

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: SB 536

INTRODUCER: Senators Flores and Storms

SUBJECT: Sale or Distribution of Obscene Materials to a Minor

DATE: February 15, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	deMarsh-Mathues	ED	Fav/1 amendment
2.	Clodfelter	Cannon	CJ	Pre-meeting
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input checked="" type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill provides that it is a third-degree felony for a person to knowingly sell or distribute to a minor or post materials harmful to a minor on public and private school property. The bill defines school property as the grounds or facility of any public or private kindergarten, elementary school, middle school, junior high school, secondary school, career center, or postsecondary school.

This bill substantially amends section 847.012 of the Florida Statutes.

II. Present Situation:

Regulation of Obscene Materials

Section 847.001(10), F.S., defines the term “obscene” as the status of material which:

- The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;

- Depicts or describes, in a patently offensive way, sexual conduct¹; and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value.

It is a first-degree misdemeanor for a person to knowingly distribute, sell, lend, give away, transmit, transmute, or show certain obscene materials.² It is a second-degree misdemeanor for a person to knowingly have certain obscene material in one's possession, custody, or control.³ A second or subsequent conviction of either offense is a third-degree felony.⁴ It is also a third-degree felony if a violation is based on materials that depict a minor engaged in any act or conduct that is harmful to minors.⁵

Section 847.0133, F.S., provides that it is a third degree felony to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material to a minor.

“Child pornography” is defined in s. 847.001(3), F.S., as “any image depicting a minor engaged in sexual conduct.” Section 847.0137, F.S., prohibits the transmission of child pornography by use of electronic equipment or an electronic device. Transmission of child pornography is a third degree felony, regardless of whether the recipient is a minor or an adult.

Regulation of Materials That Are Harmful to Minors

The law provides for a three-pronged test to determine whether material is harmful to minors. Section 847.001(6), F.S., defines “harmful to minors” as any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity,⁶ sexual conduct,⁷ or sexual excitement⁸ when it:

- Predominantly appeals to a prurient, shameful, or morbid interest;
- Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
- Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

The definition of “harmful to minors” is similar to, but more inclusive than, the definition of “obscene.” Key differences include:

¹ “Sexual conduct” is “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. . . .” Section 847.001(16), F.S.

² Section 847.011(1), F.S. A first-degree misdemeanor is punishable by a term of imprisonment not exceeding one year, and a fine not exceeding \$1,000 may be imposed. *See* ss. 775.082 and 775.083, F.S.

³ Section 847.011(2), F.S. A second-degree misdemeanor is punishable by a term of imprisonment not exceeding 60 days, and a fine not exceeding \$500 may be imposed. *See* ss. 775.082 and 775.083, F.S.

⁴ Section 847.011(1)(c), F.S. A third-degree felony is punishable by a state prison sentence not exceeding five years, and a fine not exceeding \$5,000 may be imposed. *See* ss. 775.082 and 775.083, F.S.

⁵ Section 847.011(1)(c), F.S.

⁶ “Nudity” is “the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. . . .” Section 847.001(9), F.S.

⁷ *Supra* note 1.

⁸ “Sexual excitement” is “the condition of the human male or female genitals when in a state of sexual stimulation or arousal.” Section 847.001(17), F.S.

- (1) “Obscene” only includes materials that depict or describe sexual conduct, while “harmful to minors” also includes materials depicting nudity and sexual excitement.
- (2) In order to be found to be obscene, when taken as a whole the material in question must lack serious literary, artistic, political, or scientific value. In order to be found to be harmful to minors, the material must lack serious literary, artistic, political, or scientific value *for minors*.

Selling, Renting, or Loaning Materials Harmful to Minors

Section 847.012, F.S., provides that it is a third-degree felony to knowingly sell, rent, or loan for monetary consideration to a minor:

- Any picture, photograph, drawing, sculpture, motion picture film, videocassette, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors; or
- Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter defined in s. 847.001, F.S., explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and which is harmful to minors.⁹

The term “knowingly” is defined as having the general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

- The character and content of any material (described above) which is reasonably susceptible of examination by the defendant; and
- The age of the minor.¹⁰

A person’s ignorance of a minor’s age, a minor’s misrepresentation of his or her age, a bona fide belief of a minor’s age, or a minor’s consent may not be raised as a defense in a prosecution for a violation of s. 847.012, F.S.¹¹

Distribution of Materials Harmful to Minors

There are three statutes that prohibit distribution of materials that meet the definition of “harmful to minors” to a minor for no compensation:

- s. 847.0138, F.S., prohibits a person from knowingly transferring material harmful to a minor to a specific individual whom he or she knows or believes to be a minor by means of an electronic device or electronic equipment.¹²
- s. 847.0135(5), F.S., prohibits computer transmission to persons under 16 years of age of certain sexual acts that are included in the definition of “harmful to minors.”¹³

⁹ Section 847.012(3), F.S.

¹⁰ Section 847.012(1), F.S.

¹¹ Section 847.012(2), F.S.

¹² The offense is punishable as a third degree felony.

- s. 847.0133, F.S., provides that it is a third degree felony to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material to a minor. However, it does not address materials that are harmful to minors but that do not rise to the level of obscenity.

Otherwise, there is currently no express prohibition against an adult giving material harmful to minors to a minor without compensation if a child is not depicted in the material.¹⁴

III. Effect of Proposed Changes:

The bill creates a new subsection (5) of s. 847.012, F.S. This new subsection makes it a third degree felony for an adult to knowingly sell or distribute to a minor or post on school property any of the materials described in current subsection (3) of the statute. This includes material harmful to minors in any format: pictures, photographs, drawings, sculptures, motion picture films, videocassettes, similar visual representations or images, books, pamphlets, magazines, printed matter however reproduced, or sound recordings.

The bill's prohibition against posting material harmful to minors is clearly limited to posting on school grounds. However, the wording is ambiguous with regard to the distribution and sale of such materials. While the intent appears to be to prohibit distribution or sale on school grounds, the wording could be interpreted to prohibit distribution or sale anywhere. Sale of material harmful to minors to a minor anywhere is already prohibited by s. 847.012(3), F.S., but free distribution is not.

The bill defines school property as the grounds or facility of any public or private kindergarten, elementary school, middle school, junior high school, secondary school, career center¹⁵, or postsecondary school.

As a third degree felony, this new offense would be punishable by up to five years in prison and a \$5,000 fine.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

¹³ The offense is a second degree felony if the offender is 18 years old or older. It is a third degree felony if the offender is under 18 years old.

¹⁴ There may be circumstances under which such activity could be charged as a violation of s. 827.04(1), F.S., which prohibits contributing to the delinquency of a child. This is a first degree misdemeanor.

¹⁵ Section 1001.44, F.S., describes a "career center" as "an educational institution offering terminal courses of a technical nature, and courses for out-of-school youth and adults." It is part of the district school system.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The constitutionality of the bill's prohibition against posting material harmful to minors on the property of a postsecondary school would be subject to challenge as overbroad. This would prohibit, for example, posting of a nude picture of an adult on the wall of a college dormitory. This constitutional concern could be eliminated if the bill were amended to apply only to types of school property that are frequented by minors.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference assessed this bill as having an insignificant impact on state prison beds.

VI. Technical Deficiencies:

As currently worded, it is unclear whether the bill's prohibition on sale or distribution of material harmful to minors to a minor is intended to apply only when such activity occurs on school property.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

Barcode 532532 by Pre-K – 12 on January 9, 2012:

Further describes the criminal third degree felony created by this bill in the title of the bill for clarification and notice purposes.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
