

8170

2011-2012 Regular Sessions

I N A S S E M B L Y

June 3, 2011

Introduced by M. of A. PERRY, P. RIVERA, MAISEL, ROBERTS -- read once
and referred to the Committee on Social Services

AN ACT to amend the social services law, in relation to creating an educational reform program for certain offenders who are criminally charged with certain offenses involving the creation, exhibition or distribution of a photograph depicting nudity through the use of an electronic communication device, an interactive wireless communications device or a computer; and to amend the criminal procedure law and the family court act, in relation to creating a diversionary program for cases involving certain offenders who are criminally charged with certain offenses involving the creation, exhibition or distribution of a photograph depicting nudity through the use of an electronic communication device, an interactive wireless communications device or a computer

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

1 Section 1. This act shall be known and may be cited as "The Cyber-
2 Crime Youth Rescue Act".
3 S 2. Legislative intent. The teenage practices of sexting and posting
4 sexual images online are nationwide problems that have perplexed
5 parents, school administrators, and law enforcement officials. Prosecu-
6 tors in several states have charged teenagers who have engaged in these
7 behaviors with criminal offenses, including distribution of child
8 pornography. A charge of this type can ruin the future of a young person
9 who was too inexperienced to understand the consequences of his or her
10 actions.
11 It is necessary to develop an alternative to prosecution for juveniles
12 who are charged with a criminal offense for posting sexually suggestive
13 or sexually explicit photographs on the internet or disseminating such
14 images by use of other electronic media such as cell phones.

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

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1 S 3. The social services law is amended by adding a new section 423-b
2 to read as follows:

3 S 423-B. EDUCATIONAL REFORM PROGRAM FOR CERTAIN JUVENILE OFFENDERS. 1.
4 THE OFFICE OF CHILDREN AND FAMILY SERVICES, HEREINAFTER THE "OFFICE," IN
5 CONSULTATION WITH THE CHIEF ADMINISTRATOR OF THE COURTS AND THE COMMIS-
6 SIONER OF THE DEPARTMENT OF EDUCATION, SHALL DEVELOP, AND THE OFFICE
7 SHALL IMPLEMENT, AN EDUCATIONAL REFORM PROGRAM FOR ELIGIBLE OFFENDERS
8 WHO HAVE BEEN REFERRED TO THE PROGRAM THROUGH THE DIVERSIONARY PROGRAM
9 DESCRIBED IN SECTION 530.15 OF THE CRIMINAL PROCEDURE LAW.

10 2. THE PROGRAM SHALL BE AVAILABLE IN EVERY COUNTY IN THE STATE;
11 PROVIDED THAT IF THE OFFICE DETERMINES THAT THERE IS NOT A SUFFICIENT
12 NUMBER OF ELIGIBLE OFFENSES IN A COUNTY TO MANDATE THE ESTABLISHMENT OF
13 A SITE FOR THE PROGRAM, PROVISIONS SHALL BE MADE FOR THE RESIDENTS OF
14 SAID COUNTY TO ATTEND A PROGRAM IN ANOTHER COUNTY WHERE A PROGRAM
15 EXISTS.

16 3. THE PROGRAM SHALL PROVIDE, AT A MINIMUM, INFORMATION CONCERNING:

17 A. THE LEGAL CONSEQUENCES OF AND PENALTIES FOR SHARING SEXUALLY
18 SUGGESTIVE OR EXPLICIT MATERIALS, INCLUDING SANCTIONS IMPOSED UNDER
19 APPLICABLE FEDERAL AND STATE STATUTES;

20 B. THE NON-LEGAL CONSEQUENCES OF SHARING SEXUALLY SUGGESTIVE OR
21 EXPLICIT MATERIALS INCLUDING, BUT NOT LIMITED TO, THE EFFECT ON
22 RELATIONSHIPS, LOSS OF EDUCATIONAL AND EMPLOYMENT OPPORTUNITIES, AND
23 BEING BARRED OR REMOVED FROM SCHOOL PROGRAMS AND EXTRACURRICULAR ACTIV-
24 ITIES;

25 C. HOW THE UNIQUE CHARACTERISTICS OF CYBERSPACE AND THE INTERNET,
26 INCLUDING THE NEARLY UNLIMITED ABILITY OF AN INFINITE AUDIENCE TO
27 UTILIZE THE INTERNET TO SEARCH FOR AND REPLICATE MATERIALS, CAN PRODUCE
28 LONG-TERM AND UNFORESEEN CONSEQUENCES FOR SHARING SEXUALLY SUGGESTIVE OR
29 EXPLICIT MATERIALS; AND

30 D. THE POSSIBLE CONNECTION BETWEEN BULLYING AND CYBER-BULLYING AND
31 JUVENILES SHARING SEXUALLY SUGGESTIVE OR EXPLICIT MATERIALS.

32 4. UPON RECEIPT OF THE COURT ORDER DIRECTING THAT THE CASE BE DIVERTED
33 TO THE PROGRAM, AS PROVIDED IN SUBDIVISION SIX OF SECTION 530.15 OF THE
34 CRIMINAL PROCEDURE LAW, THE PROGRAM SHALL SCHEDULE THE ELIGIBLE OFFENDER
35 TO ATTEND THE NEXT SESSION OF THE PROGRAM AND SHALL SEND WRITTEN NOTICE
36 OF THE SCHEDULING, ALONG WITH THE DATE, TIME AND LOCATION OF THE SESSION
37 OR SESSIONS, TO THE ELIGIBLE OFFENDER, HIS OR HER PARENTS OR GUARDIANS
38 AND THE CLERK OF THE REFERRING COURT.

39 5. ATTENDANCE AT EACH SCHEDULED SESSION OF THE PROGRAM, FROM THE
40 COMMENCEMENT OF THE SESSION TO ITS CONCLUSION, IS MANDATORY FOR ELIGIBLE
41 OFFENDERS. IN THE DISCRETION OF THE OFFICE, ANY OFFENDER WHO, WITHOUT
42 VALID EXCUSE AS DETERMINED BY THE OFFICE, DOES NOT ATTEND EACH COMPLETE
43 SESSION OF THE PROGRAM MAY BE DEEMED TO HAVE FAILED TO COMPLETE THE
44 PROGRAM. THE OFFICE SHALL NOTIFY THE REFERRING COURT OF AN ELIGIBLE
45 OFFENDER'S UNEXCUSED FAILURE TO COMPLETE THE PROGRAM WITHIN THREE DAYS
46 OF THE ELIGIBLE OFFENDER'S FAILURE TO ATTEND A SESSION.

47 6. A. AT THE CONCLUSION OF THE PROGRAM, EACH ELIGIBLE OFFENDER WHO HAS
48 COMPLETED THE PROGRAM SHALL UNDERGO AN EVALUATION BY THE OFFICE FOR THE
49 PURPOSES OF DETERMINING:

50 (1) WHETHER THE ELIGIBLE OFFENDER COMPREHENDS THE LEGAL AND NON-LEGAL
51 CONSEQUENCES OF HIS OR HER ACTIONS;

52 (2) WHETHER THE ELIGIBLE OFFENDER COMPREHENDS THE RISKS ATTENDANT TO
53 HIS OR HER ACTIONS; AND

54 (3) WHETHER THE ELIGIBLE OFFENDER IS LIKELY TO RE-OFFEND.

55 B. THE OFFICE SHALL PREPARE A WRITTEN REPORT OF THE RESULTS OF THE
56 EVALUATION REQUIRED BY PARAGRAPH A OF THIS SUBDIVISION AND SHALL PROVIDE

1 A COPY OF THE EVALUATION, TOGETHER WITH A CERTIFICATION THAT THE ELIGI-
2 BLE OFFENDER HAS SUCCESSFULLY COMPLETED THE PROGRAM, A RECOMMENDATION AS
3 TO WHETHER THE CASE AGAINST THE ELIGIBLE OFFENDER SHOULD OR SHOULD NOT
4 BE DISMISSED AND ANY OTHER INFORMATION THE OFFICE DEEMS RELEVANT, TO THE
5 REFERRING COURT WITHIN TWENTY DAYS OF THE DATE THE ELIGIBLE OFFENDER
6 COMPLETES THE PROGRAM.

7 7. AS USED IN THIS SECTION:

8 A. "ELIGIBLE OFFENDER" MEANS AN OFFENDER AS DEFINED IN SUBDIVISION TWO
9 OF SECTION 530.15 OF THE CRIMINAL PROCEDURE LAW;

10 B. "ELIGIBLE OFFENSE" MEANS AN OFFENSE AS DEFINED IN SUBDIVISION TWO
11 OF SECTION 530.15 OF THE CRIMINAL PROCEDURE LAW; AND

12 C. "PROGRAM" MEANS THE EDUCATION REFORM PROGRAM DEVELOPED PURSUANT TO
13 SUBDIVISION ONE OF THIS SECTION.

14 S 4. The criminal procedure law is amended by adding a new section
15 530.15 to read as follows:

16 S 530.15 DIVERSIONARY PROGRAM FOR ELIGIBLE OFFENSES.

17 1. A CASE AGAINST AN ELIGIBLE OFFENDER WHO HAS BEEN CHARGED WITH AN
18 ELIGIBLE OFFENSE, AS DEFINED IN SUBDIVISION TWO OF THIS SECTION, SHALL
19 BE DIVERTED FROM PROSECUTION TO THE EDUCATIONAL REFORM PROGRAM DESCRIBED
20 IN SECTION FOUR HUNDRED TWENTY-THREE-B OF THE SOCIAL SERVICES LAW ON THE
21 CONDITIONS PROVIDED IN THIS SECTION. AN OFFENDER WHO QUALIFIES FOR AND
22 SUCCESSFULLY COMPLETES THE EDUCATIONAL REFORM PROGRAM SHALL HAVE THE
23 OPPORTUNITY TO AVOID PROSECUTION FOR THE ELIGIBLE OFFENSE. PROSECUTION
24 OF THE OFFENDER FOR THE ELIGIBLE OFFENSE SHALL BE DEFERRED FOR THE PERI-
25 OD DURING WHICH THE OFFENDER ATTENDS THE PROGRAM. THE COURT SHALL INFORM
26 AN OFFENDER OF THE POSSIBILITY OF DIVERSION TO THE PROGRAM AT THE TIME
27 OF ARRAIGNMENT.

28 2. AS USED IN THIS SECTION:

29 (A) "ELIGIBLE OFFENDER" MEANS A PERSON EIGHTEEN YEARS OLD OR YOUNGER
30 WHO HAS BEEN CHARGED WITH AN ELIGIBLE OFFENSE AND WHOSE CASE CAN BE
31 DIVERTED TO THE EDUCATIONAL REFORM PROGRAM.

32 (B) "ELIGIBLE OFFENSE" MEANS AN OFFENSE IN WHICH: (1) THE FACTS OF THE
33 CASE INVOLVE THE CREATION, EXHIBITION OR DISTRIBUTION, WITHOUT MALICIOUS
34 INTENT, OF A PHOTOGRAPH DEPICTING NUDITY AS DEFINED IN SECTION 245.10 OF
35 THE PENAL LAW THROUGH THE USE OF AN ELECTRONIC COMMUNICATION DEVICE, AN
36 INTERACTIVE WIRELESS COMMUNICATIONS DEVICE OR A COMPUTER; AND (2) THE
37 CREATOR AND SUBJECT OF THE PHOTOGRAPH BOTH ARE, OR WERE AT THE TIME OF
38 ITS MAKING, EIGHTEEN YEARS OLD OR YOUNGER.

39 (C) "PROGRAM" OR "EDUCATIONAL REFORM PROGRAM" MEANS THE EDUCATIONAL
40 REFORM PROGRAM DESCRIBED IN SECTION FOUR HUNDRED TWENTY-THREE-B OF THE
41 SOCIAL SERVICES LAW.

42 3. DIVERSION TO THE PROGRAM SHALL BE LIMITED TO SITUATIONS WHERE:

43 (A) THE OFFENDER HAS NOT PREVIOUSLY BEEN ADJUDICATED DELINQUENT FOR OR
44 CONVICTED OF A CRIME OR OFFENSE WHICH, IF COMMITTED BY AN ADULT, WOULD
45 CONSTITUTE A VIOLATION OF THE PROVISIONS OF SECTION 235.05 (OBSCENITY IN
46 THE THIRD DEGREE); 235.06 (OBSCENITY IN THE SECOND DEGREE); 235.07
47 (OBSCENITY IN THE FIRST DEGREE); 235.21 (DISSEMINATING INDECENT MATERIAL
48 TO MINORS IN THE SECOND DEGREE); 235.22 (DISSEMINATING INDECENT MATERIAL
49 TO MINORS IN THE FIRST DEGREE); 263.10 (PROMOTING AN OBSCENE SEXUAL
50 PERFORMANCE BY A CHILD); 263.11 (POSSESSING AN OBSCENE SEXUAL PERFORM-
51 ANCE BY A CHILD); 263.15 (PROMOTING A SEXUAL PERFORMANCE BY A CHILD); OR
52 263.16 (POSSESSING A SEXUAL PERFORMANCE BY A CHILD) OF THE PENAL LAW;

53 (B) THE OFFENDER WAS NOT AWARE THAT HIS OR HER ACTIONS COULD CONSTI-
54 TUTE A CRIMINAL OFFENSE;

55 (C) THE OFFENDER DID NOT HAVE THE INTENT TO COMMIT A CRIMINAL OFFENSE;

(D) THERE IS A LIKELIHOOD THAT THE OFFENDER'S OFFENSE IS RELATED TO A CONDITION OR SITUATION THAT WOULD BE CONDUCIVE TO CHANGE THROUGH HIS OR HER PARTICIPATION IN THE EDUCATIONAL PROGRAM; AND

(E) THE BENEFITS TO SOCIETY IN ADMITTING THE OFFENDER INTO THE EDUCATIONAL PROGRAM OUTWEIGH THE HARM DONE TO SOCIETY BY ABANDONING CRIMINAL PROSECUTION.

4. (A) THE DETERMINATION OF WHETHER A CASE AGAINST AN OFFENDER SHALL BE DIVERTED TO THE PROGRAM SHALL BE MADE:

(1) BY THE DISTRICT ATTORNEY AT ANY TIME PRIOR TO ARRAIGNMENT OF THE ELIGIBLE OFFENDER ON THE CHARGES CONSTITUTING THE ELIGIBLE OFFENSE; OR

(2) BY THE JUDGE AT ANY TIME AFTER ARRAIGNMENT OF THE ELIGIBLE OFFENDER ON THE CHARGES CONSTITUTING THE ELIGIBLE OFFENSE BUT BEFORE ENTRY OF A GUILTY PLEA OR COMMENCEMENT OF TRIAL UPON: (I) THE RECOMMENDATION OF THE DISTRICT ATTORNEY; (II) THE REQUEST OF THE DEFENDANT; OR (III) THE COURT'S OWN INITIATIVE.

(B) IN DETERMINING WHETHER THE CASE SHALL BE DIVERTED TO THE EDUCATIONAL PROGRAM, THE COURT SHALL CONSIDER, IN ADDITION TO THE REQUIREMENTS OF SUBDIVISION THREE OF THIS SECTION:

(1) THE SERIOUSNESS OF THE ALLEGED OFFENSE OR CONDUCT AND THE CIRCUMSTANCES IN WHICH IT OCCURRED;

(2) THE AGE AND MATURITY OF THE OFFENDER, INCLUDING ANY SPECIAL CIRCUMSTANCES ATTENDANT TO THE OFFENDER'S ABILITY TO COMPREHEND THE CONSEQUENCES OF HIS OR HER ACTIONS;

(3) THE RISK THAT THE OFFENDER PRESENTS AS A SUBSTANTIAL DANGER TO OTHERS;

(4) THE FAMILY CIRCUMSTANCES, INCLUDING ANY HISTORY OF DRUGS, ALCOHOL ABUSE OR CHILD ABUSE ON THE PART OF THE OFFENDER, HIS PARENTS OR GUARDIAN;

(5) THE NATURE AND NUMBER OF CONTACTS WITH THE DEPARTMENT OF SOCIAL SERVICES AND THE COURT THAT THE OFFENDER OR HIS OR HER FAMILY HAVE HAD;

(6) THE OUTCOME OF THOSE CONTACTS, INCLUDING THE SERVICES TO WHICH THE OFFENDER OR FAMILY HAVE BEEN REFERRED AND THE RESULTS OF THOSE REFERRALS; AND

(7) ANY RECOMMENDATION EXPRESSED BY THE DISTRICT ATTORNEY.

5. (A) IF THE CASE IS DIVERTED TO THE PROGRAM AFTER ARRAIGNMENT, AN ORDER SHALL BE ENTERED DIRECTING THAT THE CASE BE DIVERTED TO THE PROGRAM AND SPECIFYING THAT THE PROSECUTION OF THE OFFENDER FOR THE ELIGIBLE OFFENSE SHALL BE DEFERRED FOR THE PERIOD DURING WHICH THE OFFENDER ATTENDS THE PROGRAM.

(B) AN ELIGIBLE OFFENDER MAY DECLINE TO PARTICIPATE IN THE PROGRAM. AN OFFENDER WHO DECLINES TO PARTICIPATE IN THE PROGRAM MAY SUBSEQUENTLY REQUEST THAT HIS OR HER CASE BE DIVERTED TO THE PROGRAM AT ANY TIME BEFORE THE ENTRY OF A GUILTY PLEA OR THE COMMENCEMENT OF TRIAL.

6. WITHIN FIVE DAYS OF THE DATE OF ENTRY OF AN ORDER DIRECTING THAT THE CASE BE DIVERTED TO THE PROGRAM, THE CLERK OF THE COURT SHALL FORWARD TO THE PROGRAM A COPY OF THE ORDER DIVERTING THE CASE TO THE PROGRAM, ALONG WITH THE ADDRESS, TELEPHONE NUMBER AND SOCIAL SECURITY NUMBER OF THE ELIGIBLE OFFENDER AND THE NAME, ADDRESS, AND TELEPHONE NUMBERS OF THE ELIGIBLE OFFENDER'S PARENTS OR GUARDIANS.

7. EACH ELIGIBLE OFFENDER PARTICIPATING IN THE PROGRAM SHALL UNDERGO EVALUATION AT THE END OF THE PROGRAM AS PROVIDED IN SECTION FOUR HUNDRED TWENTY-THREE-B OF THE SOCIAL SERVICES LAW. THE RESULTS OF THE ASSESSMENT AND ANY OTHER DOCUMENTS OR MATERIALS PERTAINING TO THE ASSESSMENT SHALL BE PROVIDED TO THE DISTRICT ATTORNEY AND TO THE ELIGIBLE OFFENDER AND SUCH MATERIALS SHALL BE USED SOLELY FOR THE PURPOSE OF DETERMINING WHETHER THE CASE AGAINST THE ELIGIBLE OFFENDER SHOULD BE DISMISSED. THE

1 ELIGIBLE OFFENDER SHALL PROVIDE WRITTEN AUTHORIZATION ALLOWING DISCLO-
2 SURE OF THE RESULTS OF THE PROGRAM ASSESSMENT TO THE COURT AND THE
3 DISTRICT ATTORNEY'S OFFICE.

4 8. AN ELIGIBLE OFFENDER WHO FAILS TO COMPLETE THE PROGRAM SHALL HAVE
5 HIS OR HER CASE IMMEDIATELY REINSTATED TO THE CALENDAR OF THE REFERRING
6 COURT. THE COURT, IN ITS DISCRETION, MAY DIVERT THE CASE TO THE PROGRAM
7 ONE ADDITIONAL TIME.

8 9. UPON SUCCESSFUL COMPLETION OF THE PROGRAM, AS CERTIFIED BY THE
9 DEPARTMENT OF SOCIAL SERVICES, AN ELIGIBLE OFFENDER MAY APPLY TO THE
10 COURT ON A FORM PROVIDED FOR THAT PURPOSE, FOR DISMISSAL OF THE CHARGES
11 ARISING FROM THE ELIGIBLE OFFENSE FOR WHICH THE OFFENDER WAS REFERRED TO
12 THE PROGRAM. IN THE EXERCISE OF THE COURT'S DISCRETION, UPON RECEIPT OF
13 SUCH APPLICATION AND UPON PAYMENT OF ANY COSTS OR CIVIL PENALTIES FOR
14 WHICH THE ELIGIBLE OFFENDER MAY BE LIABLE, THE COURT IS AUTHORIZED TO
15 DISMISS THE CASE AGAINST THE ELIGIBLE OFFENDER OR ORDER THAT THE CASE BE
16 ADJOURNED IN CONTEMPLATION OF DISMISSAL. THE COURT SHALL CONSIDER ALL
17 CIRCUMSTANCES, REFERENCES AND RECOMMENDATIONS IN EXERCISING ITS
18 DISCRETION WITH REGARD TO DISMISSAL OF THE CHARGES.

19 10. NOTWITHSTANDING ANY PROVISION OF LAW TO THE CONTRARY, THE
20 PROVISIONS OF THIS SECTION SHALL BE APPLICABLE TO ANY PROCEEDING IN
21 FAMILY COURT THAT INVOLVES AN ELIGIBLE OFFENSE COMMITTED BY A PERSON
22 EIGHTEEN YEARS OLD OR YOUNGER.

23 S 5. The family court act is amended by adding a new section 303.4 to
24 read as follows:

25 S 303.4. DIVERSIONARY PROGRAM FOR ELIGIBLE OFFENSES. NOTWITHSTANDING
26 ANY PROVISION OF LAW TO THE CONTRARY, THE PROVISIONS OF SECTION 530.15
27 OF THE CRIMINAL PROCEDURE LAW SHALL BE APPLICABLE TO ANY PROCEEDING IN
28 FAMILY COURT THAT INVOLVES AN ELIGIBLE OFFENSE COMMITTED BY A PERSON
29 EIGHTEEN YEARS OLD OR YOUNGER.

30 S 6. This act shall take effect on the one hundred eightieth day after
31 it shall have become a law; provided that, effective immediately, the
32 commissioner of the office of children and family services, the commis-
33 sioner of the department of education and the chief administrator of the
34 courts shall promulgate any rules and regulations and take all other
35 actions necessary to implement the provisions of this act on or before
36 its effective date.