

9361

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:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 S 263.25 Proof of age of child.

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

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

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

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