

Department of Legislative Services
 Maryland General Assembly
 2020 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 365 (Senator Lee)
 Judicial Proceedings

Criminal Law - Child Pornography and Exhibition and Display of Obscene Items to Minors

This bill exempts minors from the penalty scheme for violations of crimes relating to the (1) sale or display of an obscene item to a minor; (2) manufacture or display of child pornography; and (3) possession of child pornography. The bill (1) establishes a penalty scheme for minors violating these laws such that the violations are civil offenses; (2) specifies procedures for adjudicating these cases; and (3) requires the Secretary of Juvenile Services to develop an education program designed to teach minors about the risks and consequences associated with the possession, production, and distribution of depictions of minors engaged as subjects in specified sexual activities.

Fiscal Summary

State Effect: General fund expenditures increase by \$60,500 in FY 2021 only for the Judiciary to make one-time programming changes. Otherwise, the bill is not expected to materially affect State expenditures. The Department of Juvenile Services (DJS) can implement the bill with existing budgeted resources. Revenues are not materially affected.

(in dollars)	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	60,500	0	0	0	0
Net Effect	(\$60,500)	\$0	\$0	\$0	\$0

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

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

Small Business Effect: None.

Analysis

Bill Summary/Current Law:

§ 11-212 of the Criminal Law Article

The bill establishes new procedures for the adjudication of a minor who commits specified acts relating to obscene items and pornography. Under the bill, a minor may not commit an act described in § 11-203(b)(1) (sale or display of obscene item to minor), § 11-207(a)(1) through (4) (production or distribution of child pornography), or § 11-208(b) (possession of child pornography).

A violation is a civil offense and is subject to a mandatory sentence of participation in an education program developed by the Secretary of Juvenile Services. Adjudication of a violation (1) is not a criminal conviction for any purpose and (2) does not impose any of the civil disabilities that may result from a criminal conviction.

These provisions do not apply to a minor who (1) has been found guilty of a Code violation or adjudicated as having committed a delinquent act on a prior occasion under § 11-212; (2) has been convicted of or adjudicated delinquent on a prior occasion under specified laws relating to sexual crimes; (3) displays or exhibits to another minor an item described under § 11-203(b)(1) under specified circumstances; (4) causes, induces, solicits, or allows another minor to engage as a subject in the production of obscene matter or a visual representation or performance under specified circumstances; (5) photographs or films another minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct in specified circumstances; (6) uses a computer to depict or describe another minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct in certain circumstances; (7) engages in specified activities related to any matter, visual representation, or performance described in § 11-207(a)(4); or (8) knowingly possesses and intentionally retains a specified film, videotape, photograph, or other visual representation described in § 11-208(b) in specified circumstances.

A citation for a violation may be issued to a minor by a police officer authorized to make arrests if there is probable cause to believe that the minor is committing or has committed a violation. The citation must include specified information, and the court must summon the minor for trial. The form of the citation must be uniform throughout the State and must be prescribed by the District Court. The issuing jurisdiction must forward a copy of the citation and a request for trial to the circuit court having venue.

A minor issued a citation for a violation of this section must be subject to the procedures and disposition provided for juvenile cases. If there is a waiver of juvenile jurisdiction with respect to a minor who is otherwise subject to juvenile court jurisdiction, or if the juvenile

court does not have jurisdiction and the minor is only charged with a violation under § 11-212, the District Court has jurisdiction over the matter.

The bill contains provisions regarding proceedings for these code violations, including burden of proof, evidentiary standards, representation by counsel, and pleas. The State's Attorney for any county may prosecute a code violation under this section in the same manner as prosecution of a violation of the criminal laws of the State. In a code violation case under this section, the State's Attorney may enter a *nolle prosequi* or move to place the case on the stet docket and exercise authority in the same manner as prescribed by law for violation of the criminal laws of the State.

It is an affirmative defense to a violation that the minor was coerced, threatened, or intimidated into committing the conduct constituting the violation.

A citation for a violation of this section and the official record of a court regarding the citation are not subject to public inspection and may not be included on the public website maintained by the Maryland Judiciary.

In general, nothing in this section must prohibit a prosecution or proceeding alleging a delinquent act against a minor under §§ 11-203, 11-207, or 11-208 of the Criminal Law Article for any act that is not applicable or not specifically prohibited under this section. A minor who is found not guilty or adjudicated to have not committed a delinquent act under this section may not be subject to a prosecution or a proceeding alleging a delinquent act under those provisions for the same act that gave rise to the charge or proceeding alleging a delinquent act against the minor under this section.

The bill makes corresponding changes to existing statutory provisions to reflect the procedures established under § 11-212, as described below.

The education program required to be developed by DJS under the bill must be conducted in each county in the State. DJS may adopt regulations to develop and implement the education program.

Juvenile Causes – Disposition

Under current law, except under certain circumstances, a child may not be committed to DJS for out-of-home placement if the child's most serious offense is one of eight listed offenses. The bill adds an offense involving display of obscene matter to a minor or child pornography under § 11-212 of the Criminal Law Article to the list.

The bill also requires that a child whose most serious offense is an offense involving the display of obscene matter to a minor or child pornography under § 11-212 of the

Criminal Law Article be ordered to complete the education program developed by the Secretary of Juvenile Services. The child may not be subject to any other disposition measure authorized unless the child refuses or fails to complete the education program ordered by the court or the court makes a written finding, including specific facts supporting the finding, that the disposition measure is necessary for the welfare of the child or in the interest of public safety.

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

Section 11-203 of the Criminal Law Article prohibits a person from willfully or knowingly displaying or exhibiting to a minor an item the cover or content of which is principally made up of an obscene description or depiction of illicit sex or that consists of an obscene picture of a nude or partially nude figure.

A person also may not willfully or knowingly engage in the business of displaying, exhibiting, selling, showing, advertising for sale, or distributing to a minor an item the cover or content of which is principally made up of an obscene description or depiction of illicit sex or 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 maximum fine for a first violation and imprisonment for up to three years and/or a \$5,000 maximum fine for each subsequent violation.

The bill adds that a minor may not be found in violation of this prohibition for conduct that violates § 11-212 unless the minor on a prior occasion has been (1) convicted or adjudicated delinquent for specified offenses or (2) found guilty of a code violation or adjudicated delinquent for a violation of § 11-212.

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.

The bill adds that a minor may not be found to have violated § 11-207 for conduct that violates § 11-212 unless the minor has previously been (1) convicted or adjudicated delinquent for specified offenses or (2) found guilty of a Code violation or adjudicated delinquent for a violation of § 11-212.

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

Under current law, 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.

The bill adds that these provisions may not be construed to prohibit:

- a person who is an adult from possessing an illegal visual representation described above showing only the possessor or the possessor with another, unless the visual representation (1) shows an actual act of “sexually assaultive behavior” or “prostitution”; (2) was filmed, photographed, or otherwise created without the consent of a person shown in the visual representation; or (3) was obtained because the person engaged in conduct that would constitute a violation of § 3-709 of the Criminal Law Article (sextortion and revenge porn); or
- except under specified circumstances, a prosecution or proceeding alleging a delinquent act against a minor under § 11-212.

The bill adds that in the case of a minor, it is an affirmative defense to a charge of violating § 11-208 that the minor reported the matter to a school principal, an assistant principal, or a guidance counselor employed at the school the minor attends.

The bills adds that a minor may not be found to have violated § 11-208 for conduct that violates § 11-212 unless the minor has previously been (1) convicted or adjudicated delinquent for specified offenses or (2) found guilty of a code violation or adjudicated as having committed a delinquent act under § 11-212.

Background:

Sexting

Sexting is the sending of sexually explicit digital images or videos by mobile device. Sexting can be done at any age but is problematic when minors record sexually explicit images or videos of themselves and send those images or videos to other minors. Anyone receiving such images may share them with others without the knowledge of the creator. It is believed that sexting among minors is fairly common. In a meta-analysis published in *JAMA Pediatrics* (2018), the mean prevalence for sending and receiving sexts by youth were 14.8% and 27.4%, respectively, while the mean prevalence for forwarding a sext without consent and having a sext forwarded without consent were 12.0% and 8.4%, respectively.

In re: S.K.

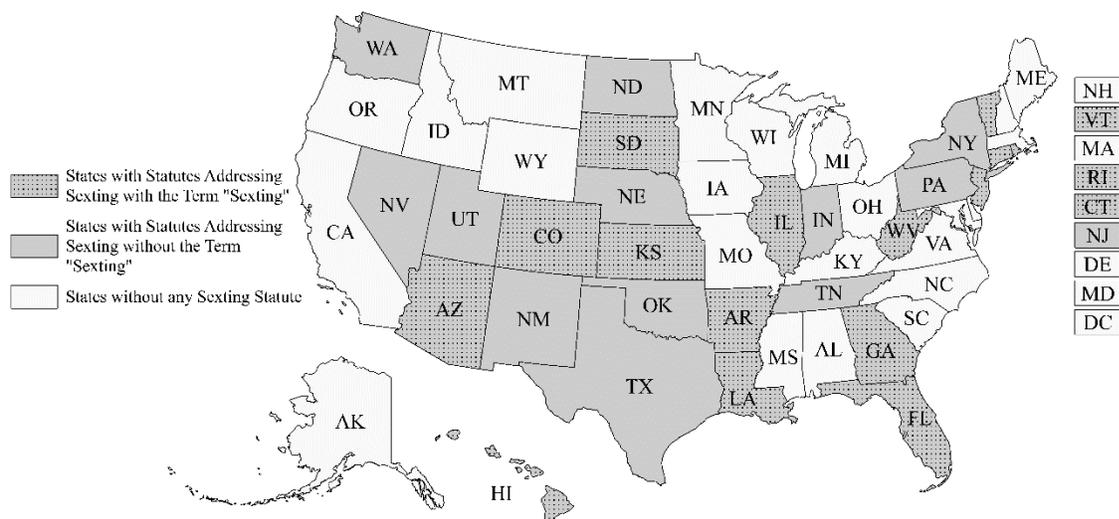
In August 2019, the Maryland Court of Appeals upheld a juvenile court’s ruling that a 16-year-old girl who texted a video of herself participating in a consensual sexual act with another person was delinquent under statutory prohibitions against distribution of child pornography and displaying an obscene 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. See **Exhibit 1** for details regarding states with sexting statutes.

The court 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.”

Exhibit 1
States with Sexting Statutes



Source: Cyberbullying Research Center; Department of Legislative Services

Maryland's Juvenile Justice System

With certain exceptions, persons younger than age 18 who commit illegal acts 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.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 501 (Delegate Moon, *et al.*) - Judiciary.

Information Source(s): Baltimore City; City of College Park; Harford, Montgomery, and Wicomico counties; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Maryland Department of Health; Department of Human Services; Department of Juvenile Services; Department of Public Safety and Correctional Services; Department of State Police; Cyberbullying Research Center; Department of Legislative Services

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