

1 **ENROLLED**

2 **COMMITTEE SUBSTITUTE**

3 **FOR**

4 **H. B. 2357**

5
6 (By Delegates Poore, Marshall, Moore, Hamilton, Miley,
7 Longstreth, Caputo, Manchin and Ellem)

8 [Passed April 13, 2013; in effect ninety days from passage.]

9
10 AN ACT to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new section, designated §49-5-13g; and to
12 amend said code by adding thereto a new section, designated
13 §61-8C-3b, all relating to relating to juvenile proceedings;
14 proscribing juveniles from manufacturing, possessing and
15 distributing nude or partially nude images of minors;
16 declaring a violation to be an act of juvenile delinquency and
17 providing for the punishment thereof; authorizing the
18 development of an educational diversion program for minors
19 engaged in delinquent offenses associated with sexting and
20 related offenses; delineation of sexting and associated
21 offenses; providing for the establishment of a specialized
22 diversion program by the West Virginia Supreme Court of
23 Appeals for sexting by minors and associated offenses;
24 suggested scope and topics to be included in such specialized
25 diversion program; providing for the participation in the
26 diversion program as a part of a pre-petition diversion and
27 informal resolution in advance of a filed petition, as part of
28 a required counseling plan, or as part of an improvement

1 period requirement established in advance of adjudication;
2 consideration of successful completion of specialized
3 diversion program on first offense and subsequent offenses;
4 and allowing for court discretion as to whether adjudicated
5 juvenile should be required to register as a sex offender as
6 a result of adjudication as status offender for sexting and
7 related offenses.

8 *Be it enacted by the Legislature of West Virginia:*

9 That the Code of West Virginia, 1931, as amended, be amended
10 by adding thereto a new section, designated §49-5-13g; and that
11 said code be amended by adding thereto a new section, designated
12 §61-8C-3b, all to read as follows:

13 **CHAPTER 49. CHILD WELFARE.**

14 **ARTICLE 5. JUVENILE PROCEEDINGS.**

15 **§49-5-13g. Sexting educational diversion program.**

16 (a) Before a juvenile petition is filed for activity
17 proscribed by article eight-a or eight-c, chapter sixty-one of this
18 code, or after probable cause has been found to believe a juvenile
19 has committed a violation thereof, but before an adjudicatory
20 hearing on the petition, the court or a prosecuting attorney may
21 direct or allow a minor who engaged in such activity to participate
22 in an educational diversion program which meets the requirements of
23 subsection (b) of this section. The prosecutor or court may refer
24 the minor to the educational diversion program, as part of a pre-
25 petition diversion and informal resolution pursuant to the
26 provisions of section two-a of this article; as part of counseling
27 provided pursuant to the provisions of sections three or three-a of
28 this article; or as part of the requirements of an improvement

1 period to be satisfied in advance of an adjudicatory hearing
2 pursuant to the provisions of section nine of this article.

3 (b) The West Virginia Supreme Court of Appeals may develop an
4 educational diversion program for minors who are accused of
5 activity proscribed by the provisions of article eight-a or eight-
6 c, chapter sixty-one of this code. As a part of any specialized
7 educational diversion program so developed, the following issues
8 and topics should be included:

9 (1) The legal consequences of and penalties for sharing
10 sexually suggestive or explicit materials, including applicable
11 federal and state statutes;

12 (2) The nonlegal consequences of sharing sexually suggestive
13 or explicit materials including, but not limited to, the effect on
14 relationships, loss of educational and employment opportunities,
15 and being barred or removed from school programs and
16 extracurricular activities;

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

21 (4) The connection between bullying and cyber-bullying and
22 minors sharing sexually suggestive or explicit materials.

23 (c) Once a specialized educational diversion program is
24 established by the West Virginia Supreme Court of Appeals
25 consistent with the provisions of this section, the minor's
26 successful completion of the educational diversion program shall be
27 duly considered by the prosecutor or the court in their respective
28 decisions to either abstain from filing the juvenile petition or to

1 dismiss the juvenile petition, as follows:

2 (1) If the minor has not previously been judicially determined
3 to be delinquent, and the minor's activities represent a first
4 offense for a violation of section three-b, article eight-c,
5 chapter sixty-one of this code, the minor shall not be subject to
6 the requirements of said section, as long as he or she successfully
7 completes the educational diversion program; and

8 (2) If the minor commits a second or subsequent violation of
9 article eight-a or eight-c, chapter sixty-one of this code, the
10 minor's successful completion of the educational diversion program
11 may be considered as a factor to be considered by the prosecutor
12 and court in deciding to not file a petition or to dismiss a
13 petition, upon successful completion of an improvement plan
14 established by the court.

15 **CHAPTER 61. CRIMES AND THEIR PUNISHMENT.**

16 **ARTICLE 8C. FILMING OF SEXUALLY EXPLICIT CONDUCT OF MINORS.**

17 **§61-8C-3b. Prohibiting juveniles from manufacturing, possessing**
18 **and distributing nude or partially nude images of**
19 **minors; creating exemptions; declaring a violation to**
20 **be an act of juvenile delinquency; and providing for**
21 **the punishment thereof.**

22 (a) Any minor who intentionally possesses, creates, produces,
23 distributes, presents, transmits, posts, exchanges, or otherwise
24 disseminates a visual portrayal of another minor posing in an
25 inappropriate sexual manner or who distributes, presents,
26 transmits, posts, exchanges or otherwise disseminates a visual
27 portrayal of himself or herself posing in an inappropriate sexual
28 manner shall be guilty of an act of delinquency and upon

1 adjudication disposition may be made by the circuit court pursuant
2 to the provisions of article five, chapter forty-nine of this code.

3 (b) As used in this section:

4 (1) "Posing in an inappropriate sexual manner" means
5 exhibition of a bare female breast, female or male genitalia, pubic
6 or rectal areas of a minor for purposes of sexual titillation.

7 (2) "Visual portrayal" means:

8 (A) A photograph;

9 (B) A motion picture;

10 (C) A digital image;

11 (D) A digital video recording; or

12 (E) Any other mechanical or electronic recording process or
13 device that can preserve, for later viewing, a visual image of a
14 person that includes, but is not limited to, computers, cellphones,
15 personal digital assistance and other digital storage or
16 transmitting devices;

17 (c) It shall be an affirmative defense to an alleged violation
18 of this section that a minor charged with possession of the
19 prohibited visual depiction did neither solicit its receipt nor
20 distribute, transmit or present it to another person by any means.

21 (d) Notwithstanding the provisions of article twelve, chapter
22 fifteen of this code, an adjudication of delinquency under the
23 provisions of this section shall not subject the minor to the
24 requirements of said article and chapter.