

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 149
Judiciary

(Delegate Wilson)

Criminal Law - Distribution of Child Pornography - Minor

This bill decriminalizes specified instances of distribution or manufacturing of child pornography by a person younger than age 18.

Fiscal Summary

State Effect: The bill is not expected to materially affect State finances or operations, as discussed below.

Local Effect: The bill is not expected to materially affect local government finances or operations, as discussed below.

Small Business Effect: None.

Analysis

Bill Summary: A person *at least age 18* may not 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.

Current Law:

Juvenile Court Jurisdiction

In general, the juvenile court has jurisdiction over a child alleged to be delinquent, in need of supervision, or who has received a citation for specified violations.

The juvenile court does not have jurisdiction over children at least age 16 who are alleged to have committed specified violent crimes, children age 14 and older charged with a crime punishable by life imprisonment, and children who have previously been convicted as an adult of a felony and are subsequently alleged to have committed an act that would be a felony if committed by an adult. However, with specified exceptions, a circuit court may transfer a case involving such a child to the juvenile court if such a transfer is believed to be in the interests of the child or society (“reverse waiver”).

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

Under current law, 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.

None of the prohibitions are specifically limited to acts committed by a person *at least age 18*.

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) 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."

State Expenditures: The bill is not expected to materially affect State finances. This estimate assumes that the Department of Juvenile Services (DJS) handles very few cases that would fall under the bill's provisions. Any resources devoted to relevant DJS cases are likely to be redistributed to other DJS cases. Any reduction in caseloads for the Office of the Public Defender (OPD) is likely to be redirected to address other OPD cases. The bill is not expected to have a material effect on the Judiciary.

Local Expenditures: The juvenile courts are contained within the circuit courts. Any reduction in juvenile court caseloads is not expected to materially affect local finances. The Maryland State's Attorneys' Association advises that the bill does not have a fiscal or operational effect on prosecutors.

Additional Information

Prior Introductions: HB 931 of 2020 received a hearing in the House Judiciary Committee, but no further action was taken. HB 1049 of 2019 received a hearing in the House Judiciary Committee, but no further action was taken.

Designated Cross File: None.

Information Source(s): Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Department of Juvenile Services; Department of Public Safety and Correctional Services; Department of Legislative Services

Fiscal Note History: First Reader - January 20, 2021
rh/aad

Analysis by: Donavan A. Ham

Direct Inquiries to:
(410) 946-5510
(301) 970-5510