



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

March 18, 1996

The Honorable Michael L. Fair  
Senator, District No. 6  
501 Gressette Building  
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Senator Fair:

You note in a recent letter that "[a] parent has complained that their child, a middle school student in Lexington County has been viewing (at school) "R" rated movies that contain sexually explicit scenes." You further recount that it is your understanding "that the films contain material that is harmful to minors as defined in 16-15-375." In your letter, you further state:

[m]y concern is that minor children are being shown material that includes sexually explicit scenes in films that might meet "community standards" for adults but not for minors. Furthermore, I am concerned that children are being exposed, without parental permission, to sexually explicit scenes in materials that some would say are not "in the whole" sexually oriented.

Your questions are these:

- (1) [i]s the law applied differently within the confines of the public school vs. a theater?
- (2) [d]o you see a weakness in the "Harmful to Minors" section of the law that requires a legislative adjustment?

Law / Analysis

S.C. Code Ann. Sec. 16-15-385 provides in pertinent part:

(A) A person commits the offense of disseminating harmful material to minors if, knowing the character or content of the material, he:

(1) sells, furnishes, presents, or distributes to a minor material that is harmful to minors; or

(2) allows a minor to review or peruse material that is harmful to minors.

A person does not commit an offense under this subsection when he employs a minor to work in a theater if the minor's parent or guardian consents to the employment and if the minor is not allowed in the viewing area when material harmful to minors is shown.

Section 16-15-375 (1) defines the term "harmful to minors". Such Subsection states:

(1) "Harmful to minors" means that quality of any materials or performance that depicts sexually explicit nudity or sexual activity and that, taken as a whole, has the following characteristics:

(a) the average adult person applying contemporary standards would find that the material or performance has a predominant tendency to appeal to a prurient interest of minors in sex; and

(b) the average adult person applying contemporary community standards would find that the depiction of sexually explicit nudity or sexual activity in the material or performance is patently offensive to prevailing standards in the adult community concerning what is suitable for minors; and

(c) to a reasonable person, the material or performance taken as a whole lacks serious literary, artistic, political or scientific value for minors.

Section 16-15-375 (5) defines "sexual activity" as including:

any of the following acts or simulations thereof:

(a) masturbation, whether done alone or with another human or animal;

(b) vaginal, anal or oral intercourse, whether done with another human or an animal;

(c) touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of an human female;

(d) an act or condition that depicts bestiality, sado-masochistic abuse, meaning flagellation or torture or upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or the condition of being fettered, bound, or otherwise physically restrained on the part of the one so clothed;

(e) excretory functions;

(f) the insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.

"Sexually explicit nudity" is defined in Section 16-15-375 (6) as the showing of

(a) uncovered, or less than opaquely covered, human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast; or

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(b) covered human male genitals in a discernibly turgid state.

Subsection (C)(2) of Section 16-15-385 further provides:

[e]xcept as provided in item (3) of this subsection, mistake of age is not a defense to a prosecution under this section. It is an affirmative defense under this section that:

... (2) the defendant was a school, church, museum, public, school, college or university library, government agency, medical clinic, or hospital carrying out its legitimate function, or an employee or agent of such an organization acting in that capacity and carrying out a legitimate duty of his employment.

Subsection (D) makes this offense a felony, and upon conviction a violation thereof must be imprisoned for not more than five years or fined more than five thousand dollars, or both.

The United States Supreme Court has stated that "the government's interest in the 'well-being of its youth' ... [justifies] the regulation of otherwise protected expression." FCC v. Pacifica Foundation, 438 U.S. 726 (1978). In Pacifica, the Court upheld the FCC's ban upon use of "indecent" words over the airwaves even though not obscene under the standards of Miller v. California, 413 U.S. 15 (1973) and Beigay v. Traxler, 790 F.2d 1080 (1986) [upholding South Carolina's obscenity statute under Miller]. In Sable Communications v. FCC, \_\_\_\_\_ U.S. \_\_\_\_\_, 106 L.Ed.2d 93, 105 (1989) the Court has subsequently stated that the State

has a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.

Accordingly, in Martin v. Parrish, 805 F.2d 583 (4th Cir. 1986) the Court found constitutionally valid the prohibition of profanity in a public school classroom. The students in the classroom were deemed to be a captive audience and the Court held that the State had a compelling interest in protecting its youth.

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Courts have determined criminal statutes such as Section 16-17-385 which prohibit the dissemination of material harmful to minors to be constitutional. In the recent case of State v. Thiel, 183 Wis.2d 505, 515 N.W.2d 847 (Wis. 1994), the Wisconsin Supreme Court reviewed a prosecution under a statute similar to South Carolina's. Recognizing that many states have enacted so-called "variable obscenity" laws, prohibiting a person from distributing or exhibiting to children any materials which would be obscene to minors, but not necessarily to adults, the Court noted that such statutes "reflect a state's compelling interest to protect the physical and psychological well-being of children ...." The Court noted that the Wisconsin statute "has a two fold purpose, similar to variable obscenity statutes in other states: (1) to protect minors from material harmful to them as a class and (2) to protect the rights of parents to supervise the development of their children." 515 N.W.2d at 854.

Such statutes were generally valid, if properly drafted, the Court observed, summarizing the law this way:

[t]he United States Supreme Court, in Ginsberg [v. New York], 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)] ... recognized the concept of "variable obscenity," which allows a state legislature or municipality to ban access to materials deemed to be obscene for minors as opposed to adults. Ginsberg was convicted under a New York law for selling "girlie" magazines to minors. On appeal, Ginsberg challenged the statute and argued that "the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex [could not] be made to depend on whether the citizen is an adult or minor." .... The Supreme Court held, however, that New York's variable obscenity standard was constitutional, and the statute "simply adjust[ed] the definition of obscenity 'to social realities by permitting the appeal of [material concerned with sex] to be assessed in terms of the sexual interests ...' of ... minors."

515 N.W.2d at 855.

When faced with the question of the constitutionality of "harmful to minors" statutes like our own, courts have addressed a number of specific issues. Central, however, has been the question of whether "the government's protection of minors burdens (even indirectly) adults' access to material protected as to them." American Booksellers v. Webb, 919 F.2d, supra at 1501. As the Webb case stated, "a state may,

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absent an impermissible burden on adults, deny minors all access in any form to materials obscene as to them. Minors have no right to view or in any way consume this material - even if they do not purchase or otherwise take control of it." Id.

In analyzing the constitutionality of the Georgia "harmful to minors" statute, the Court in Webb examined the three-part test which had been enunciated in Miller v. California, supra and determined it to be controlling, where properly modified with respect to minors. Said the Court,

[n]othing in Miller casts any doubt on the constitutional viability of a variable standard of obscenity for minors based upon a Ginsberg - like adoption of the current Supreme Court standard for determining adult obscenity.

Id. at 1503.

Webb concluded that the first prong of the Miller test, i.e., "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interests" had been properly modified by the Georgia "harm to minors" statute. The Georgia law required that the work "[t]aken as whole, predominantly appeals to the prurient, shameful, or morbid interest of minors." Our own Section 16-15-375 addresses the first prong of the test in virtually identical fashion to Miller by requiring that "the average adult person applying contemporary standards would find that the material or performance has a predominant tendency to appeal to a prurient interest of minors in sex ...".

The second prong of the Miller standard, likewise met by the Georgia statute, is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law ...". Webb noted that Miller did not expressly require that the work be "taken as a whole". Such language was not necessary, reasoned Webb, and would not make sense in the context of Miller's second prong. The Court stated that:

... [w]hether the sexually explicit portion of the work is "patently offensive," - a necessary condition that is distinct from the other two prongs - does not depend upon or in any way relate to the "work as a whole" or to the unobjectionable portions of the allegedly obscene work. Thus, the absence of the "as a whole" language in the Miller test does not work a change in the second prong of the obscenity test.

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... It is our view that the first and second tests under the pre - and post - Ginsberg (i.e. Miller) definitions of obscenity must be judged with reference to the "average" member of the "whole" community, whereas the third prong is decided with reference to whether a reasonable member of the community would find serious value in the allegedly obscene material, regardless of whether the "average" member of the community would find serious value. ... The first and third prongs also require that the allegedly obscene material be viewed "as a whole." ... .

The Court in Webb also stressed that Miller had changed the third prong of the test from the earlier decision in Ginsberg. Whereas Ginsberg had upheld a statute which required the work to be "utterly without social importance for minors ...", the Webb Court concluded that Miller "relaxed the third prong of the obscenity test ... ." Miller altered this aspect of the test to require simply that "... the work, taken as a whole, lacks serious literary, artistic, political or scientific value." In the context of a "harm to minors" statute, Webb summarized that, as interpreted in Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987),

... the first two prongs of the Miller test utilize "contemporary community standards," whereas "serious value" is determined not with reference to "majority approval," but on the basis of whether any reasonable person would find serious value - even if the community as a whole, or the "average" member of the community would not.

As applied to a Ginsberg - type adaptation of the adult obscenity test, Pope teaches that if any reasonable minor, including a seventeen - year old, would find serious value, the material is not "harmful to minors." As the Fourth Circuit and the Virginia Supreme Court recently observed. "if a work is found to have serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole." American Booksellers Assn. v. Virginia 882 F.2d at 127 (quoting Commonwealth v. American Booksellers Assn., 236 Va. 168, 372 S.E.2d 618, 624 (1988).

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919 F.2d at 1504-1505.

Likewise, Thiel, in upholding the Wisconsin statute, summarized the constitutional standard for a "harmful to minors" statute in much the same way as Webb as follows:

[t]he legislature has narrowly drafted sec. 948.11 Stats., so as to have only an incidental effect on the rights of adults to view materials considered not to be obscene for them. The language of the statute reflects the states compelling interest to protect the well-being of its youth by examining the nature of the materials. Once the nature of the materials is deemed to be harmful, by application of the Miller test, an individual may not -- in a public or private forum -- "sell," "loan," "exhibit," and "transfer" represents a knowing and affirmative act. ... Distinct from those cases involving the commercial display of materials to a general, consumer audience, the language of sec. 948.11 focuses upon the affirmative conduct of an individual toward a specific minor or minors. Therefore, an individual violates the statute if he or she, aware of the nature of the material, knowingly offers or presents for inspection to a specific minor or minors material defined as harmful to children in sec. 948.11 (1) (b).

In sec. 948.11 (1) (b), Stats. the legislature adapted the Miller test of obscenity to produce a definition of what may be considered harmful to children. The first two prongs of the test -- appeal to prurient interest and patent offensiveness -- are analyzed by applying contemporary community standards. See Smith v. United States, 431 U.S. 291, 97 S.Ct. 1756, 57 S.E.2d 324 (1977). However, the third prong requires a separate analysis: does the material have literary, artistic, political or scientific value? The appropriate standard at this point is "whether a reasonable person would find such value in the material, taken as a whole." ... Therefore, the appropriate standard to apply under this statute is whether material defined as harmful has any serious literary, artistic, political, scientific, or educational value, when taken as a whole. Such value is assessed by a reasonable minor of like age to the minor to whom the material is exhibited.



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The state has successfully borne the burden of proving that sec. 948.11, Stats. does not unconstitutionally encroach upon the first amendment rights of adults. ... The statute has properly adapted the Miller obscenity standard to determine what materials are harmful to minors so as to allow the state to protect the well-being of youth without unduly burdening the first amendment rights of adults to view, sell, or examine materials not considered obscene or harmful for them.

515 N.W.2d at 859.

South Carolina's "harmful to minors" statute is very similar to those scrutinized in the cases discussed above, which found such statutes to be constitutional on their face. Our definition of "harmful to minors" is virtually identical to the three-prong test articulated in Miller v. California, but has been sufficiently modified to strike "a proper balance between this State's compelling interest to protect the physical and psychological well-being of our own youth while not precluding access to materials deemed to be harmful to minors though not obscene to adults." Thiel, 515 N.W.2d at 858. Thus, in my opinion, Section 16-15-375 et seq., is facially constitutional.

Turning now to your specific question, you have asked whether the law is applied "differently within the confines of the public school vs. a theater". The elements of the offense, contained in Section 16-15-385, are:

[a] person commits the offense of disseminating harmful material to minors if, knowing the character or content of the material, he:

- (1) sells, furnishes, presents, or distributes to a minor material that is harmful to minors; or
- (2) allows a minor to review or peruse material that is harmful to minors.

The Supreme Court of Virginia has concluded that a statute proscribing a minor's "perusal" of "harmful material" typically involves "detailed examination." Commonwealth v. Am. Booksellers Assoc. Inc., 372 S.E.2d supra at 624. Thus, if a jury concludes beyond a reasonable doubt that, anyone, including a school employee, has engaged in the conduct referenced in the above provision, such would constitute a violation of the "harmful to minors" statute.

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I must note, however, that Section 16-15-385 (c) expressly authorizes an affirmative defense if the defendant was a school "carrying out its legitimate function ... or an employee or agent of such an organization acting in that capacity and carrying out a legitimate duty of his employment." Such special treatment is not afforded commercial dealers. Generally, many "harmful to minors" statutes exempt schools or libraries altogether and several courts have concluded that such an exemption is rationally related. American Booksellers v. Webb, *supra*. An affirmative defense assumes the matter charged to be true, but, nevertheless, provides a defense to it. State v. Staples, 299 N.W.2d 276, 299 (Wis. \_\_\_\_). Generally speaking in South Carolina, "affirmative defenses must be established by the defendant by a preponderance of the evidence." McAninch and Fairey, The Criminal Law In South Carolina, (2d ed.) p.53; State v. Cole, 304 S.C. 47, 403 S.E.2d 117 (1991). The General Assembly has, whether wisely or not, as a matter of public policy, given schools and school officials the opportunity to assert to the jury a legal excuse for the dissemination of "harmful materials" to minors, i.e. that they were carrying out a "legitimate function" of their institution or employment. See e.g. Section 59-32-5 et seq. (Comprehensive Health Education Act); see also, particularly Section 59-32-90 ["Films, pictures or diagrams in any comprehensive health education program in public schools must be designed solely for the purpose of explaining bodily functions or the human reproduction process and may not include actual or simulated portrayals of sexual activities or sexual intercourse."]

Such decision by the General Assembly, however, is not constitutionally required. As the Court in Webb stated, "the Constitution does not protect unfettered open placement of [materials obscene to minors] in public places accessible to minors." 919 F.2d at 1512. The Legislature's purpose in adopting this type of provision evidently was to make it a jury issue whether material covered by the Act is "available in an atmosphere free of commercial pressure and generally available for educational purposes." Webb, *Id.* at 1512-1513. However, the State is neither required to exempt schools, or other similar institutions, nor to establish that the dissemination of such material to minors as part of "legitimate functions" of a school, is an affirmative defense to the crime.

Recently, the Attorney General of Georgia concluded that Georgia's definition of "harmful to minors" was constitutional, and thus further legislative restrictions upon such definition could jeopardize the Act. However, the Attorney General further advised that the Legislature was in no way required to provide a statutory exception to schools. Concluded the Attorney General,

[a]ssuming that "harmful to minors" criteria is the benchmark, as I believe we must, the General Assembly may still legislate to require public libraries to take precautions to protect minors

from exposure to these materials. In O.C.G.A. S. 16-12-104 there exists a "library exception" to the criminal penalties for exhibiting harmful to minors materials to children. It is my opinion that this exception was inserted into the law to protect librarians from criminal liability ... . The library exception was designed in part, as a mechanism for making "harmful to minors" material available for adult consumption.

However, while the library exception exempts public and school librarians from criminal sanctions, it does not prevent them from distinguishing between adult materials and those suitable for children, and clearly does not prohibit librarians from taking steps to restrict access to "harmful to minors" material to adults only. In my opinion, legislation could be passed to require such actions by libraries.

Ga. Op. Atty. Gen. No. U 95-24 (Unofficial Opinion, October 13, 1995).

One other point should be mentioned. In Borger v. Bisciglia, 888 F.Supp. 97 (E.D. Wis. 1995), the Court reviewed the constitutionality of a school board policy which stated that "[n]o film having a rating of R, N17, or X shall be shown to students at any school." Under existing guidelines, an R-rated film "may include hard language, or tough violence, or nudity within sensual scenes, or drug abuse or other elements, or a combination of some of the above, so that parents are counseled, in advance, to take this advisory rating very seriously. Parents must find out more about an R-rated movie before they allow their teenagers to view it." 888 F.Supp. at 99.

A student had sued the school district, alleging that the school district policy disallowing schools in the district to show students an R-rated film, violated his First Amendment rights. The Court rejected the argument. Concluded the Court,

[t]his is not a case in which the plaintiff alleges that school officials acted pursuant to political or religious beliefs ... . The defendants have presented an unrebutted "legitimate pedagogical concern" - that its students not be subjected to movies with too much violence, nudity, or "hard" language. This is a viewpoint-neutral, non-ideological reason for a facially neutral policy and a viewpoint-neutral application of that policy. Borger does not dispute that the school has a

legitimate policy to try to keep harsh language, violence, and nudity out of the history or government classroom curriculum.

... "R" ratings are the threshold which the School Board has chosen as movies that will not even be considered. An R-rating indicates that reasonable people could determine that high school students should not view the film ... . That "reasonableness" is all that is necessary in a high school setting. This is a constitutional exercise of school board discretion, and the court shall not enjoin the enforcement of policy 6161.11.

Thus, the Court has found a school board policy which prohibits the showing of R-rated films in that district's school is both reasonable and constitutional.

In summary, it is my opinion that South Carolina's "harmful to minors" statute conforms to the constitutional requirements of Ginsberg, Miller, Webb and other cases, and is thus facially constitutional. The statute properly modifies the Miller three-prong test as it relates to material which is obscene to minors as opposed to adults, but does not unconstitutionally deny this material to adults. Because the statute's definition of material "harmful to minors" virtually tracks the Miller standard, I do not believe this definition could survive any further legislative restriction.

However, the "as a whole" language in the statute which conforms to constitutional requirements does not mean that the State is not able to restrict "the manner of display of materials that are harmful to minors ... ." Upper Midwest Booksellers v. City of Minneapolis, 780 F.2d 1389, 1394 (8th Cir. 1985). Our present statute clearly prohibits the dissemination of material "harmful to minors" as defined therein. A school official may violate the statute as well as anyone else.

It is true, however, that the law in its present form treats school officials and officials at other institutions differently from commercial dealers. The statute presently allows school officials to disseminate to minors material "harmful to minors" without criminal liability if the official asserts and proves as an affirmative defense to a jury (presumably by a preponderance of evidence) that he or she was disseminating the "harmful material" to the minor as a "legitimate function" of the school.

This exception for schools and other institutions is not constitutionally required, however, but is a matter of legislative policy. It is generally inserted to protect school officials in carrying out their functions as educators. As the Attorney General of Georgia

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has stated, if such a defense or exemption is not included in the statute, the employees and personnel of these institutions would have to insure that material harmful to minors was not distributed to minors and that minors were not allowed to peruse such material precisely in the same way that commercial enterprises must presently do.

It is, of course a question for the General Assembly as to whether it wishes this affirmative defense provisions to remain in the present law. Such disparate treatment between commercial enterprises and the enumerated institutions has been attacked in various cases as denying equal protection. Courts such as Webb and Thiel have found the distinction rational, but other decisions such as Upper Midwest Booksellers Assn. have held that it is unconstitutional to treat such institutions differently from commercial endeavors. The latter case severed the exemption portion from the remainder of the ordinance proscribing the display of material "harmful to minors" unless the material is in a sealed wrapper, and found the ordinance constitutional.

You may wish to reevaluate current law in light of the affirmative defense exception for schools. You may also wish to reevaluate present law in light of the fact that I have located at least one decision which has found that a ban upon the showing of R-rated films in schools is both reasonable and constitutional. As you have also sought legislative assistance from this Office, I am forwarding a copy of this Informal Opinion to Mr. Cameron Crawford, Executive Assistant for Legislative/Public Affairs, who I am sure will be in touch with you further.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General

RDC/an