



**Am. Sub. S.B. 4**  
125th General Assembly  
(As Passed by the General Assembly)

**Sens.** Spada, Amstutz, Goodman, Jacobson, Harris, Austria, Blessing, Schuring, Stivers, Herington, Fedor, Dann, Armbruster, Brady, Carey, Carnes, Coughlin, DiDonato, Fingerhut, Randy Gardner, Robert Gardner, Hagan, Hottinger, Jordan, Mallory, Miller, Mumper, Nein, Prentiss, Roberts, Schuler, Wachtmann, White

**Reps.** Reidelbach, Widowfield, Book, Gilb, Harwood, Allen, Aslanides, Barrett, Beatty, Brown, Buehrer, Callender, Calvert, Carano, Carmichael, Cates, Chandler, Cirelli, Clancy, Collier, Core, Daniels, DeBose, DePiero, Domenick, Driehaus, C. Evans, D. Evans, Faber, Fessler, Flowers, Gibbs, Hagan, Hartnett, Hollister, Hoops, Hughes, Husted, Jolivet, Kearns, Key, Kilbane, Latta, Martin, Niehaus, Oelslager, Olman, Otterman, S. Patton, T. Patton, Perry, Peterson, Price, Raussen, Redfern, Reinhard, Schaffer, Schlichter, Schmidt, Schneider, Seaver, Seitz, Setzer, G. Smith, S. Smith, D. Stewart, J. Stewart, Strahorn, Taylor, Ujvagi, Wagner, Webster, White, Widener, Willamowski, Wilson, Wolpert, Woodard

**Effective date:** Vetoed by Governor

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**ACT SUMMARY**

The Governor vetoed the act, which would have done the following:

- Enacted mechanisms for taking and using, in a criminal proceeding or delinquent child proceeding, the deposition of a victim of a specified offense who is a mentally retarded or developmentally disabled person.
- Provided for closed circuit telecast into the courtroom of testimony of such a victim that was taken outside the courtroom, recording the testimony of the victim for showing in the courtroom, and, in criminal proceedings, use of preliminary hearing testimony.
- Created the offense of patient endangerment, prohibiting an "MR/DD caretaker" from creating a substantial risk to the health or safety of a mentally retarded or developmentally disabled person and prohibiting a

person who owns, operates, administers, or is an agent of a care facility from condoning or knowingly permitting any such conduct by an MR/DD caretaker under that person's control.

- Specified that an "MR/DD employee" cannot have sexual contact with a person with mental retardation or another developmental disability for whom the employee is employed or under a contract to provide care.
- Required that annual notice be provided to each MR/DD employee regarding the conduct for which an MR/DD employee may be included in the registry regarding misconduct by MR/DD employees.
- Required each county board of mental retardation and developmental disabilities to prepare a memorandum of understanding related to abuse, neglect, and exploitation of persons in the county who are mentally retarded or developmentally disabled.
- Modified the law regarding reporting of abuse or neglect of a person with mental retardation or a developmental disability by: (1) requiring a person in any profession that is subject to the mandatory reporting requirement to make a report when the person has reason to believe that a person with mental retardation or a developmental disability faces a substantial risk of suffering any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect, (2) revising the entity to which reports are made in specified circumstances, (3) limiting the application of the mandatory reporting provisions to clergymen and persons who render spiritual treatment through prayer to circumstances in which they are employed in a position that includes providing specialized services to an individual with mental retardation or another developmental disability and are acting in that capacity, (4) adding a limited exemption from the mandatory reporting requirement for attorneys and physicians, (5) specifying that any person who fails to make a mandatory report is eligible to be included in the registry regarding abuse by MR/DD employees, (6) requiring investigations of a report by a law enforcement agency or the Department of Mental Retardation and Developmental Disabilities (DMRDD) to be in accordance with the memorandum of understanding, (7) revising the penalties for specified violations of the reporting law, (8) requiring a county board that receives a report in circumstances it believes are an emergency to attempt a face-to-face contact with the alleged victim within one hour, and (9) requiring DMRDD to adopt rules under the

Administrative Procedure Act that provide standards for substantiation of reports.

- Revised the law regarding reports of abuse, neglect, and misappropriation of property by an MR/DD employee and the registry of employees who have engaged in such conduct.
- Required the prosecutor, in any case involving a victim that the prosecutor knows is a mentally retarded or developmentally disabled person, to send written notice of the charges to DMRDD.
- Modified provisions regarding a probate court's issuance of an order authorizing a county board of mental retardation and developmental disabilities to arrange services for an adult with mental retardation or a developmental disability.
- Added "patient endangerment" to convictions for which the Bureau of Criminal Identification and Investigation checks when conducting a records check of persons under final consideration for appointment or employment with DMRDD, county boards of MR/DD, and entities under service contracts with a county board.
- Created a mechanism to be used if the Governor announces an intent to close any developmental center, including an independent study by the Legislative Service Commission, the appointment of a Closure Commission, and the Closure Commission's preparation of a report containing nonbinding recommendations.
- Required specified health care, emergency, and law enforcement personnel to notify the office of the coroner when any mentally retarded or developmentally disabled person dies.
- Permitted DMRDD or a county board of MR/DD to seek a court order for an autopsy or post-mortem examination if a person with mental retardation or a developmental disability dies under suspicious circumstances.
- Clarified that a provision requiring a court to appoint an interpreter to assist a party or witness to a legal proceeding applies to the language and descriptions of any mentally retarded or developmentally disabled person

who cannot be reasonably understood, or cannot understand questioning, without the aid of an interpreter.

- Provided evaluation standards for the appointment of interpreters.
- Expanded the professions that are subject to the mandatory child abuse and neglect reporting provision to include superintendents, board members, and employees of a county board of mental retardation and developmental disabilities, investigative agents contracted with by a county board, and employees of DMRDD.

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## CONTENT AND OPERATION

The act was vetoed by the Governor. Provisions similar to those in the act were enacted in Am. S.B. 178 of the 125th General Assembly.

### Special testimonial procedures

The act would have created mechanisms for taking and using depositions in certain criminal and delinquent child proceedings involving a victim who is a mentally retarded or developmentally disabled person.<sup>1</sup> The act would also have

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<sup>1</sup> *"Mentally retarded or developmentally disabled victim" would include (1) any mentally retarded or developmentally disabled person who was a victim of any violation listed in "Depositions in general" as a violation to which that provision applies, an offense of violence regarding criminal defendants, or an act that would be an "offense of violence" (see COMMENT 2) if committed by an adult regarding delinquent children, or (2) any mentally retarded or developmentally disabled person against whom was directed any conduct that constitutes, or that is an element of, any violation listed in "Depositions in general" as a violation to which that provision applies, an offense of violence regarding criminal defendants, or an act that would be an offense of violence if committed by an adult regarding delinquent children. Regarding the preliminary hearing provisions, the meaning of the term would be limited to felony violations. (R.C. 2152.821.)*

*"Mentally retarded person" would mean a person having significantly subaverage general intellectual functioning existing concurrently with deficiencies in adaptive behavior, manifested during the developmental period. (See R.C. 5123.01.)*

*"Developmentally disabled person" would have meant a person with a developmental disability. As used in this definition, "developmental disability" means a severe, chronic disability that is characterized by all of the following: (1) it is attributable to a mental or physical impairment or a combination of mental and physical impairments, other than a mental or physical impairment solely caused by mental illness, (2) it is manifested before age 22, (3) it is likely to continue indefinitely, (4) it results in one of the following: (a) in*

provided for the closed circuit telecast into the courtroom of testimony of such a victim that is taken outside the courtroom; recording, for showing in the courtroom, of the testimony of such a victim; and, in criminal proceedings, the use of preliminary hearing testimony, including recorded preliminary hearing testimony. A summary of each of the mechanisms follows.

### **Deposition**

(R.C. 2152.821 and 2945.482)

**Depositions in general.** Under the act, in the prosecution of a charge of any of the violations specified below (or in juvenile court involving a complaint, indictment, or information in which a child is charged with any of those violations) the judge, on motion of the prosecution, would have been required to order that the testimony of an alleged victim who is a mentally retarded or developmentally disabled person be taken by deposition. The prosecution would be permitted to request that the deposition be videotaped, as described below. The judge would be required to notify the victim whose deposition is to be taken, the prosecution, and the attorney for the person charged of the date, time, and place for taking the deposition. The notice would be required to identify the victim who is to be examined and indicate whether a request that the deposition be videotaped has been made. The person charged would have the right to attend the deposition and to be represented by counsel. Depositions would have to be taken in the manner provided in civil cases, except that the judge would preside at the taking of the deposition and rule on objections at that time. The prosecution and the attorney for the person charged would have the right to full examination and cross-examination of the victim.

The violations to which this provision would have applied are: (1) for both criminal prosecutions and for delinquent child proceedings, knowingly failing to

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*the case of a person under three years of age, at least one developmental delay or an established risk, (b) in the case of a person at least three years of age but under six years of age, at least two developmental delays or an established risk, or (c) in the case of a person six years of age or older, a substantial functional limitation in at least three of the following areas of major life activity, as appropriate for the person's age: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and, if the person is at least 16 years of age, capacity for economic self-sufficiency, and (5) it causes the person to need a combination and sequence of special, interdisciplinary, or other type of care, treatment, or provision of services for an extended period of time that is individually planned and coordinated for the person. As used in this definition, "substantial functional limitation," "developmental delay," and "established risk" have the meanings established pursuant to R.C. 5123.011, not in the act. (See R.C. 5123.01.)*



provide for a functionally impaired person, recklessly failing to provide for a functionally impaired person, patient abuse, gross patient abuse, patient neglect, rape, sexual battery, gross sexual imposition, compelling prostitution, procuring, soliciting, engaging in solicitation after a positive HIV test, pandering obscenity, pandering obscenity involving a minor, pandering sexually oriented matter involving a minor, illegal use of a minor in a nudity-oriented material or performance, the new offense of patient endangerment, and offenses of violence or, regarding juveniles, acts that would be an offense of violence if committed by an adult, and (2) for criminal prosecutions, unlawful restraint, sexual imposition, and public indecency.

If a deposition taken under this provision is intended to be offered as evidence, it would have had to be filed with the court and would have been admissible in the manner described below. If the deposition was admitted as evidence at the proceeding, the victim would not have been required to testify in person at the proceeding.

Before the conclusion of the proceeding, the attorney for the person charged would have been permitted to file a motion requesting that another deposition of the victim be taken because new evidence material to the defense has been discovered that the attorney could not with reasonable diligence have discovered prior to the taking of the deposition. In delinquent child proceedings, any motion requesting another deposition would have had to be accompanied by supporting affidavits, and, on the filing of the motion and affidavits, the court could have ordered that additional testimony be taken by another deposition. In any case, if the court ordered the taking of another deposition, it would have had to be taken in the manner described above. If the deposition was a videotaped deposition described below, the new deposition would also have had to be videotaped in accordance with that provision. In other cases, the new deposition could have been videotaped in accordance with that provision.

**Videotaped depositions.** If the prosecution requested that a deposition to be taken as described above be videotaped, the judge would have had to order that the deposition be videotaped. If a judge issued an order to videotape the deposition, the judge would have been required to exclude everyone from the room in which the deposition is to be taken except (1) the victim giving the testimony, (2) the judge, (3) one or more interpreters if needed, (4) the attorneys for the prosecution and the person charged, (5) any person needed to operate the equipment to be used, (6) one person chosen by the victim, and (7) any person whose presence the judge determines would contribute to the welfare and well-being of the victim. The person chosen by the victim could not be a witness in the proceeding and, both before and during the deposition, would not have been permitted to discuss the testimony of the victim with any witness in the proceeding. To the extent

feasible, any person operating the recording equipment would be restricted to a room adjacent to the room in which the deposition is taken, or to a location in the room in which the deposition is being taken that is behind a screen or mirror, so that person can see and hear, but cannot be seen or heard by the victim.

The person charged would have been permitted to observe and hear the testimony on a monitor, provided with an electronic means of immediate communication with his or her attorney during the testimony, and restricted to a location from which he or she could not be seen or heard by the victim, except on a monitor provided for that purpose. The victim would have been provided with a monitor on which he or she could observe the person charged. The judge would have been permitted to preside at the deposition by electronic means from outside the room in which the deposition is taken. If the judge presides by electronic means, the judge would have been provided with monitors to view each person in the room in which the deposition is to be taken and with an electronic means of communication with each person. Each person in the room would likewise be provided with a monitor on which that person could see the judge and with an electronic means of communication with the judge.

A deposition videotaped under this provision would have been taken and filed in the manner described above and would be admissible in the manner described in this paragraph and "Use of depositions," below. If a deposition videotaped under this provision was admitted as evidence at the proceeding, the victim could not be required to testify in person at the proceeding. No deposition videotaped under this provision could be admitted as evidence at any proceeding unless the provisions described below in "Use of depositions" were satisfied relative to the deposition and all of the following apply relative to the recording: (1) the recording is both aural and visual and is recorded on film, videotape, or by other electronic means, (2) the recording is authenticated under the Rules of Evidence and the Rules of Criminal Procedure as a fair and accurate representation of what occurred, and it is not altered other than at the direction and under the supervision of the judge, (3) each voice on the recording that is material to the testimony on the recording or the making of the recording, as determined by the judge, is identified, and (4) both the prosecution and the person charged are afforded an opportunity to view the recording before it is shown in the proceeding.

The authority of a juvenile judge to close the taking of a deposition under this provision in a delinquent child proceeding would be in addition to the authority of a judge to close a hearing pursuant to existing law.

Use of depositions. The act would have provided that at any proceeding in relation to which a deposition is taken under the provisions described above, the deposition or a part of it would be admissible in evidence on motion of the prosecution if the testimony in the deposition or the part to be admitted would not

be excluded by the Hearsay Rule and would otherwise be admissible under the Rules of Evidence.<sup>2</sup> The act would have provided that, for purposes of this provision, testimony is not excluded by the Hearsay Rule if: it is specifically excluded from the definition of hearsay under the Ohio Rules of Evidence;<sup>3</sup> it falls within an exception to the Hearsay Rule that does not depend on the witness' availability;<sup>4</sup> the victim who gave the testimony is unavailable as a witness, as defined in Evidence Rule 804, and the testimony is admissible under that Rule; or both of the following apply: (1) the person charged had an opportunity and similar motive at the time of the taking of the deposition to develop the testimony by direct, cross, or redirect examination, and (2) the judge determines that there is reasonable cause to believe that, if required to testify in person at the proceeding, the victim would experience serious emotional trauma as a result of participating at the proceeding.

The act would have provided that objections to receiving a deposition or a part of it in evidence under the provision described above must be made as provided in civil actions. Further, the provisions pertaining to the taking of depositions in general, to the videotaping of depositions, and to the use of the depositions would be in addition to any other provisions of the Revised Code, the Rules of Juvenile Procedure, the Rules of Criminal Procedure, or the Rules of Evidence that pertain to the taking or admission of depositions in the proceeding, and would not limit the deposition's admissibility under any of those other provisions.

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<sup>2</sup> *Hearsay is generally defined as an out-of-court statement made by a person other than the one testifying that is offered for its truth. The Ohio version of the Hearsay Rule provides that*

*[h]earsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio*

*Ohio Rules of Evidence 802.*

<sup>3</sup> *Statements excluded from the definition of hearsay include prior inconsistent statements, prior consistent statements offered to rebut a charge of recent fabrication or improper influence or motive, and admissions by a party-opponent. Ohio R.Evid. 801(D).*

<sup>4</sup> *These exceptions are set forth in Ohio Evidence Rule 803.*

**Closed circuit telecast of testimony and recording testimony**

(R.C. 2152.821 and 2945.482)

**Criteria for issuing orders.** Under the act, a judge could order the closed circuit telecast of testimony or the recording of testimony for showing in the courtroom if the judge determines that the mentally retarded or developmentally disabled victim is unavailable to testify in the physical presence of the person charged due to one or more of the following circumstances: (1) the persistent refusal of the victim to testify despite judicial requests to do so, (2) the inability of the victim to communicate about the alleged violation or offense because of extreme fear, failure of memory, or another similar reason, or (3) the substantial likelihood that the victim will suffer serious emotional trauma from testifying.

**Motion and order for telecast.** The act would have permitted the prosecution, in any proceeding in a criminal prosecution (or in a juvenile court proceeding involving a complaint, indictment, or information) in which a person is charged with any violation listed above in "**Depositions in general**" as a violation to which that provision applies or an "offense of violence" and in which an alleged victim was a mentally retarded or developmentally disabled person, to file a motion requesting the judge to order the testimony of the victim to be taken in a room other than the room in which the proceeding is conducted and be televised by closed circuit equipment into the room in which the proceeding is conducted to be viewed by the person charged, the jury, and any other persons who are not permitted in the room in which the testimony is to be taken but who would have been present during the testimony had it been given in the room in which the proceeding is conducted. Except for good cause shown, the prosecution would have been required to file a motion under this provision at least seven days before the date of the proceeding. The judge would have been required to exclude from the room in which the testimony is to be taken every person except a person described above as a person who is permitted to be present during the videotaping of a deposition. The judge could preside during the giving of the testimony by electronic means from outside the room in which it is being given, subject to the limitations set forth above regarding the videotaping of a deposition. To the extent feasible, any person operating the televising equipment would have to be hidden from the sight and hearing of the victim giving the testimony, in a manner similar to that described above regarding the videotaping of a deposition. The person charged would be permitted to observe and hear the testimony of the victim giving the testimony on a monitor, provided with an electronic means of immediate communication with his or her attorney during the testimony, and restricted to a location from which he or she cannot be seen or heard by the victim giving the testimony, except on a monitor provided for that purpose. The victim giving the

testimony would have been provided with a monitor on which he or she could observe the person charged.

The order would be required to specifically identify the victim to whose testimony it applies. The order would have applied only during the testimony of that victim, and that victim could not be required to testify at the proceeding other than in accordance with the order. Regarding delinquent child proceedings, the authority of a juvenile judge to close a proceeding under this provision would have been in addition to the authority of a judge to close a hearing pursuant to continuing law.

**Motion and order for recording.** Under the act, in a criminal prosecution (or in a juvenile court proceeding involving a complaint, indictment, or information) in which a person is charged with any violation listed above in "**Depositions in general**" as a violation to which that provision applies or an "offense of violence" and in which an alleged victim of the violation or offense was a mentally retarded person or a developmentally disabled person, the prosecution would have been permitted to file a motion asking the judge to order the testimony of the victim to be taken outside of the room in which the proceeding is being conducted and be recorded for showing in the room in which the proceeding is being conducted before the judge, the person charged, the jury if applicable, and any other persons who would have been present during the testimony of the victim had it been given in the room in which the proceeding is being conducted. Except for good cause shown, the act would have required that the prosecution file a motion under this provision at least seven days before the date of the proceeding.

The act would have required a judge who issues such an order to exclude from the room in which the testimony is to be taken every person except a person described above as a person who is permitted to be present during the videotaping of a deposition. To the extent feasible, any person operating the recording equipment would have to be hidden from the sight and hearing of the victim giving the testimony, in a manner similar to that set forth regarding the videotaping of a deposition. The person charged would be permitted to observe and hear the testimony of the victim on a monitor, provided with an electronic means of immediate communication with his or her attorney, and restricted to a location from which he or she cannot be seen or heard by the victim, except on a monitor provided for that purpose. The victim testifying would have to be provided with a monitor on which to view the person charged. No order for the taking of testimony by recording could have been issued under this provision unless the provisions described above in clauses (1) to (4) of the last paragraph under "**Videotaped depositions**" apply to the recording of the testimony.

Under the act, an order pursuant to this provision requiring the testimony of a mentally retarded or developmentally disabled victim to be taken outside of the room in which the proceeding is being conducted would have been required to specifically identify the victim to whose testimony it applies. The order would have applied only during the testimony of that victim, and that victim could not have been required to testify at the proceeding other than in accordance with the order. In delinquent child proceedings, the authority of a juvenile judge to close a proceeding under this provision would have been in addition to the authority of a judge to close a hearing under continuing law.

**Entry of determinations on the record**

The act would specify that a judge who makes any determination regarding the admissibility of a deposition, the videotaping of a deposition, or the taking of testimony outside of the room in which a proceeding is being conducted under any of the provisions of the act described above must enter the determination and findings on the record in the proceeding.

**Use of videotaped preliminary hearing testimony**

(R.C. 2945.491)

Under the act, at a trial on a charge of any felony violation listed above in "**Depositions in general**" as a violation to which that provision applies regarding criminal defendants or delinquent children (*but not* the three additional violations that are specified regarding only criminal defendants) or an "offense of violence" and in which an alleged victim of the violation or offense was a mentally retarded or developmentally disabled person, the court, on motion of the prosecutor in the case, would have been permitted to admit videotaped preliminary hearing testimony of the victim as evidence at the trial, in lieu of the victim appearing as a witness and testifying at trial, if (1) the videotape of the testimony was made at the preliminary hearing at which probable cause of the violation charged was found, (2) the videotape of the testimony was made in accordance with existing law,<sup>5</sup> and (3) the testimony in the videotape is not excluded by the Hearsay Rule and otherwise is admissible under the Rules of Evidence.

For purposes of the Rules of Evidence, testimony is not excluded by the Hearsay Rule if the testimony is not hearsay under Evidence Rule 801, the testimony is within an exception to the Hearsay Rule set forth in Evidence Rule 803, the victim who gave the testimony is unavailable as a witness, as defined in Evidence Rule 804, and the testimony is admissible under that rule, or both of the

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<sup>5</sup> R.C. 2937.11(C), *not in the act.*

following apply: (a) the accused had an opportunity and similar motive at the preliminary hearing to develop the testimony of the victim by direct, cross, or redirect examination, and (b) the court determines that there is reasonable cause to believe that if the victim were to testify in person at the trial, the victim would experience serious emotional trauma as a result of participation at the trial.

If a mentally retarded or developmentally disabled victim of an alleged felony violation or offense identified in the second preceding paragraph testifies at the preliminary hearing in the case, the testimony was videotaped pursuant to current law, and the defendant files a written objection to the use of the videotaped testimony at the trial, the court, immediately after the filing, would have been required to hold a hearing to determine whether the videotaped testimony should be admissible at trial and, if it is admissible, whether the victim should be required to provide limited additional testimony. At the hearing, the defendant and the prosecutor would have been able to present any relevant evidence, but the victim could not be required to testify. After the hearing, the court would not be able to require the victim to testify at the trial, unless it determined that both of the following apply: (1) the testimony of the victim at trial is necessary because evidence that was not available at the time of the victim's testimony at the preliminary hearing has been discovered, or the circumstances surrounding the case have changed sufficiently to necessitate that the victim testify at the trial, or both, and (2) the testimony of the victim at the trial is necessary to protect the right of the defendant to a fair trial.

The act would require the court to enter its finding and the reasons for it in the journal. If the court required the victim to testify at the trial, the act would require that the testimony be limited to the new evidence and changed circumstances. The act would permit the required testimony of the victim to be given in person or, on motion of the prosecution, taken by deposition in accordance with the provisions described above.

If videotaped testimony of a mentally retarded or developmentally disabled victim is admitted at trial in accordance with the above-described provisions, the act would have provided that the victim cannot be compelled to appear as a witness at the trial, except as provided in those provisions. An order issued pursuant to the above-described provisions would have been required to specifically identify the mentally retarded or developmentally disabled victim concerning whose testimony it pertains, and would have applied only during the testimony of the victim it specifically identifies.



## Offense of "patient endangerment"

(R.C. 2903.341)

### The act

The act would have created a new offense related to the endangerment of a mentally retarded or developmentally disabled person by a person involved with the care and protection of the mentally retarded or developmentally disabled person. Specifically, the act would have:

(1) Prohibited an "MR/DD caretaker"<sup>6</sup> from creating a "substantial risk" to the health or safety of a mentally retarded or developmentally disabled person. It would not have been a violation of this provision to treat a physical or mental illness or defect of the mentally retarded or developmentally disabled person by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body;

(2) Prohibited a person who owns, operates, administers, or is an agent of a care facility<sup>7</sup> from condoning or knowingly permitting any conduct by an MR/DD caretaker who is employed by or under the control of the owner, operator, administrator, or agent that is in violation of clause (1) above and involves a mentally retarded or developmentally disabled person who is under the care of the owner, operator, administrator, or agent. A person who relies on treatment by spiritual means through prayer alone, in accordance with the tenets of a recognized

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<sup>6</sup> "MR/DD caretaker" means any MR/DD employee or any person who assumes the duty to provide for the care and protection of a mentally retarded person or a developmentally disabled person on a voluntary basis, by contract, through receipt of payment for care and protection, as a result of a family relationship, or by order of a court of competent jurisdiction. "MR/DD caretaker" includes a person who is an employee of a care facility and a person who is an employee of an entity under contract with a provider. "MR/DD caretaker" does not include a person who owns, operates, administers, or is an agent of, a care facility unless the person also personally provides care to persons with mental retardation or a developmental disability (R.C. 2903.341(A)(1)).

<sup>7</sup> "Care facility" means any of the following: (a) a "home" as described in existing law governing nursing homes and similar residential facilities, (b) a residential facility for persons with mental retardation, (c) an institution or facility operated or provided by DMRDD, (d) a residential facility for persons with mental illness, (e) any unit of a hospital that provides the same services as a nursing home, (f) any institution, residence, or facility that provides, for a period of more than 24 hours, accommodations to one individual or two unrelated individuals who are dependent upon the services of others, (g) an adult care facility, (h) an adult foster home certified by the Department of Aging or its designee, or (i) a community alternative home for persons with AIDS.

religious denomination, would not have been considered "endangered" under this provision for that reason alone.

A violation of either prohibition would have been the offense of "patient endangerment." The act would have provided that patient endangerment generally is a first degree misdemeanor, but is a fourth degree felony if the offender has previously been convicted of, or pleaded guilty to, patient endangerment. If the violation results in serious physical harm to the person with mental retardation or a developmental disability, patient endangerment would have been a third degree felony.

The act would have provided an affirmative defense to a charge of patient endangerment if the actor's conduct was committed in good faith solely because the actor was ordered to commit the conduct by a person who has supervisory authority over the actor or has authority over the actor's conduct pursuant to a contract for the provision of services. The act would also have provided three affirmative defenses to a charge of a violation of the prohibition described above in (2): (a) the owner, operator, administrator, or agent of a care facility charged with the violation is following the individual service plan for the involved mentally retarded or developmentally disabled person, (b) the admission, discharge, and transfer rule set forth in the Administrative Code is being followed, and (c) a means to prevent the death or harm to the person with mental retardation or a developmental disability was not readily available to the actor and the actor took reasonable efforts to summon aid.

### **Sexual activity**

(R.C. 5123.541)

The act would have specified that an MR/DD employee cannot engage in any sexual conduct or have any sexual contact with an individual with mental retardation or another developmental disability for whom the employee is employed or under a contract to provide care and who is not the employee's spouse.<sup>8</sup> Any MR/DD employee who violates this restriction would have been

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<sup>8</sup> As used in this provision:

*"MR/DD employee" means all of the following: (a) an employee of DMRDD, (b) an employee of a county board of mental retardation and developmental disabilities, (c) a worker in an intermediate care facility for the mentally retarded, and (d) an individual who is employed in a position that includes providing specialized services to an individual with mental retardation or a developmental disability. (R.C. 5123.50.)*

*"Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without*

eligible to be included in the registry regarding misappropriation, abuse, neglect, or other specified misconduct by MR/DD employees, in addition to any other sanction or penalty authorized or required by law.

The act would have required any person who is a mandatory reporter of abuse or neglect with reason to believe that an MR/DD employee has violated this prohibition to immediately report that belief to the DMRDD. Under the act any other person with such a belief would have been authorized to report it to DMRDD.

### **Reports of abuse or neglect**

(R.C. 5120.173, 5123.61, and 5123.99; Section 3)

#### **Existing law**

**Mandatory reports.** Ohio law governing the reporting of abuse and neglect lists certain categories of professions and prohibits any person in any of the categories, having reason to believe that a person with mental retardation or a developmental disability has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of that person, from failing to immediately report or cause reports to be made to a law enforcement agency or the county board of mental retardation and developmental disabilities, except that if the report concerns a resident of a facility operated by DMRDD the report must be made either to a law enforcement agency or to DMRDD.<sup>9</sup> The professions to

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*privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse. (R.C. 2907.01, not in the act.)*

*"Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person. (R.C. 2907.01, not in the act.)*

*"Spouse" means a person married to an offender at the time of an alleged offense, except that such person cannot be considered the spouse when any of the following applies: (a) when the parties have entered into a written separation agreement authorized by the Domestic Relations Law, (b) during the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or legal separation, or (c) in the case of an action for legal separation, after the effective date of the judgment for legal separation. (R.C. 2907.01, not in the act.)*

<sup>9</sup> Under existing law, as used in the reporting provisions: (1) "law enforcement agency" means the State Highway Patrol, a municipal police department, or a county sheriff, (2)



which the mandatory reporting provision applies are physicians; dentists; podiatrists; chiropractors; practitioners of a limited branch of medicine; hospital administrators and employees; nurses; employees of an ambulatory health facility, home health agency, adult care facility, or community mental health facility; school teachers or school authorities; social workers; psychologists; attorneys; peace officers; coroners; clergymen; residents' rights advocates; superintendents, board members, and employees of a county board of mental retardation and developmental disabilities; administrators, board members, and employees of a residential facility or of any other public or private provider of services to a person with mental retardation or a developmental disability; MR/DD employees; members of a citizen's advisory council established at an institution or branch institution of DMRDD; and persons who, while acting in an official or professional capacity, render spiritual treatment through prayer in accordance with the tenets of an organized religion. The reporting requirements do not apply to members of the Legal Rights Service Commission or to employees of the Legal Rights Service.

The reports must be made promptly by telephone or in person, must be followed by a written report, and must contain names and addresses of the person with mental retardation or a developmental disability and the person's custodian, if known, the age of the person with mental retardation or a developmental disability, and any other information that would assist in the investigation. A physician performing services as a member of the staff of a hospital or similar institution who has reason to believe that a person with mental retardation or a developmental disability has suffered injury, abuse, or physical neglect, is required to notify the person in charge of the institution or that person's designated delegate, who must make the necessary reports.

**Discretionary reports.** Ohio law regarding reports of abuse or neglect permits any person having reasonable cause to believe that a person with mental retardation or a developmental disability has suffered abuse or neglect to report the belief, or cause a report to be made, to a law enforcement agency, the county board of mental retardation and developmental disabilities, or, if the person is a resident of a facility operated by DMRDD, to a law enforcement agency or to DMRDD.

**Procedures regarding reports.** On receipt of a report concerning possible abuse or neglect of a person with mental retardation or a developmental disability, the law enforcement agency must inform the county board of mental retardation

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*"abuse" has the same meaning as in current DMRDD law, except that it includes a misappropriation, as defined in that section, and (3) "neglect" has the same meaning as in current law governing DMRDD.*



and developmental disabilities or, if the person is a resident of a facility operated by DMRDD, the Department's Director. On receipt of a report that includes an allegation of action or inaction that may constitute a crime under federal law or Ohio law, DMRDD must notify the law enforcement agency. When a county board receives a report that includes an allegation of action or inaction that may constitute any such crime, the board's superintendent or the superintendent's designee must notify the law enforcement agency. The superintendent or designee must notify DMRDD when it receives any report.

A law enforcement agency must investigate each report it receives. DMRDD, in cooperation with law enforcement officials, must investigate each report regarding a resident of a facility operated by DMRDD to determine the circumstances surrounding the injury, the cause of the injury, and the person responsible. DMRDD must determine, with the registry office maintained by DMRDD, whether prior reports have been made concerning an adult with mental retardation or a developmental disability or other principals in the case. If DMRDD finds that the report involves action or inaction that may constitute a crime under federal law or Ohio law, it must submit a written report of its investigation to the law enforcement agency. If the person with mental retardation or a developmental disability is an adult, with his or her consent, DMRDD must provide such protective services as are necessary. The law enforcement agency must make a written report of its findings to DMRDD. If the person is an adult and is not a resident of a facility operated by DMRDD, the county board must review the report of abuse or neglect, and the law enforcement agency must make the written report of its findings to the county board.

There is a qualified immunity from liability for persons, hospitals, institutions, schools, health departments, agencies, and other specified entities relative to the making of reports, and to involvement in related proceedings or conduct. Ohio law also provides a qualified protection from the taking of detrimental action or retaliation against any employee related to the making of a report.

Reports made under these provisions are not public records under the Public Records Law, but information they contain, on request, must be made available to the person who is the subject of the report, the person's legal counsel, and agencies authorized to receive information in the report by DMRDD or by a county board. The law specifies that the physician-patient privilege is not a ground for excluding evidence regarding the injuries or physical neglect of a person with mental retardation or a developmental disability or the cause thereof in any judicial proceeding resulting from a report submitted pursuant to this section.

Finally, Ohio law requires DMRDD to establish a registry office for the purpose of maintaining reports of abuse, neglect, and other major unusual incidents made to DMRDD under the above-described provisions and reports received from county boards of mental retardation and developmental disabilities. DMRDD must establish committees to review reports of abuse, neglect, and other major unusual incidents.

**Penalties.** A person who violates the existing prohibition against failing to file a mandatory report, the existing provision requiring physicians who are staff at a hospital or similar institution to provide notice to the head of the institution and requiring the head of the institution to file a report, or the existing provision requiring a county board that receives a report alleging specified criminal conduct to notify a law enforcement agency and requiring a county board that receives any report to notify DMRDD, may be fined not more than \$500.

### **The act**

The act would have modified some of the provisions regarding mandatory reports of abuse or neglect of a person with mental retardation or a developmental disability, and some of the procedures related to mandatory reports and discretionary reports. The act would have:

(1) Expanded the mandatory reporting requirement to require a person in any of the existing categories to make a report when the person has reason to believe that a person with mental retardation or a developmental disability *faces a substantial risk of suffering* any wound, injury, disability, or condition of such nature as to reasonably indicate abuse or neglect. The act would have similarly expanded the provisions regarding discretionary reports of abuse or neglect.

(2) Modified the provisions describing the entities to which the mandatory reports must be made, and the discretionary reports may be made. Under the act: (a) in general, the reports would be made to a law enforcement agency or to the county board of mental retardation and developmental disabilities, (b) if the reports concern a resident of a facility operated by DMRDD, the reports would be made either to a law enforcement agency or to DMRDD, (c) if the reports concern any act or omission of an employee of a county board of mental retardation and developmental disabilities, the reports would have to be made immediately made to DMRDD and to the county board, and (d) if the reports concern a person with mental retardation or a developmental disability who is an inmate in a state correctional institution, the reports would have to be made to the State Highway Patrol. If the Patrol determines there is probable cause that the abuse or neglect occurred, it would be required to report its findings to the Department of Rehabilitation and Correction, the sentencing court, and the Correctional Institution Inspection Committee Chairman and Vice-chairman.

(3) Modified the portions of the specified categories of professions that are subject to the mandatory reporting requirement that include clergymen and, in specified circumstances, persons who render spiritual treatment through prayer. Under the act (a) a clergyman would be included in the specified categories of professions only if the clergyman is employed in a position that includes providing specialized services to an individual with mental retardation or another developmental disability and is acting in an official or professional capacity in that position, and (b) a person who renders spiritual treatment through prayer would be included in the specified categories of professions only if the person is employed in a position that includes providing specialized services to an individual with mental retardation or another developmental disability and the person, while acting in an official or professional capacity, renders spiritual treatment through prayer in accordance with the tenets of an organized religion.

(4) Added a limited exemption from the mandatory reporting requirement for attorneys and physicians. Under the act, an attorney or physician would not have been required to make a report concerning any communication the attorney or physician receives from a client or patient in an attorney-client or physician-patient relationship, if the attorney or physician could not testify with respect to that communication in a civil or criminal proceeding. The client or patient would have been deemed to have waived any testimonial privilege and the attorney or physician would have been required to make a report under the requirement if both of the following are the case: (a) the client or patient, at the time of the communication, is a person with mental retardation or a developmental disability, and (b) the attorney or physician knows or suspects, as a result of the communication or any observations made during that communication, that the client or patient has suffered or faces a substantial risk of suffering any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of the client or patient.

(5) Specified that any MR/DD employee who unreasonably fails to make a report required under the mandatory reporting provisions when the employee knew or should have known that the failure would result in a substantial risk of harm to a person with mental retardation or a developmental disability is eligible to be included in the registry regarding misappropriation, abuse, neglect, or other misconduct by MR/DD employees.

(6) Required investigations of a mandatory or discretionary report by a law enforcement agency or DMRDD to be in accordance with the memorandum of understanding prepared under the act's provisions, as described below.

(7) Revised the penalties provided for specified violations of the reporting law. Under the act, a person who violates the prohibition against failing to file a mandatory report, the provision requiring physicians who are staff at a hospital or

similar institution to provide a notice to the head of the institution and requiring the head of the institution to file a report, or the provision requiring a county board that receives a report alleging specified criminal conduct to notify a law enforcement agency and requiring a county board that receives any report to notify DMRDD is guilty of a fourth degree misdemeanor or, if the abuse or neglect constitutes a felony, a second degree misdemeanor. In addition, if the offender is an MR/DD employee, the offender would have been eligible to be included in the MR/DD registry.

(8) Enacted a provision specifying that, when a county board receives a report under the reporting provisions and believes that the degree of risk to the person is such that the report is an emergency, the superintendent of the board or an employee of the board the superintendent designates must attempt a face-to-face contact with the alleged victim within one hour of the board's receipt of the report.

(9) Required DMRDD to adopt rules that provide standards for the substantiation of reports of abuse or neglect filed under the reporting law.

### **Memorandum of understanding**

(R.C. 5126.058)

The act would have required each county board of mental retardation and developmental disabilities to prepare a memorandum of understanding concerning reports of abuse, neglect, or exploitation. The act would have required that the memorandum of understanding be developed by all of the following and be signed by all of those persons except the judges: (1) if there is only one probate judge in the county, the probate judge of the county or the probate judge's representative, (2) if there is more than one probate judge in the county, a probate judge or the probate judge's representative selected by the probate judges or, if they are unable to do so for any reason, the probate judge who is senior in point of service or the senior probate judge's representative, (3) the county peace officer, all chief municipal peace officers within the county, and other law enforcement officers handling abuse, neglect, and exploitation of mentally retarded and developmentally disabled persons in the county, (4) the prosecuting attorney of the county, (5) the public children services agency, and (6) the coroner of the county.

The act would have provided that the memorandum of understanding must set forth the normal operating procedure to be employed by officials in the execution of their respective responsibilities regarding reports of abuse, neglect, or exploitation of a person with mental retardation or another developmental disability. The memorandum's primary goal would have been the elimination of unnecessary interviews of persons who are the subject of reports. Failure of an



official to follow the procedure would not have been grounds for, and could not have resulted in, the dismissal of a charge or complaint arising from a reported case of abuse, neglect, or exploitation or the suppression of evidence obtained as a result of reported abuse, neglect, or exploitation. In addition, such a failure would not have given any rights or grounds for appeal or post-conviction relief to any person.

Under the act, the memorandum of understanding would have been required to specify roles and responsibilities for all of the following: (1) handling emergency and nonemergency cases of abuse, neglect, or exploitation, (2) handling and coordinating investigations of reported cases of abuse, neglect, or exploitation, as well as methods to be used in interviewing the person who is the subject of the report, (3) addressing the categories of persons who may interview the person who is the subject of the report, (4) providing victim services to mentally retarded and developmentally disabled persons pursuant to the existing crime victims rights law, and (5) filing criminal charges against persons alleged to have abused, neglected, or exploited mentally retarded or developmentally disabled persons.

The act would have permitted the memorandum of understanding to be signed by victim advocates, municipal court judges, municipal prosecutors, and any other person whose participation furthers the goals of a memorandum of understanding.

**Abuse, neglect, or misappropriation of property by an MR/DD employee**

(R.C. 5123.51)

**Existing law**

Ohio law provides that, in addition to any other required action, DMRDD must review each report it receives of abuse or neglect of an individual with mental retardation or a developmental disability or misappropriation of an individual's property that includes an allegation that an MR/DD employee committed or was responsible for the abuse, neglect, or misappropriation. DMRDD must review a report it receives from a public children services agency only after the agency completes its investigation, as discussed below. DMRDD must do both of the following: (1) investigate the allegation or adopt the findings of an investigation or review conducted by another person or government entity and determine whether there is a reasonable basis for the allegation, and (2) if it determines there is a reasonable basis for the allegation, conduct an adjudication pursuant to the Administrative Procedure Act.

DMRDD, or DMRDD and a union representative in certain circumstances, must appoint an independent hearing officer to conduct any hearing pursuant to the provisions described in the preceding paragraph. No hearing may be conducted until any criminal proceeding or collective bargaining arbitration concerning the same allegation has concluded. In conducting a hearing, the hearing officer must do both of the following: (1) determine whether there is clear and convincing evidence that the MR/DD employee has misappropriated the property of an individual with mental retardation or a developmental disability, knowingly abused or neglected such an individual, recklessly abused or neglected such an individual with resulting physical harm, or negligently abused or neglected such an individual with resulting serious physical harm (hereafter, these are collectively referred to as "specified prohibited acts"), and (2) give weight to the decision in any collective bargaining arbitration regarding the same allegation.<sup>10</sup> Unless DMRDD's Director determines there are extenuating circumstances (including an employee's use of physical force that was necessary as self-defense) and subject to the exceptions described below, the Director must include the name of an MR/DD employee in the MR/DD registry if the Director finds that there is clear and convincing evidence the employee has committed one or more of the specified prohibited acts. If the Director includes an MR/DD employee in the registry, the Director must notify the employee, the individual who was the subject of the report, and certain other specified persons and entities.

DMRDD's Director cannot include in the registry an individual who has been found not guilty by a court or jury of an offense arising from the same facts. If an allegation concerns an employee of the Department, the Director of Health or that Director's designee must review the hearing officer's decision to determine whether "the standard described in R.C. 5123.51(C)(2) has been met." If the Director or designee determines that the standard has been met and that no extenuating circumstances exist, the Director or designee must notify DMRDD's Director that the MR/DD employee is to be included in the registry. If DMRDD's Director receives such notification, the Director must include the MR/DD employee in the registry, unless the individual has been found not guilty by a court or jury of an offense arising from the same facts, and must provide the related notification. Files and records of investigations conducted pursuant to these provisions are not public records under the Public Records Law, but, on request, DMRDD must provide copies to the Attorney General, a prosecuting attorney, or a law enforcement agency.

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<sup>10</sup> "Clear and convincing evidence [is e]vidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than beyond a reasonable doubt, the norm for criminal trials." *BLACK'S LAW DICTIONARY* 577 (7th ed. 1999).

### *The act*

The act would have revised the provisions regarding reports of abuse, neglect, or misappropriation of property by an MR/DD employee in the following ways:

(1) Requiring DMRDD to review the notice it receives from a prosecutor concerning the filing of charges in a case involving an alleged victim with mental retardation or a developmental disability when DMRDD receives it;

(2) Expanding the duties of DMRDD, in certain circumstances, following its investigation of an allegation of abuse, neglect, or misappropriation of property by an MR/DD employee and enacts related provisions. Under the act, if DMRDD determines that there is a reasonable basis for the allegation and there is no criminal proceeding pending regarding the allegation, DMRDD would be required to conduct an adjudication pursuant to the Administrative Procedure Act. If a criminal proceeding regarding the allegation is pending, DMRDD would be able to proceed with the adjudication only if the prosecutor responsible for the criminal proceeding, after receiving notice of DMRDD's intention to proceed, consents.

(3) Modifying the matters that a hearing officer must determine at a hearing conducted under the provisions. First, it would have revised the "misappropriation of property" offense, requiring the hearing officer to determine whether there is clear and convincing evidence that the MR/DD employee has misappropriated property of one or more individuals with mental retardation or a developmental disability with an aggregate value of \$100 or more. Second, it would have created another category of misappropriation to be considered involving property that is designed to be used as a check, draft, negotiable instrument, credit card, charge card, or device for implementing an electronic fund transfer at a point of sale terminal, automated teller machine, or cash dispensing machine. Third, the act would have eliminated the requirement that the hearing officer determine whether there is clear and convincing evidence that the employee knowingly neglected a person with mental retardation or a developmental disability. In addition, it would have expanded the matters the hearing officer must determine to include, determinations of whether the MR/DD employee has done any of the following: (a) recklessly neglected such an individual, creating a "substantial risk" of "serious physical harm," (b) engaged in sexual conduct or had sexual contact with such an individual for whom the employee is employed or under a contract to provide care and who was not the employee's spouse, or (c) unreasonably failed to make a report pursuant to the provisions described above under "*Reports of abuse or neglect*" when the employee knew or should have known that the failure would result in a substantial risk of harm to an individual with mental retardation or a developmental disability;

(4) Repealing the prohibition against DMRDD's Director including in the MR/DD registry an individual who has been found not guilty by a court or jury of an offense arising from the same facts as the allegation in question, and the related application to findings made by the Director of Health;

(5) Requiring the disposition of a court proceeding or arbitration arising out of the same facts as the allegation that resulted in an individual's placement on the registry be noted in the registry next to the individual's name;

(6) Clarifying that, when determining whether to place an individual on the registry, the Director of DMRDD must consider the same things that a hearing officer conducting an adjudication would consider;

(7) Specifying that, if DMRDD is required by the Administrative Procedure Act to give notice of an opportunity for a hearing and the MR/DD employee subject to the notice does not timely request a hearing in accordance with a specified provision of that Act, DMRDD is not required to hold a hearing;

(8) Requiring the hearing officer to give weight to any relevant facts presented at the hearing.

**Notice to MR/DD employees**

(R.C. 5123.542)

The act would have required that each MR/DD employee be provided an annual written notice describing the conduct for which an employee may be included in the registry regarding misappropriation, abuse, neglect, or other misconduct by an MR/DD employee. Each of the following would have been required to provide the notice, to its own employees: (1) DMRDD, (2) each county board of mental retardation and developmental disabilities, (3) each contracting entity of a county board, (4) each owner, operator, or administrator of a residential facility, and (5) each owner, operator, or administrator of a program certified by the department to provide supported living. The notice would have been required to be provided in a form and manner proscribed by DMRDD, and the form would have been the same for all persons and entities required to provide the notice.

The act provided that the fact that an MR/DD employee does not receive the notice required by this division does not exempt the employee from being included in the registry.

### **Review of major unusual incidents**

(R.C. 5123.614)

The act would have authorized DMRDD to conduct, or request that certain entities conduct, an independent investigation or review of major unusual incidents reported to DMRDD. DMRDD would have been able to request that any of the following conduct the investigation or review: a county board of mental retardation and developmental disabilities that is not implicated in the report, a regional council of government, or any other entity authorized to conduct such an investigation.

The act would have required that an independent investigation or review occur if the report concerns the health or safety of a person with mental retardation or a developmental disability and involves an allegation that an employee of a county board of mental retardation and developmental disabilities created a substantial risk of serious physical harm to a person with MR/DD.

### **Prosecutor's report of filing of charges**

(R.C. 2930.03 and 2930.061)

The act would have required that, if a person is charged in a complaint, indictment, or information with any violation of law involving a victim that the prosecutor knows is a mentally retarded or developmentally disabled person, in addition to any other required notices, the prosecutor in the case must send written notice of the charges to DMRDD. The notice would have been required to specifically identify the person charged. The provisions of the existing crime victims rights law that govern the giving of notices to crime victims under that law would not have applied regarding a notice given under this provision of the act.

### **Protective service order and plans**

#### **Complaint for protective services**

(R.C. 5126.30, 5126.33, and 5126.50; Section 4)

**Ohio law.** Under Ohio law, a county board of mental retardation and developmental disabilities may file a complaint with the probate court of the county in which an adult with mental retardation or a developmental disability resides for an order authorizing the board to arrange services for that adult if the board has been unable to secure consent. The complaint must include the adult's name, age, and address, facts describing the nature of the abuse or neglect and supporting the board's belief that services are needed, the types of services proposed by the board, as set forth in the individualized service plan prepared for

the person and filed with the complaint, and facts showing the board's attempts to obtain the required consent to the services. The law specifies notice procedures that must be followed when a board files such a complaint, and procedures that must be followed at the hearing on the complaint.

The court must issue an order authorizing the board to arrange the services if it finds, by clear and convincing evidence, that the adult has been abused or neglected, is incapacitated, is facing a substantial risk of immediate physical harm or death, is in need of the services, and that no person authorized by law or court order to give consent for the adult is available or willing to consent to the services. In formulating the order, the court must consider the individual service plan and specifically designate the services that are necessary to deal with the abuse, neglect, or condition resulting from abuse or neglect and that are available locally, and authorize the board to arrange for these services only. The court must limit the provision of these services to a period not exceeding 14 days, renewable for an additional 14-day period on a showing by the board that continuation of the order is necessary. The law sets forth certain limitations on the court, in issuing the order. The adult, the board, or any other person who received notice of the petition may file a motion for modification of the court order at any time.

**Operation of the act.** The act would have modified these provisions to do the following:

- (1) Clarify that a county board can seek an order under this section for an adult who is eligible to receive services or support;
- (2) Require that, unless the court has waived notice, notice of the filing of the complaint be personally served on all parties;
- (3) Specify that all parties may attend the hearing, present evidence, and examine and cross-examine witnesses;
- (4) Provide that the Ohio Rules of Evidence apply in hearings conducted under this provision;
- (5) Revise the provisions that refer to the board's arrangement of services for the adult and to the individualized service plan for the adult so that they instead refer to the arrangement of protective services for the adult and to the individualized protective service plan for the adult, and add references to "exploitation" in those provisions to conform to the changes described below.
- (6) Require the board to develop a detailed protective service plan describing the services the board will provide, or arrange for the provision of, to the adult to prevent further abuse, neglect, or exploitation, require the board to

submit the plan to the court for approval, and specify that the plan may be changed only by court order.<sup>11</sup>

(7) Extend the limit for the provision of the services to a period not exceeding six months, renewable for an additional six-month period on a showing by the board that continuation of the order is necessary.

(8) Enact provisions regarding temporary orders related to protective services.<sup>12</sup> Under the act, after the filing of a complaint for a protective services order, the court, prior to the final disposition, could have entered any temporary order necessary to protect the adult from abuse, neglect, or exploitation including the following: (a) a temporary protection order, (b) an order requiring the evaluation of the adult, (c) an order requiring a party<sup>13</sup> to vacate the adult's place of residence or legal settlement, provided that, subject to clause (d) of this sentence, no operator of a residential facility licensed by DMRDD may be removed under this provision, or (d) an order pursuant to existing law that appoints a receiver to take possession of and operate a residential facility licensed by DMRDD. The

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<sup>11</sup> "Adult" means a person 18 years of age or older with mental retardation or a developmental disability.

"Abuse" and "neglect" have the same meanings as in existing law governing DMR/DD, except that "abuse" includes a misappropriation.

"Exploitation" means the unlawful or improper act of a caretaker using an adult or an adult's resources for monetary or personal benefit, profit, or gain, including misappropriation (see "**Abuse, neglect, or misappropriation of property by an MR/DD employee,**") of an adult's resources.

"Protective service plan" means an individualized plan developed by the county board of mental retardation and developmental disabilities to prevent the further abuse, neglect, or exploitation of an adult with mental retardation or a developmental disability. (R.C. 5126.30.)

<sup>12</sup> "Protective services" means services provided by the county board of mental retardation and developmental disabilities to an adult with mental retardation or a developmental disability for the prevention, correction, or discontinuance of an act of as well as conditions resulting from abuse, neglect, or exploitation. (R.C. 5126.30(I).)

<sup>13</sup> "Party" means all of the following: (a) an adult who is the subject of a probate proceeding concerning protective services, (b) a caretaker, unless otherwise ordered by, the probate court, and (c) any other person designated as a party by the probate court, including, but not limited to, the adult's spouse, custodian, guardian, or parent. (R.C. 5126.30(L).)

court would have been able to grant an *ex parte*<sup>14</sup> order pursuant to this provision on its own motion or on a motion by a party requesting the issuance of the order and stating the reasons for it, if it appears to the court that the best interest and the welfare of the adult require that the court issue the order immediately. The court, if acting on its own motion, or the person requesting the granting of an *ex parte* order, to the extent possible, would have been required to give notice of its intent or of the request to all parties, the adult's legal counsel, and the Legal Rights Service. If it issued an *ex parte* order, the court would have been required to hold a hearing to review the order within 72 hours after it is issued or before the end of the day after the day on which it is issued, whichever occurs first. Under the act, the court would have been required to give written notice of the hearing to all parties to the action.

**Emergency ex parte orders by telephone**

(R.C. 5126.331, 5126.332, and 5126.333)

**Issuance.** The act would have permitted a probate court, through a probate judge or magistrate, to issue an *ex parte* emergency order by telephone if (1) the court receives notice from the county board of mental retardation and developmental disabilities, or an authorized employee of the board, that the board or employee believes such an order is needed, (2) the adult who is the subject of the notice is eligible to receive services or support from the board, (3) there is reasonable cause to believe that the adult who is the subject of the notice is incapacitated,<sup>15</sup> and (4) there is a substantial risk to the adult of immediate physical harm or death.

Under the act, a court would not have been permitted to issue an order to remove an adult under this section until it is satisfied that reasonable efforts have been made to notify the adult and any person with whom the adult resides of the proposed removal and any reasons for it. The court, however, would have been able to issue such an order despite the fact that reasonable efforts to give notice were not made if notification could (1) jeopardize the physical or emotional safety of the adult or (2) result in the adult being removed from the court's jurisdiction.

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<sup>14</sup> An *ex parte* order is "[a]n order made by the court upon the application of one party to an action without notice to the other." *BLACK'S LAW DICTIONARY* 1123 (7th ed. 1999).

<sup>15</sup> "Incapacitated" means lacking understanding or capacity, with or without the assistance of a caretaker, to make and carry out decisions regarding food, clothing, shelter, health care, or other necessities, but does not include mere refusal to consent to the provision of services. (R.C. 5126.30(G).)

**Duration of order.** An order issued pursuant to this provision could have been effective for up to 24 hours, unless the day following the day on which the order was issued is a weekend-day or holiday, in which case the order would have been able to remain in effect until the next business day.

**Effect of order.** The act would have provided that an *ex parte* order issued pursuant to this section could authorize the county board to provide for, or arrange for the provision of, emergency protective services for the adult; remove the adult from the adult's place of legal residence or legal settlement; or remove the adult from the place where the abuse, neglect, or exploitation occurred.

Under the act, if an emergency *ex parte* order is issued under this provision, the county board or employee that provided notice to the court would have been required to file a complaint for protective services as described above within 24 hours. If the day after the day the order was issued is a weekend-day or holiday, the complaint would have been required to be filed on the next business day.

**Probable cause hearing.** The act would have provided that if an emergency *ex parte* order is issued pursuant to this section, the court must hold a hearing within 24 hours of issuance to determine if there is probable cause for the order. If, however, the day after the order was issued is a weekend-day or holiday, the hearing must be held on the next business day. At the hearing, the court is required to consider the adult's choice of residence and determine whether protective services are the least restrictive alternative to meet the adult's needs. The court is permitted to issue temporary orders to protect the adult from immediate physical harm; such an order is effective for 30 days, and may be renewed for an additional 30-day period. The act's provisions also would have permitted the court to order emergency protective services.<sup>16</sup>

**Notice to the Department.** The act would have permitted any person with reason to believe that an adult with mental retardation or a developmental disability faces a substantial risk of immediate physical harm or death and that the responsible county board has neither filed a complaint for protective services nor sought an emergency *ex parte* order for such services to notify the Department of Mental Retardation and Developmental Disabilities. Within 24 hours of receipt of the notice, the Department would have been required to cause an investigation to be conducted regarding the notice. The act would have required the Department to provide assistance to the county board to provide for the health and safety of the adult.

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<sup>16</sup> "Emergency protective services" means protective services furnished to a person with mental retardation or a developmental disability to prevent immediate physical harm. (R.C. 5126.30(H).)

## *Criminal record checks*

(R.C. 109.572, 5123.081, and 5126.28)

### *Existing law*

Continuing law requires (1) DMRDD's Director to request that the Superintendent of the Bureau of Criminal Identification and Investigation (BCII) conduct a criminal records check with respect to (a) each person who is under final consideration for appointment to or employment with DMRDD (an applicant), (b) a person who is being transferred to DMRDD, and (c) an employee who is being recalled or reemployed after a layoff, (2) the superintendent of a county board of mental retardation and developmental disabilities to request that BCII's Superintendent conduct a criminal records check with respect to any applicant who has applied to the board for employment in any position, and (3) the entity under contract with a county board for the provision of specialized services to individuals with mental retardation or a developmental disability request that BCII's Superintendent conduct a criminal records check with respect to all persons under final consideration for employment in a direct services position with an entity contracting with a county board for employment. The criminal records checks are not required with respect to employees who are being considered for a different position or are returning after a leave of absence or seasonal break in employment, as long as the Director or county board superintendent has no reason to believe that the employee has committed any "disqualifying offense," and are not required in other specified circumstances. Existing law contains procedures regarding the manner of requesting BCII to conduct a criminal records check, and the manner in which BCII is to conduct a check.

BCII's Superintendent must conduct a criminal records check on receipt of a request regarding an applicant for employment in any position with DMRDD, in any position with a county board of mental retardation and developmental disabilities, or in a direct services position with an entity contracting with a county board, a completed form prescribed pursuant to the request procedures, and a set of fingerprint impressions obtained in the manner described in the request procedures. The Superintendent must conduct the criminal records check in accordance with the specified procedures to determine whether any information exists that indicates that the person who is the subject of the request has been convicted of or pleaded guilty to any of a number of crimes specified in statute, including murder, rape, and assault.

In general, the entity or person required to request a criminal records check regarding an applicant cannot employ or place the applicant in a direct services position if the applicant has been convicted of or pleaded guilty to a "disqualifying offense." The law specifies circumstances, pertaining to provisional employment



pending receipt of the report of the criminal records check and to employment of an applicant who satisfies specified "rehabilitation standards," to whom the ban does not apply.

### **Operation of the act**

The act would have expanded the list of convictions for which BCII's Superintendent must check in conducting a criminal records check and the list of disqualifying offenses to include the offense of patient endangerment.

### **Closing DMRDD developmental centers**

(R.C. 5123.032)

#### **In general**

The act would have created a mechanism to be used regarding the closing of any DMRDD developmental center. "Developmental center" would have meant any institution or facility of DMRDD that, on the act's effective date, is named, designated, or referred to as a developmental center. Under the act, any closure of a developmental center would have been subject to the mechanism, as described below. Notwithstanding any other provision of law, if the Governor announced on or after January 1, 2003, the intended closure of a developmental center and the closure identified in the announcement did not occur prior to the act's effective date, the closure would have been subject to the criteria set forth in the mechanism as if the announcement had been made on or after the act's effective date (R.C. 5123.032(A) and (B)).

#### **Notice to General Assembly; LSC study**

At least ten days prior to making any official, public announcement that the Governor intends to close one or more developmental centers, the act would have required the Governor to notify the General Assembly in writing of that intention. The notice would have had to identify each developmental center that the Governor intends to close by name or, if the Governor has not determined any specific developmental center to close, state the Governor's general intent to close one or more developmental centers. When the Governor notifies the General Assembly as required by this provision, the act would have required the Legislative Service Commission (LSC) to promptly conduct an independent study of DMRDD's developmental centers and DMRDD's operation of the centers. The study would have addressed relevant criteria and factors, including all of the following:

(1) The manner in which the closure of developmental centers in general would affect the safety, health, well-being, and lifestyle of the centers' residents



and their family members and public safety and, if the Governor's notice identifies by name one or more developmental centers that the Governor intends to close, the manner in which the closure of each center identified would affect the safety, health, well-being, and lifestyle of the center's residents and their family members and public safety;

- (2) The availability of alternate facilities;
- (3) The cost effectiveness of the facilities identified for closure;
- (4) A comparison of the cost of residing at a facility identified for closure and the cost of new living arrangements;
- (5) The geographic factors associated with each facility and its proximity to other similar facilities;
- (6) The impact of collective bargaining on facility operations;
- (7) The utilization and maximization of resources;
- (8) Continuity of the staff and ability to serve the facility population;
- (9) Continuing costs following closure of a facility;
- (10) The impact of the closure on the local economy;
- (11) Alternatives and opportunities for consolidation with other facilities;
- (12) How the closing of a facility identified for closure relates to DMRDD's plans for the future of developmental centers in Ohio;
- (13) The effect of the closure of developmental centers in general on the state's fiscal resources and fiscal status and, if the Governor's notice identifies one or more developmental centers for closure by name, the effect of the closure of each identified developmental center on the state's fiscal resources and fiscal status.

Under the act, LSC would have been required to complete the study described above, and prepare a report that contains its findings, not later than 90 days after the Governor makes the official, public announcement that the Governor intends to close one or more developmental centers as described above. A copy of the report would have been provided to each member of the General Assembly who requests one.

### *MRDD Developmental Center Closure Commission*

Not later than the date on which LSC is required to complete its report, the Mental Retardation and Developmental Disabilities Developmental Center Closure Commission would have been created by the bill. The act would have required the officials with the duties to appoint members of the Commission to appoint the members of the Commission, and, as soon as possible after the appointments, the Commission would have been required to meet for the purposes described below. On completion of the report and the creation of the Commission, LSC would have been required to promptly provide a copy of the report to the Commission and present the report.

The Commission would have consisted of the following five members:

(1) The Director of DMRDD;

(2) A private executive with expertise in facility utilization, jointly appointed by the Speaker of the House of Representatives and the President of the Senate;

(3) A member of the board of the Ohio Civil Service Employees' Association, appointed by the Governor;

(4) A private executive with expertise in economics, jointly appointed by the Speaker of the House of Representatives and the President of the Senate; and

(5) A member of the law enforcement or health care community, appointed by the Governor.

The Act would have provided that private executive members could not be members of the General Assembly and could not have a developmental center identified for closure in the county in which the private executive resides. The members of the Commission would have served without compensation. At the Commission's first meeting, the members would have been required to organize and appoint a chairperson and vice-chairperson.

The act would have required the Commission to meet as often as necessary for the purpose of making recommendations to the Governor. The Commission's meetings would have been open to the public, and the Commission would have been required to accept public testimony. Under the act, LSC would have been required to appear before the Commission and present the report it prepared. The Commission would have been required to meet for the purpose of making recommendations to the Governor, which could include all of the following: (1) whether any developmental center should be closed, (2) if so, which center or centers should be closed, and (3) if the Governor's notice identifies by name one or

more developmental centers that the Governor intends to close, whether the center or centers so identified should be closed.

The Commission, not later than 90 days after it receives the LSC report, would have been required to prepare a report containing its recommendations to the Governor. A copy of the report would have been sent to the Governor and each member of the General Assembly who requests one. On receipt of the Commission's report, the Governor would have been required to review and consider the Commission's recommendation. The Act would have required that the Governor do one of the following:

(1) Follow the Commission's recommendation;

(2) Close no developmental center;

(3) Take other action the Governor determines is necessary for the purpose of expenditure reductions or budget cuts and state the reason for the action.

The Governor's decision would have been final. On the Governor's making of that decision, the Commission would have ceased to exist, provided that another Commission would have been created under this provision each time the Governor makes an official, public announcement that the Governor intends to close one or more developmental centers.

### **Notice to coroner regarding certain deaths**

(R.C. 313.12)

#### **Background**

When a person dies as a result of criminal or other violent means, by casualty, by suicide, or in any suspicious or unusual manner, or when any person dies suddenly when in apparent good health, the physician called in attendance, or any member of an ambulance service, emergency squad, or law enforcement agency who obtains knowledge thereof arising from the person's duties, must immediately notify the office of the coroner of the known facts concerning the time, place, manner, and circumstances of the death, and any other information required pursuant to the coroner law. In such cases, if a request is made for cremation, the funeral director called in attendance immediately must notify the coroner.

#### **The act**

The act would have expanded the coroner notification provision to also require the specified health care, emergency, and law enforcement personnel to



immediately notify the office of the coroner when any mentally retarded person or developmentally disabled person dies regardless of the circumstances.

**Consent for autopsy or post-mortem examination**

(R.C. 2108.50 and 2108.521)

**Background**

A licensed physician or surgeon may perform an autopsy or post-mortem examination if consent has been given in the order named by one of the following persons of sound mind and 18 years of age or older: (1) the deceased person during the deceased person's lifetime, (2) the deceased person's spouse, (3) if there is no surviving spouse, if the surviving spouse's address is unknown or outside the United States, if the surviving spouse is physically or mentally unable or incapable of giving consent, or if the deceased person was separated and living apart from the surviving spouse, then a person having the first named degree of relationship in the following list in which a relative of the deceased person survives and is physically and mentally able and capable of giving consent may execute consent: children; parents; or brothers or sisters, (4) if there are no surviving persons of any degree of relationship listed in clause (3) of this paragraph, any other relative or person who assumes custody of the body for burial, (5) a person authorized by written instrument executed by the deceased person to make arrangements for burial, or (6) a person who, at the time of the deceased person's death, was serving as guardian of the person for the deceased person. The consent must be in a written instrument executed by the person or on the person's behalf at the person's express direction. Consent to an autopsy or post-mortem examination may be revoked only by the person executing the consent and in the same manner as required for execution of consent.

**The act**

Under the act, when a mentally retarded person or a developmentally disabled person dies, if (1) DMRDD or a county board of mental retardation and developmental disabilities has a good faith reason to believe that the death occurred under suspicious circumstances, and (2) the coroner was apprised of the circumstances of the death, and declines to conduct an autopsy, DMRDD or the board would have been permitted to file a petition in a court of common pleas seeking an order authorizing an autopsy or post-mortem examination.

On the filing of a petition under this provision, the court could have conducted a hearing on the petition. The court would have been permitted to determine whether to grant the petition without a hearing. DMRDD or the board, and all other interested parties, would have been able to submit information and

statements to that court that are relevant to the petition, and would have been able to present evidence and testimony at the hearing. The court would have been required to order the requested autopsy or post-mortem examination if it finds that DMRDD or the board has demonstrated a need for the autopsy or post-mortem examination regardless of whether any consent has been given, has been given and withdrawn, or whether any information was presented to the coroner or to the court regarding an autopsy being contrary to the deceased person's religious beliefs.

An autopsy or post-mortem examination ordered under this provision could have been performed by a licensed physician or surgeon. The court would have been able to identify in the order the person who is to perform the autopsy or post-mortem examination. If an autopsy or post-mortem examination is ordered under this provision, DMRDD or the board that requested the autopsy or examination would have been required to pay the physician or surgeon performing the autopsy or examination for costs and expenses incurred in performing the autopsy or examination.

### **Appointment of an interpreter in a legal proceeding**

(R.C. 2311.14)

#### **Background**

Whenever because of a hearing, speech, or other impairment a party to or witness in a legal proceeding cannot readily understand or communicate, the court must appoint a qualified interpreter to assist such person. Before entering upon his or her duties, the interpreter must take an oath that he or she will make a true interpretation of the proceedings to the party or witness, and that he or she will truly repeat the statements made by such party or witness to the court, to the best of his or her ability. The court is required to determine a reasonable fee for all such interpreter service which must be paid out of the same funds as witness fees.

#### **The act**

The act would have specified that: (1) the interpreter-appointment provision described above is not limited to a person who speaks a language other than English, (2) the provision also applies to the language and descriptions of any mentally retarded person or developmentally disabled person who cannot be reasonably understood, or who cannot understand questioning, without the aid of an interpreter, and (3) the interpreter may aid the parties in formulating methods of questioning the person with mental retardation or a developmental disability and in interpreting the answers of the person. The act would have provided that, before appointing any interpreter under this provision, the court must evaluate the

qualifications of the interpreter and make a determination as to the ability of the interpreter to effectively interpret on behalf of the party or witness. The court would have been able to appoint the interpreter only if it is satisfied that the interpreter is able to effectively interpret on behalf of that party or witness. The act would have specified that the existing "oath" requirement must be satisfied before the interpreter enters upon his or her "official duties," as opposed to his or her "duties." It also would have required that, if the interpreter is appointed to assist a mentally retarded or developmentally disabled person, the oath must include a statement that the interpreter will not prompt, lead, suggest, or otherwise improperly influence the testimony of the witness or party.

### **Mandatory reporters of abuse or neglect**

(R.C. 2151.421 and 2151.99, not in the act)

#### **Background**

People in certain professions are prohibited, when acting in an official or professional capacity and when they know or suspect that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, from failing to immediately report that knowledge or suspicion to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. The professions to which the mandatory reporting provision applies are attorneys; physicians; dentists; podiatrists; practitioners of a limited branch of medicine; registered, licensed practical, and visiting nurses; other health care professionals; licensed psychologists; licensed school psychologists; speech pathologists and audiologists; coroners; administrators and employees of a child day-care center, residential camp, child day camp, certified child care agency, or other public or private children services agency; school teachers, employees, and authorities; persons engaged in social work or the practice of professional counseling; and persons rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion. Attorneys and physicians are provided an exception from the mandatory reporting provision, in specified circumstances, concerning communications received from a client or patient in an attorney-client or physician-patient relationship.

Failure to make a mandatory report is a misdemeanor of the fourth degree. Law provides procedures for making the report, rules and procedures regarding follow-ups and investigations regarding the report, a qualified civil immunity regarding the making of the report, rules regarding the use or confidentiality of the report, and rules and procedures regarding protective services based on the report.

**The act**

The act would have expanded the list of professions subject to the mandatory abuse and neglect reporting provision. Under the act, the provision would have also applied to superintendents, board members, and employees of a county board of mental retardation, investigative agents contracted with by a county board of mental retardation, and employees of DMRDD.

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**HISTORY**

ACTION	DATE	JOURNAL ENTRY
Introduced	01-23-03	p. 64
Reported, S. Judiciary on Criminal Justice	04-02-03	p. 242
Passed Senate	04-02-03	p. 243
Reported, H. Juvenile & Family Law	06-24-03	p. 973
Passed House	06-25-03	p. 973
Concurrence	12-02-03	pp. 1220-1225 (Senate)
		pp. 1225-1230 (House)
Vetoed by Governor	12-12-03	

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