

HB 382

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 382
Judiciary
(Delegate Wilson)

Juvenile Law - Conduct by Children Involving Sexually Explicit or Nude Images

This bill creates a new subtitle to address conduct by children involving sexually explicit or nude images. A child alleged to have violated the established prohibitions may only be subject to a petition alleging that the child is a child in need of assistance (CINA) or a child in need of supervision (CINS), as specified. The bill also alters certain elements of the crimes of production or distribution of child pornography, possession of child pornography, and displaying and exhibiting obscene matter to another minor to exclude applicability to minors under specified circumstances. The State Board of Education (SBE) must develop and implement a program on the risks of possessing, sending, displaying, and publishing sexually explicit or nude images.

Fiscal Summary

State Effect: SBE can handle the bill's requirements using existing resources. Otherwise, the bill is not anticipated to materially affect State finances or operations.

Local Effect: The bill is not anticipated to materially affect local government finances or operations.

Small Business Effect: None.

Analysis

Bill Summary:

Prohibitions Established by New Subtitle

A child may not knowingly send, display, or publish to another a sexually explicit or nude image *depicting another child* unless:

- each person depicted in the image gave the child permission to send, display, or publish the image or no person depicted in the image had a reasonable expectation that it would remain private;
- the sexually explicit or nude image (1) was solicited or otherwise requested by each person who received, observed, or otherwise viewed the image or (2) was sent, displayed, or published under circumstances in which each person who received, observed, or otherwise viewed the image agreed to do so; and
- no person who received, observed, or otherwise viewed the image suffered emotional distress from the exposure.

A child may not knowingly send, display, or publish to another a sexually explicit or nude image *depicting only the child* unless:

- the sexually explicit or nude image (1) was solicited or requested by each person who received, observed, or otherwise viewed the image or (2) was sent, displayed, or published under circumstances in which each person who received, observed, or otherwise viewed the image agreed to do so; and
- no person who received, observed, or otherwise viewed the image suffered emotional distress from the exposure.

A child may not knowingly possess a sexually explicit or nude image depicting another child without the other child's consent unless the child, within 72 hours after initially viewing the image, took reasonable steps to destroy the image or reported the image to the child's parent, guardian, or custodian.

A child alleged to have violated the above provisions may be subject only to a petition alleging that a child is a CINA if the child is younger than age 13 or is at least age 13 and is not alleged to have violated the prohibitions against sending, displaying, or publishing a sexually explicit or nude image. A child at least age 13 who is alleged to have violated the prohibitions regarding sending, displaying, or publishing a sexually explicit or nude image may be subject only to a petition alleging that the child is a CINS.

Limitations on Applicability

The above provisions do not apply to a child who possesses, sends, displays, or publishes a sexually explicit or nude image that the child knows or reasonably should know consists of, depicts, or was created because of (1) an act of sexually assaultive behavior, as defined in § 10-923 of the Courts and Judicial Proceedings Article; (2) sex trafficking, as defined in § 5-701 of the Family Law Article; (3) a violation of § 3-709 of the Criminal Law Article (sexortion and revenge porn); or (4) the violation of a law of another state, the United States, or a foreign country that is equivalent to one of these offenses. The provisions also do not apply if the child knows or reasonably should know that the image was created or produced without the consent of a person depicted in the image or to the possession, transmission, display, or publication of an image which is directly related to the financial gain of any person.

Alterations to Existing Prohibitions Regarding Obscene Matter and Child Pornography

The bill prohibits a minor from being found to have violated provisions that prohibit a person from willfully or knowingly displaying or exhibiting to a minor specified obscene material (§ 11-203 of the Criminal Law Article) unless the item consists of or is principally made up of a depiction or obscene picture created or otherwise produced without the consent of a person depicted or because of specified acts, including sex trafficking, sexortion, or revenge porn.

The bill specifically excludes from existing child pornography crimes under § 11-207 of the Criminal Law Article the minor who is the subject of the pornography by specifying that prohibitions pertaining to a minor apply to “*another who is a minor*.” A minor may not be found to have violated § 11-207 for conduct that violates the prohibitions specified above regarding sending, displaying, or publishing a sexually explicit or nude image.

The bill likewise makes the possession of child pornography offenses under § 11-208 of the Criminal Law Article inapplicable to children who are the subject of the pornography. The bill also specifies that prohibitions against the possession of child pornography may not be construed to prohibit a person from possessing (1) a visual representation, as specified, showing only the person who possesses the visual representation or (2) a computer-generated image that is indistinguishable from the person who possesses the computer-generated image. A minor may not be found to have violated § 11-208 of the Criminal Law Article for conduct that violates provisions as established in the bill.

However, the bill’s restrictions regarding § 11-207 and § 11-208 may not be construed to prohibit a prosecution or proceeding alleging a delinquent act against a minor who is ineligible to be the subject of CINA or CINS petition, as authorized under the bill.

State Board of Education Responsibilities

SBE must, in consultation with any relevant unit of State, county, or local government, develop and implement a program on the risks of possessing, sending, displaying, and publishing sexually explicit or nude images. The program must be started in grade 6 and delivered through grade 12 in each public school.

Current Law:

Child in Need of Assistance and Child in Need of Supervision

With certain exceptions, persons younger than age 18 who commit acts that would be crimes if committed by adults are handled by the juvenile justice system. Unlike the adult criminal system, the juvenile system is designed to protect public safety while holding young offenders accountable for their actions without a determination of guilt or the imposition of fixed sentences.

Statutory provisions set forth procedures regarding juveniles who are alleged to have committed a delinquent act as well as those who are alleged to be a CINS. A CINS is a juvenile requiring guidance, treatment, or rehabilitation who (1) is required by law to attend school and is habitually truant; (2) is habitually disobedient, ungovernable, and beyond the control of the person with custody; (3) deports himself or herself so as to injure or endanger the child or others; or (4) has committed an offense applicable only to children. Within 25 days of receiving a complaint alleging that a child is in need of supervision, a juvenile intake officer may (1) authorize the filing of a petition or a peace order request, or both; (2) propose an informal adjustment of the matter; or (3) refuse authorization to file a petition or peace order or both.

Statutory provisions also set forth procedures regarding CINA. A CINA is a child who requires court intervention because the child was abused or neglected or has a developmental disability or a mental disorder, and the child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.

Sale or Display of Obscene Item to Minor – § 11-203 of the Criminal Law Article

Among other prohibitions, a person may not willingly or knowingly display or exhibit to a minor an item (1) the cover or content of which is principally made up of an obscene description or depiction of illicit sex or (2) that consists of an obscene picture of a nude or partially nude figure. Violators are guilty of a misdemeanor, punishable by imprisonment for up to one year and/or a \$1,000 fine for a first violation and imprisonment for up to three years and/or a \$5,000 fine for each subsequent violation.

Production or Distribution of Child Pornography – § 11-207 of the Criminal Law Article

A person may not:

- cause, induce, solicit, or knowingly allow a minor to engage as a subject in the production of obscene matter or a visual representation or performance that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct;
- photograph or film a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct;
- use a computer to depict or describe a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct;
- knowingly promote, advertise, solicit, distribute, or possess with the intent to distribute any matter, visual representation, or performance that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct or in a manner that reflects the belief, or that is intended to cause another to believe, that the matter, visual representation or performance depicts a minor engaged as a subject of sadomasochistic abuse or sexual conduct; or
- use a computer to knowingly compile, enter, transmit, make, print, publish, reproduce, cause, allow, buy, sell, receive, exchange, or disseminate any notice, statement, advertisement, or minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information for the purpose of engaging in, facilitating, encouraging, offering, or soliciting unlawful sadomasochistic abuse or sexual conduct of or with a minor.

Violators are guilty of a felony, punishable by imprisonment for up to 10 years and/or a \$25,000 maximum fine for a first violation and imprisonment for up to 20 years and/ or a \$50,000 maximum fine for each subsequent violation.

Possession of Child Pornography – § 11-208 of the Criminal Law Article

A person may not knowingly possess and intentionally retain a film, videotape, photograph, or other visual representation showing an actual child or a computer-generated image that is indistinguishable from an actual and identifiable child younger than age 16:

- engaged as a subject of sadomasochistic abuse;
- engaged in sexual conduct; or
- in a state of sexual excitement.

Violators are guilty of a misdemeanor, punishable by imprisonment for up to 5 years and/or a \$2,500 maximum fine for a first offense. A subsequent violation is a felony, punishable by imprisonment for up to 10 years and/or a \$10,000 maximum fine.

In re: S.K.

In the case of *In re: S.K.*, 466 Md. 61 (2019), the Maryland Court of Appeals upheld a juvenile court's ruling that a 16-year-old girl who texted a video of herself participating in a consensual sexual act with another person was delinquent under statutory prohibitions against distribution of child pornography and displaying an obscene item to a minor. The girl who was the subject of the case, S.K., had sent to two of her friends a one-minute video of herself performing a sexual act. Later, there was a disagreement among the friends, and the video was distributed to other students at the high school as well as the school resource officer. After notification, the State's Attorney for Charles County filed a juvenile petition alleging criminal charges against S.K. under § 11-207 (a)(2) and (a)(4) and § 11-203(b)(1)(ii) (sale or display of an obscene item to a minor) of the Criminal Law Article. The juvenile court ultimately found S.K. involved as to two of the three charges and imposed supervised probation subject to several terms and conditions, including approximately three weeks of electronic monitoring. S.K. subsequently fulfilled her probation requirements, and the case has been ordered closed and sealed.

In the opinion, the Court of Appeals noted that other states have responded to the issues surrounding teenage sexting with specific legislation. For example, states have included provisions such as separate offenses as applied to minors, affirmative defenses for minors, and lower penalties if the minor is found delinquent. Further, the court noted that Maryland has not passed any such legislation and recognized that there may be compelling reasons for treating teenage sexting differently than child pornography. The court noted that while legislation to specially address sexting by minors has been unsuccessful in the past, "...in light of these policy concerns, such legislation ought to be considered by the General Assembly in the future."

Additional Information

Prior Introductions: HB 1245 of 2020 received a hearing in the House Judiciary Committee, but no further action was taken.

Designated Cross File: None.

Information Source(s): Anne Arundel, Baltimore, Garrett, Howard, and Montgomery counties; City of Laurel; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Maryland State Department of Education; Department of Juvenile Services; Department of Public Safety and Correctional Services; Department of State Police; Department of Legislative Services

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