

Suffolk County Legislator William R. Spencer, M.D. Statement
Before the United States Senate Committee on Commerce, Science,
and Transportation on July 31, 2013

Introduction – Good afternoon ladies and gentlemen. Thank you for allowing me the opportunity to testify today on the marketing and sale of energy drinks to children.

I am Suffolk County Legislator William Spencer from New York. I am also a board-certified, fellowship-trained, pediatric otolaryngologist in Huntington, New York. I am currently the Vice President for the Suffolk County Medical Society, a delegate to the New York State Medical Society, and a member of the AMA. I have attached my CV for your review.

For the purposes of this presentation I will be referring to the products as “energy drinks.” I want you to know that I disagree with the characterization of these products as “energy drinks” and in fact, in my legislation, I refer to them as “stimulant drinks” because they do not provide energy, they stimulate.

In November 2011, I was elected to the Suffolk County Legislature. I am one of 18 legislators in the County’s legislative body that represent over 1.5 million people. As the first physician to serve on the Suffolk County Legislature, I was appointed to serve as Chairman of the County’s Health Committee and to serve on the County Board of Health. The Board of Health is charged with formulating public health policy and administering the sanitary code.

Suffolk County has a proud history of passing consumer protecting, visionary legislation that have gone on to be adopted at both the state and federal levels. Prohibiting the use of cell phones while driving and most recently the ban on the use of the carcinogen bisphenol A (BPA) are resolutions that began as Suffolk County resolutions.

In 2010, my colleague Legislator Lynn Nowick introduced two resolutions regarding energy drinks, one to alert customers to the health risks associated with energy drinks and the other

that would have banned the sale of energy drinks to minors in our county. Her efforts received national and even worldwide attention. Lobbyists and industry representatives opposed any restrictions on their products claiming they were safe. They believed the legislation was misguided and that any bans would hurt commerce.

The powerful energy drink industry generates over 7 billion dollars per year in revenue, and spends hundreds of millions of dollars per year in marketing and advertising here in the United States.

Eventually, under pressure from the industry, Legislator Nowick was able to fashion a compromise. Some major manufacturers of energy drinks and the American Beverage Association agreed to include a warning on their labels that stated “these products are not intended for children, pregnant or nursing women or those sensitive to caffeine.” In addition, they agreed to disclose the total caffeine content on the product label. Additionally, funding was promised for an educational campaign to teach youth about the risks of excessive caffeine ingestion.

With this compromise in hand, Legislator Nowick allowed her resolutions to expire without any further action being taken. In light of the enormous lobbying effort against her position, my colleague’s efforts were considered by most a huge win against a powerful industry and a victory for protecting our children’s public health.

Two years later, I was elected and started my tenure on the Board of Health. Due to the growing reports of adverse incidents related to energy drinks, the board requested that I revisit the issue for potential legislative action. During the summer of 2012, I began to research and discuss the issue with my colleagues and peers in the medical field.

Much had changed since the compromise with Legislator Nowick.

A poor public health message had become pervasive. The idea delivered in advertisements was that if you are tired, just drink an energy drink. Recent ads included the catch phrase “zap the nap”. The message to our children, who are frequently over scheduled and under constant

pressure to succeed, is to ignore your body's natural signals of fatigue or hunger and override those signals with stimulants. These beverages are marketed as a quick and easy way to relieve fatigue and improve performance. Their illusion of energy is high-dose caffeine acting as a stimulant to the central nervous system.

These deceptive marketing tactics and messages are imbedded throughout our children's lives, supported by popular stars, influential athletes and are directed at the very young, even in early morning cartoons. Recent data reveals that the marketing of these products to children and young people has doubled in recent years.

A Yale Rudd Center for Food Policy and Obesity study showed that "on average, preschoolers viewed 44 energy drink ads per year in 2010, children viewed 54 ads, and adolescents viewed 124 ads. From 2008 to 2010, exposure increased 47% among preschoolers, 23% among children, and 22% among adolescents. In 2010, adolescents viewed 18% more ads for energy drinks compared to adults."

In our 24/7, high tech social media world, a shift of influence has occurred away from parents. Commercials, sponsorships and sampling directed at our children have taken the power of control away from parents and made our children vulnerable to an industry with a cool seductive message. I discovered that an un-level playing field existed and that most parents did not know about the dangers associated with ingesting energy drinks or the enticing advertising their children had been exposed to as they watched television, played video games, and even competed on their local soccer field. In fact, many parents think energy drinks were akin to sports drinks.

I have personally witnessed a parent dispensing an energy drink to her 10-year-old child at a swim meet. She had assumed incorrectly that she was helping her child hydrate and that the caffeine would boost her child's performance. Other parents I have spoken with have witnessed their peers supplying their children with energy drinks before track, soccer and lacrosse meets.

While I was contemplating this issue, others were starting to express concern as well:

In April 2012, The Honorable Senator Durbin sent a letter to the FDA “expressing concern about the potential safety issues associated with the consumption of so-called “energy drinks and requested they take certain actions in response to these issues...” Most of his issues dealt with how the industry defines their product.

In July 2012, the School Board of Manatee County in Florida banned the sale of energy drinks in its schools and would no longer allow students to bring them from home, citing the drinks make students to restless to concentrate in class. The director of elementary schools, Joe Stokes was quoted as saying “we know a significant number of students who have increased energy followed by decreased energy can have agitation. Caffeine affects how the brain works.”

In August 2012, closer to my home, NYS Attorney General Schneiderman began investigating energy drinks, specifically whether the multibillion-dollar energy drink industry is deceiving consumers with misstatements about the ingredients and health value of its products. According to reports, the subpoenas asked for “information on the companies’ marketing and advertising practices.”

In October 2012, strict new regulations and taxes were imposed on the sale of energy drinks in Mexico to deter new brands from entering the market. The Mexican Senate eventually banned the sale of energy drinks to anyone under the age of 18.

In November 2012, the FDA announced that it was investigating reports of five deaths that may have been associated with Monster Energy Drink since 2009. The family of Anais Fournier, a 14-year-old girl with a heart condition who died after drinking two cans of it’s Monster Energy Drink in a 24-hour period had recently filed its lawsuit against the company.

It was also reported during that same time that emergency room visits attributed to caffeine toxicity had risen 10-fold between the years 2005-2008. According to a 2012 report by the Substance Abuse and Mental Health Services Administration, there were 1,128 visits to an E.R. as a result of caffeine overdoses in 2005. That number went up to 16,053 in 2008.

One last example of the changing tide, was in late October 2012, Dennis J. Herrera, the city attorney of San Francisco sent a letter to Monster Beverage, asking them to substantiate its claim that large daily quantities of Monster were safe for adolescents and adults. According to reports, Mr. Herrera cited a section of California law that makes it illegal for a company to make false or misleading advertising claims that purport to be based on fact or clinical data.

Similar conversations were taking place in Canada where Mr. James Shepherd, who lost his 15 year-old son due to an “unexplained arrhythmia” on January 6, 2008, has become a huge advocate for regulation and change in Canada. Claims are that his son was supplied an energy drink sample during a free hand out by Red Bull company representatives and several hours later collapsed and died. Canadian government officials have made strides to create a caffeine cap on these products and are working on further regulations.

Schools, colleges, cities, states, countries and even branches of the military have started to address increasing use and abuse of these products. The issue is studied and a variety of actions including banning the sale, use and marketing of the products have been taken to protect consumers.

So far I have reported about what I have read, heard and researched, but this is what we have seen in Suffolk County which led my colleagues to support my three point plan to educate, protect and empower residents.

1. I heard first hand from residents and colleagues that energy drink companies were sponsoring local sporting events/lacrosse and soccer tournaments. Coupons and products with the company's logo were distributed.
2. Samples of Monster Energy Drink were distributed on several occasions out of the back of a Monster Energy truck to concert attendees, ranging from approximately 12 years old to adult, in front of the Paramount in Huntington Village. Concert attendees were given samples of the product as they waited on line for the concerts to begin. The Paramount is a very popular concert and performance venue.

3. Energy Drink marketing displays are positioned next to video games in local department stores. I heard testimony that energy drink manufacturers imbed logos or references to their products in video games and cartoons. One drink even “gives you wings...” which are particularly attractive to children when they are playing in a competitive arena.
4. One of my colleagues called to report that energy drink samples were handed out at a traditional small town Memorial Day parade in Sayville, Long Island. Apparently, there was an energy drink truck with company representatives handing out products with their logo and coupons to parade attendees and there were no obvious attempts at ensuring that children didn’t receive these samples. This activity took place a month after Suffolk made it illegal to do so.
5. Finally and probably the most egregious was that a direct-mail sample packet was sent to one of my colleague’s 16- year-old son at his home. The product was clearly marked not for use by anyone under 18 but was sent directly to a 16- year-old who had come home from school hours before his parents, and could have added the small packet to water and ingested it, without his parent’s knowledge.

I believe the government has a responsibility to protect the public, particularly the most vulnerable, our children. I also believe in the importance of free commerce, capitalism and the right of businesses to conduct business in an unfettered way. But they cannot be allowed to imperil the public, especially our most vulnerable.

In the fall of 2012, I began meeting with industry leaders, health officials and educators, constituents and my colleagues. Rather than implementing an outright ban on the sale of the products in Suffolk County as our Board of Health advocated, I worked to create a balanced, comprehensive plan.

After getting word that the minor son of my colleague received a sample and coupons in the mail from a local energy drink company, I filed *IR 1085-2013, A Local Law to Protect Minors From Direct Mail Stimulant Drink Advertising and Samples*. The product that was clearly

marked “Not for Use by Children” was sent directly to a minor through the mail. Despite vehement claims by the industry that they didn’t market to children, there was enormous proof to the contrary.

To address the concerns expressed by the Suffolk County Board of Health, my colleagues supported the compromise position stated in my *IR 1086-2013, A Local Law to Prohibit the Sales and Distribution of Stimulant Drinks to Minors in County Parks*. If the County Board of Health, supported by much research and reliable data, was concerned about the harmful effects of energy drinks on children, then we should not be allowing those products to be sold or distributed on County property.

Finally, but actually the first and most widely supported resolution was *IR 1920-2012, Establishing “The Truth About Stimulant Drinks” Public Education Campaign to Increase Awareness of the Side Effects Associated with Stimulant Drink Consumption*. This campaign would educate junior high and high school students about stimulant drinks and encourages their participation in a public safety announcement (PSA) competition. The winning PSA would be aired on local cable television to strengthen awareness about these drinks annually. We have begun to meet with the Department of Health and school officials to get this program off the ground and have met with excitement and support.

In April 2013, after an exhaustive effort, Suffolk County became the first municipality in the United States to pass legislation that would modestly regulate the industry and educate consumers. We had fashioned a comprehensive energy/stimulant education and protection plan to address the health risks associated with energy/stimulant drinks. Again, this historic three-pronged approach included:

- Prohibiting the marketing and advertising of stimulant drinks to minors.
- Prohibiting the distribution and sale of stimulant drinks to minors in County parks.
- Educating Suffolk’s youth about the health risks associated with stimulant drinks.

This plan addresses the issue from an educational, medical and practical way without stifling business or infringing on anyone’s constitutional rights.

These bills were approved, in spite of the industry's efforts to stop any legislation which included constant lobbying, letters, repeated phone calls. Political pressure was placed on legislators by calls to other elected officials, county leaders and even calls to the NYS governor's staff to stop the legislation.

Most of the industry's arguments against legislation were well-worn and repetitive. The same players showed up to testify, using the arguments as they had when the Suffolk County Legislature debated Legislator Nowick's resolutions in 2010. Their arguments against legislation include the following points with responses as numbered below include:

1. "Caffeine is a natural substance. It is safe. Why try to regulate it?" Poppies use to make heroin are also a natural substance but that does not make their use safe.
2. "FDA fully regulates energy drinks, their ingredients and labeling." Substances designated as "Food" products, have to list their exact ingredients but don't have to report adverse reactions or side effects. But dietary supplements don't have to list exact ingredients but must report adverse reactions. Most energy drinks are now regulated as foods.
3. "Some caffeine is safe for children, why limit their access to it." Although children can tolerate some caffeine there is no benefit to caffeine in a child's diet.
4. Many energy drinks contain as much caffeine as much as large cups of coffee why not ban or restrict coffee? Coffee has a considerably higher volume and is hot which slows the ingestion of caffeine.
5. Industry leaders insist repeatedly that they do not market their products to children and teens. When in fact, according to one pediatrician, Dr. Kwabena Blankson, "They market in places kids like to go – on their X-boxes, at the X-games..." This point can be broadened. Energy drink manufacturers market to children during cartoons, during sporting events, in video games and movies. Products are

available everywhere children go, except for school but that change was recent and not welcomed by the industry. They send samples to minors using team rosters and market research. They hand out coupons and samples at concert venues. They sponsor teams, athletes, and popular video gamers. They give drinks trendy, cool names, put them in attractive packaging and offer appealing, desirable performance enhancement abilities. **There is overwhelming proof that there is direct marketing to children and adolescents.**

6. "Ingredients are considered safe." Yes, this may be the case when they are consumed individually but what they cannot prove is that their ingredients in combination are safe. Energy drinks often include, vitamins, supplements (Guaraine, Taurine, Guarana) and other ingredients that potentiate stimulating effects of caffeine. If multiple drinks are consumed, the effects are multiplied. The AMA, with members across the nation have expressed concern that these ingredients, taken together may not be safe for children under 19.

7. "There are warnings on the bottles or cans..." This labeling had been part of the compromise originally negotiated by my colleague two years prior!! ***If the industry agrees that their "products are not intended for children, pregnant or nursing women or those sensitive to caffeine" then why allow them to market to children?***

Important Points to Consider:

Potentially as many as 1 out of 100 children have underlying congenital heart anomalies that may go undetected but under the right circumstances in combination with stimulants and extreme physical activity like competing in a sport event, running or etc. may potentially cause heart arrhythmias or possibly death possibly after one ingestion of a normal serving of a energy drink.

Currently without caffeine caps or guidelines new products are being introduced to the marketplace upping the ante including highly concentrated caffeinated products like gum, patches, tongue tabs electronic cigarettes with no limits to caffeine concentration.

Energy/stimulant drinks can be a gateway to addiction to alcohol and drugs by altering vulnerable chemistry of the brain by starting a cycle of dependence.

There are some responsible members of the industry who do not do all of the above but do allow marketing divisions broad discretion to get their message out.

With the support of my colleagues in the Suffolk County Medical Society, I brought my resolution to annual convention of the New York State House of Delegates of the Medical Society of the State of New York. The bill was to temporarily ban the marketing of energy drinks to children until the FDA could investigate the products and deem them safe. It was approved overwhelmingly. A delegation from MSSNY brought the same resolution before the American Medical Association, where it was strengthened, changes were made and it was also approved.

In conclusion, my desire is to protect our kids. That is what this is about. I am going to paraphrase my colleague Legislator Lou D'Amaro, who summed up our debate so eloquently....Our kids are bombarded by all kinds of advertising. Some things are worse than others. There is always a matter of degree, but the fact of the matter is that energy drinks, just by the name alone, are a misnomer because they don't give you energy. But, yet, that is the message that's being directed at our children, telling them that as we live in a more and more hectic world, and it becomes more and more difficult to find the time to do everything you want to do in a day, here's the quick solution. Have an energy drink, you'll feel great and you'll just keep on going.

It is even more egregious for athletes, kids in schools, kids that are in school playing, maybe even high school sports, to believe that energy drinks somehow will make you a better athlete, because they will not. But, yet, this industry insists on calling their products energy drinks. They are not energy drinks. They give you a caffeine high and a sugar high and then you

crash. They reduce your performance and add to fatigue. We are talking about children. They should not be drinking caffeine no matter if the amount is equivalent to a cup of coffee. I will not advise any parents to give their child one cup of coffee, and never multiple cups. This is about telling our children at a very young age that it's okay to drink these products because you're going to feel great. These seemingly benign stimulants can be a precursor and gateway to using other drugs and alcohol as teenagers look for that next and better high. For the vulnerable person, the jolt from caffeine or an energy complex, changes the chemistry, tricks the brain and leaves it seeking more chemical stimulation. If caffeine is stopped, the body and brain do experience withdrawal symptoms, no matter the quantity ingested. Hundreds of thousands of physicians across this nation, as indicated by the AMA resolution, agree that these products have the potential to harm our children. The deceptive marketing practices of the industry are placing children in peril, contributing to addiction cycles of those who are vulnerable and taking away parents' power to make educated decisions about what their children should and can ingest.

Please, consider restricting the marketing to children under 18 unless or until the products are proven to be safe and not habit forming. Also, let's embark on an education campaign to empower parents to make educated decisions for their children and even teach adults about the potential side effects they may experience as a result of choosing to indulge in these products.

Thank you for your time and attention to this matter. I am honored to have been given this opportunity. Thank you again.