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 Committee on Criminal Justice

BILL:	CS/SB 1692
INTRODUCER:	Criminal Justice Committee and Senator McClain
SUBJECT:	Material that is Harmful to Minors
DATE:	March 20, 2025
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wyant	Stokes	CJ	**Fav/CS**
2.			ED	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1692 amends s. 1006.28, F.S., to add a modified definition for material that is "harmful to minors." Additionally, the bill revises what materials a parent or resident may object to.

A parent or resident may object to any material used in a classroom, made available in a school or classroom library, or included in a reading list that contains content which depicts or describes sexual conduct, unless such material is *specifically authorized as part of a health education course, comprehensive health education, or approved through the State Board of Education for specific educational purposes*. The bill provides such materials must be removed within 5 school days upon receipt of an objection by a parent or resident of the county and must remain unavailable throughout the objection review process. The school board may not consider potential literary, artistic, political, or scientific value as a basis for retaining the material.

The State Board of Education (SBE) is required to monitor district compliance and notify a district of any noncompliance. Additionally, the SBE may withhold certain funds until the school district complies.

The bill reenacts s.1014.05, F.S., regarding the requirement for school districts to notify parents of procedures relating to the objection process.

The bill takes effect on July 1, 2025.

II. Present Situation:

Freedom of Speech and the Protection of Minors

The U.S. Supreme Court addressed the issue of whether the First Amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries in *Pico*.[1] In that case, books were removed from libraries that the school board characterized as "anti-American, anti-Christian, anti-Semitic, and just plain filthy;" The board further stated "it is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers."[2]

The court recognized precedent that local school boards have broad discretion in the management of school affairs.[3] The court also recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.[4] The court held in *Pico* that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'[5]

The Florida Legislature passed HB 1069 in 2023, which, in part, provided that a parent or resident may proffer evidence to the district school board that education materials depict or describe sexual conduct, unless such material is for a specified course or identified by State Board of Education rule. Any material that is subject to such objection must be removed within 5 school days of receipt of the objection and remain unavailable to students until the objection is resolved.[6] As a result of passing such legislation, a number of lawsuits were filed claiming that the law violates First Amendment rights. Numerous objections to educational materials have taken place and have since been litigated.[7]

In 2024, Peter Parnell, et al., filed suit against the School Board of Nassau County, seeking declaratory and injunctive relief for the removal of 36 books, including, *And Tango Makes Three*. In September of 2024, the parties signed a settlement agreement. The terms in the settlement included, in part, that *And Tango Makes Three* contains no obscene material in violation of the obscenity statue, is appropriate for students of all ages, and has pedagogical value. Additionally, the book was immediately restored, with no age restrictions, to the Nasssau County's Libraries.[8]

Twenty two other challenged books were ordered to return to the libraries by September 13, 2024, and the agreement stated the appropriate grade level for each book. Twelve books were to

[1] *Board of Educ., Island trees Union free School District No. 26 et al., v. Pico*, 102 S. Ct. 2799 (1982).
[2] *Id.* at 2803.
[3] *Id.* at 2806.
[4] *Id*. at 2807.
[5] *Id* at 2810.
[6] Ch. No. 2023-105, L.O.F.
[7] *Peter Parnell, et al, v. School Board of Nassau County, Florida*, Case: 3:24-cv-00492-WWB-MCR. (Complaint for Declaratory and Injunctive Relief).
[8] *Id*. (Settlement Agreement).

be returned no later than October 31, 2024, and may be checked out by students 18 years of age or older, or with parental consent.[9]

Background

Freedom of speech is guaranteed to citizens in the United States Constitution and the State Constitution.[10] As a foundational principle, this prohibits the government from dictating what people "see or read or speak or hear."[11] However, there are limits to the freedom of speech; it is not absolute. Categories of speech that do not enjoy complete protection include defamation, incitement, obscenity, and pornography involving real children.[12]

Courts have held, as a bedrock principle of the First Amendment, that a government may not prohibit or suppress the expression of an idea simply because an audience finds the idea offensive or disagreeable.[13] When evaluating what constitutes the free speech rights of adults, the U.S. Supreme Court held, "[W]e have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'"[14] Stated slightly differently, this means that some forms of pornography are protected under the Constitution, but obscenity is not.

Obscenity and The Miller Test

The U.S. Supreme Court has long held that obscenity is not within the area of constitutionally protected speech, however, sex and obscenity are not synonymous. The Court held that portrayal of sex, for example, in art, literature and scientific works, is not itself a sufficient reason to deny material the constitutional protections of free speech. Obscene material is material that deals with sex in a manner appealing to prurient interests.[15] The U.S. Supreme Court's standard for determining what material is obscene has evolved over the years.[16]

In 1973, the U.S. Supreme Court developed a three-prong test in *Miller v. California,*[17] to define obscene speech. The court acknowledged the inherent dangers of undertaking to regulate any form of expression, and that statutes designed to regulate obscene materials must be carefully limited. This is the test that is still used today to determine whether speech is obscene. According to the *Miller* test, speech is determined to be obscene if:

- The average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

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[9] *Id.*
[10] The United States Constitution states, "Congress shall make no law … abridging the freedom of speech." U.S. CONST. amend. I. The State Constitution similarly states "No law shall be passed to restrain or abridge the liberty of speech or of the press." Fla. Const. art. I, s. 4.
[11] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).
[12] *Id*.
[13] *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd*, 502 U.S. 105, 118 (1991).
[14] *Ashcroft*, 245, quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).
[15] *Roth v. U.S.*, S. Ct. 1304 (1957).
[16] *See* Roth v. U.S., S. Ct. 1304 (1957); *A book named 'John Cleland's Memoirs of a Woman of Please,' et al., v. Attorney General of the Commonwealth of Massachusetts*, 86 S. Ct. 975 (1965); *Miller v. California*, 413 U.S. 15 (1973).
[17] *Miller v. California*, 413 U.S. 15 (1973).

- The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[18]

In addressing the contemporary community standard, the court in *Miller* stated "to require a state to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility," and held that the requirement of the jury to evaluate the materials with reference to contemporary standards of the State is constitutionally adequate.[19]

Material Harmful to Minors

The power of the state to control the conduct of children reaches beyond the scope of its authority over adults. The state may give minors a more restricted right than that assured to adults to determine for themselves what sex material they may read or see.[20] The U.S. Supreme Court held in *Ginsberg*, that a statute which defined obscenity of material on a basis of its appeal to minors, by prohibiting the sale of obscene material harmful to minors, to youths had a rational relation to the objective of safeguarding such minors from harm, and was constitutionally valid.[21]

Further, courts have found that the state has a "'compelling interest in protecting the physical and psychological well-being of minors' which 'extends to shielding minors from the influence of literature that is not obscene by adult standards.' In doing so, however, the means must be narrowly tailored to achieve that end so as not to unnecessarily deny adults access to material which is constitutionally protected indecent material. No similar tailoring is required when the material is obscene material, which is not protected by the First Amendment."[22]

Despite the Court's clear ruling that a state may regulate material harmful to minors, but not obscene for adults, some statutes have been found unconstitutionally overbroad and criminalized constitutionally protected speech. For example, in *Powell's Books Inc. v. Kroger*, the Ninth Circuit Court of Appeals struck down a pair of statutes aimed at prohibiting "luring" and "grooming."[23] The first statute struck down in this case criminalized providing children under the age of 13 with sexually explicit material, and the second statute criminalized providing minors under the age of 18 with visual, verbal, or narrative descriptions of sexual conduct for the purpose of sexually arousing the minor or the furnisher, or inducing the minor to engage in sexual conduct.[24]

In *Powell's Books, Inc,* the court found that speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed simply to protect youth from ideas or images legislators find unsuitable. "To criminalize furnishing material solely intended to titillate the reader will certainly sweep up some material that appeals to the prurient interests of children and minors, but it will also criminalize a broad swath of material that does not appeal to prurient interests.[25] The court found that the statutes were overbroad and reached far more material than hardcore pornography or material that is obscene to minors.

[18] *Id.*at 24.
[19] *Id.* at 33-34.
[20] *Ginsberg v. New York*, 88 S. Ct. 1274 (1968).
[21] *Id.* at 1282
[22] *Simmons v. State*, 944 So. 2d 317 (Fla. 2006). *See also Ashcroft v. Free Speech Coal*., 535 U.S. 234, 244-45 (2002).
[23] *See Powell's Books, Inc. v. Kroger,* 622 F. 3d 1202 (2010).
[24] *Powell's Books, Inc. v. Kroger,* 622 F. 3d 1202, 1206-07 (2010).
[25] *Id.* at 1214-15.

Similarly, in 2011, in *Entertainment Merchants*, the U.S. Supreme Court found that even where the protection of children is the object the constitutional limits on governmental action apply. While *Entertainment Merchants* did not address obscenity directly, it held a statute that regulated violent video games for minors was unconstitutional, and in doing so, noted that minors are guaranteed protections of the First Amendment.

> Minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well defined circumstances may government bar public dissemination of protected materials to them. No doubt a state possesses legitimate power to protect children from harm, but that does not include a free floating power to restrict the ideas to which children may be exposed. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.[26]

Florida Transmission of Material Harmful to Minors

Because the state may modify the test for obscenity as it relates to what is obscene (or "harmful to minors"), courts have upheld the *Miller* test, as modified for minors. The *Miller* test is incorporated into Florida's definition of what is "harmful to minors" in s. 847.001(7), F.S., and "obscenity" in s. 847.001(12), F.S.

Section 847.001(7), F.S., defines "harmful to minors" as any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement[27] 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*.

Section 847.0138, F.S., provides that:

- Any person who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors to a specific individual known by the defendant to be a minor commits a third degree felony.[28]
- Any person in any jurisdiction other than this state who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors, to a specific individual known by the defendant to be a minor commits a third degree felony.[29,30]

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[26] *Brown, Governor of California, et al., Entertainment Merchants Ass'n et al.*, 131 S. Ct. 2729, 2735-36 (2011) (citing *Ernoznik v. Jacksonville*, 422 U.S. 205 (1975); *Ginsberg v. New York*, 88 S. Ct. 1274 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944)).

[27] Section 847.001(20), F.S., defines "sexual excitement" as the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

[28] Section 847.0138(2), F.S.

[29] Section 847.0138(3), F.S.

[30] A third degree felony is generally punishable by not more than 5 years in state prison and a fine not exceeding $5,000. Sections 775.082 and 775.083, F.S.

The Supreme Court of Florida has upheld Florida's criminal laws relating to the transmission of harmful materials. In *Simmons*, the court noted that sexual expression which is indecent but not obscene is protected by the First Amendment, however the state may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.

The court in *Simmons* found that the term harmful to minors is adequately defined by a reference to the three prong miller standard, as modified to apply to minors. The court also noted that the third prong in Miller is particularly important because it allows appellate courts to impose some limitations and regularity on the definition.[31]

K-12 Student and Parent Rights

Parents of public school students are required by law to receive accurate and timely information regarding their child's academic progress and must be informed of ways they can help their child succeed in school.[32] K-12 students and their parents are afforded numerous statutory rights pertaining to student education, including reproductive health and disease education.[33]

Florida law requires district school boards to provide comprehensive health education that among other issues addresses community health, family life (including awareness of the benefits of sexual abstinence as the expected standard and the consequences of teenage pregnancy), personal health, and the prevention and control of disease. One right a parent of a public school student has is to make a written request to the school principal to exempt his or her student from reproductive health and disease instruction, including instruction relating to HIV/AIDS. If such a request is made the student must be exempt from such instruction and may not be penalized.[34]

Health education is included in the required instruction to ensure that students meet Florida State Board of Education (SBE) standards. Course curriculum refers to the lessons and academic content taught in a school or specific course. It may include but is not limited to a course syllabus and standards, instructional materials, or other resources an instructor may use in the class. Standards and instructional materials are subject to specific selection, adoption, and review processes.[35]

Instructional Materials

Each district school board has the constitutional duty and responsibility to select and provide adequate instructional materials to each student for core courses in mathematics, language arts, science, social studies, reading, and literature for kindergarten through grade 12. School districts may purchase instructional materials from a list of state-reviewed and adopted instructional materials or establish their own review and adoption program. District school boards receive state funding for instructional materials through the instructional materials allocation.

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[31] *Simmons v. Florida*, 944 So. 2d 317 (2006).
[32] Section 1002.20, F.S.
[33] *Id.*
[34] Section 1003.42(5), F.S.
[35] Florida Department of Education, Healthy Schools, *Comprehensive Health Education*, available at: https://www.fldoe.org/schools/healthy-schools/comprehensive-health-edu.stml (last visited March 13, 2025).

Each district school board is responsible for the content of all instructional materials and any other materials used in the classroom, made available in a school library, or included on a reading list. Each district school board must maintain on its website a current list of instructional materials, purchased by the district, separated by grade level. Florida law establishes that the parent of a public school student has the right to receive effective communication from the school principal about the manner in which instructional materials are used to implement curricular objectives.[36]

District school boards are required to adopt a policy for objections by a parent or resident of the county to the use of a specific instructional material.[37] The policy must clearly describe a process, in which the objector has the opportunity to provide specific evidence to the district school board, and provide for resolution. The process must provide the parent or resident the opportunity to proffer evidence to the district school board that:

- An instructional material does not meet the criteria of s. 1006.31(2), F.S.,[38] or s. 1006.40(3)(c), F.S.,[39] if it was selected for use in a course or otherwise made available to students in the school district but was not subject to the public notice, review, comment, and hearing procedures under s. 1006.283(2)(b), F.S.
- Any material used in a classroom, made available in a school or classroom library, or included in a reading list contains content which:
  - Is pornographic or prohibited under s. 847.012, F.S.;
  - Depicts or describes sexual conduct,[40] unless such material is for a course relating to health education and the instruction in acquired immune deficiency syndrome (AIDS),[41] the prevention of child sexual abuse, exploitation, and human trafficking,[42] the awareness of the benefits of sexual abstinence as the expected standard and the consequences of teenage pregnancy for grades 6 through 12,[43] or is identified by State Board of Education rule;
  - Is not suited to student needs and their ability to comprehend the material presented; or,
  - Is inappropriate for the grade level and age group for which the material is used.

[36] Section 1006.28(4)(a), F.S.
[37] Section 1006.28(2)(a)2., F.S.
[38] Section 1006.31(2), F.S., provides, along with additional requirements, instructional materials recommended by a reviewer must be, accurate, objective, balanced, noninflammatory, current, free of pornography and prohibited material, and suited to student needs and their ability to comprehend the material presented.
[39] Section 1006.40(3)(c), F.S. requires any instructional materials purchased must be free of pornography or prohibited material, suited to student needs and their ability to comprehend the material presented, and appropriate for the grade level and age group for which the materials are used or made available.
[40] "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated 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 around or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulated that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct". Section 847.001(19), F.S.
[41] Section 1003.46, F.S.
[42] Section 1003.42(2)(o)1.g.,F.S.
[43] Section 1003.42(2)(o)3., F.S.

III. Effect of Proposed Changes:

The bill amends s. 1006.28, F.S., to add a modified definition for material that is "harmful to minors."

"Harmful to minors" is defined as any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- Predominantly appeals to a prurient, shameful, or morbid interest; and
- Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors.

The bill does not include the requirement that the material, taken as a whole, is without serious literary, artistic, political, or scientific value for minors, for it to be considered harmful to minors, for the purpose of a parent or resident objecting to educational materials.

Additionally, the bill revises what materials a parent or resident may object to. A parent or resident may object to any material used in a classroom, made available in a school or classroom library, or included in a reading list that contains content which depicts or describes sexual conduct, unless such material is *specifically authorized as part of a health education course, comprehensive health education, or approved through the State Board of Education for specific educational purposes.*

The bill provides such materials must be removed within 5 school days upon receipt of an objection by a parent or resident of the county and must remain unavailable throughout the objection review process. The school board may not consider potential literary, artistic, political, or scientific value as a basis for retaining the material.

The SBE is required to monitor district compliance through regular audits and reporting, notify a district of such noncompliance, and require the district to submit a corrective action plan within 30 days of receiving such notice. Additionally, the SBE may withhold the transfer of state funds, discretionary grant funds, discretionary lottery funds, or any other funds specified by the Legislature until the school district complies and may impose additional sanctions or requirements as conditions for the continued receipt of state funds.

The bill takes effect on July 1, 2025.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require the cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the State Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The First Amendment of the U.S. Constitution states that, "Congress shall make no law … abridging the freedom of speech…" This language prohibits the government from having the ability to constrain the speech of citizens. However, materials that constitute child pornography, obscenity, or material harmful to minors may be restricted. Child pornography, obscenity, and material harmful to minors have been defined in ch. 847, F.S., and are consistent with federal law and the United States Supreme Court holdings regarding such laws.

The bill maintains the definition for what is considered harmful to minors within ch. 847, F.S., thus maintaining the constitutionality of Florida's criminal statutes relating to harmful materials. However, the bill removes one of the prongs of the "*Miller* Test," as modified for what is considered material harmful to minors for purposes of objecting to educational materials.

The U.S. Supreme Court has held that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'[44] Under the bill, a parent or resident may object to educational material, even if such material has a serious literary, artistic, political, or scientific value for minors. Therefore, material that is not considered "harmful to minors" under the constitutionally approved standard, may be objected to. The modification of the *Miller* test by removal of such value requirement may subject the law to challenges under the First Amendment.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

[44] *Board of Educ., Island trees Union free School District No. 26 et al., v. Pico*, 102 S. Ct. 2799 (1982).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 1006.28 and 1014.05.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Criminal Justice Committee on March 18, 2025:
The committee substitute:

- Removes the language amending the definition of "harmful to minors" in s. 847.001, F.S., and removes the corresponding chapter 847 statutes being reenacted by this change.
- Adds a modified definition for "harmful to minors" under s. 1006.28, F.S.

B. Amendments:

None.