

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: SB 410

INTRODUCER: Senator Rodriguez

SUBJECT: Materials Harmful to Minors

DATE: March 29, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stokes	Jones	CJ	Pre-meeting
2.			ED	
3.			RC	

I. Summary:

SB 410 amends the definitions of “child pornography,” “harmful to minors,” and “obscene” in s. 847.001, F.S., in the following manner:

- “Child pornography,” is amended to include any text describing a minor engaged in sexual conduct.
- “Harmful to minors,” is amended to remove the requirement that the material, taken as a whole, is without serious literary, artistic, political, or scientific value for minors for such material to be considered harmful to minors.
- “Obscene,” is amended to provide that materials are obscene when:
 - The average person, applying contemporary community standards for appropriate materials for minors, would object to as depicting or describing, in a patently offensive way, sexual conduct which is harmful to minors; and
 - Taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

The bill amends s. 847.012, F.S., providing that it is a third degree felony for a person to knowingly sell or rent for monetary consideration, or loan for any reason certain materials to a minor. Additionally, the bill adds to the list of materials that may not be sold, rented, or loaned to a minor, any material used in a public K-12 school classroom, made available in a K-12 school library or included on a public K-12 school recommended reading list, and which contains obscene content, or is harmful to minors or is prohibited as conduct inappropriate for minors.

Such material as described above must be proactively removed by the school district. The required removal of materials is not dependent upon a parent or resident complaint.

The bill amends s. 1002.20, F.S., providing that a public school student may be exposed to the teaching of reproductive health or any sexually transmitted disease, including HIV/AIDS, only in accordance with s. 1003.42(3), F.S.

The bill amends s. 1003.42(3), F.S., requiring school districts or schools to notify and request the written consent of parents at least 10 instructional days before the teaching of reproductive health or any sexually transmitted disease, including HIV/AIDS, and its symptoms, development, and treatment. Students who have not obtained prior written consent of his or parent may not be exposed to such teaching. A student whose parent does not give consent for such teaching may not be penalized.

The bill amends s. 1006.28, F.S., providing that there must be a process to afford a parent or resident an opportunity to proffer evidence to the district school board that any material used in a classroom, made available at a school library, or included on a reading list contains content that constitutes child pornography, is harmful to minors, or is obscene, as those terms are defined in s. 847.001, F.S., is:

- Pornographic or prohibited under s. 847.012, F.S.;
- 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.

Additionally, the bill provides that by July 1, 2022, and each July 1 thereafter, district school boards must complete a review of all instructional material used in a public K-12 classroom, made available in a public K-12 library, or included on a public K-12 reading list. Removal of material must be immediate and not dependent upon whether the school board has received a complaint.

The bill provides that a parent of a public school student or a resident of the county may contest the district school board's adoption of a specific instructional material at any time before or after the material's adoption by the district school board on the grounds that the material constitutes child pornography, is harmful to minors, is obscene, or is pornographic or prohibited under s. 847.012, F.S.

For the purposes of incorporating the amendments made by the bill, ss. 847.001 and 288.1254, F.S., are reenacted.

This bill is effective July 1, 2021.

II. Present Situation:

Obscenity and the Law

The First Amendment of the U.S. Constitution states that, "Congress shall make no law ... abridging the freedom of speech..."¹ This language prohibits the government from having the ability to constrain the speech of citizens.²

¹ U.S. CONST. amend. I.

² Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, Congressional Research Service, summary page, (September 8, 2014), available at <https://fas.org/sgp/crs/misc/95-815.pdf> (last visited March 24, 2021).

However, there are some exceptions to this outright prohibition, the Supreme Court has ruled over time that some forms of speech are not protected by the First Amendment. Among the types of speech that are not protected are child pornography,³ “fighting words,” and obscenity.⁴

Case Law Prohibiting the Use of Obscenity

There have been numerous cases that have made it to the Supreme Court regarding the issue of obscenity. In 1957, the Court decided *Roth v. U.S.*, a case in which the defendant was challenging the constitutionality of a federal obscenity statute⁵ that prohibited the mailing of “obscene, lewd, lascivious, indecent, filthy, or vile” materials.⁶ The Court was faced with the pointed question of whether obscenity was protected speech.⁷ In its analysis, the Court considered some states’ laws that provided criminal punishments for using certain types of speech, such as libel and obscenity, and reasoned that it was clear that, “[T]he unconditional phrasing of the First Amendment was not intended to protect every utterance.”⁸

The Court further explained that all ideas having even the slightest redeeming social importance have the full protection of the guaranties.⁹ Obscenity, however, was not an essential part of any exposition of ideas and was of such slight social value that any benefit derived from its use was outweighed by the social interest in order and morality. As a result, the Court held that obscenity was not constitutionally protected speech.¹⁰

Though the Court had clearly declined to extend protection to obscenity, the more difficult question over time came in defining it. In *Roth*, the Court classified obscene material as that which “deals with sex in a manner appealing to *prurient* interest,” and defined prurient as “material having a tendency to excite lustful thoughts.”¹¹ Similar difficulties arose a few years later for the Court in *Jacobellis v. Ohio*, whereby a man’s conviction for possession and exhibition of an obscene film hinged on whether the French film at issue was in fact obscene.¹² The Court held that the film was not obscene and it was in Justice Stewart’s concurrence that he famously demonstrated the difficulty of explaining obscenity as being “indefinable” by noting, “...But I know it when I see it.”¹³

³ “Child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical or other means, of sexually explicit conduct, where (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. See 18 U.S.C.A. s. 2256.

⁴ *Supra* n. 2.

⁵ 18 U.S.C.A s. 1461.

⁶ *Roth v. U.S.*, 354 U.S. 476, 479 (1957).

⁷ *Id.* at 481.

⁸ *Id.* at 482-83.

⁹ *Id.* at 484.

¹⁰ *Id.* at 485.

¹¹ *Id.* at 487 and n. 20.

¹² *Jacobellis v. Ohio*, 378 U.S. 184, 185-87 (1964).

¹³ *Id.* at 197.

It wasn't until the Court's decision of *Miller v. California* that clarity on obscenity was established with the creation of what is now commonly referred to as the *Miller Test*.¹⁴ The three-prong test requires the trier of fact to consider the following factors to determine if something is obscene:

- Whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest;
- Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁵

Obscenity Involving Minors

Federal law prohibits obscenity involving minors, and those who violate the law often face harsher penalties than if the offense involved adults only.¹⁶ The law prohibits any individual from knowingly transferring or attempting to transfer an obscene material using any means to a minor under 16 years of age.¹⁷ It is also prohibited for any person to knowingly produce, distribute, receive, or possess with intent to transfer or distribute material that appears to depict minors engaged in sexually explicit conduct and is deemed obscene.¹⁸

The test for determining whether matter involving minors is obscene is a slightly lower threshold than the *Miller* test. Material involving minors can be considered obscene if:

- It depicts an image that is, or appears to be a minor engaged in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse; and
- The image lacks serious literary, artistic, political, or scientific value.¹⁹

The Court tends to grant greater protections to minors, routinely upholding state statutes that penalize those who possess or disseminate obscene material relating to minors. In *New York v. Ferber*, the defendant was convicted for distributing material that depicted a sexual performance by a minor under the age of 16 in violation of a state law that prohibited persons from knowingly promoting material that depicted such a performance.²⁰ In *Ferber*, the Court held that the statute at issue did not violate the First Amendment, explaining that the states have a compelling interest, and thus are granted more leeway, in regulating pornographic depictions of children.²¹ The Court reasoned that such material bears so heavily on the welfare of children engaged in its production that a balance of compelling interests are struck and, therefore, these materials are not afforded the protections of the First Amendment.²²

¹⁴ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁵ *Id.*

¹⁶ The United States Department of Justice, *Citizen's Guide to U.S. Federal Law on Obscenity*, available at <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity> (last visited March 24, 2021).

¹⁷ 18 U.S.C.A. s. 1470 (1998).

¹⁸ 18 U.S.C.A. s. 1466A. (2003).

¹⁹ *Id.*

²⁰ *New York v. Ferber*, 458 U.S. 747 (1982).

²¹ *Ferber*, 458 U.S. at 756.

²² *Id.* at 747-48.

Florida Obscenity Laws

In *Miller*, the Court explained that state laws that regulate obscene material must be carefully limited, as written or construed, in order to adequately protect the values of the First Amendment.²³ Current Florida law defines “obscene” to mean the status of material which:

- The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- Depicts or describes, in a patently offensive way, sexual conduct;²⁴ and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value.²⁵

The possession, custody, or control of an obscene material²⁶ by any person who knowingly sells, lends, gives away, distributes, transmits, shows, transmutes, offers to sell, lend, give away, distribute, transmit, show, or transmute, or has in his or her possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner commits a first degree misdemeanor.²⁷ A subsequent violation is punishable as a third degree felony.²⁸

Additionally, the possession, custody, or control of an obscene material by any person who does not have the intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise commits a second degree misdemeanor.²⁹ A subsequent violation is punishable as a first degree misdemeanor.³⁰

The courts have consistently held that the obscenity statute is not overbroad and that in light of the fact that obscenity is not protected by the First and Fourteenth Amendments, it is subject to limited regulation pursuant to the police power left to the states.³¹

²³ *Miller*, 413 U.S. 15, 24-25.

²⁴ “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse; actual 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 arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates 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(16), F.S.

²⁵ Section 847.001(10), F.S.

²⁶ The following materials are listed as examples of an obscene material: Any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose. Section 847.011(1)(a), F.S.

²⁷ Section 847.011(1)(a), F.S. A first degree misdemeanor is punishable by a state prison term not exceeding 1 year, a fine not exceeding \$1,000, or both. Sections 775.082 and 775.083, F.S.

²⁸ Section 847.011(1)(a), F.S. A third degree felony is punishable by a state prison term not exceeding 5 years, a fine not exceeding \$5,000, or both. Sections 775.082 and 775.083, F.S.

²⁹ Section 847.011(2), F.S. A second degree misdemeanor is punishable by a term of imprisonment not exceeding 60 days, a fine not exceeding \$500, or both. Sections 775.082 and 775.083, F.S.

³⁰ Section 847.011(2), F.S.

³¹ *Johnson v. State*, 351 So. 2d 10, 11 (Fla. 1977).

If certain obscenity law violations³² are based on material that depicts a minor engaged in any act or conduct that is harmful to minors, such a violation is a third degree felony.³³ The penalty applies regardless of a person's ignorance of a minor's age, a minor's misrepresentation of his or her age, a bona fide belief of a minor's age, or a minor's consent. Additionally, none of these circumstances may be raised as a defense in a prosecution.³⁴

Florida statutes define "material harmful to minors," to mean any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- Predominately 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.³⁵

Child Pornography

The United States Supreme Court³⁶ has recognized that states have a compelling interest in safeguarding the physical and psychological well-being of minors and in preventing their sexual exploitation and abuse. The Court noted that it was "unlikely that visual depictions of children . . . lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."³⁷

Child Pornography Prevention Action of 1996

Prior to 1996, federal law criminalized a variety of acts relating to child pornography.³⁸ At that time, the statutes described such material as images created using an actual minor.³⁹ In 1996, Congress passed the Child Pornography Prevention Action of 1996 (CPPA),⁴⁰ which created a definition of "child pornography" which for the first time criminalized acts relating to morphed child pornography. Under the CPPA, "child pornography" was defined as:

- (8) Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct,⁴¹ where:
 - (A) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

³² See s. 847.011(1)(a) or (2)(b), F.S.

³³ Section 847.011(1)(c), F.S.

³⁴ Section 847.011(1)(d), F.S.

³⁵ Section 847.001(6), F.S. A mother's breastfeeding of her baby is not under any circumstances "harmful to minors."

³⁶ *New York v. Ferber*, 458 U.S. 747 (1982).

³⁷ *Id.* at 763.

³⁸ See, e.g., 18 U.S.C. s. 2252 (1994 ed.).

³⁹ *U.S. v. Hotaling*, 599 F.Supp. 2d 306, 309 (N.D.N.Y. 2008); see also 18 U.S.C. ss. 2252 and 2256 (1994 ed.).

⁴⁰ Pub. L. No. 104-208, s. 121.

⁴¹ The term "sexually explicit conduct" was defined as actual or simulated sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal) whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. s. 2256(2) (1996 ed.).

- (B) Such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct (i.e., *virtual child pornography – created without using an actual child*);
- (C) Such visual depiction has been created, adapted, or modified to appear that an identifiable minor⁴² is engaging in sexually explicit conduct (i.e., *morphed child pornography*); or
- (D) Such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.⁴³

In 2002, the United States Supreme Court⁴⁴ held the CPPA was unconstitutionally overbroad. The specific section found unconstitutional made it a crime to possess or distribute images depicting a child or what appears to be a child, engaging in sexually explicit conduct (i.e., virtual child pornography).⁴⁵

The Court held that the “speech” criminalized in the challenged provision of the CPPA violated the First Amendment because it extended the federal prohibition against child pornography to sexually explicit images that appeared to depict minors but were produced without using any real children.⁴⁶ The Court decided that prohibiting child pornography that did not depict an actual child, “abridged the freedom to engage in a substantial amount of lawful speech” and was therefore overbroad and unconstitutional.⁴⁷

This decision did not specifically address the constitutionality of 18 U.S.C. 2256(8)(C) (prohibiting *morphed* child pornography), it did note, in dictum, that “[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children. . . .”⁴⁸ Courts have taken this dictum to suggest that the *Ashcroft* court would have deemed morphed child pornography as not protected by the First Amendment.⁴⁹

Florida Law – Child Pornography

Chapter 847, F.S., provides that “child pornography,” means any image depicting a minor engaged in sexual conduct.⁵⁰ In 2010, Florida’s Second DCA decided *Stelmack v. State*,⁵¹ a case in which the defendant was charged with violating s. 827.071(5), F.S. (possession of child pornography). The images at issue showed the faces and heads of two girls, ages 11 and 12, which were cut and pasted onto images of a 19-year old woman lewdly exhibiting her genitals.⁵²

⁴² The term “identifiable minor” was defined as a person who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature, and: who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting, or modifying the visual depiction. The term was not be construed to require proof of the actual identity of the identifiable minor. 18 U.S.C. s. 2556(9) (1996 ed.).

⁴³ 18 U.S.C. s. 2556(8) (1996 ed.).

⁴⁴ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

⁴⁵ 18 U.S.C. s. 2556(8) (1996).

⁴⁶ *Ashcroft*, 535 U.S. at 256.

⁴⁷ *Id.*

⁴⁸ *Id.* at 242.

⁴⁹ *McFadden v. Alabama*, 67 So. 3d 169, 181-182 (Ala. Crim. App. 2010).

⁵⁰ Section 847.001(3), F.S.

⁵¹ 58 So. 3d 874 (Fla. 2d DCA 2010).

⁵² *Id.* at 875.

The court closely examined the definition of “sexual conduct,” and determined that it requires images to include actual lewd exhibition of the genitals *by a child*.⁵³ Because the only sexual conduct in the images at issue was performed by an adult, the court held that the images were not prohibited by s. 827.071(5), F.S.⁵⁴

The court also noted that the images depicted *simulated* lewd exhibition of the genitals by a child. The state argued that s. 827.071(5), F.S., proscribed such images because they were photographs or representations “which ... *in part* ... include ... sexual conduct by a child.”⁵⁵ The court disagreed and found that the legislature specifically excluded *simulated* lewd exhibition from the definition of “sexual conduct.” Specifically the court stated, “[i]f the legislature had intended to proscribe the possession of composite images that simulate lewd and lascivious exhibition of the genitals, it could have included a provision doing so. In fact, child pornography has been defined in the federal statutes to specifically include composite images. . . .⁵⁶

Sale or distribution of harmful material to minors

Section 847.012, F.S., provides that it is a third degree felony⁵⁷ for a person to knowingly sell, rent, or loan for monetary consideration to a minor:

- Any picture, photograph, drawing, sculpture, motion picture film, videocassette, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors; or
- Any book, pamphlet, magazine, printed matter however reproduced, or sound recording that contains any matter defined in s. 847.001, F.S., explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and that is harmful to minors.⁵⁸

An adult may not knowingly distribute to a minor on school property, or post on school property any of the material described above.⁵⁹

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.⁶⁰ K-12 students and their parents are afforded numerous statutory rights pertaining to student education, including reproductive health and disease education.⁶¹

⁵³ *Id.* at 877.

⁵⁴ *Id.*

⁵⁵ *Id.* (emphasis in original).

⁵⁶ *Id.* at 876.

⁵⁷ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

⁵⁸ Section 847.012(3) and (6), F.S.

⁵⁹ Section 847.012(5), F.S. School property means the grounds or a facility of any kindergarten, elementary school, middle school, junior high school, or secondary school, whether public or nonpublic. This subsection does not apply to the distribution or posting of school approved instructional materials that by design serve as a major tool for assisting in the instruction of a subject or course by school officers, instructional personnel, school volunteers, educational support employees, or managers.

⁶⁰ Section 1002.20, F.S.

⁶¹ *See* s. 1002.20, F.S.

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.⁶² 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.⁶³

Health education is included in the required instruction to ensure that students meet Florida State Board of Education (SBE) standards.⁶⁴ 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.⁶⁵ Standards and instructional materials are subject to specific selection, adoption, and review processes.⁶⁶

Instructional Materials

Each district school board has the constitutional duty and responsibility to select and provide adequate instructional materials⁶⁷ to each student for core courses in mathematics, language arts, science, social studies, reading, and literature for kindergarten through grade 12.⁶⁸ School districts may purchase instructional materials from a list of state-reviewed and adopted instructional materials⁶⁹ or establish their own review and adoption program.⁷⁰ District school boards receive state funding for instructional materials through the instructional materials allocation.⁷¹

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.⁷² Each district school board must maintain on its website a current list of instructional materials, purchased by the district, separated by grade level.⁷³ Florida law establishes that the parent of a public school student has the right to receive effective

⁶² Section 1003.42(2)(n), F.S.

⁶³ Section 1002.20(3)(d), F.S.

⁶⁴ See CPALMS, *Browse and Search Standards*, available at <https://www.cpalms.org/Public/search/Standard> (last visited March 24, 2021) (Select “Subject” and filter by “Health Education”).

⁶⁵ See The Glossary of Education Reform, *Curriculum*, available at <https://www.edglossary.org/curriculum/> (last visited March 24, 2021).

⁶⁶ See ss. 1003.41 and 1006.28, F.S. See also text accompanying notes 14-19.

⁶⁷ “Instructional materials” are items with intellectual content that by design serve as a major tool for assisting in the instruction of a subject or course. These items may be available in bound, unbound, kit, or package form and may consist of hardbacked or softbacked textbooks, electronic content, consumables, learning laboratories, manipulatives, electronic media, and computer courseware or software. See ss. 1006.28(1) and 1006.29(2), F.S.

⁶⁸ See s. 1006.40(2) and (4), F.S.

⁶⁹ See Florida Department of Education, *Instructional Materials*, available at <http://www.fldoe.org/academics/standards/instructional-materials/> (last visited March 24, 2021).

⁷⁰ See ss. 1006.283 and 1006.40, F.S.

⁷¹ See s. 1006.40, F.S. See also Florida Department of Education, *2020-21 Funding for Florida School Districts*, at 20, available at <http://www.fldoe.org/core/fileparse.php/7507/urlt/fefpdist.pdf> (last visited March 24, 2021).

⁷² Section 1006.28(2)(a)1., F.S.

⁷³ Section 1006.28(2)(a)1., F.S.

communication from the school principal about the manner in which instructional materials are used to implement curricular objectives.⁷⁴

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.⁷⁵ The policy must clearly describe a process, in which the objector has the opportunity to provide specific evidence⁷⁶ to the district school board, and provide for resolution.⁷⁷

III. Effect of Proposed Changes:

The bill amends the definitions of “child pornography,” “harmful to minors,” and “obscene” in s. 847.001, F.S. The definition of:

- “Child pornography,” is amended to include any text describing a minor engaged in sexual conduct.
- “Harmful to minors,” is amended to remove the requirement that the material, taken as a whole, is without serious literary, artistic, political, or scientific value for minors for such material to be considered harmful to minors.
- “Obscene,” is amended to provide that materials are obscene when:
 - The average person, applying contemporary community standards for appropriate materials for minors, would object to as depicting or describing, in a patently offensive way, sexual conduct which is harmful to minors; and
 - Taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

The bill amends s. 847.012, F.S., providing that it is a third degree felony for a person to knowingly sell or rent for monetary consideration, or loan for any reason certain materials to a minor. Additionally, the bill adds to the list of materials that may not be sold, rented, or loaned to a minor, any material used in a public K-12 school classroom, made available in a K-12 school library or included on a public K-12 school recommended reading list, and which contains obscene content, or is harmful to minors or is prohibited as conduct inappropriate for minors.

Such material as described above must be proactively removed by the school district. The required removal of materials is not dependent upon a parent or resident complaint.

The bill amends s. 1002.20, F.S., providing that a public school student may be exposed to the teaching of reproductive health or any sexually transmitted disease, including HIV/AIDS, only in accordance with s. 1003.42(3), F.S.

The bill amends s. 1003.42(3), F.S., requiring school districts or schools to notify and request the written consent of parents at least 10 instructional days before the teaching of reproductive health

⁷⁴ Section 1002.20(19)(b), F.S.

⁷⁵ Section 1006.28(2)(a)2., F.S.

⁷⁶ The parent or resident may present evidence to show that the material does not meet the criteria or requirements of the instructional material selection or adoption process. The parent or resident may also present evidence that the instructional material contains pornographic or prohibited content, as described by s. 847.012, F.S., is not suited to student needs and comprehension of the materials presented, or is inappropriate for the grade level and age group. Section 1006.28(2)(a)2.a.-b., F.S.

⁷⁷ *Id.*

or any sexually transmitted disease, including HIV/AIDS, and its symptoms, development, and treatment. Students who have not obtained prior written consent of his or parent may not be exposed to such teaching. A student whose parent does not give consent for such teaching may not be penalized.

The bill amends s. 1006.28, F.S., providing that there must be a process to afford a parent or resident an opportunity to proffer evidence to the district school board that any material used in a classroom, made available at a school library, or included on a reading list contains content that constitutes child pornography, is harmful to minors, or is obscene, as those terms are defined in s. 847.001, F.S., is:

- Pornographic or prohibited under s. 847.012, F.S.;
- 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.

Additionally, the bill provides that by July 1, 2022, and each July 1 thereafter, district school boards must complete a review of all instructional material used in a public K-12 classroom, made available in a public K-12 library, or included on a public K-12 reading list. Removal of material must be immediate and not dependent upon whether the school board has received a complaint.

The bill provides that a parent of a public school student or a resident of the county may contest the district school board's adoption of a specific instructional material at any time before or after the material's adoption by the district school board on the grounds that the material constitutes child pornography, is harmful to minors, is obscene, or is pornographic or prohibited under s. 847.012, F.S.

The school board must publish a form for such petition on the school district's website. The form must be completed by the parent or resident, include any required contact information, and state the objection to the material. The school board must, within 30 days, grant the petition or refer the matter to the Division of Administrative Hearings for a hearing. The administrative law judge has final order authority over the petition, and must award reasonable attorney fees and costs to a prevailing parent or resident.

For the purposes of incorporating the amendments made by the bill, ss. 847.001 and 288.1254, F.S., are reenacted.

This bill is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

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 expands the definition of child pornography, obscenity and material harmful to children. The expansion of such definitions may subject laws relating to child pornography, obscenity, and materials harmful to children to challenges under the First Amendment.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not yet reviewed the bill. The bill expands materials that constitute child pornography, obscenity, and materials harmful to minors. The bill may have a positive indeterminate prison bed impact (unquantifiable increase prison bed impact) on the Department of Corrections.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 847.001, 847.012, 1002.20, 1003.42, and 1006.28.

The bill reenacts the following sections of the Florida Statutes: 92.561 and 288.1254.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

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

None.

B. Amendments:

None.