

2593

2011-2012 Regular Sessions

I N   S E N A T E

January 26, 2011

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Introduced by Sen. FLANAGAN -- read twice and ordered printed, and when printed to be committed to the Committee on Mental Health and Developmental Disabilities

AN ACT to amend the mental hygiene law, in relation to disclosure of sexual offender information related to a patient or client, and to amend the correction law, in relation to inclusion of certain persons within the provisions of the sex offender registration act who have had pleas accepted, or who have had verdicts entered with respect to them, of not responsible by reason of mental disease or defect

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. Paragraph 9 of subdivision (c) of section 33.13 of the  
2     mental hygiene law is amended by adding a new subparagraph (ix) to read  
3     as follows:  
4     (IX) APPROPRIATE PERSONS AND ENTITIES PURSUANT TO ARTICLE SIX-C OF THE  
5     CORRECTION LAW, WHEN DISCLOSURE IS LIMITED TO SEXUAL OFFENDER REGISTRA-  
6     TION INFORMATION NECESSARY TO ENSURE THE WELFARE AND SAFETY OF OTHERS.  
7     S 2. Subdivision 1 of section 168-a of the correction law, as added by  
8     chapter 192 of the laws of 1995, is amended to read as follows:  
9     1. "Sex offender" includes any person who is convicted of any of the  
10    offenses set forth in subdivision two or three of this section.  
11    Convictions that result from or are connected with the same act, or  
12    result from offenses committed at the same time, shall be counted for  
13    the purpose of this article as one conviction. Any conviction set aside  
14    pursuant to law is not a conviction for purposes of this article. FOR  
15    PURPOSES OF THIS ARTICLE, THE TERM "SEX OFFENDER" SHALL BE DEEMED TO  
16    INCLUDE A PERSON WHO HAS HAD A CRIMINAL ACTION COMMENCED AGAINST THEM BY  
17    THE FILING OF AN ACCUSATORY INSTRUMENT, A SUPERIOR COURT INFORMATION, OR  
18    INDICTMENT WHICH INCLUDES A CHARGE FOR THE COMMISSION OF ANY OF THE  
19    OFFENSES SET FORTH IN SUBDIVISION TWO OR THREE OF THIS SECTION AND, WITH  
20    RESPECT TO SUCH OFFENSE OR OFFENSES, HAS ENTERED A PLEA, WHICH IS

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

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1 ACCEPTED, OR HAS HAD A VERDICT ENTERED AGAINST SUCH PERSON, OF NOT  
2 RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT. ANY SUCH PLEA OR  
3 VERDICT WITH RESPECT TO SUCH OFFENSE OR OFFENSES SHALL BE CONSIDERED A  
4 CONVICTION OF ALL OF THE OFFENSES SO CHARGED, OR THAT REMAIN AS CHARGED  
5 OR OTHERWISE EXIST AT THE TIME OF THE ENTRY OF SUCH PLEA OR VERDICT, AS  
6 MAY BE APPLICABLE, THAT FALL WITHIN THE DEFINITION OF SEX OFFENSE OR  
7 SEXUALLY VIOLENT OFFENSE AS SET FORTH IN SUBDIVISION TWO OR THREE OF  
8 THIS SECTION AND SHALL BE DEEMED TO BE A CONVICTION FOR ALL OTHER  
9 PURPOSES OF THIS ARTICLE.

10 S 3. Paragraph (c) of subdivision 1 of section 168-b of the correction  
11 law, as amended by chapter 11 of the laws of 2002, is amended to read as  
12 follows:

13 (c) A description of the offense for which the sex offender was  
14 convicted, the date of conviction and the sentence imposed. IN THE EVENT  
15 THAT SUCH CONVICTION IS DEEMED TO EXIST FROM THE ENTRY AND ACCEPTANCE OF  
16 A PLEA, OR THE ENTRY OF A VERDICT, OF NOT RESPONSIBLE BY REASON OF  
17 MENTAL DISEASE OR DEFECT AS DESCRIBED IN SUBDIVISION ONE OF SECTION ONE  
18 HUNDRED SIXTY-EIGHT-A OF THIS ARTICLE, THE DATE OF CONVICTION SHALL BE  
19 DEEMED TO BE THE DATE THE PLEA WAS ACCEPTED BY THE COURT, OR THE DATE A  
20 VERDICT WAS ENTERED, OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR  
21 DEFECT. IN LIEU OF A DESCRIPTION OF THE SENTENCE IMPOSED WHERE A  
22 CONVICTION IS DEEMED TO EXIST AS A RESULT OF SUCH PLEA OR VERDICT, THERE  
23 SHALL BE ENTERED A DESCRIPTION OF ALL PROCEEDINGS THAT HAVE OCCURRED  
24 PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMI-  
25 NAL PROCEDURE LAW.

26 S 4. Section 168-d of the correction law, as amended by chapter 11 of  
27 the laws of 2002, paragraph (a) of subdivision 1 as amended by chapter  
28 69 of the laws of 2003, paragraph (b) of subdivision 1 as amended by  
29 chapter 74 of the laws of 2007, and subdivision 2 as amended and subdi-  
30 vision 4 as added by chapter 684 of the laws of 2005, is amended to read  
31 as follows:

32 S 168-d. Duties of the court. 1. (a) Except as provided in paragraphs  
33 (b) and (c) of this subdivision, upon conviction of any of the offenses  
34 set forth in subdivision two or three of section one hundred sixty-  
35 eight-a of this article the court shall certify that the person is a sex  
36 offender and shall include the certification in the order of commitment,  
37 if any, and judgment of conviction OR IN AN ORDER ISSUED PURSUANT TO THE  
38 PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE  
39 LAW, except as provided in paragraph (e) of subdivision two of section  
40 one hundred sixty-eight-a of this article. The court shall also advise  
41 the sex offender of his or her duties under this article. Failure to  
42 include the certification in the order of commitment [or], the judgment  
43 of conviction, OR IN AN ORDER ISSUED PURSUANT TO THE PROVISIONS OF ARTI-  
44 CLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW shall not relieve  
45 a sex offender of the obligations imposed by this article.

46 (b) Where a defendant stands convicted of an offense defined in para-  
47 graph (b) of subdivision two of section one hundred sixty-eight-a of  
48 this article or where the defendant was convicted of patronizing a pros-  
49 titute in the third degree under section 230.04 of the penal law and the  
50 defendant controverts an allegation that the victim of such offense was  
51 less than eighteen years of age or, in the case of a conviction under  
52 section 230.04 of the penal law, less than seventeen years of age, the  
53 court, without a jury, shall, prior to sentencing OR ISSUING AN ORDER  
54 PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMI-  
55 NAL PROCEDURE LAW, conduct a hearing, and the people may prove by clear  
56 and convincing evidence that the victim was less than eighteen years of

1 age or less than seventeen years of age, as applicable, by any evidence  
2 admissible under the rules applicable to a trial of the issue of guilt.  
3 The court in addition to such admissible evidence may also consider  
4 reliable hearsay evidence submitted by either party provided that it is  
5 relevant to the determination of the age of the victim. Facts concerning  
6 the age of the victim proven at trial or ascertained at the time of  
7 entry of a plea of guilty, OR FACTS CONCERNING THE AGE OF THE VICTIM  
8 ASCERTAINED AT THE TIME A PLEA IS ENTERED, WHICH IS ACCEPTED BY THE  
9 COURT, OR AT A TRIAL WHERE VERDICT IS ENTERED AGAINST SUCH PERSON, OF  
10 NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, shall be deemed  
11 established by clear and convincing evidence and shall not be reliti-  
12 gated. At the conclusion of the hearing, or if the defendant does not  
13 controvert an allegation that the victim of the offense was less than  
14 eighteen years of age or less than seventeen years of age, as applica-  
15 ble, the court must make a finding and enter an order setting forth the  
16 age of the victim. If the court finds that the victim of such offense  
17 was under eighteen years of age or under seventeen years of age, as  
18 applicable, the court shall certify the defendant as a sex offender, the  
19 provisions of paragraph (a) of this subdivision shall apply and the  
20 defendant shall register with the division in accordance with the  
21 provisions of this article.

22 (c) Where a defendant stands convicted of an offense defined in para-  
23 graph (c) of subdivision two of section one hundred sixty-eight-a of  
24 this article and the defendant controverts an allegation that the  
25 defendant was previously convicted of a sex offense or a sexually  
26 violent offense defined in this article or has previously been convicted  
27 of or convicted for an attempt to commit any of the provisions of  
28 section 130.52 or 130.55 of the penal law, the court, without a jury,  
29 shall, prior to sentencing OR ISSUING AN ORDER PURSUANT TO THE  
30 PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE  
31 LAW, conduct a hearing, and the people may prove by clear and convincing  
32 evidence that the defendant was previously convicted of a sex offense or  
33 a sexually violent offense defined in this article or has previously  
34 been convicted of or convicted for an attempt to commit any of the  
35 provisions of section 130.52 or 130.55 of the penal law, by any evidence  
36 admissible under the rules applicable to a trial of the issue of guilt.  
37 The court in addition to such admissible evidence may also consider  
38 reliable hearsay evidence submitted by either party provided that it is  
39 relevant to the determination of whether the defendant was previously  
40 convicted of a sex offense or a sexually violent offense defined in this  
41 article or has previously been convicted of or convicted for an attempt  
42 to commit any of the provisions of section 130.52 or 130.55 of the penal  
43 law. At the conclusion of the hearing, or if the defendant does not  
44 controvert an allegation that the defendant was previously convicted of  
45 a sex offense or a sexually violent offense defined in this article or  
46 has previously been convicted of or convicted for an attempt to commit  
47 any of the provisions of section 130.52 or 130.55 of the penal law, the  
48 court must make a finding and enter an order determining whether the  
49 defendant was previously convicted of a sex offense or a sexually  
50 violent offense defined in this article or has previously been convicted  
51 of or convicted for an attempt to commit any of the provisions of  
52 section 130.52 or 130.55 of the penal law. If the court finds that the  
53 defendant has such a previous conviction, the court shall certify the  
54 defendant as a sex offender, the provisions of paragraph (a) of this  
55 subdivision shall apply and the defendant shall register with the divi-  
56 sion in accordance with the provisions of this article.

1     2. Any sex offender, who is released on probation or discharged upon  
2 payment of a fine, conditional discharge or unconditional discharge OR  
3 IS RELEASED OR DISCHARGED PURSUANT TO THE PROVISIONS OF ARTICLE THREE  
4 HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW shall, prior to such  
5 release or discharge, be informed of his or her duty to register under  
6 this article by the court in which he or she was convicted OR BY THE  
7 COURT ISSUING AN ORDER PURSUANT TO THE PROVISIONS OF ARTICLE THREE  
8 HUNDRED THIRTY OF THE CRIMINAL PROCEDURE LAW. At the time sentence is  
9 imposed OR AT THE TIME THAT THE COURT ISSUES AN ORDER PURSUANT TO THE  
10 PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMINAL PROCEDURE  
11 LAW, such sex offender shall register with the division on a form  
12 prepared by the division. The court shall require the sex offender to  
13 read and sign such form and to complete the registration portion of such  
14 form. The court shall on such form obtain the address where the sex  
15 offender expects to reside upon his or her release, and the name and  
16 address of any institution of higher education he or she expects to be  
17 employed by, enrolled in, attending or employed, whether for compen-  
18 sation or not, and whether he or she expects to reside in a facility  
19 owned or operated by such an institution, AND, IF APPLICABLE, A COPY OF  
20 THE ORDER ISSUED, AND DESCRIPTION OF ALL PROCEEDINGS THAT HAVE OCCURRED,  
21 PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY OF THE CRIMI-  
22 NAL PROCEDURE LAW and shall report such information to the division. The  
23 court shall give one copy of the form to the sex offender and shall send  
24 two copies to the division which shall forward the information to the  
25 law enforcement agencies having jurisdiction. The court shall also noti-  
26 fy the district attorney and the sex offender of the date of the deter-  
27 mination proceeding to be held pursuant to subdivision three of this  
28 section, which shall be held at least forty-five days after such notice  
29 is given. This notice shall include the following statement or a  
30 substantially similar statement: "This proceeding is being held to  
31 determine whether you will be classified as a level 3 offender (risk of  
32 repeat offense is high), a level 2 offender (risk of repeat offense is  
33 moderate), or a level 1 offender (risk of repeat offense is low), or  
34 whether you will be designated as a sexual predator, a sexually violent  
35 offender or a predicate sex offender, which will determine how long you  
36 must register as a sex offender and how much information can be provided  
37 to the public concerning your registration. If you fail to appear at  
38 this proceeding, without sufficient excuse, it shall be held in your  
39 absence. Failure to appear may result in a longer period of registration  
40 or a higher level of community notification because you are not present  
41 to offer evidence or contest evidence offered by the district attorney."  
42 The court shall also advise the sex offender that he or she has a right  
43 to a hearing prior to the court's determination, that he or she has the  
44 right to be represented by counsel at the hearing and that counsel will  
45 be appointed if he or she is financially unable to retain counsel. If  
46 the sex offender applies for assignment of counsel to represent him or  
47 her at the hearing and counsel was not previously assigned to represent  
48 the sex offender in the underlying criminal action, the court shall  
49 determine whether the offender is financially unable to retain counsel.  
50 If such a finding is made, the court shall assign counsel to represent  
51 the sex offender pursuant to article eighteen-B of the county law. Where  
52 the court orders a sex offender released on probation, such order must  
53 include a provision requiring that he or she comply with the require-  
54 ments of this article. Where such sex offender violates such provision,  
55 probation may be immediately revoked in the manner provided by article  
56 four hundred ten of the criminal procedure law.

1 3. For sex offenders released on probation or discharged upon payment  
2 of a fine, conditional discharge or unconditional discharge, OR RELEASED  
3 OR DISCHARGED PURSUANT TO THE PROVISIONS OF ARTICLE THREE HUNDRED THIRTY  
4 OF THE CRIMINAL PROCEDURE LAW, it shall be the duty of the court apply-  
5 ing the guidelines established in subdivision five of section one  
6 hundred sixty-eight-1 of this article to determine the level of notifi-  
7 cation pursuant to subdivision six of section one hundred sixty-eight-1  
8 of this article and whether such sex offender shall be designated a  
9 sexual predator, sexually violent offender, or predicate sex offender as  
10 defined in subdivision seven of section one hundred sixty-eight-a of  
11 this article. At least fifteen days prior to the determination proceed-  
12 ing, the district attorney shall provide to the court and the sex offen-  
13 der a written statement setting forth the determinations sought by the  
14 district attorney together with the reasons for seeking such determi-  
15 nations. The court shall allow the sex offender to appear and be heard.  
16 The state shall appear by the district attorney, or his or her designee,  
17 who shall bear the burden of proving the facts supporting the determi-  
18 nations sought by clear and convincing evidence. Where there is a  
19 dispute between the parties concerning the determinations, the court  
20 shall adjourn the hearing as necessary to permit the sex offender or the  
21 district attorney to obtain materials relevant to the determinations  
22 from any state or local facility, hospital, institution, office, agency,  
23 department or division. Such materials may be obtained by subpoena if  
24 not voluntarily provided to the requesting party. In making the determi-  
25 nations, the court shall review any victim's statement and any relevant  
26 materials and evidence submitted by the sex offender and the district  
27 attorney and the court may consider reliable hearsay evidence submitted  
28 by either party provided that it is relevant to the determinations.  
29 Facts previously proven at trial or elicited at the time of entry of a  
30 plea of guilty OR PREVIOUSLY ELICITED AT THE TIME A PLEA IS ENTERED,  
31 WHICH IS ACCEPTED BY THE COURT, OR ARE PROVEN AT A TRIAL WHERE A VERDICT  
32 HAS BEEN ENTERED, OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR  
33 DEFECT shall be deemed established by clear and convincing evidence and  
34 shall not be relitigated. The court shall render an order setting forth  
35 its determinations and the findings of fact and conclusions of law on  
36 which the determinations are based. A copy of the order shall be submit-  
37 ted by the court to the division. Upon application of either party, the  
38 court shall seal any portion of the court file or record which contains  
39 material that is confidential under any state or federal statute. Either  
40 party may appeal as of right from the order pursuant to the provisions  
41 of articles fifty-five, fifty-six and fifty-seven of the civil practice  
42 law and rules. Where counsel has been assigned to represent the sex  
43 offender upon the ground that the sex offender is financially unable to  
44 retain counsel, that assignment shall be continued throughout the  
45 pendency of the appeal, and the person may appeal as a poor person  
46 pursuant to article eighteen-B of the county law.

47 4. If a sex offender, having been given notice, including the time and  
48 place of the determination proceeding in accordance with this section,  
49 fails to appear at this proceeding, without sufficient excuse, the court  
50 shall conduct the hearing and make the determinations in the manner set  
51 forth in subdivision three of this section.

52 S 5. Section 29.16 of the mental hygiene law, as amended by chapter  
53 465 of the laws of 1992, is amended to read as follows:  
54 S 29.16 Discharge OR RELEASE; certain cases.

55 (A) The director of a facility shall, with respect to any patient  
56 admitted to such facility pursuant to section five hundred nine of the

1 executive law or 353.4 of the family court act and article nine or  
2 fifteen of this chapter, give immediate written notice to the [director  
3 of the division for youth] OFFICE OF CHILDREN AND FAMILY SERVICES and to  
4 the mental hygiene legal service when any such patient leaves the facil-  
5 ity without the consent of its director. Such patient shall not be  
6 discharged so long as there is a valid order of the family court placing  
7 such person with the [division for youth] OFFICE OF CHILDREN AND FAMILY  
8 SERVICES, except in accordance with the provisions of section five  
9 hundred nine of the executive law or section 353.4 of the family court  
10 act.

11 (B) NOTWITHSTANDING ANY PROVISIONS OF LAW TO THE CONTRARY, PRIOR TO  
12 THE DISCHARGE OR RELEASE, INCLUDING A COURT ORDERED RELEASE, FROM A  
13 DEPARTMENT FACILITY OF A PATIENT WHO IS A SEX OFFENDER REQUIRED TO  
14 REGISTER PURSUANT TO ARTICLE SIX-C OF THE CORRECTION LAW, THE DIRECTOR  
15 OF A FACILITY SHALL CONTACT THE DIVISION OF CRIMINAL JUSTICE SERVICES  
16 (HEREIN THE "DIVISION") TO DETERMINE WHETHER OR NOT SUCH PATIENT HAS  
17 REGISTERED A CHANGE OF ADDRESS PURSUANT TO THE PROVISIONS OF SUBDIVISION  
18 FOUR OF SECTION ONE HUNDRED SIXTY-EIGHT-F OF THE CORRECTION LAW. IN THE  
19 EVENT THAT THE DIRECTOR DETERMINES THAT SUCH PATIENT HAS FAILED TO  
20 PROVIDE THE DIVISION WITH THE NOTIFICATION OF CHANGE OF ADDRESS WHICH  
21 WILL PROVIDE THE DIVISION WITH THE PATIENT'S INTENDED NEW ADDRESS WHICH  
22 WILL TAKE EFFECT UPON SUCH DISCHARGE OR RELEASE, THE DIRECTOR IMMEDIATE-  
23 LY SHALL NOTIFY THE PATIENT AND THE MENTAL HYGIENE LEGAL SERVICE OF THE  
24 REQUIREMENTS OF REGISTERING A CHANGE OF ADDRESS PURSUANT TO SUCH  
25 PROVISIONS OF THE CORRECTION LAW. NOTWITHSTANDING THE PROVISIONS OF  
26 SECTION ONE HUNDRED SIXTY-EIGHT-F OF THE CORRECTION LAW, THE DIRECTOR OF  
27 A FACILITY IS AUTHORIZED TO DELAY THE IMPLEMENTATION OF THE DISCHARGE OR  
28 RELEASE, INCLUDING A COURT ORDERED RELEASE, OF SUCH PATIENT FOR A PERIOD  
29 OF UP TO TEN DAYS OR UNTIL THE DATE THAT SUCH PATIENT COMPLIES WITH THE  
30 REGISTRATION REQUIREMENTS OF SUCH PROVISIONS OF THE CORRECTION LAW,  
31 WHICHEVER OCCURS FIRST.

32 S 6. Section 29.17 of the mental hygiene law is amended to read as  
33 follows:

34 S 29.17 Clothing and money to be furnished patients discharged or  
35 released.

36 No patient shall be discharged or released from a department facility  
37 without suitable clothing adapted to the season in which he OR SHE is  
38 discharged or released; and if it cannot be otherwise obtained, the  
39 facility shall upon the order of the director, or of the commissioner,  
40 as the case may be, furnish the same, and money not exceeding fifty  
41 dollars, to defray his OR HER expenses until he OR SHE can reach his OR  
42 HER relatives or friends, or find employment to earn a subsistence. THE  
43 FACILITY, UPON THE ORDER OF THE DIRECTOR, OR OF THE COMMISSIONER, AS THE  
44 CASE MAY BE, SHALL FURNISH A PATIENT, WHO IS A SEX OFFENDER AND IS  
45 REQUIRED TO REGISTER A CHANGE OF ADDRESS PURSUANT TO SUBDIVISION FOUR OF  
46 SECTION ONE HUNDRED SIXTY-EIGHT-F OF THE CORRECTION LAW, WITH MONEY, IN  
47 AN AMOUNT EQUAL TO THE STATUTORY AMOUNT CHARGED BY THE DIVISION OF CRIM-  
48 INAL JUSTICE SERVICES TO DEFRAY THE EXPENSE OF REGISTERING HIS OR HER  
49 CHANGE OF ADDRESS WITH THE DIVISION, AT OR PRIOR TO THE DATE OF SUCH  
50 DISCHARGE OR RELEASE.

51 S 7. Paragraph a of subdivision 2 of section 168-b of the correction  
52 law, as amended by chapter 645 of the laws of 2005, is amended to read  
53 as follows:

54 a. The division is authorized to make the registry available to any  
55 regional or national registry of sex offenders for the purpose of shar-  
56 ing information OR TO THE COMMISSIONER OF MENTAL HEALTH OR THE COMMIS-

1 SIONER OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES. The divi-  
2 sion shall accept files from any regional or national registry of sex  
3 offenders and shall make such files available when requested pursuant to  
4 the provisions of this article.

5 S 8. This act shall take effect on the one hundred eightieth day after  
6 it shall have become a law.