



Eastern Region Office  
PO Box 40008  
Philadelphia, PA 19106  
215-592-1513 T  
215-592-1343 F

Central Region Office  
PO Box 11761  
Harrisburg, PA 17108  
717-238-2258 T  
717-236-6895 F

Western Region Office  
313 Atwood St.  
Pittsburgh, PA 15213  
412-681-7736 T  
412-681-8707 F

## MEMORANDUM

**TO:** The House of Representatives of Pennsylvania

**FROM:** Andy Hoover, Legislative Director

**DATE:** June 28, 2010

**RE: OPPOSITION TO HB 2189; SUPPORT FOR PAYTON AMENDMENTS;  
COMMENTS ON EACHUS AND VITALI AMENDMENTS**

Before the General Assembly finishes the budget and breaks for the summer, it is possible that the House of Representatives will vote on House Bill 2189. This legislation criminalizes kids for behavior known as sexting. "Sexting" is one word that describes a wide range of behavior. Sexting describes photos that involve semi-nudity, nudity, and sexual acts and can be consensual or coerced. HB 2189 potentially increases the number of children who enter the criminal justice system and criminalizes constitutionally protected activity. **The American Civil Liberties Union of Pennsylvania opposes HB 2189 in its current form**, and on behalf of the 18,000 members of the ACLU of Pennsylvania, I urge you to please vote "no" on this legislation.

However, the ACLU of Pennsylvania supports amendments introduced by Representative Payton (A07193 and A07194), so **we urge you to please vote "yes" on these amendments.**

It is noteworthy that a great deal of time has been spent refining HB 2189. Legislators and especially staff from both caucuses have listened to the concerns raised by members, advocates, and academics and have done their best to write amendments that address those concerns. I am grateful that the concerns raised by the ACLU of PA have been considered.

The product of that work includes amendments filed by House Majority Leader Eachus, Representative Vitali, and Representative Payton. The Eachus amendment (A07943) and the Vitali amendment (A07191) both narrow the circumstances in which a child could be charged, and the Eachus amendment lowers the grading for a child who produces and transmits a picture of him- or herself. The Vitali amendment ensures that two minors who consensually share photos involving only nudity, e.g. the teenage couple scenario, are exempt from prosecution under this new crime and under the child pornography statute.

Both the Eachus amendment and the Vitali amendment make HB 2189 a better bill. Nevertheless, even if these amendments are incorporated into HB 2189, without the Payton amendments, the ACLU of Pennsylvania continues its opposition to the bill.

At the very first meeting about this issue in December and at every meeting since, I have expressed the ACLU of PA's concerns about the definition of "sexually explicit conduct." Simply put, the definition in the bill, which is not altered by the Eachus or Vitali amendments, sweeps First Amendment activity into the criminal code. Our suggestions have been twofold:

- Remove intent, e.g. "for the purpose of...sexual gratification or...stimulation," from the definition
- Remove "pubic area, breasts, or buttocks" from the "lewd or lascivious display" portion of the definition

These suggestions would bring the bill in line with the federal definition of child pornography and would reduce the likelihood that the commonwealth will face federal litigation over this bill, if it becomes law. We also believe that this change in the definition would greatly reduce the number of children who would be criminalized under this new law, addressing the concern raised by some child advocates.

Both amendments filed by Representative Payton (A07193 and A07194) address the concern that we've raised about the problematic definition of "sexually explicit conduct." In addition, A07193 ensures that the only sentencing alternatives for children who are adjudicated delinquent for sexting will be an informal adjustment or consent decree. An informal adjustment (42 Pa. C.S. § 6323) is a diversion mechanism that is offered prior to a petition alleging delinquency. There is no detention or confinement available for informal adjustments. A consent decree (42 Pa. C.S. § 6340) is an order of supervision after the petition alleging delinquency is filed. The child is given a set of terms and conditions to follow during the duration of the consent decree and may be eligible for expungement of records after six months of being discharged from court supervision.

Payton amendment A07194 keeps children out of the criminal justice system by adjudicating them dependent, rather than delinquent, for sexting. This preferred alternative would address sexting within Pennsylvania's dependency system as a status offense. (A status offense is an offense that is illegal only for minors and would not be illegal for adults. Pennsylvania addresses all status offenses, like truancy and other acts of ungovernability, within the dependency system and prohibits secure detention or confinement for any child adjudicated dependent under the Juvenile Act.) This approach is consistent with the importance of *educating* youth about the risks involved with sexting, and avoids saddling young people with juvenile records that will hinder their future plans for college and financial aid applications, military enlistment, and employment opportunities.

**The ACLU of PA supports both Payton amendments and urges you to please vote "yes" on A07193 and A07194.**

On sexting, there is consensus that kids will sometimes engage in foolish and irresponsible behavior but should not be charged as felons for their clumsiness in dealing with their sexuality. But House Bill 2189 has multiple flaws. It will likely lead to an increase in the number of children involved with the criminal justice system, and it may lead to federal litigation because it criminalizes First Amendment activity. Without the amendments addressed above, the ACLU of Pennsylvania opposes HB 2189 and urges you to vote “no” on the legislation.