STATE OF NEW YORK

4945

2021-2022 Regular Sessions

IN ASSEMBLY

February 9, 2021

Introduced by M. of A. MONTESANO, McDONOUGH -- read once and referred to the Committee on Codes

AN ACT to amend the penal law, in relation to sexual performance by a child under the age of eighteen years

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article 263 of the penal law, as added by chapter 910 of the laws of 1977, subdivisions 1 and 2 of section 263.00, sections 263.05, 263.10, 263.15, 263.25 and subdivision 1 of section 263.20 as amended by chapter 1 of the laws of 2000, subdivisions 3 and 7 of section 263.00 as amended by chapter 264 of the laws of 2003, sections 263.11 and 263.16 as amended and subdivision 9 of section 263.00 as added by chapter 456 of the laws of 2012 and section 263.30 as added by chapter 431 of the laws of 2008, is amended to read as follows:

ARTICLE 263

SEXUAL PERFORMANCE BY A CHILD

Section 263.00 Definitions.
263.05 Use of a child in a sexual performance.
263.10 Promoting an obscene sexual performance by a child.
263.11 Possessing an obscene sexual performance by a child.
263.15 Promoting a sexual performance by a child.
263.16 Possessing a sexual performance by a child.
263.20 Sexual performance by a child; affirmative defenses.
263.25 Proof of age of child.
263.30 Facilitating a sexual performance by a child with a controlled substance or alcohol.

§ 263.00 Definitions.

As used in this article the following definitions shall apply:

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~~] **eighteen** years of age or, for purposes of

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

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section 263.05 or 263.15 of this article, includes sexual conduct by a child less than [~~seventeen~~] **eighteen** 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~~] **eighteen** years of age or, for purposes of section 263.10 of this article, includes sexual conduct by a child less than [~~seventeen~~] **eighteen** years of age, in any material which is obscene, as such term is defined in section 235.00 of this [~~chapter~~] **part**.

3. "Sexual conduct" means actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

4. "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.

5. "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

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.

7. "Oral sexual conduct" and "anal sexual conduct" mean the conduct defined by subdivision two of section 130.00 of this chapter.

8. "Sado-masochistic abuse" means the conduct defined in subdivision five of section 235.20 of this [~~chapter~~] **part**.

9. For purposes of sections 263.10, 263.11, 263.15 and 263.16 of this article, the terms "possession," "control" and "promotion" shall not include conduct by an attorney when the performance was provided to such attorney in relation to the representation of a person under investigation or charged under this chapter or as a respondent pursuant to the family court act, and is limited in use for the purpose of representation for the period of such representation.

§ 263.05 Use of a child in a sexual performance.

A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he **or she** employs, authorizes or induces a child less than [~~seventeen~~] **eighteen** years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he **or she** consents to the participation by such child in a sexual performance.

Use of a child in a sexual performance is a class C felony.

§ 263.10 Promoting an obscene sexual performance by a child.

A person is guilty of promoting an obscene sexual performance by a child when, knowing the character and content thereof, he **or she** produces, directs or promotes any obscene performance which includes sexual conduct by a child less than [~~seventeen~~] **eighteen** years of age.

Promoting an obscene sexual performance by a child is a class D felony.

§ 263.11 Possessing an obscene sexual performance by a child.

A person is guilty of possessing an obscene sexual performance by a child when, knowing the character and content thereof, he **or she** knowingly has in his **or her** possession or control, or knowingly accesses with intent to view, any obscene performance which includes sexual conduct by a child less than [~~sixteen~~] **eighteen** years of age.

Possessing an obscene sexual performance by a child is a class E felony.

§ 263.15 Promoting a sexual performance by a child.

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he **or she** produces, directs or promotes any performance which includes sexual conduct by a child less than [~~seventeen~~] **eighteen** years of age.

Promoting a sexual performance by a child is a class D felony.

§ 263.16 Possessing a sexual performance by a child.

A person is guilty of possessing a sexual performance by a child when, knowing the character and content thereof, he **or she** knowingly has in his **or her** possession or control, or knowingly accesses with intent to view, any performance which includes sexual conduct by a child less than [~~sixteen~~] **eighteen** years of age.

Possessing a sexual performance by a child is a class E felony.

§ 263.20 Sexual performance by a child; affirmative defenses.

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~~] **eighteen** years of age or over or, for purposes of section 263.05, 263.10 or 263.15 of this article, [~~seventeen~~] **eighteen** years of age or over.

2. In any prosecution for any offense pursuant to this article, it is an affirmative defense that the person so charged was a librarian engaged in the normal course of his **or her** employment, a motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter or in any other non-managerial or non-supervisory capacity in a motion picture theatre; provided he **or she** has no financial interest, other than his **or her** employment, which employment does not encompass compensation based upon any proportion of the gross receipts, in the promotion of a sexual performance for sale, rental or exhibition or in the promotion, presentation or direction of any sexual performance, or is in any way responsible for acquiring such material for sale, rental or exhibition.

§ 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,~~] **the age of eighteen years** 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.

§ 263.30 Facilitating a sexual performance by a child with a controlled substance or alcohol.

1. A person is guilty of facilitating a sexual performance by a child with a controlled substance or alcohol when he or she:

(a) (i) knowingly and unlawfully possesses a controlled substance as defined in section thirty-three hundred six of the public health law or any controlled substance that requires a prescription to obtain, (ii) administers that substance to a person under the age of [~~seventeen~~] **eighteen** without such person's consent, (iii) intends to commit against such person conduct constituting a felony as defined in section 263.05,

263.10, or 263.15 of this article, and (iv) does so commit or attempt to commit such conduct against such person; or

(b) (i) administers alcohol to a person under the age of [~~**seventeen**~~] **eighteen** without such person's consent, (ii) intends to commit against such person conduct constituting a felony defined in section 263.05, 263.10, or 263.15 of this article, and (iii) does so commit or attempt to commit such conduct against such person.

2. For the purposes of this section, "controlled substance" means any substance or preparation, compound, mixture, salt, or isomer of any substance defined in section thirty-three hundred six of the public health law.

Facilitating a sexual performance by a child with a controlled substance or alcohol is a class B felony.

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