

5253--A

2011-2012 Regular Sessions

I N S E N A T E

May 3, 2011

Introduced by Sen. HANNON -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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

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

LBD11384-04-1

1 or sexually explicit photographs on the internet or disseminating such
2 images by use of other electronic media such as cell phones.

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

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

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

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

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

22 B. THE NON-LEGAL CONSEQUENCES OF SHARING SEXUALLY SUGGESTIVE MATERI-
23 ALS, EXPLICIT MATERIALS OR ABUSIVE MATERIALS, INCLUDING, BUT NOT LIMITED
24 TO, THE EFFECT ON RELATIONSHIPS, LOSS OF EDUCATIONAL AND EMPLOYMENT
25 OPPORTUNITIES, AND BEING BARRED OR REMOVED FROM SCHOOL PROGRAMS AND
26 EXTRACURRICULAR ACTIVITIES;

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

32 D. THE CONNECTION BETWEEN BULLYING AND CYBER-BULLYING AND JUVENILES
33 SHARING SEXUALLY SUGGESTIVE MATERIALS, EXPLICIT MATERIALS OR ABUSIVE
34 MATERIALS.

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

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

50 6. WITHIN TWENTY DAYS OF THE DATE UPON WHICH THE ELIGIBLE OFFENDER
51 COMPLETES THE PROGRAM, THE OFFICE SHALL PROVIDE THE REFERRING COURT WITH
52 A CERTIFICATION THAT THE ELIGIBLE OFFENDER HAS SUCCESSFULLY COMPLETED
53 THE PROGRAM.

54 7. AS USED IN THIS SECTION:

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

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

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

5 S 4. The criminal procedure law is amended by adding a new section
6 530.15 to read as follows:

7 S 530.15 DIVERSIONARY PROGRAM FOR ELIGIBLE OFFENSES.

8 1. A CASE AGAINST AN ELIGIBLE OFFENDER WHO HAS BEEN CHARGED WITH AN
9 ELIGIBLE OFFENSE, AS DEFINED IN SUBDIVISION TWO OF THIS SECTION, SHALL
10 BE DIVERTED FROM PROSECUTION TO THE EDUCATIONAL REFORM PROGRAM DESCRIBED
11 IN SECTION FOUR HUNDRED TWENTY-THREE-B OF THE SOCIAL SERVICES LAW ON THE
12 CONDITIONS PROVIDED IN THIS SECTION. AN OFFENDER WHO QUALIFIES FOR AND
13 SUCCESSFULLY COMPLETES THE EDUCATIONAL REFORM PROGRAM SHALL HAVE THE
14 OPPORTUNITY TO AVOID PROSECUTION FOR THE ELIGIBLE OFFENSE. PROSECUTION
15 OF THE OFFENDER FOR THE ELIGIBLE OFFENSE SHALL BE DEFERRED FOR THE PERI-
16 OD DURING WHICH THE OFFENDER ATTENDS THE PROGRAM. THE COURT SHALL INFORM
17 AN OFFENDER OF THE POSSIBILITY OF DIVERSION TO THE PROGRAM AT THE TIME
18 OF ARRAIGNMENT.

19 2. AS USED IN THIS SECTION:

20 (A) "CYBERBULLYING" MEANS COMMUNICATION WITH INTENT TO COERCE, INTIM-
21 IDATE, HARASS OR CAUSE SUBSTANTIAL EMOTIONAL DISTRESS TO A PERSON, USING
22 ELECTRONIC MEANS TO SUPPORT SEVERE, REPEATED AND HOSTILE BEHAVIOR.

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

26 (C) "ELIGIBLE OFFENSE" MEANS AN OFFENSE WHICH INVOLVES SEXTING, CYBER-
27 BULLYING OR ANY OFFENSE DEFINED IN SECTION 245.10 OF THE PENAL LAW.

28 (D) "PROGRAM" OR "EDUCATIONAL REFORM PROGRAM" MEANS THE EDUCATIONAL
29 REFORM PROGRAM DESCRIBED IN SECTION FOUR HUNDRED TWENTY-THREE-B OF THE
30 SOCIAL SERVICES LAW.

31 (E) "SEXTING" MEANS THE CREATION, EXHIBITION OR DISTRIBUTION OF A
32 PHOTOGRAPH DEPICTING NUDITY THROUGH THE USE OF AN ELECTRONIC COMMUNI-
33 CATION DEVICE, AN INTERACTIVE WIRELESS COMMUNICATIONS DEVICE OR A
34 COMPUTER, WHEN THE CREATOR THEREOF AND THE SUBJECT OF THE PHOTOGRAPH ARE
35 BOTH UNDER THE AGE OF SIXTEEN YEARS OR WERE BOTH UNDER SUCH AGE AT THE
36 TIME OF ITS MAKING.

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

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

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

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

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

54 (E) THE BENEFITS TO SOCIETY IN ADMITTING THE OFFENDER INTO THE EDUCA-
55 TIONAL PROGRAM OUTWEIGH THE HARM DONE TO SOCIETY BY ABANDONING CRIMINAL
56 PROSECUTION OR ANY PUNITIVE MEASURE.

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

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

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

10 (B) IN DETERMINING WHETHER THE CASE SHALL BE DIVERTED TO THE EDUCA-
11 TIONAL PROGRAM, THE COURT SHALL CONSIDER, IN ADDITION TO THE REQUIRE-
12 MENTS OF SUBDIVISION THREE OF THIS SECTION:

13 (1) THE SERIOUSNESS OF THE ALLEGED OFFENSE OR CONDUCT AND THE CIRCUM-
14 STANCES IN WHICH IT OCCURRED;

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

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

20 (4) THE FAMILY CIRCUMSTANCES, INCLUDING ANY HISTORY OF DRUGS, ALCOHOL
21 ABUSE OR CHILD ABUSE ON THE PART OF THE OFFENDER, HIS PARENTS OR GUARDI-
22 AN;

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

25 (6) THE OUTCOME OF THOSE CONTACTS, INCLUDING THE SERVICES TO WHICH THE
26 OFFENDER OR FAMILY HAVE BEEN REFERRED AND THE RESULTS OF THOSE REFER-
27 RALS; AND

28 (7) ANY RECOMMENDATION EXPRESSED BY THE DISTRICT ATTORNEY.

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

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

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

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

48 8. UPON SUCCESSFUL COMPLETION OF THE PROGRAM, AS CERTIFIED BY THE
49 OFFICE OF CHILDREN AND FAMILY SERVICES, AN ELIGIBLE OFFENDER MAY APPLY
50 TO THE COURT ON A FORM PROVIDED FOR THAT PURPOSE, FOR DISMISSAL OF THE
51 CHARGES ARISING FROM THE ELIGIBLE OFFENSE FOR WHICH THE OFFENDER WAS
52 REFERRED TO THE PROGRAM. IN THE EXERCISE OF THE COURT'S DISCRETION, UPON
53 RECEIPT OF SUCH APPLICATION AND UPON PAYMENT OF ANY COSTS OR CIVIL
54 PENALTIES FOR WHICH THE ELIGIBLE OFFENDER MAY BE LIABLE, THE COURT IS
55 AUTHORIZED TO DISMISS THE CASE AGAINST THE ELIGIBLE OFFENDER OR ORDER
56 THAT THE CASE BE ADJOURNED IN CONTEMPLATION OF DISMISSAL. THE COURT

1 SHALL CONSIDER ALL CIRCUMSTANCES, REFERENCES AND RECOMMENDATIONS,
2 INCLUDING BUT NOT LIMITED TO RECOMMENDATIONS AS TO (I) WHETHER THE
3 ELIGIBLE OFFENDER COMPREHENDS THE LEGAL AND NON-LEGAL CONSEQUENCE OF HIS
4 OR HER ACTIONS (II) WHETHER THE ELIGIBLE OFFENDER COMPREHENDS THE RISKS
5 ATTENDANT TO HIS OR HER ACTIONS AND (III) WHETHER THE ELIGIBLE OFFENDER
6 IS LIKELY TO RE-OFFEND, IN EXERCISING ITS DISCRETION WITH REGARD TO
7 DISMISSAL OF THE CHARGES.

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

12 10. NOTHING IN THIS SECTION SHALL BE CONSTRUED AS PRECLUDING OTHER
13 DISCIPLINARY ACTION OR THE PROSECUTION OF A RESPONDENT FOR THE COMMIS-
14 SION OF A DIFFERENT OFFENSE WHILE PARTICIPATING IN THE DIVERSIONARY
15 PROGRAM.

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

18 S 303.4. DIVERSIONARY PROGRAM FOR ELIGIBLE OFFENSES. NOTWITHSTANDING
19 ANY PROVISION OF LAW TO THE CONTRARY, THE PROVISIONS OF SECTION 530.15
20 OF THE CRIMINAL PROCEDURE LAW 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 6. This act shall take effect on the one hundred eightieth day after
24 it shall have become a law; provided that, effective immediately, the
25 commissioner of the office of children and family services, the commis-
26 sioner of the department of education and the chief administrator of the
27 courts shall promulgate any rules and regulations and take all other
28 actions necessary to implement the provisions of this act on or before
29 its effective date.