

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE BILL 320

52ND LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2016

AN ACT

RELATING TO THE PUBLIC PEACE, HEALTH, SAFETY AND WELFARE;
CREATING THE CRIME OF SEXTING; ENACTING NEW SECTIONS OF THE
DELINQUENCY ACT; ALLOWING A CHILD BELIEVED TO HAVE COMMITTED
SEXTING TO BE SENT TO AN EDUCATIONAL DIVERSION PROGRAM IN LIEU
OF PROSECUTION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. A new section of the Sexual Exploitation of
Children Act, Section 30-6A-5 NMSA 1978, is enacted to read:

"30-6A-5. [NEW MATERIAL] SEXTING.--

A. As used in this section, "prohibited sexual act"
has only the meaning ascribed to it pursuant to Paragraphs (1)
and (5) of Subsection A of Section 30-6A-2 NMSA 1978.

B. Sexting consists of a child intentionally and
voluntarily creating, producing, distributing, presenting,

.204166.2

underscored material = new
[bracketed material] = delete

1 transmitting, posting, exchanging, disseminating or possessing
2 through a computer, wireless communication device or digital
3 media any visual or print medium of a prohibited sexual act,
4 when the prohibited sexual act depicts the child who created
5 the depiction or another child who appeared intentionally and
6 voluntarily in the visual or print medium.

7 C. Whoever commits sexting, when the depiction is
8 only of the child who created the visual or print medium, shall
9 be directed to complete an educational diversion program
10 pursuant to Subsection B of Section 32A-2-34 NMSA 1978."

11 D. Whoever commits sexting, when the depiction is
12 of a person other than the child who created the depiction, is
13 guilty of a misdemeanor and may be adjudicated as a delinquent
14 child or directed to complete an educational diversion program
15 pursuant to Subsection B of Section 32A-2-34 NMSA 1978."

16 SECTION 2. Section 32A-2-3 NMSA 1978 (being Laws 1993,
17 Chapter 77, Section 32, as amended) is amended to read:

18 "32A-2-3. DEFINITIONS.--As used in the Delinquency Act:

19 A. "delinquent act" means an act committed by a
20 child that would be designated as a crime under the law if
21 committed by an adult, including the following offenses:

22 (1) any of the following offenses pursuant to
23 municipal traffic codes or the Motor Vehicle Code:

24 (a) driving while under the influence of
25 intoxicating liquor or drugs;

1 (b) failure to stop in the event of an
2 accident causing death, personal injury or damage to property;

3 (c) unlawful taking of a vehicle or
4 motor vehicle;

5 (d) receiving or transferring of a
6 stolen vehicle or motor vehicle;

7 (e) homicide by vehicle;

8 (f) injuring or tampering with a
9 vehicle;

10 (g) altering or changing of an engine
11 number or other vehicle identification numbers;

12 (h) altering or forging of a driver's
13 license or permit or any making of a fictitious license or
14 permit;

15 (i) reckless driving;

16 (j) driving with a suspended or revoked
17 license; or

18 (k) an offense punishable as a felony;

19 (2) buying, attempting to buy, receiving,
20 possessing or being served any alcoholic liquor or being
21 present in a licensed liquor establishment, other than a
22 restaurant or a licensed retail liquor establishment, except in
23 the presence of the child's parent, guardian, custodian or
24 adult spouse. As used in this paragraph, "restaurant" means an
25 establishment where meals are prepared and served primarily for

.204166.2

1 on-premises consumption and that has a dining room, a kitchen
2 and the employees necessary for preparing, cooking and serving
3 meals. "Restaurant" does not include an establishment, as
4 defined in regulations promulgated by the director of the
5 special investigations division of the department of public
6 safety, that serves only hamburgers, sandwiches, salads and
7 other fast foods;

8 (3) a violation of Section 30-29-2 NMSA 1978,
9 regarding the illegal use of a glue, aerosol spray product or
10 other chemical substance;

11 (4) a violation of the Controlled Substances
12 Act;

13 (5) escape from the custody of a law
14 enforcement officer or a juvenile probation or parole officer
15 or from any placement made by the department by a child who has
16 been adjudicated a delinquent child;

17 (6) a violation of Section 30-15-1.1 NMSA 1978
18 regarding unauthorized graffiti on personal or real property;
19 [~~or~~]

20 (7) a violation of an order of protection
21 issued pursuant to the provisions of the Family Violence
22 Protection Act; or

23 (8) a violation of Section 30-6A-5 NMSA 1978
24 regarding sexting;

25 B. "delinquent child" means a child who has

1 committed a delinquent act;

2 C. "delinquent offender" means a delinquent child
3 who is subject to juvenile sanctions only and who is not a
4 youthful offender or a serious youthful offender;

5 D. "detention facility" means a place where a child
6 may be detained under the Children's Code pending court hearing
7 and does not include a facility for the care and rehabilitation
8 of an adjudicated delinquent child;

9 E. "felony" means an act that would be a felony if
10 committed by an adult;

11 F. "misdemeanor" means an act that would be a
12 misdemeanor or petty misdemeanor if committed by an adult;

13 G. "restitution" means financial reimbursement by
14 the child to the victim or community service imposed by the
15 court and is limited to easily ascertainable damages for injury
16 to or loss of property, actual expenses incurred for medical,
17 psychiatric and psychological treatment for injury to a person
18 and lost wages resulting from physical injury, which are a
19 direct and proximate result of a delinquent act. "Restitution"
20 does not include reimbursement for damages for mental anguish,
21 pain and suffering or other intangible losses. As used in this
22 subsection, "victim" means a person who is injured or suffers
23 damage of any kind by an act that is the subject of a complaint
24 or referral to law enforcement officers or juvenile probation
25 authorities. Nothing contained in this definition limits or

.204166.2

1 replaces the provisions of Subsections A and B of Section
2 32A-2-27 NMSA 1978;

3 H. "serious youthful offender" means an individual
4 fifteen to eighteen years of age who is charged with and
5 indicted or bound over for trial for first degree murder. A
6 "serious youthful offender" is not a delinquent child as
7 defined pursuant to the provisions of this section;

8 I. "supervised release" means the release of a
9 juvenile, whose term of commitment has not expired, from a
10 facility for the care and rehabilitation of adjudicated
11 delinquent children, with specified conditions to protect
12 public safety and promote successful transition and
13 reintegration into the community. A juvenile on supervised
14 release is subject to monitoring by the department until the
15 term of commitment has expired and may be returned to custody
16 for violating conditions of release; and

17 J. "youthful offender" means a delinquent child
18 subject to adult or juvenile sanctions who is:

19 (1) fourteen to eighteen years of age at the
20 time of the offense and who is adjudicated for at least one of
21 the following offenses:

22 (a) second degree murder, as provided in
23 Section 30-2-1 NMSA 1978;

24 (b) assault with intent to commit a
25 violent felony, as provided in Section 30-3-3 NMSA 1978;

.204166.2

1 (c) kidnapping, as provided in
2 Section 30-4-1 NMSA 1978;
3 (d) aggravated battery, as provided in
4 Subsection C of Section 30-3-5 NMSA 1978;
5 (e) aggravated battery against a
6 household member, as provided in Subsection C of Section
7 30-3-16 NMSA 1978;
8 (f) aggravated battery upon a peace
9 officer, as provided in Subsection C of Section 30-22-25 NMSA
10 1978;
11 (g) shooting at a dwelling or occupied
12 building or shooting at or from a motor vehicle, as provided in
13 Section 30-3-8 NMSA 1978;
14 (h) dangerous use of explosives, as
15 provided in Section 30-7-5 NMSA 1978;
16 (i) criminal sexual penetration, as
17 provided in Section 30-9-11 NMSA 1978;
18 (j) robbery, as provided in Section
19 30-16-2 NMSA 1978;
20 (k) aggravated burglary, as provided in
21 Section 30-16-4 NMSA 1978;
22 (l) aggravated arson, as provided in
23 Section 30-17-6 NMSA 1978; or
24 (m) abuse of a child that results in
25 great bodily harm or death to the child, as provided in Section

.204166.2

1 30-6-1 NMSA 1978;

2 (2) fourteen to eighteen years of age at the
3 time of the offense, who is adjudicated for any felony offense
4 and who has had three prior, separate felony adjudications
5 within a three-year time period immediately preceding the
6 instant offense. The felony adjudications relied upon as prior
7 adjudications shall not have arisen out of the same transaction
8 or occurrence or series of events related in time and location.
9 Successful completion of consent decrees [~~are~~] is not
10 considered a prior adjudication for the purposes of this
11 paragraph; or

12 (3) fourteen years of age and who is
13 adjudicated for first degree murder, as provided in Section
14 30-2-1 NMSA 1978."

15 SECTION 3. A new section of the Delinquency Act, Section
16 32A-2-34 NMSA 1978, is enacted to read:

17 "32A-2-34. [NEW MATERIAL] EDUCATIONAL DIVERSION PROGRAM--
18 REQUIREMENTS.--

19 A. Before a juvenile petition is filed for sexting
20 pursuant to Section 30-6A-5 NMSA 1978, or after probable cause
21 has been found to believe a juvenile has committed a violation
22 of that section, but before an adjudicatory hearing on the
23 petition, the court or a prosecuting attorney may require a
24 child who engaged in the activity to participate in an
25 educational diversion program that meets the requirements of

.204166.2

1 Subsection B of this section.

2 B. The administrative office of the courts shall
3 develop an educational diversion program for children who are
4 accused of sexting pursuant to Section 30-6A-5 NMSA 1978. The
5 following issues and topics shall be included as a part of the
6 educational diversion program:

7 (1) the legal consequences of and penalties
8 for sharing sexually suggestive or explicit materials,
9 including applicable federal and state statutes;

10 (2) the nonlegal consequences of sharing
11 sexually suggestive or explicit materials, including the effect
12 on relationships, loss of educational and employment
13 opportunities and barring or removal from school programs and
14 extracurricular activities;

15 (3) how the unique characteristics of
16 cyberspace and the internet, including searchability,
17 replicability and an infinite audience, can produce long-term
18 and unforeseen consequences for sharing sexually suggestive or
19 explicit materials; and

20 (4) the connection between bullying and
21 cyberbullying and children who share sexually suggestive or
22 explicit materials.

23 C. The child's successful completion of the
24 educational diversion program shall be considered by the
25 prosecutor or the court in the prosecutor's or the court's

.204166.2

1 decision to either abstain from filing the juvenile petition or
2 to dismiss the juvenile petition, as follows:

3 (1) if the child has not previously been
4 judicially determined to be delinquent, and the child's
5 activities represent a first offense for a violation of Section
6 30-6A-5 NMSA 1978, the child is not subject to the requirements
7 of that section, as long as the child successfully completes
8 the educational diversion program; and

9 (2) if the child commits a second or
10 subsequent violation of Section 30-6A-5 NMSA 1978, the child's
11 successful completion of the educational diversion program may
12 be considered as a factor to be considered by the prosecutor
13 and court in deciding whether to file a petition or to dismiss
14 a petition, upon successful completion of an improvement plan
15 established by the court."

16 SECTION 4. A new section of the Delinquency Act, Section
17 32A-2-35 NMSA 1978, is enacted to read:

18 "32A-2-35. [NEW MATERIAL] EXPUNGEMENT OF SEXTING
19 CHARGES.--All records of a sexting offense committed by a child
20 shall be expunged by the court and the department when the
21 child reaches the age of eighteen."

22 SECTION 5. EFFECTIVE DATE.--The effective date of the
23 provisions of this act is July 1, 2016.