

**AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.**

To: Interested Persons
Date: May 2024
From: A. Eric Johnston
RE: HB385 - Representative Arnold Mooney (Will have a new bill # in 2025 Session)
Prohibition of Sexual or Gender Oriented Performances to Children

Purpose: This bill amends the Alabama Anti-Obscenity Enforcement Act (“AAOEA”), that was passed in 1989, *viz.*, §13A-12-200.1, *et seq.*, 1975 *Code of Alabama*, to include sexual or gender oriented performances in places where minors are present. It also amends § 6-5-160, *et seq. id.*, to include a right to enjoin material, including activities, harmful to minors as a public nuisance.

§ 6-5-160 & 160.1 pages 2 and 3 add to the public nuisance statute an injunction remedy for exposing children to material “harmful to minors.”

§13A-12-200.1, *et seq.*, pages 3-7, include stylistic changes only.

§ 13A-12-200.1 (22)(c), page 8, expands the definition of “sexual conduct” to include:

“Any sexual or gender-oriented conduct that knowingly exposes minors to persons who are dressed in sexually revealing, exaggerated, or provocative clothing or costumes, or are stripping, or engaged in lewd or lascivious dancing, presentations, or activities in K-12 public schools and public libraries, where minors are expected and are known to be present without parental presence or consent.”

§13A-12-200.10, pages 8 and 9, provide the law shall not apply do a K-12 public school or public library, if a written notice is given to it, with a copy to the County DA, and offensive materials are removed or activities are ceased within seven days. If not, criminal misdemeanors apply.

Explanation of the amendments: When the AAOEA was written, there were no circumstances where minors were exposed to public sexually themed activities. The amendment to the law adds a new definition that includes such performances. In the public nuisance statute, there was an apparent oversight that permitted an action to enjoin distribution of “obscene” materials but not materials “harmful to minors”. The AAOEA is a statute with criminal penalties. Because these prohibited activities are occurring in public schools and libraries, they are now subject to the law.

Why This Law is Needed: Obscenity in all its forms is not constitutionally protected speech or activity. “Harmful to minors” is a subset of the obscenity law with a similar prohibition to protect minors from speech or activities, that may not be prohibited for adults. See *Ginsberg v. State of New York*, 390 U.S. 629,635(1968). When the AAOEA was written, there was no practice of minors being exposed to strip or drag shows, or in other fora where sexually charged activities may be taking place. In recent years, there are increasing efforts to expose children to sexual and gender activities in public schools and public libraries. These practices may not meet prevailing community standards.

The AAOEA was written as a cohesive document. To explain, “material” includes a live performance or dance. “Sexual conduct” is expanded to include the dress and dancing activities quoted above. In the “harmful to minors” section, the factors include “the material depicts or describes sexual conduct.” The bill merely edits the statute to include these new prohibited activities. The law already prohibits improper books, videos, and other expressive materials.

While free speech is always a defense, the long-standing SCOTUS requirements for obscenity and harmful to minors avoids overbreadth arguments. If there is a question about whether a material or an activity violates the statute, it is answered by a deliberative jury of peers to find (1) if an average person applying contemporary community standards believes the material appeals to the prurient interest of minors, (2) if the material depicts sexual conduct in a way offensive to prevailing standards in the adult community with respect to minors, and (3) lacks serious literary, artistic, political or scientific value for minors.

WHAT THIS BILL DOES NOT DO: This bill does not affect the rights of any adult to engage in sexual or gender related speech or activities in any place where minors are not present and which would otherwise not be defined as obscenity. Adult men and women are free to dress as they choose and act as they choose, so long as it is not in a place where minors are expected and known to be present without parental presence or consent.

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