DY0) and the Victims of Crime/Reparations Fund (Fund 4020).

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