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MEMORANDUM

TO: The House of Representatives of Pennsylvania

FROM: Andy Hoover, Legislative Director, ACLU of PA

DATE: May 10, 2011

RE: OPPOSITION TO HOUSE BILL 815

In the near future, possibly as early as Wednesday, the House of Representatives is likely to consider House Bill 815. This legislation creates a new crime of “sexting,” which is one word that describes a broad range of activity but generally refers to the sharing of photos involving semi-nudity, nudity, or sexual activity via electronic means. Specifically, HB 815 creates a new crime of sexting for minors between the ages of 13 and 17. HB 815 is an overreaction to teens’ clumsy sexual behavior, and the bill criminalizes expression that is protected by the First Amendment of the United States Constitution. The ACLU of Pennsylvania opposes HB 815, and on behalf of the 17,000 members of the ACLU of PA, I urge you to please vote “no” on this bill.

On the heels of the Luzerne County juvenile court scandal, in which two county judges accepted bribes from a private detention company in exchange for sending children to the facility, the General Assembly would be wise to approach juvenile justice with caution and with wisdom. HB 815 fails to pass that test. We all know that teenagers will sometimes commit irrational acts, including acts related to their sexuality. HB 815 criminalizes children for behavior that stems from their biological development and overcriminalizes kids. In the shadow of the Luzerne County scandal, this is the wrong approach.

HB 815 also criminalizes expression that is protected by the First Amendment of the federal constitution. HB 815’s definition of “sexually explicit conduct” is overbroad. The definition follows the definition of child pornography in federal law by including “a lewd or lascivious display of the genitals” but then goes further by including displays of the pubic area, breasts, or buttocks. Some forms of sexting, as defined in HB 815, are protected expression. If the images involve nudity and are produced and shared with the subject’s consent, it is protected. (See *Commonwealth v. Davidson*, 938 A.2d 198, 214-15, citing U.S. Supreme Court decisions; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-51 (2002); *Osborne v. Ohio*, 495 U.S. 103 (1990)) This encompasses the teenage couple scenario in which a couple consensually shares nude and semi-nude photos with each other. HB 815 turns them into criminals. While adults recognize the potential risk of engaging in such behavior, criminalizing it is an overreaction to activity that can be better addressed through education.

Supporters of HB 815 incorrectly assert that all forms of sexting currently fall under the felony child pornography statute. In fact, as noted above, some forms of sexting are protected expression. In addition, if that assertion were correct, minors could be prosecuted for distributing photos of themselves. The legislative intent of the child pornography statute was never to charge kids who were both the producers of and the subjects of the images in question. Charging a child with child pornography for abusing him- or herself isn't logical. Some district attorneys have misinterpreted the law and overreacted to sexting.

This session the state Senate has offered an alternative proposal to address sexting that is both reasonable and fair to children. Senate Bill 850 criminalizes sexting when it is used to abuse and harm another person, which is the real danger of sexting. Supporters of HB 815 often justify passage of the bill by citing real stories in which one teen harmed and abused another teen through sexting. These examples include a 13-year-old girl in Ohio who committed suicide after a photo of herself that she sent to her boyfriend was given to other kids at her school. Another example occurred in Wisconsin, where a group of boys were deceived into sending nude photos of themselves to another boy, who posed online as a girl and who then blackmailed the boys into having sex with him.

Ironically, HB 815 would, in fact, criminalize the victims of such abuse and would provide a disincentive for these victims to report the abuse. SB 850, on the other hand, focuses on the perpetrators of the abuse without victimizing the victim a second time.

Parents continue to be challenged by teenage sexual development in new ways, as generations of parents were before them. Sexting is a public health issue that is best addressed through education, not criminalization. HB 815 prohibits expression protected by the First Amendment and damages teens' futures by crippling their opportunities for college admission, job prospects, and military enlistment. In coming to terms with their sexuality, teenagers will make mistakes. The state government has a duty to protect these kids, not over-criminalize them. Please vote "no" on HB 815.