



Ohio Legislative Service Commission

Bill Analysis

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(As Introduced)

Sens. Cates, Beagle

BILL SUMMARY

- Prohibits a minor, by use of a telecommunications device or other means, from knowingly creating, receiving, exchanging, sending, or possessing a photograph, video, or other material that shows a minor, who is not the actor's child or ward, in a state of nudity.
- Specifies that a first violation of the prohibition in the preceding dot point must result in an unruly child adjudication; a second or subsequent violation is a delinquent act that would be a first degree misdemeanor if it could be committed as an adult.
- Creates the following as exceptions to the prohibition described in the second preceding dot point:
 - The photograph, video, or other material is or is to be created, received, exchanged, sent, or possessed for a bona fide purpose.
 - The photograph, video, or other material depicts or appears to depict a minor less than 13 years of age or a minor engaged in sexual activity, sado-masochistic abuse, or violent conduct.
 - The minor received pecuniary gain or a thing of value or the promise of such for the material or paid money or a thing of value or promised to pay such for the material.
 - The minor sends ten or more different prohibited materials or sends prohibited materials to ten or more different telecommunication devices.

--The minor previously has been adjudicated two or more times to be in violation of the prohibition.

- Specifies that the bill does not preclude a county prosecuting attorney from pursuing any felony charge against a minor who has used a telecommunications device or other means to knowingly create, receive, exchange, send, or possess prohibited materials that show a minor in a state of nudity.
- Specifies that a violation of this prohibition does not make a minor subject to the registration and notification requirements of the Sex Offender Registration and Notification Law (SORN Law).

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CONTENT AND OPERATION

Illegal use of a telecommunications device involving a minor in a state of nudity

Prohibition and sanctions

The bill prohibits a "minor," by use of a telecommunications device or other means, from knowingly creating, receiving, exchanging, sending, or possessing a photograph, video, or other "material" that shows a minor, who is not the actor's child or ward, in a "state of nudity" (see "**Definitions**," below, for definitions of the terms in quotation marks; "telecommunications device" is not defined for purposes of this provision). A violation of the prohibition is the offense of "illegal use of a telecommunications device involving a minor in a state of nudity." A minor must be adjudged an "unruly child" (see "**Definitions**," below) on the first offense. A second or subsequent offense is a delinquent act that would be a first degree misdemeanor if it could be committed as an adult, and the child therefore may be adjudicated a "delinquent child" (see "**Definitions**," below) under R.C. Chapter 2152. The dispositions that a juvenile court may make when a child is adjudicated an unruly child or a delinquent child, unchanged by the bill, are described below in "**Existing unruly child and delinquent child dispositions**."

A violation of the prohibition does not make a minor subject to the registration and notification requirements of the Sex Offender Registration and Notification Law (SORN Law). It is no defense to a charge of a violation of the prohibition that the minor created, received, exchanged, sent, or possessed a photograph, video, or other material that shows themselves in a state of nudity.¹

Exceptions

The prohibition created by the bill does not apply under any of the following circumstances:²

(1) The photograph, video, or other material is or is to be created, received, exchanged, sent, or possessed for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies for research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the photograph, video, or other material.

(2) The photograph, video, or other material depicts or appears to depict a minor less than 13 years of age, depicts a minor engaged in "sexual activity," or depicts "sado-masochistic abuse" or violent conduct (see "**Definitions**," below).

(3) The minor sends the photograph, video, or other material for pecuniary gain or in exchange for a thing of value or for the promise of pecuniary gain or a thing of value or the minor who possesses or receives the photograph, video, or other material paid money or exchanged a thing of value for it or promised to pay money or exchange a thing of value for it.

(4) The minor sends ten or more different photographs, videos, or other materials in violation of the prohibition or sends photographs, videos, or other materials to ten or more different telecommunication devices in violation of it.

(5) The minor previously has been adjudicated two or more times to be in violation of the prohibition (see **COMMENT**).

Additionally, the prohibition created by the bill does not preclude a county prosecuting attorney from pursuing any felony charge (see "**Existing prohibitions that could apply to conduct prohibited by the bill**," below) against a minor who has used a telecommunications device or other means to knowingly create, receive, exchange,

¹ R.C. 2907.324(A), (C), (D), and (F), with conforming changes at R.C. 2151.022(D) and 2152.02(F)(3).

² R.C. 2907.324(B).

send, or possess a photograph, video, or other material that shows a minor in a state of nudity.³

Existing prohibitions that could apply to conduct prohibited by the bill

Several existing prohibitions could apply to the conduct described in the second preceding paragraph, depending upon the circumstances present. If a child is adjudicated a delinquent child for violating any of the prohibitions, the juvenile court may make any of the delinquent child dispositions described below in "**Existing unruly child and delinquent child dispositions.**" The existing prohibitions that could apply are as follows (none of the discussed Revised Code sections are in the bill):

(1) R.C. 2907.31, in relevant part, prohibits a person, with knowledge of its character or content, from recklessly: (a) directly delivering, furnishing, disseminating, providing, exhibiting, or presenting to a "juvenile" or group of juveniles any material that is "obscene" or "harmful to juveniles," (b) directly offering or agreeing to deliver, furnish, disseminate, provide, exhibit, or present to a juvenile or group of juveniles any material that is obscene or harmful to juveniles, or (c) while in the physical proximity of the juvenile, allowing any juvenile to review or peruse any material that is harmful to juveniles. A violation of the prohibition is the offense of "disseminating matter harmful to juveniles." If the material involved is harmful to juveniles, the offense is a misdemeanor of the first degree. If the material involved is obscene, the offense generally is a felony of the fifth degree, but if the juvenile involved in the offense is under 13 years of age, it is a felony of the fourth degree.

(2) R.C. 2907.321, in relevant part, prohibits a person, with knowledge of the character of the material involved, from: (a) creating, reproducing, or publishing any obscene material that has a minor as one of its participants, (b) promoting or advertising for dissemination; delivering, disseminating, displaying, exhibiting, presenting, or providing; or offering or agreeing to deliver, disseminate, display, exhibit, present, or provide, any obscene material that has a minor as one of its participants, (c) procuring, possessing, or controlling any obscene material that has a minor as one of its participants, or (d) bringing or causing to be brought into Ohio any obscene material that has a minor as one of its participants. A violation of the prohibition is the offense of "pandering obscenity involving a minor." A violation based on clause (a), (b), or (d) of the prohibition is a felony of the second degree. A violation based on clause (c) of the prohibition generally is a felony of the fourth degree, but if the offender previously has been convicted of pandering obscenity involving a minor or a violation of R.C. 2907.322 or 2907.323, it is a felony of the third degree.

³ R.C. 2907.324(E).

(3) R.C. 2907.322, in relevant part, prohibits a person, with knowledge of the character of the material involved, from: (a) creating, recording, photographing, filming, developing, reproducing, or publishing any material that shows a minor participating or engaging in "sexual activity," masturbation, or bestiality, (b) advertising for dissemination, distributing, transporting, disseminating, exhibiting, or displaying any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, (c) knowingly soliciting, receiving, exchanging, possessing, or controlling any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality, or (d) bringing or causing to be brought into Ohio any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality. A violation of the prohibition is the offense of "pandering sexually oriented matter involving a minor." A violation based on clause (a), (b), or (d) of the prohibition is a felony of the second degree. A violation based on clause (c) of the prohibition generally is a felony of the fourth degree, but if the offender previously has been convicted of pandering sexually oriented matter involving a minor or a violation of R.C. 2907.321 or 2907.323, it is a felony of the third degree.

(4) R.C. 2907.323, in relevant part, prohibits a person from doing any of the following: (a) photographing any minor who is not the person's child or ward in a state of nudity, or creating, producing, or transferring any material that shows the minor in a state of nudity, or (b) possessing or viewing any material that shows a minor who is not the person's child or ward in a state of nudity. Neither prohibition applies if the material is disseminated, displayed, possessed, controlled, brought or caused to be brought into Ohio, or presented for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material. The prohibition in clause (a) does not apply if the minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used. The prohibition in clause (b) does not apply if the person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material is used or transferred. A violation of the prohibition is the offense of "illegal use of a minor in a nudity-oriented material or performance." A violation based on clause (a) of the prohibition is a felony of the second degree, and, if the offender is convicted of a specification of the type described in R.C. 2941.1422, the court must sentence the offender to a mandatory prison term and order the offender to make restitution. A violation based on clause (b) of the prohibition generally is a felony of the fifth degree, but if the offender previously has been convicted of illegal use of a minor in a nudity-

oriented material or performance or a violation of R.C. 2907.321 or 2907.322, it is a felony of the fourth degree.

(5) R.C. 2919.22, in relevant part, prohibits a person from enticing, coercing, permitting, encouraging, compelling, using, or allowing a child under 18 years of age or a mentally or physically handicapped child under 21 years of age to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of any material that the offender knows or reasonably should know is obscene, is "sexually oriented matter," or is "nudity-oriented matter." A violation of the prohibition is the offense of "endangering children, a felony of the second degree. If the offender also is convicted of a specification of the type described in R.C. 2941.1422, the court must sentence the offender to a mandatory prison term and order the offender to make restitution.

(6) R.C. 2919.24, in relevant part, prohibits a person from: (a) aiding, abetting, inducing, causing, encouraging, or contributing to a child or a ward of the juvenile court becoming an unruly child or a delinquent child, or (b) acting in a way tending to cause a child or a ward of the juvenile court to become an unruly child or a delinquent child. A violation of the prohibition is the offense of "contributing to the unruliness or delinquency of a child," a misdemeanor of the first degree. Each day of violation of the prohibition is a separate offense.

Definitions

As used in the bill:

"Delinquent child" is defined in existing law to include any of the following:⁴

(1) Any child, except a juvenile traffic offender, who violates any law of this state or the United States, or any ordinance of a political subdivision of the state, that would be an offense if committed by an adult;

(2) Any child who violates any lawful order of the court made under Chapter 2152. or Chapter 2151. of the Revised Code other than an order issued under R.C. 2151.87 (prohibition against a child from using, consuming, possessing, purchasing, attempting to purchase, ordering, paying for, or sharing the cost of cigarettes, other tobacco products, or papers used to roll cigarettes, or, under certain circumstances, accepting or receiving cigarettes, other tobacco products, or papers used to roll

⁴ R.C. 2152.02(F); the bill modifies the part of the definition contained in (3) to conform it to the prohibition and sanctions the bill enacts.

cigarettes, unless accompanied by a parent, spouse who is 18 years of age or older, or legal guardian of the child);

(3) Any child who violates the prohibition against illegal use of a telecommunications device involving a minor in a state of nudity on a second or subsequent offense or who violates R.C. 2907.39(C) (the prohibition against an individual who is under 18 years of age knowingly showing or giving false information concerning the individual's name or age, or other false identification, for the purpose of gaining entrance to an adult entertainment establishment), R.C. 2923.211(A) (the prohibition against a person under 18 years of age purchasing or attempting to purchase a firearm), R.C. 2925.55(C)(1) or (D) (the prohibition against an individual under 18 years of age knowingly purchasing, receiving, or otherwise acquiring a pseudoephedrine product, unless the pseudoephedrine product is dispensed by a pharmacist pursuant to a valid prescription issued by a licensed health professional authorized to prescribe drugs, and the prohibition against an individual under 18 years of age knowingly showing or giving false information concerning the individual's name, age, or other identification for the purpose of purchasing, receiving, or otherwise acquiring a pseudoephedrine product);

(4) Any child who is an habitual truant and who previously has been adjudicated an unruly child for being an habitual truant;

(5) Any child who is a chronic truant.

"Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch and includes an image or text appearing on a computer monitor, television screen, liquid crystal display, or similar display device or an image or text recorded on a computer hard disk, computer floppy disk, compact disk, magnetic tape, or similar data storage device.⁵

"Minor" means a person under the age of 18.⁶

"Sado-masochistic abuse" means flagellation or torture by or upon a person or the condition of being fettered, bound, or otherwise physically restrained.⁷

⁵ R.C. 2907.01, not in the bill.

⁶ R.C. 2907.01, not in the bill.

⁷ R.C. 2907.01, not in the bill.

"Sexual activity" means sexual conduct or sexual contact, or both. As used in this definition, "**sexual conduct**" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another (penetration, however slight, is sufficient to complete vaginal or anal intercourse); and "**sexual contact**" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.⁸

"State of nudity" is defined in the bill to mean a lewd depiction, exhibition, representation, or showing of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state, or involving a graphic focus on human male or female genitals.⁹

"Unruly child" is defined in existing law to include any of the following:¹⁰

(1) Any child who does not submit to the reasonable control of the child's parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient;

(2) Any child who is an habitual truant from school and who previously has not been adjudicated an unruly child for being an habitual truant;

(3) Any child who behaves in a manner as to injure or endanger the child's own health or morals or the health or morals of others;

(4) Any child who violates the prohibition against illegal use of a telecommunications device involving a minor in a state of nudity for the first time or who violates any other law, other than R.C. 2907.39(C) (the prohibition against an individual who is under 18 years of age knowingly showing or giving false information concerning the individual's name or age, or other false identification, for the purpose of gaining entrance to an adult entertainment establishment), R.C. 2923.211(A) (the prohibition against a person under 18 years of age purchasing or attempting to

⁸ R.C. 2907.01, not in the bill.

⁹ R.C. 2907.324(F).

¹⁰ R.C. 2151.022; the bill modifies the part of the definition contained in (3) to conform it to the prohibition and sanctions the bill enacts.

purchase a firearm), R.C. 2925.55(C)(1) or (D) (the prohibition against an individual under 18 years of age knowingly purchasing, receiving, or otherwise acquiring a pseudoephedrine product, unless the pseudoephedrine product is dispensed by a pharmacist pursuant to a valid prescription issued by a licensed health professional authorized to prescribe drugs, and the prohibition against an individual under 18 years of age knowingly showing or giving false information concerning the individual's name, age, or other identification for the purpose of purchasing, receiving, or otherwise acquiring a pseudoephedrine product) or R.C. 2151.87 (prohibition against a child from using, consuming, possessing, purchasing, attempting to purchase, ordering, paying for, or sharing the cost of cigarettes, other tobacco products, or papers used to roll cigarettes, or, under certain circumstances, accepting or receiving cigarettes, other tobacco products, or papers used to roll cigarettes, unless accompanied by a parent, spouse who is 18 years of age or older, or legal guardian of the child), that is applicable only to a child.

Existing unruly child and delinquent child dispositions

Current law, unchanged by the bill, provides that, if a child is adjudicated an unruly child, the court may make any of the following dispositions (the summarized dispositions are those that might be relevant to the bill):¹¹

(1) Any disposition authorized under R.C. 2151.353 relative to an abused, neglected, or dependent child;

(2) Place the child on community control under any sanctions, services, and conditions that the court prescribes, as described in R.C. 2152.19(A)(3), provided that, if the court imposes a period of community service upon the child, the period of community service shall not exceed 175 hours (note that R.C. 2152.19(A)(3) pertains to placement of a delinquent child in a detention facility and not to community control – R.C. 2152.19(A)(4) pertains to community control for delinquent children);

(3) Suspend the driver's license, probationary driver's license, or temporary instruction permit issued to the child for a period of time prescribed by the court and suspend the registration of all motor vehicles registered in the name of the child for a period of time prescribed by the court;

(4) Commit the child to the temporary or permanent custody of the court;

(5) Make any further disposition the court finds proper that is consistent with R.C. 2151.312 and 2151.56 to 2151.61;

¹¹ R.C. 2151.254, not in the bill.

(6) If, after making a disposition under a provision described above in (1), (2), or (3), the court finds upon further hearing that the child is not amenable to treatment or rehabilitation under that disposition, make a disposition otherwise authorized under R.C. 2152.19(A)(1), (3), (4), and (7) for delinquent children that is consistent with R.C. 2151.312 and 2151.56 to 2151.61.

Current law, unchanged by the bill, provides numerous dispositions that a juvenile court may make when a child is adjudicated a delinquent child. If the child's delinquent act would be a felony if committed by an adult, the court may commit the child to the Department of Youth Services for secure confinement.¹² In any case in which a child is adjudicated a delinquent child, relevant to the bill, the court may make any of the following orders of disposition, in addition to any other disposition authorized or required by the Delinquent Child Law (the summarized dispositions are those that might be relevant to the bill):¹³

(1) Any order authorized by R.C. 2151.353 for the care and protection of an abused, neglected, or dependent child;

(2) Commit the child to the temporary custody of any school, camp, institution, or other facility operated for the care of delinquent children that is authorized and qualified to provide the care, treatment, or placement required;

(3) Place the child in a detention facility or district detention facility operated under R.C. 2152.41, for up to 90 days;

(4) Place the child on community control under any sanctions, services, and conditions that the court prescribes, including, but not limited to, the following sanctions and conditions: (a) a period of basic probation supervision or intensive probation supervision, (b) a period of day reporting, (c) a period of community service of up to 500 hours, (d) a requirement that the child obtain a high school diploma, a certificate of high school equivalence, vocational training, or employment, (e) a period of drug and alcohol use monitoring, alcohol or drug assessment or counseling, or a period in an alcohol or drug treatment program, (f) a curfew period, (g) a requirement that the child serve monitored time, or (h) a period of house arrest, electronic monitoring, continuous alcohol monitoring, or any combination thereof;

(5) Commit the child to the custody of the court;

¹² R.C. 2152.16 to 2152.18, not in the bill.

¹³ R.C. 2152.19 and 2152.20, not in the bill.

(6) Require the child to not be absent without legitimate excuse from the public school the child is supposed to attend for five or more consecutive days, seven or more school days in one school month, or 12 or more school days in a school year;

(7) Make any further disposition that the court finds proper, except that the child shall not be placed in a state correctional institution, a county, multicounty, or municipal jail or workhouse, another place in which an adult convicted of a crime, under arrest, or charged with a crime is held, or in most cases, a community corrections facility;

(8) Impose a fine not to exceed \$250;

(9) Require the child to pay costs;

(10) Require the child to make restitution to the victim of the child's delinquent act or, if the victim is deceased, to a survivor of the victim in an amount based upon the victim's economic loss caused by or related to the delinquent act or juvenile traffic offense;

(11) Require the child to reimburse any or all of the costs incurred for services or sanctions provided or imposed, including, but not limited to, all or part of the costs of implementing any community control imposed as a disposition under R.C. 2152.19 or all or part of the costs of confinement in a residential facility described in R.C. 2152.19.

COMMENT

The bill provides that a second *or subsequent* violation of the bill's prohibition is a delinquent act. However, it also provides that the section creating the prohibition does not apply if a minor has been adjudicated two or more times to be in violation of that prohibition. Since the prohibition does not apply to a minor who has two prior adjudications for a violation of the prohibition, any prosecution for conduct that could constitute a third violation will have to be for a violation of an existing prohibition that could apply to that conduct.

HISTORY

ACTION	DATE
Introduced	02-10-11