S T A T E O F N E W Y O R K

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2013-2014 Regular Sessions

I N A S S E M B L Y

January 17, 2013

Introduced by M. of A. SIMOTAS, BENEDETTO, STEVENSON, ROSENTHAL, MAISEL, ROBERTS -- Multi-Sponsored by -- M. of A. BRENNAN, COOK, CYMBROWITZ, GIBSON, GOTTFRIED, HOOPER, MARKEY, ROBINSON -- read once and referred to the Committee on Consumer Affairs and Protection

AN ACT to amend the general business law, the executive law and the social services law, in relation to prohibiting every child day care, child day care provider, child day care center, group family day care home, school age child care or family day care home from using or having for use unsafe children's products, defining unsafe children's products and authorizing civil penalties

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

Section 1. The general business law is amended by adding a new article 28-F to read as follows:

ARTICLE 28-F

NEW YORK SAFE CHILD CARE ACT

SECTION 491. SHORT TITLE.

491-A. DEFINITIONS.

491-B. LIST OF UNSAFE CHILDREN'S PRODUCTS AND DURABLE JUVENILE PRODUCTS.

491-C. UNSAFE CHILDREN'S PRODUCTS; CHILD CARE.

491-D. ENFORCEMENT.

S 491. SHORT TITLE. THIS ARTICLE SHALL BE KNOWN AND MAY BE CITED AS THE "NEW YORK SAFE CHILD CARE ACT".

S 491-A. DEFINITIONS. FOR THE PURPOSES OF THIS ARTICLE: 1. "CHILDREN'S PRODUCT" MEANS A TOY OR OTHER ARTICLE, OTHER THAN CLOTHING, PRIMARILY INTENDED FOR USE BY A CHILD UNDER TWELVE YEARS OF AGE. THE FOLLOWING SHALL BE CONSIDERED IN DETERMINING IF THE TOY OR ARTICLE IS INTENDED FOR A CHILD UNDER TWELVE YEARS OF AGE:

A. A STATEMENT BY A MANUFACTURER ABOUT THE INTENDED USE OF SUCH TOY OR ARTICLE, INCLUDING A LABEL ON SUCH TOY OR ARTICLE;

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

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B. THE CONTEXT AND MANNER OF THE ADVERTISING, PROMOTION, AND MARKETING ASSOCIATED WITH THE TOY OR ARTICLE; AND

C. WHETHER THE TOY OR ARTICLE IS COMMONLY RECOGNIZED BY CONSUMERS AS BEING INTENDED FOR USE BY A CHILD UNDER TWELVE YEARS OF AGE.

2. "CHILD CARE PROGRAM" MEANS ANY PLACE SUBJECT TO SECTION THREE HUNDRED NINETY OF THE SOCIAL SERVICES LAW OR ARTICLE FORTY-SEVEN OF THE NEW YORK CITY HEALTH CODE AS AUTHORIZED BY SECTION FIVE HUNDRED FIFTY-EIGHT OF THE NEW YORK CITY CHARTER.

3. "DEPARTMENT" MEANS THE DEPARTMENT OF STATE.

4. "DURABLE JUVENILE PRODUCT" MEANS PRODUCTS INTENDED FOR USE, OR THAT MAY BE REASONABLY EXPECTED TO BE USED, BY CHILDREN UNDER THE AGE OF FIVE YEARS AS DEFINED IN SUBSECTION (F) OF SECTION 104 OF THE UNITED STATES CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008, PUB. L. NO. 110-314 OR OTHER SIMILAR DURABLE JUVENILE PRODUCTS DESIGNED FOR CHILDREN UNDER AGE FIVE AS SHALL BE SPECIFIED IN REGULATIONS PROMULGATED BY THE UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION.

5. "PERSON" MEANS A NATURAL PERSON, FIRM, CORPORATION, LIMITED LIABILITY COMPANY, OR ASSOCIATION, AND ANY EMPLOYEE OR AGENT THEREOF.

6. "OFFICE" MEANS THE OFFICE OF CHILDREN AND FAMILY SERVICES.

7. "RECALL" MEANS A REQUEST TO RETURN A PRODUCT TO THE MANUFACTURER DUE TO A DEFECT IN THE PRODUCT.

S 491-B. LIST OF UNSAFE CHILDREN'S PRODUCTS AND DURABLE JUVENILE PRODUCTS. 1. THE DEPARTMENT, IN CONSULTATION WITH THE OFFICE, SHALL CREATE, MAINTAIN, AND UPDATE A COMPREHENSIVE LIST OF UNSAFE CHILDREN'S PRODUCTS AND DURABLE JUVENILE PRODUCTS.

2. A CHILDREN'S PRODUCT OR DURABLE JUVENILE PRODUCT IS DEEMED TO BE UNSAFE FOR PURPOSES OF THIS ARTICLE IF IT MEETS ANY OF THE FOLLOWING CRITERIA:

A. THE DEPARTMENT HAS RECEIVED NOTIFICATION FROM AN AGENCY OF THE FEDERAL GOVERNMENT THAT THE PRODUCT DOES NOT CONFORM TO ALL APPLICABLE FEDERAL LAWS AND REGULATIONS SETTING FORTH STANDARDS FOR THE CHILDREN'S PRODUCT OR DURABLE JUVENILE PRODUCT;

B. THE PRODUCT HAS BEEN RECALLED FOR SAFETY REASONS BY AN AGENCY OF THE FEDERAL GOVERNMENT OR THE PRODUCT'S MANUFACTURER, DISTRIBUTOR, OR IMPORTER, AND THE RECALL HAS NOT BEEN RESCINDED; OR

C. AN AGENCY OF THE FEDERAL GOVERNMENT HAS ISSUED A WARNING THAT A SPECIFIC PRODUCT'S INTENDED USE CONSTITUTES A SAFETY HAZARD, AND THE WARNING HAS NOT BEEN RESCINDED.

3. THE DEPARTMENT AND THE OFFICE SHALL MAKE THE COMPREHENSIVE LIST AVAILABLE TO THE PUBLIC AT NO COST, SHALL POST IT ON ITS WEBSITE, AND SHALL ENCOURAGE LINKS.

S 491-C. UNSAFE CHILDREN'S PRODUCTS; CHILD CARE. 1. A CHILD CARE PROGRAM MAY NOT USE OR HAVE ON THE PREMISES AN UNSAFE CHILDREN'S PRODUCT OR DURABLE JUVENILE PRODUCT AS DESCRIBED IN SECTION FOUR HUNDRED NINETY-ONE-B OF THIS ARTICLE. THIS SUBDIVISION SHALL NOT APPLY TO A CHILDREN'S PRODUCT OR DURABLE JUVENILE PRODUCT THAT CHILDREN BRING TO THE PREMISES FROM THEIR HOME OR AN ANTIQUE OR COLLECTIBLE CHILDREN'S PRODUCT OR DURABLE JUVENILE PRODUCT IF IT IS NOT USED BY, OR ACCESSIBLE TO, ANY CHILD IN THE CHILD CARE PROGRAM.

2. THE DEPARTMENT, IN CONSULTATION WITH THE OFFICE AND THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE SHALL NOTIFY CHILD CARE FACILITIES OF THE PROVISIONS OF THIS SECTION AND THIS ARTICLE AND OF UNSAFE CHILDREN'S PRODUCTS AND DURABLE JUVENILE PRODUCTS, AS DETERMINED IN ACCORDANCE WITH THIS ARTICLE, IN PLAIN, NON-TECHNICAL LANGUAGE THAT WILL ENABLE EACH CHILD CARE PROGRAM TO EFFECTIVELY INSPECT CHILDREN'S PRODUCTS OR DURABLE JUVENILE PRODUCTS AND IDENTIFY UNSAFE CHILDREN'S

PRODUCTS OR DURABLE JUVENILE PRODUCTS. SUCH NOTICE SHALL BE PROVIDED TO EVERY CHILD CARE PROGRAM UPON THE EFFECTIVE DATE OF THIS ARTICLE OR AS SOON AS PRACTICABLE THEREAFTER AND AT EVERY SIX MONTH INTERVAL THEREFROM, AND SUCH NOTICE SHALL ALSO BE PROVIDED TO EACH APPLICANT FOR LICENSE OR REGISTRATION PURSUANT TO SECTION THREE HUNDRED NINETY OF THE SOCIAL SERVICES LAW.

3. THE DEPARTMENT AND THE OFFICE SHALL PROMULGATE RULES AND REGULATIONS TO CARRY OUT THE PROVISIONS OF THIS SECTION.

D. EACH CHILD CARE PROGRAM SHALL MAINTAIN A FILE CONTAINING ALL BULLETINS, NOTICES, OR BOTH ISSUED BY THE DEPARTMENT AND THE OFFICE REGARDING UNSAFE CHILDREN'S PRODUCTS OR DURABLE JUVENILE PRODUCTS, AND SHALL MAKE THE FILE ACCESSIBLE TO THE PROGRAM STAFF MEMBERS AND TO PARENTS OF THE CHILDREN WHO ATTEND THE PROGRAM.

S 491-D. ENFORCEMENT. WHENEVER THE OFFICE DETERMINES THAT ANY CHILD CARE PROGRAM HAS VIOLATED ANY PROVISION OF THIS ARTICLE, THE OFFICE MAY BRING AN ENFORCEMENT ACTION PURSUANT TO SUBDIVISION ELEVEN OF SECTION THREE HUNDRED NINETY OF THE SOCIAL SERVICES LAW.

S 2. Subdivision 3 of section 94-a of the executive law is amended by adding a new paragraph 16 to read as follows:

(16) CREATE A LIST OF UNSAFE CHILDREN'S PRODUCTS AND DURABLE JUVENILE PRODUCTS AND PROVIDE SUCH LIST TO CHILD CARE FACILITIES PURSUANT TO ARTICLE TWENTY-EIGHT-F OF THE GENERAL BUSINESS LAW.

S 3. Subdivision 11 of section 390 of the social services law, as added by chapter 750 of the laws of 1990, paragraphs (a) and (b) as amended and paragraph (d) as added by chapter 416 of the laws of 2000 and paragraph (c) as amended and paragraph (e) as added by chapter 117 of the laws of 2010, is amended to read as follows:

11. (a) (i) The office of children and family services shall adopt regulations establishing civil penalties of no more than five hundred dollars per day to be assessed against child day care centers, school age child care programs, group family day care homes or family day care homes for violations of this section, sections three hundred ninety-a and three hundred ninety-b of this title, ARTICLE TWENTY-EIGHT-F OF THE GENERAL BUSINESS LAW and any regulations promulgated thereunder. The regulations establishing civil penalties shall specify the violations subject to penalty.

(ii) The office of children and family services shall adopt regulations establishing civil penalties of no more than five hundred dollars per day to be assessed against child day care providers who operate child day care centers or group family day care homes without a license or who operate family day care homes, school-age child care programs, or child day care centers required to be registered without obtaining such registration.

(iii) In addition to any other civil or criminal penalty provided by law, the office of children and family services shall have the power to assess civil penalties in accordance with its regulations adopted pursuant to this subdivision after a hearing conducted in accordance with procedures established by regulations of the office of children and family services. Such procedures shall require that notice of the time and place of the hearing, together with a statement of charges of violations, shall be served in person or by certified mail addressed to the school age child care program, group family day care home, family day care home, or child day care center at least thirty days prior to the date of the hearing. The statement of charges shall set forth the existence of the violation or violations, the amount of penalty for which the program may become liable, the steps which must be taken to

rectify the violation, and where applicable, a statement that a penalty may be imposed regardless of rectification. A written answer to the charges of violations shall be filed with the office of children and family services not less than ten days prior to the date of hearing with respect to each of the charges and shall include all material and relevant matters which, if not disclosed in the answer, would not likely be known to the office of children and family services.

(iv) The hearing shall be held by the commissioner of the office of children and family services or the commissioner's designee. The burden of proof at such hearing shall be on the office of children and family services to show that the charges are supported by a preponderance of the evidence. The commissioner of the office of children and family services or the commissioner's designee, in his or her discretion, may allow the child day care center operator or provider to attempt to prove by a preponderance of the evidence any matter not included in the answer. Where the child day care provider satisfactorily demonstrates that it has rectified the violations in accordance with the requirements of paragraph (c) of this subdivision, no penalty shall be imposed except as provided in paragraph (c) of this subdivision.

(b)(i) In assessing penalties pursuant to this subdivision, the office of children and family services may consider the completeness of any rectification made and the specific circumstances of such violations as mitigating factors.

(ii) Upon the request of the office of children and family services, the attorney general shall commence an action in any court of competent jurisdiction against any child day care program subject to the provisions of this subdivision and against any person, entity or corporation operating such center or school age child care program, group family day care home or family day care home for the recovery of any penalty assessed by the office of children and family services in accordance with the provisions of this subdivision.

(iii) Any such penalty assessed by the office of children and family services may be released or compromised by the office of children and family services before the matter has been referred to the attorney general; when such matter has been referred to the attorney general, such penalty may be released or compromised and any action commenced to recover the same may be settled and discontinued by the attorney general with the consent of the office of children and family services.

(c)(i) Except as provided for in this paragraph, a child day care provider shall avoid payment of a penalty imposed pursuant to this subdivision where the provider has rectified the condition which resulted in the imposition of the penalty within thirty days of notification of the existence of the violation of statute or regulation.

(ii) [Clause] SUBPARAGRAPH (i) of this paragraph notwithstanding, rectification shall not preclude the imposition of a penalty pursuant to this subdivision where:

(A) the child day care provider has operated a child day care center or group family day care home without a license, has refused to seek a license for the operation of such a center or home, or has continued to operate such a center or home after denial of a license application, revocation of an existing license or suspension of an existing license;

(B) the child day care provider has operated a family day care home, school-age child care program or child day care center required to be registered without being registered, has refused to seek registration for the operation of such home, program or center or has continued to operate such a home, program or center after denial of a registration

application, revocation of an existing registration or suspension of an existing registration;

(C) there has been a total or substantial failure of the facility's fire detection or prevention systems or emergency evacuation procedures;

(D) the child day care provider or an assistant, employee or volunteer has failed to provide adequate and competent supervision;

(E) the child day care provider or an assistant, employee or volunteer has failed to provide adequate sanitation;

(F) the child day care provider or an assistant, employee, volunteer or, for a family day care home or group family day care home, a member of the provider's household, has injured a child in care, unreasonably failed to obtain medical attention for a child in care requiring such attention, used corporal punishment against a child in care or abused or maltreated a child in care;

(G) the child day care provider has violated the same statutory or regulatory standard more than once within a six month period;

(H) the child day care provider or an assistant, employee or volunteer has failed to make a report of suspected child abuse or maltreatment when required to do so pursuant to section four hundred thirteen of this article; [or]

(I) the child day care provider or an assistant, employee or volunteer has submitted to the office of children and family services a forged document as defined in section 170.00 of the penal law; OR

(J) THE CHILD DAY CARE PROVIDER HAS VIOLATED THE PROVISIONS OF ARTICLE TWENTY-EIGHT-F OF THE GENERAL BUSINESS LAW ON MORE THAN ONE OCCASION.

(d) Any civil penalty received by the office of children and family services pursuant to this subdivision shall be deposited to the credit of the "quality child care and protection fund" established pursuant to section ninety-seven-www of the state finance law.

(e)(i) The office of children and family services shall deny a new application for licensure or registration made by a day care provider whose license or registration was previously revoked or terminated based on a violation of statute or regulation for a period of two years from the date that the revocation or termination of the license or registration became finally effective, unless such office determines, in its discretion, that approval of the application will not in any way jeopardize the health, safety or welfare of children in the center, program or home. For the purposes of this paragraph, the date that the revocation or termination became finally effective shall be, as applicable:

(A) the date that the revocation or termination became effective based on the notice of revocation or termination;

(B) the date that the hearing decision was issued upholding the revocation or termination;

(C) the date of issuance of a final court order affirming the revocation or termination or affirming a hearing decision that upheld the revocation or termination; or

(D) another date mutually agreed upon by the office of children and family services and the provider.

(ii)(A) Such office shall deny a new application for licensure or registration made by a day care provider who is enjoined or otherwise prohibited by a court order from operation of a day care center, group family day care home, family day care home or school-age child care program without a license or registration for a period of two years from the date of the court order unless the court order specifically enjoins the provider from providing day care for a period longer than two years,

in which case the office shall deny any new application made by the provider while the provider is so enjoined.

(B) Such office shall deny a new application for licensure or registration made by a day care provider who is assessed a second civil penalty by such office for having operated a day care center, group family day care home, family day care home or school-age child care program without a license or registration for a period of two years from the date of the second fine. For the purposes of this paragraph, the date of the second fine shall be either the date upon which the day care provider signs a stipulation agreement to pay the second fine or the date upon which a hearing decision is issued affirming the determination of such office to impose the second fine, as applicable.

(iii) A day care provider who surrenders the provider's license or registration while such office is engaged in enforcement seeking suspension, revocation or termination of such provider's license or registration pursuant to the regulations of such office, shall be deemed to have had their license or registration revoked or terminated and shall be subject to the prohibitions against licensing or registration pursuant to subparagraph (i) of this paragraph for a period of two years from the date of surrender of the license or registration.

S 4. This act shall take effect one year after it shall have become a law; provided that the department of state and the office of children and family services are authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date.