

4710

2009-2010 Regular Sessions

I N S E N A T E

April 27, 2009

Introduced by Sen. LEIBELL -- read twice and ordered printed, and when printed to be committed 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:

1 Section 1. Subdivision 3 of section 235.21 of the penal law, as added
2 by chapter 600 of the laws of 1996, is amended to read as follows:
3 3. Knowing the character and content of the communication which, in
4 whole or in part, depicts OR DESCRIBES, EITHER IN WORDS OR IMAGES actual
5 or simulated nudity, sexual conduct or sado-masochistic abuse, and which
6 is harmful to minors, he OR SHE intentionally uses any TELEPHONIC COMMU-
7 NICATION, ELECTRONIC COMMUNICATION OR computer communication system
8 allowing the input, output, examination or transfer, of computer data or
9 computer programs from one computer to another, to initiate or engage in
10 such communication with a person who is a minor OR A PERSON WHO, REGARD-
11 LESS OF HIS OR HER AGE, IS A POLICE OFFICER AND THE ACTOR REASONABLY
12 BELIEVES SUCH OFFICER TO BE A MINOR.
13 S 2. Section 235.22 of the penal law, as added by chapter 600 of the
14 laws of 1996, subdivision 1 as amended by chapter 8 of the laws of 2007,
15 subdivision 2 as amended by chapter 264 of the laws of 2003, is amended
16 to read as follows:
17 S 235.22 Disseminating indecent material to minors in the first degree.
18 A person is guilty of disseminating indecent material to minors in the
19 first degree when:
20 1. knowing the character and content of the communication which, in
21 whole or in part, depicts or describes, either in words or images actual
22 or simulated nudity, sexual conduct or sado-masochistic abuse, and which

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

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1 is harmful to minors, he OR SHE intentionally uses any TELEPHONIC COMMU-
2 NICATION, ELECTRONIC COMMUNICATION OR computer communication system
3 allowing the input, output, examination or transfer, of computer data or
4 computer programs from one computer to another, to initiate or engage in
5 such communication with a person who is a minor OR A PERSON WHO, REGARD-
6 LESS OF HIS OR HER AGE, IS A POLICE OFFICER AND THE ACTOR REASONABLY
7 BELIEVES SUCH OFFICER TO BE A MINOR; and

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

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

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

21 1. "Sexual performance" means any performance or part thereof which[,
22 for purposes of section 263.16 of this article, includes sexual conduct
23 by a child less than sixteen years of age or, for purposes of section
24 263.05 or 263.15 of this article,] includes sexual conduct, OR WHAT
25 REASONABLY APPEARS TO BE SEXUAL CONDUCT, by a child less than seventeen
26 years of age.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33 A PERSON IS GUILTY OF POSSESSING AN OBSCENE SEXUAL PERFORMANCE BY A
34 CHILD IN THE SECOND DEGREE WHEN, KNOWING THE CHARACTER AND CONTENT THERE-
35 OF, HE OR SHE KNOWINGLY HAS IN HIS OR HER POSSESSION OR CONTROL TEN OR
36 MORE OBSCENE PERFORMANCES WHICH INCLUDE SEXUAL CONDUCT, OR WHAT REASON-
37 ABLY APPEARS TO BE SEXUAL CONDUCT, BY A CHILD LESS THAN SEVENTEEN YEARS
38 OF AGE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 1. Under this article, it shall be an affirmative defense that the
6 defendant in good faith reasonably believed the person appearing in the
7 performance was[, for purposes of section 263.11 or 263.16 of this arti-
8 cle, sixteen years of age or over or, for purposes of section 263.05,
9 263.10 or 263.15 of this article,] seventeen years of age or over.

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

12 S 263.25 Proof of age of child.

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

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

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

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