

SUSAN C. LEE
Legislative District 16
Montgomery County

MAJORITY WHIP

Judicial Proceedings Committee

Joint Committee on
Cybersecurity, Information Technology,
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Chair Emeritus
Maryland Legislative Asian American
and Pacific Islander Caucus

President Emeritus
Women Legislators of the
Maryland General Assembly, Inc.



James Senate Office Building
11 Bladen Street, Room 223
Annapolis, Maryland 21401
410-841-3124 · 301-858-3124
800-492-7122 Ext. 3124
Susan.Lee@senate.state.md.us

THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

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Senate Judicial Proceedings Committee

**Senate Bill 365 – Criminal Law – Child Pornography and Exhibition and
Display of Obscene Items to Minors**

Senate Bill 365 recognizes that producing, sending and receiving sexually explicit photos, or “sexts,” is becoming common practice among teenagers, but this behavior differs significantly in character from the production, possession, display and sale of child pornography. As the fiscal note mentions, approximately 15% of youths have sent a sext, while more than 25% percent have received one. Selectively criminalizing one teenager and not another for this behavior is problematic; this issue requires our attention as policymakers because our strict laws against displaying child pornography have yet to grapple with the complexity of teen sexting. The criminalization of common adolescent behavior is not a solution here, but neither is condoning this destructive conduct.

SB 365 specifically protects the flirtatious sharing of images with one person, but prohibits the recipient republishing the image to others. If teenagers distribute the images to a larger group without the consent of the depicted parties, they would be subject to criminal justice through the juvenile justice system. This is a much more appropriate venue for such behavior, and it will not just be a slap on the wrist, because there will be requirements of completion of an education program and if the destructive and harmful behavior continues they could be fully prosecuted.

In a particularly high-profile case that was decided last August, the Maryland Court of Appeals upheld a juvenile court decision in *re: S.K.* that found a 16-year-old girl, S.K., who filmed herself performing a sexual act on an adult and then shared the video with two friends. This teenage girl was found guilty on two counts relating to possession and display of her own likeness as child pornography. While the court had no choice but to read and apply the letter of the law in this case, the majority opinion also noted that the existing code lacked nuance by treating teen sexting and child pornography as substantively similar. The court even went as far as to say that legislation to

add nuance to the code “ought to be considered by the General Assembly.” SB365 is the legislation that our State’s highest court requested.

The bill clarifies that minors are exempt from criminal penalties for 1) selling or displaying an obscene item to a minor, 2) producing or distributing child pornography, and 3) possessing child pornography if they have not been previously convicted or adjudicated delinquent of a substantially similar offense.

That is not to say that we endorse teen sexting; in fact, our bill requires minors who violate one of the relevant statutes to complete an education program designed to teach minors about the risk and consequences associated with the possession, production and distribution of images and depictions of minors engaged in sexual acts. The Department of Juvenile Services is required to design and implement this program and, as indicated in the fiscal note, can do so within existing budgeted resources. A police officer is authorized to issue a citation to a minor for a violation of this section, but it is a full and affirmative defense to a charge under the section if the minor was coerced, threatened or intimidated into committing the act that constitutes the violation.

The carve out *does not* apply in cases 1) when a minor knew or should have reasonably known that another minor did not want a sexual depiction of themselves to be displayed or exhibited, 2) when the depiction of a minor was produced by coercion or without the consent of that minor, or 3) when the depiction of a minor in question is sexually assaultive in nature. A police officer is authorized to issue a citation to a minor for violation to avoid the trauma of an arrest. In addition, there is a full and affirmative defense when coercion is used to produce or display the image.

Teen sexting is complicated, uncomfortable and highly charged. But the vast majority of teen sexting cases can and should be confronted with rehabilitation and education rather than criminal punishment. Of course, there are instances in which criminal penalties are warranted, and we’ve done our best to enumerate those instances in broad terms so that the judiciary has flexibility to levy appropriate penalties based on the facts of the case.

For all these reasons, we respectfully request a favorable report on SB365.