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I N  A S S E M B L Y

(PREFILED)

January 6, 2010

Introduced by M. of A. GABRYSZAK -- Multi-Sponsored by -- M. of A. ALFANO, PHEFFER -- read once and referred to the Committee on Codes

AN ACT to amend the penal law, in relation to disseminating indecent material to minors in the first degree, promoting and possessing an obscene sexual performance by a child, and promoting and possessing a sexual performance by a child; and to amend the civil rights law, in relation to a child victim's right of privacy

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision 3 of section 235.21 of the penal law, as added by chapter 600 of the laws of 1996, is amended to read as follows:

3. Knowing the character and content of the communication which, in whole or in part, depicts OR DESCRIBES, EITHER IN WORDS OR IMAGES actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he OR SHE intentionally uses any TELEPHONIC COMMUNICATION, ELECTRONIC COMMUNICATION OR computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor OR A PERSON WHO, REGARDLESS OF HIS OR HER AGE, IS A POLICE OFFICER AND THE ACTOR REASONABLY BELIEVES SUCH OFFICER TO BE A MINOR.

S 2. Section 235.22 of the penal law, as added by chapter 600 of the laws of 1996, subdivision 1 as amended by chapter 8 of the laws of 2007, subdivision 2 as amended by chapter 264 of the laws of 2003, is amended to read as follows:

S 235.22 Disseminating indecent material to minors in the first degree.

A person is guilty of disseminating indecent material to minors in the first degree when:

1. knowing the character and content of the communication which, in whole or in part, depicts or describes, either in words or images actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he OR SHE intentionally uses any TELEPHONIC COMMUNICATION, ELECTRONIC COMMUNICATION OR computer communication system

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor OR A PERSON WHO, REGARDLESS OF HIS OR HER AGE, IS A POLICE OFFICER AND THE ACTOR REASONABLY BELIEVES SUCH OFFICER TO BE A MINOR; and

2. by means of such communication he OR SHE importunes, invites or induces a minor OR A PERSON WHO, REGARDLESS OF HIS OR HER AGE, IS A POLICE OFFICER AND THE ACTOR REASONABLY BELIEVES SUCH OFFICER TO BE A MINOR to engage in sexual intercourse, oral sexual conduct or anal sexual conduct, or sexual contact with him OR HER, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his OR HER benefit.

Disseminating indecent material to minors in the first degree is a class D felony.

S 3. Subdivisions 1, 2, 4 and 6 of section 263.00 of the penal law, subdivisions 1 and 2 as amended by chapter 1 of the laws of 2000 and subdivisions 4 and 6 as added by chapter 910 of the laws of 1977, are amended to read as follows:

1. "Sexual performance" means any performance or part thereof which[, for purposes of section 263.16 of this article, includes sexual conduct by a child less than sixteen years of age or, for purposes of section 263.05 or 263.15 of this article,] includes sexual conduct, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, by a child less than seventeen years of age.

2. "Obscene sexual performance" means any performance which[, for purposes of section 263.11 of this article, includes sexual conduct by a child less than sixteen years of age or, for purposes of section 263.10 of this article,] includes sexual conduct, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, by a child less than seventeen years of age, in any material which is obscene, as such term is defined in section 235.00 of this chapter.

4. "Performance" means any play, motion picture, photograph [or], dance, FILM, VIDEO, DIGITAL IMAGE OR DATA STORED ON A COMPUTER DISK OR BY ELECTRONIC MEANS WHERE SUCH DATA IS CAPABLE OF CONVERSION INTO A VISUAL IMAGE. Performance also means any other visual representation exhibited before an audience.

6. "Simulated" means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct [and which exhibits any uncovered portion of the breasts, genitals or buttocks].

S 4. Section 263.10 of the penal law, as amended by chapter 1 of the laws of 2000, is amended to read as follows:

S 263.10 Promoting an obscene sexual performance by a child IN THE SECOND DEGREE.

A person is guilty of promoting an obscene sexual performance by a child IN THE SECOND DEGREE when, knowing the character and content thereof, he OR SHE produces, directs or promotes any obscene performance which includes sexual conduct, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, by a child less than seventeen years of age.

Promoting an obscene sexual performance by a child IN THE SECOND DEGREE is a class D felony.

S 5. The penal law is amended by adding a new section 263.10-a to read as follows:

S 263.10-A PROMOTING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD IN THE FIRST DEGREE.

A PERSON IS GUILTY OF PROMOTING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD IN THE FIRST DEGREE, WHEN KNOWING THE CHARACTER AND CONTENT THEREOF, HE OR SHE PRODUCES, DIRECTS OR PROMOTES:

1. TEN OR MORE OBSCENE PERFORMANCES WHICH INCLUDE SEXUAL CONDUCT, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, BY A CHILD LESS THAN SEVENTEEN YEARS OF AGE, OR

2. ANY OBSCENE PERFORMANCE WHICH INCLUDES SEXUAL CONDUCT, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, BY A CHILD LESS THAN SEVENTEEN YEARS OF AGE AND HE OR SHE PROMOTES SUCH PERFORMANCE TO A CHILD LESS THAN SEVENTEEN YEARS OF AGE, OR TO A PERSON WHO, REGARDLESS OF HIS OR HER AGE, IS A POLICE OFFICER AND THE ACTOR REASONABLY BELIEVES SUCH OFFICER TO BE A CHILD LESS THAN SEVENTEEN YEARS OF AGE.

PROMOTING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD IN THE FIRST DEGREE IS A CLASS C FELONY.

S 6. Section 263.11 of the penal law, as added by chapter 11 of the laws of 1996, is amended to read as follows:

S 263.11 Possessing an obscene sexual performance by a child IN THE THIRD DEGREE.

A person is guilty of possessing an obscene sexual performance by a child IN THE THIRD DEGREE when, knowing the character and content thereof, he OR SHE knowingly has in his OR HER possession or control any obscene performance which includes sexual conduct, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, by a child less than [sixteen] SEVENTEEN years of age.

Possessing an obscene sexual performance by a child IN THE THIRD DEGREE is a class E felony.

S 7. The penal law is amended by adding a new section 263.12 to read as follows:

S 263.12 POSSESSING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD IN THE SECOND DEGREE.

A PERSON IS GUILTY OF POSSESSING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD IN THE SECOND DEGREE WHEN, KNOWING THE CHARACTER AND CONTENT THEREOF, HE OR SHE KNOWINGLY HAS IN HIS OR HER POSSESSION OR CONTROL TEN OR MORE OBSCENE PERFORMANCES WHICH INCLUDE SEXUAL CONDUCT, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, BY A CHILD LESS THAN SEVENTEEN YEARS OF AGE.

POSSESSING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD IN THE SECOND DEGREE IS A CLASS D FELONY.

S 8. The penal law is amended by adding a new section 263.13 to read as follows:

S 263.13 POSSESSING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD IN THE FIRST DEGREE.

A PERSON IS GUILTY OF POSSESSING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD IN THE FIRST DEGREE WHEN, KNOWING THE CHARACTER AND CONTENT THEREOF, HE OR SHE KNOWINGLY HAS IN HIS OR HER POSSESSION OR CONTROL ONE HUNDRED OR MORE OBSCENE PERFORMANCES WHICH INCLUDE SEXUAL CONDUCT, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, BY A CHILD LESS THAN SEVENTEEN YEARS OF AGE.

POSSESSING AN OBSCENE SEXUAL PERFORMANCE BY A CHILD IN THE FIRST DEGREE IS A CLASS C FELONY.

S 9. Section 263.15 of the penal law, as amended by chapter 1 of the laws of 2000, is amended to read as follows:

S 263.15 Promoting a sexual performance by a child IN THE SECOND DEGREE.

A person is guilty of promoting a sexual performance by a child IN THE SECOND DEGREE when, knowing the character and content thereof, he OR SHE produces, directs or promotes any performance which includes sexual

conduct, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, by a child less than seventeen years of age.

Promoting a sexual performance by a child IN THE SECOND DEGREE is a class D felony.

S 10. The penal law is amended by adding a new section 263.15-a to read as follows:

S 263.15-A PROMOTING A SEXUAL PERFORMANCE BY A CHILD IN THE FIRST DEGREE.

A PERSON IS GUILTY OF PROMOTING A SEXUAL PERFORMANCE BY A CHILD IN THE FIRST DEGREE WHEN, KNOWING THE CHARACTER AND CONTENT THEREOF, HE OR SHE PRODUCES, DIRECTS OR PROMOTES:

1. TEN OR MORE PERFORMANCES WHICH INCLUDE SEXUAL CONDUCT, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, BY A CHILD LESS THAN SEVENTEEN YEARS OF AGE, OR

2. ANY PERFORMANCE WHICH INCLUDES SEXUAL CONDUCT, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, BY A CHILD LESS THAN SEVENTEEN YEARS OF AGE AND HE OR SHE PROMOTES SUCH PERFORMANCE TO A CHILD LESS THAN SEVENTEEN YEARS OF AGE, OR TO A PERSON WHO, REGARDLESS OF HIS OR HER AGE, IS A POLICE OFFICER AND THE ACTOR REASONABLY BELIEVES SUCH OFFICER TO BE A CHILD LESS THAN SEVENTEEN YEARS OF AGE.

PROMOTING A SEXUAL PERFORMANCE BY A CHILD IN THE FIRST DEGREE IS A CLASS C FELONY.

S 11. Section 263.16 of the penal law, as added by chapter 11 of the laws of 1996, is amended to read as follows:

S 263.16 Possessing a sexual performance by a child IN THE THIRD DEGREE.

A person is guilty of possessing a sexual performance by a child IN THE THIRD DEGREE when, knowing the character and content thereof, he OR SHE knowingly has in his OR HER possession or control any performance which includes sexual conduct, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, by a child less than [sixteen] SEVENTEEN years of age.

Possessing a sexual performance by a child IN THE THIRD DEGREE is a class E felony.

S 12. The penal law is amended by adding a new section 263.17 to read as follows:

S 263.17 POSSESSING A SEXUAL PERFORMANCE BY A CHILD IN THE SECOND DEGREE.

A PERSON IS GUILTY OF POSSESSING A SEXUAL PERFORMANCE BY A CHILD IN THE SECOND DEGREE WHEN, KNOWING THE CHARACTER AND CONTENT THEREOF, HE OR SHE KNOWINGLY HAS IN HIS OR HER POSSESSION OR CONTROL TEN OR MORE PERFORMANCES WHICH INCLUDE SEXUAL CONDUCT, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, BY A CHILD LESS THAN SEVENTEEN YEARS OF AGE.

POSSESSING A SEXUAL PERFORMANCE BY A CHILD IN THE SECOND DEGREE IS A CLASS D FELONY.

S 13. The penal law is amended by adding a new section 263.18 to read as follows:

S 263.18 POSSESSING A SEXUAL PERFORMANCE BY A CHILD IN THE FIRST DEGREE.

A PERSON IS GUILTY OF POSSESSING A SEXUAL PERFORMANCE BY A CHILD IN THE FIRST DEGREE WHEN, KNOWING THE CHARACTER AND CONTENT THEREOF, HE OR SHE KNOWINGLY HAS IN HIS OR HER POSSESSION OR CONTROL ONE HUNDRED OR MORE PERFORMANCES WHICH INCLUDE SEXUAL CONDUCT, OR WHAT REASONABLY APPEARS TO BE SEXUAL CONDUCT, BY A CHILD LESS THAN SEVENTEEN YEARS OF AGE.

POSSESSING A SEXUAL PERFORMANCE BY A CHILD IN THE FIRST DEGREE IS A CLASS C FELONY.

S 14. Subdivision 1 of section 263.20 of the penal law, as amended by chapter 1 of the laws of 2000, is amended to read as follows:

1. Under this article, it shall be an affirmative defense that the defendant in good faith reasonably believed the person appearing in the performance was[, for purposes of section 263.11 or 263.16 of this article, sixteen years of age or over or, for purposes of section 263.05, 263.10 or 263.15 of this article,] seventeen years of age or over.

S 15. Section 263.25 of the penal law, as amended by chapter 1 of the laws of 2000, is amended to read as follows:

S 263.25 Proof of age of child.

Whenever it becomes necessary for the purposes of this article to determine whether a child who participated in a sexual performance was [under an age specified in this article] LESS THAN SEVENTEEN YEARS OF AGE, the court or jury may make such determination by any of the following: personal inspection of the child; inspection of [a photograph or motion picture which constituted] the sexual performance; oral testimony by a witness to the sexual performance as to the age of the child based upon the child's appearance; expert medical testimony based upon the appearance of the child in the sexual performance; and any other method authorized by any applicable provision of law or by the rules of evidence at common law.

S 16. Subdivision 1 of section 50-b of the civil rights law, as amended by chapter 320 of the laws of 2006, is amended to read as follows:

1. The identity of any victim of a sex offense, as defined in article one hundred thirty, TWO HUNDRED THIRTY-FIVE, TWO HUNDRED SIXTY-THREE, or section 255.25, 255.26 or 255.27 of the penal law, or of an offense involving the alleged transmission of the human immunodeficiency virus, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section.

S 17. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.