

2648

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:

1 Section 1. The general business law is amended by adding a new article
2 28-F to read as follows:

3 ARTICLE 28-F

4 NEW YORK SAFE CHILD CARE ACT

5 SECTION 491. SHORT TITLE.

6 491-A. DEFINITIONS.

7 491-B. LIST OF UNSAFE CHILDREN'S PRODUCTS AND DURABLE JUVENILE
8 PRODUCTS.

9 491-C. UNSAFE CHILDREN'S PRODUCTS; CHILD CARE.

10 491-D. ENFORCEMENT.

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

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

18 A. A STATEMENT BY A MANUFACTURER ABOUT THE INTENDED USE OF SUCH TOY OR
19 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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1 B. THE CONTEXT AND MANNER OF THE ADVERTISING, PROMOTION, AND MARKETING
2 ASSOCIATED WITH THE TOY OR ARTICLE; AND

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

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

9 3. "DEPARTMENT" MEANS THE DEPARTMENT OF STATE.

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

17 5. "PERSON" MEANS A NATURAL PERSON, FIRM, CORPORATION, LIMITED LIABIL-
18 ITY COMPANY, OR ASSOCIATION, AND ANY EMPLOYEE OR AGENT THEREOF.

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

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

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

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

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

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

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

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

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

50 2. THE DEPARTMENT, IN CONSULTATION WITH THE OFFICE AND THE NEW YORK
51 CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE SHALL NOTIFY CHILD CARE
52 FACILITIES OF THE PROVISIONS OF THIS SECTION AND THIS ARTICLE AND OF
53 UNSAFE CHILDREN'S PRODUCTS AND DURABLE JUVENILE PRODUCTS, AS DETERMINED
54 IN ACCORDANCE WITH THIS ARTICLE, IN PLAIN, NON-TECHNICAL LANGUAGE THAT
55 WILL ENABLE EACH CHILD CARE PROGRAM TO EFFECTIVELY INSPECT CHILDREN'S
56 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42 (B) the date that the hearing decision was issued upholding the revo-
43 cation or termination;

44 (C) the date of issuance of a final court order affirming the revoca-
45 tion or termination or affirming a hearing decision that upheld the
46 revocation or termination; or

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

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

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

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

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

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