

Memorandum in Support

Committee on Children and the Law

Children #8

March 25, 2016

S. 6406-B, Part M

By: BUDGET

A. 9006-B, Part M

By: BUDGET

Senate Committee: Finance

Assembly Committee: Way and Means

Effective Date: Immediate

LAW AND SECTIONS REFERRED TO: Adds Social Services Law § 383-a.

THE COMMITTEE ON CHILDREN AND THE LAW SUPPORTS THE SENATE ARTICLE VII BUDGET BILL WITH AMENDMENTS

It is critically important to address the provision in the Governor's budget bill that would provide foster parents and foster care agencies with immunity from liability when using the reasonably prudent parent standard, unless they were grossly negligent, a very high standard to meet. Both the Senate and Assembly Article VII bills include alternative language. For the reasons set out below, we believe that the Senate version of the bill is preferable with minor clarifying amendments.

However, we are concerned that both the Assembly and Senate versions do not fully succeed in accomplishing their intended purposes: (1) encouraging caregivers to apply the Reasonable and Prudent Parent standard without fear of liability; (2) creating clarity as to when someone might be liable for harm incurred as a result of their negligent action or inaction; and (3) ensuring that children have a means of redress if the agency/foster parent acts negligently other than in the decision-making related to application of the RPPS standard.

The purpose of the language is to allow foster parents and agencies to enroll foster children in normal childhood activities, as federal law requires, without being sued for doing so, if they exercised the Reasonable and Prudent Parent standard. The Committee agrees that such a goal is important for children in foster care. Thus, if a foster parent or congregate care facility enrolls a normally-developed child in a local Little League, and the child is injured during a game, the foster parent will not be liable for having enrolled the child and the foster care agency or local department of social services will not be liable for having agreed to the enrollment of the child in this activity. (The Little League may or may not be liable, but their liability could not be imposed on the foster parent or agency.) However, if the foster parent is driving the child to the game and is driving

negligently and the child is injured, the child should still be able to sue for compensation for injuries. The language to meet this purpose, needs to be VERY carefully designed to make it clear that if the foster parent and/or foster care agency used Reasonable and Prudent Parenting decision making properly, they are not negligent. However, if the Reasonable and Prudent Parenting standard was not used then New York State statute and caselaw would apply regarding any possibility that there may be negligence.

To clarify, there are three levels of care, or lack thereof. First, Reasonable and Prudent Parent: under current law, neither a parent nor foster parent is liable for “negligent supervision” and the new law should continue that rule. Second, Negligence: a parent can be liable to his or her child for negligence (a car accident, e.g.), and a foster parent should be also. Third, Gross or Willful Negligence: a foster parent or agency is liable under current law, and federal law, and would be under the bills.

By its terms, the Assembly version applies only to people who have been trained in the Reasonable and Prudent Parent standard (according to the definition of "caregiver"). It is unclear what that means for the liability of a foster parent or caseworker who has not been through the training. For example, in neglect cases, kinship foster parents may be provisionally certified in 24 hours and may not finish their full foster parent training (Model Approach to Partnerships in Parenting) until months later. The Senate version has no such requirement in the definition of caregiver and is therefore preferable.

Finally, there are provisions of §383-a that contain language that is permissive (caregivers shall “be encouraged to”; caregivers “can permit”) rather than mandatory, leaving the caregiver too much discretion to deny the child permission, perhaps due to fear of liability, thereby utterly defeating the purpose of this statute and the federal mandate. The language should make clear that children in foster care should be given permission to participate in normative activities, absent a compelling reason that would prevent participation.

Based on the forgoing, the New York State Bar Association’s Committee on Children and the Law **SUPPORTS** the Senate Article VII bill **WITH AMENDMENT**.

Betsy Ruslander, Chair
Committee on Children and the Law

Kathleen DeCataldo, Chair
Legislative Response Subcommittee