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(As Introduced)

Rep. Wagner

BILL SUMMARY

- Creates mechanisms for: (1) taking and use in criminal proceedings and delinquent child proceedings of depositions and videotaped depositions of a victim of specified offenses who is a functionally impaired person, (2) closed circuit telecast into a courtroom of testimony of such a victim that is taken outside the courtroom, (3) recording, for showing in the courtroom, of the testimony of such a victim, and (4) in criminal proceedings, the use of preliminary hearing testimony or recorded preliminary hearing testimony.
- Prohibits a caretaker from creating a substantial risk to the health or safety of a functionally impaired person under the caretaker's care, and designates a violation of this prohibition "endangering a functionally impaired person."
- Prohibits a person who owns, operates, administers, or is an agent or employee of a care facility from creating a substantial risk to the health or safety of a functionally impaired person under the person's care, and designates a violation of this prohibition "patient endangerment."
- Requires the Director of the Department of Mental Retardation and Developmental Disabilities (DMRDD) and the superintendent of a county board of mental retardation and developmental disabilities to require an applicant to sign an agreement prior to employment under which the applicant agrees to not engage in any sexual conduct or sexual contact with an individual with mental retardation or a developmental disability in the applicant's care.
- Modifies statutory provisions requiring reporting of abuse or neglect of a person with mental retardation or a developmental disability by:

(1) Requiring a person in any of the specified professions required to report to make a report when the person has reason to believe that someone with mental retardation or a developmental disability faces the threat of suffering any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect;

(2) Requiring a person in any of the specified professions who discovers or suspects that a child under 18 or a mentally retarded, developmentally disabled, or physically impaired person under 21 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 to immediately report that knowledge or suspicion to the public children services agency or a peace officer;

(3) Specifying that any person who fails to make a report under the reporting provisions is eligible to be included in the MR/DD employee registry;

(4) Requiring investigations of a mandatory or discretionary report by a law enforcement agency or DMRDD to be in accordance with the memorandum of understanding described below;

(5) Revising the penalties for specified violations of the reporting law and making them apply to a person who violates the new provision described above;

(6) Requiring each county board of mental retardation and developmental disabilities (county board) to prepare a memorandum of understanding concerning abuse reports.

- Revises statutory provisions regarding reports of abuse, neglect, or misappropriation of property by an MR/DD employee by:

(1) Requiring DMRDD to review a report it receives from a prosecutor when the employee is charged;

(2) Repealing the prohibition against conducting an administrative hearing regarding the report until any criminal

proceeding or collective bargaining arbitration concerning the allegation has been concluded;

(3) Expanding the matters a hearing officer must determine at a hearing conducted regarding the report to include determinations of whether the employee has created a substantial risk to the health and safety of, or has engaged in a sexual relationship with, an individual in their care;

(4) Repealing the prohibition against DMRDD's Director including an individual who has been found not guilty of an offense arising from the same facts as the allegation in question in the registry of MR/DD employees;

(5) Specifying that, if the Administrative Procedure Act generally requires DMRDD to give notice of an opportunity for a hearing and the employee subject to the notice does not timely request a hearing, DMRDD is not required to hold one.

- Requires that, in any case involving a victim that the prosecutor knows or reasonably should know has mental retardation or a developmental disability, the prosecutor send written notice to DMRDD on the filing of charges.
- Modifies provisions regarding a probate court's issuance of an order authorizing a county board to arrange services for an adult with mental retardation or a developmental disability by: (1) extending the period for the provision of services under an order from 14 days to six months and extending the possibility of renewal of the services from an additional 14 days to an additional six months, (2) enacting provisions regarding *ex parte* emergency orders for protective services, and (3) enacting provisions regarding temporary orders related to protective services.
- Adds to persons who may give written consent to an autopsy or post-mortem examination in circumstances in which the deceased person had mental retardation or a developmental disability, DMRDD or the county board of mental retardation and developmental disabilities.
- Modifies a provision requiring a court to appoint an interpreter to assist a party or witness who cannot readily understand or communicate by specifying that (1) it applies to the language and descriptions of any

person who cannot be reasonably understood, or who cannot understand questioning, without the aid of an interpreter and (2) the interpreter may aid the parties in formulating methods of questioning the person with mental retardation.

- Expands the professions that are subject to the mandatory child abuse and neglect reporting provision.

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CONTENT AND OPERATION

Special testimonial procedures

(R.C. 2152.821, 2945.482, and 2945.491)

The bill enacts mechanisms for: (1) the taking and use in criminal proceedings and in delinquent child proceedings of depositions and videotaped depositions of a victim of specified offenses who is a functionally impaired person, (2) the closed circuit telecast into the courtroom of testimony of such a victim that is taken outside the courtroom, (3) the recording, for showing in the courtroom, of the testimony of such a victim, and (4) the use of preliminary hearing testimony or recorded preliminary hearing testimony in criminal proceedings (see **COMMENT 1**).¹ A summary of each of these mechanisms follows.

Deposition of a victim who is a functionally impaired person

Depositions in general. Under the bill, in a proceeding for 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) in which an alleged victim was a functionally impaired person, the judge, on motion of the prosecution, must order that the testimony of the victim be taken by deposition. The prosecution also may request that the deposition be videotaped, as described below. The judge must notify the victim whose deposition is to be taken, the prosecution, and the attorney for the person charged with the violation of the date, time, and place for taking the deposition. The notice must identify the victim who is to be examined and indicate whether a request that the deposition be videotaped has been made. The person charged with the violation has the right to attend the deposition and to be represented by counsel. Depositions must be taken as in civil

¹ See "*Definitions*," below for definitions of "victim" and "functionally impaired person."

cases, except that the judge must preside at the taking of the deposition and rule on any objections at that time. The prosecution and the attorney for the person charged have the right to full examination and cross-examination of the functionally impaired victim whose deposition is to be taken.

The violations to which this provision applies are (1) for both criminal prosecutions and for delinquent child proceedings, knowingly failing to 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 set forth in the bill, and offenses of violence (see **COMMENT 2**) 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 in the proceeding, it must be filed with the court in which the action is pending. The deposition is admissible in the manner described below in "*Use of depositions.*" If a deposition of a functionally impaired victim taken under this provision is admitted as evidence at the proceeding as described below, the victim cannot be required to testify in person at the proceeding.

Before the conclusion of the proceeding, the attorney for the person charged with the violation may file a motion with the judge requesting that another deposition of the victim be taken because new evidence material to the defense has been discovered that the attorney could not have discovered prior to the taking of the admitted depositions with reasonable diligence. In juvenile court proceedings, any motion requesting another deposition must be accompanied by supporting affidavits. On the filing of the motion and affidavits, the court may order that testimony of the victim relative to the new evidence be taken by deposition. In any case, if the court orders the taking of another deposition under this provision, the deposition must be taken in the manner described above. If the admitted deposition was videotaped in accordance with the provision described below in "*Videotaped depositions.*" the new deposition must be videotaped in accordance with that provision. In other cases, the new deposition may be videotaped in accordance with that provision.

Videotaped depositions. If the prosecution requests that a deposition to be taken as described above be videotaped, the judge must order that the deposition be videotaped as described here. If a judge issues an order to videotape the deposition, the judge must exclude from the room in which the deposition is to be



taken every person except the victim giving the testimony, the judge, interpreters if needed, the attorneys for the prosecution, and the person charged with the violation, any person needed to operate the equipment to be used, one person chosen by the victim, and any person whose presence the judge determines would contribute to the welfare and well-being of the victim. The person chosen by the victim cannot be a witness in the proceeding and, both before and during the deposition, cannot discuss the testimony of the victim with any other witness in the proceeding. To the extent feasible, any person operating the recording equipment must be restricted to a room adjacent to the room in which the deposition is being taken, or to a location in the room that is behind a screen or mirror, so that the person operating the recording equipment can see and hear, but cannot be seen or heard by the victim during the deposition.

The person charged with the violation must 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 during the testimony, 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 must be provided with a monitor on which he or she can observe, while giving testimony, the person charged with the violation. The judge may preside at the deposition by electronic means from outside the room in which the deposition is to be taken. If the judge presides by electronic means the following must be provided: (1) monitors on which the judge can see each person in the room in which the deposition is to be taken, (2) a way for the judge to communicate electronically with each person in the room, (3) monitors for each person in the room that allow them to view the judge, and (4) a way for each person in the room to communicate electronically with the judge.

A deposition videotaped under this provision must be taken and filed in the manner described above and is admissible in the manner described in this paragraph and below. If a deposition videotaped under this provision is admitted as evidence at the proceeding, the victim cannot be required to testify in person at the proceeding. No deposition videotaped under this provision may be admitted as evidence at any proceeding unless the provisions described below in "*Use of depositions*" are satisfied and all of the following apply relative to the recording: (1) the recording is both aural and visual and is recorded on film or 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 or the making of the recording, as determined by the judge, is identified, and (4) both the prosecution and the person charged with the violation

is 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 is in addition to the authority of a judge to close a hearing pursuant to existing law (R.C. 2151.35, not in the bill).

Use of depositions. At any proceeding in relation to which a deposition was taken under the bill's provisions described above, the deposition or a part of it is admissible in evidence on motion of the prosecution if the testimony in the deposition or the part to be admitted is not excluded by the Hearsay Rule and is otherwise admissible under the Rules of Evidence. The bill provides that, for purposes of this provision, 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 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 with the violation had an opportunity and similar motive at the time 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 the victim were to testify in person at the proceeding, the victim would experience serious emotional trauma.

The bill provides that objections to receiving a deposition or a part of it into evidence under the provision described in the preceding paragraph must be made as provided in civil actions. It also provides that its provisions pertaining to the taking, videotaping, and use of depositions are 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 a criminal proceeding or a juvenile court proceeding, as applicable. The bill does not limit the admissibility of a deposition taken as described above under any of those other provisions in criminal proceedings. Likewise, the bill provides that in juvenile court proceedings, the admissibility of depositions "taken under R.C. 2152.821(A)" of the bill is not limited by these provisions (the meaning of this statement is unclear, since R.C. 2152.821(A) contains only definitions).

Closed circuit telecast of testimony of a victim who is a functionally impaired person

Motion requesting, and issuance of order for, telecast. Under the bill, in any criminal prosecution or juvenile court proceeding in which a person is charged with any violation listed above or an "offense of violence" (see **COMMENT 2**) and in which an alleged victim was a functionally impaired person, the



prosecution may 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 being conducted and be televised, by closed circuit equipment, into the room in which the proceeding is being conducted to be viewed. Except for good cause shown, the prosecution must file a motion under this provision at least seven days before the date of the proceeding.

The judge may issue the order if the judge determines that the victim is unavailable to testify in the room in which the proceeding is being conducted in the physical presence of the person charged with the violation, offense, or act for one or more of the reasons described below. If a judge issues an order of that nature, the judge must exclude every person except a person described above (in "Videotaped depositions") as a person who is permitted to be present during the videotaping of a deposition from the room in which the testimony is to be taken. The judge may preside during the giving of the testimony by electronic means subject to the limitations set forth above in "Videotaped depositions." To the extent feasible, any person operating the televising equipment must be hidden from the sight and hearing of the victim giving the testimony, in a manner similar to that described above in "Videotaped depositions." The person charged with the violation must 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 during the testimony, 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 giving the testimony must be provided with a monitor on which he or she can observe, while giving testimony, the person charged with the violation, offense, or act.

If a judge issues an order pursuant to this provision requiring the testimony of a functionally impaired victim to be taken outside of the room in which the juvenile court proceeding is being conducted, the order must specifically identify the victim to whose testimony it applies. The order applies only during the testimony of that victim, and that victim cannot 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 is in addition to the authority of a judge to close a hearing pursuant to existing law (R.C. 2151.35, not in the bill).

Criteria for issuing order for telecast. The bill provides that a judge may order the testimony of a functionally impaired victim to be taken outside of the room in which a proceeding is being conducted for telecast if the judge determines that the victim is unavailable to testify in the physical presence of the person charged with the violation 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 so testifying.

Recording for the courtroom, the testimony of a victim who is a functionally impaired person

Motion requesting, and issuance of order for, recording. Under the bill, in a criminal prosecution or juvenile court proceeding in which a person is charged with any violation listed above (in "**Depositions in general**") or an "offense of violence" (see COMMENT 2) and in which an alleged victim of the violation or offense was a functionally impaired person, the prosecution may file a motion requesting 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. Except for good cause shown, the prosecution must file a motion under this provision at least seven days before the date of the proceeding.

The judge may issue the order if the judge determines that the functionally impaired victim is unavailable to testify in the room in which the proceeding is being conducted in the physical presence of the person charged with the violation due to one or more of the reasons described below (in "**Criteria for issuing order for recording**"). If a judge issues the order, the judge must exclude from the room in which the testimony is to be taken every person except a person described above (in "**Videotaped depositions**") 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 must be hidden from the sight and hearing of the victim giving the testimony, in a manner similar to that set forth above (in "**Videotaped depositions**"). The person charged with the violation must 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 must be provided with a monitor on which the victim can observe, while giving testimony, the person charged with the violation. No order for the taking of testimony by recording may be issued under this provision unless the provisions described above (under "**Videotaped depositions**") apply to the recording of the testimony.

If a judge issues an order pursuant to this provision that requires the testimony of a functionally impaired victim to be taken outside of the room in which the proceeding is being conducted, the order must specifically identify the victim to whose testimony it applies. The order applies only during the testimony of that victim, and that victim cannot 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 is in addition to the authority of a judge to close a hearing pursuant to existing law (R.C. 2151.35, not in the bill).

Criteria for issuing order for recording. The bill provides that a judge may order the testimony of a functionally impaired victim to be taken outside of the room in which a proceeding is being conducted for recording and shown under this provision if the judge determines that the victim is unavailable to testify in the room in the physical presence of the person charged with the violation due to one or more of the circumstances described above (in "**Criteria for issuing order for telecast**") regarding the telecasting of a victim's testimony.

Entry of determinations on the record

The bill specifies 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 bill described above must enter the determination and findings on the record in the proceeding.

Use of preliminary hearing, prior trial, or deposition testimony

General use. The bill permits the use of certain forms of former testimony in criminal cases where the witness is, for various reasons, unable to testify. Testimony taken at an examination or a preliminary hearing at which the defendant was present, at a former trial of the cause, or taken by deposition at the instance of the defendant or the state may be used whenever the witness giving the testimony dies, cannot be produced at trial, or has become incapacitated to testify. If the former testimony is contained within an authenticated transcript of the testimony, it must be proven by the transcript or by other testimony. (R.C. 2945.491(A)(3); note that this provision is identical to existing R.C. 2945.49(A)(2), which is not in the bill; the need for this provision is unclear.)

Use of videotaped preliminary hearing testimony by a victim who is a functionally impaired person. Also under the bill, at a trial on a charge of any felony violation listed above (in "**Depositions in general**") regarding criminal defendants or delinquent children (*but not* the three additional violations that are specified regarding only criminal defendants) or an "offense of violence" (see **COMMENT 2**) and in which an alleged victim of the violation or offense was a functionally impaired person, the court, on motion of the prosecutor, may admit videotaped preliminary hearing testimony of the victim as evidence in lieu of the victim appearing as a witness and testifying if all of the following apply: (1) the videotape was made at the preliminary hearing at which probable cause of the

violation charged was found, (2) the videotape was made in accordance with existing law (R.C. 2937.11(C), not in the bill), and (3) the testimony is not excluded by the Hearsay Rule and otherwise is admissible under the Rules of Evidence.

For purposes of clause (3) of the preceding paragraph, testimony is not excluded by the Hearsay Rule if it is not hearsay under Evidence Rule 801, it is within an exception to the Hearsay Rule set forth in Evidence Rule 803, the functionally impaired victim who gave the testimony is unavailable as a witness, as defined in Evidence Rule 804, and it is admissible under that rule, or both of the 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.

If a functionally impaired 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 existing law (R.C. 2937.11(C), not in the bill), and the defendant in the case files a written objection to the use of the videotaped testimony at the trial, the court, immediately after the filing of the objection, must hold a hearing to determine whether the videotaped testimony should be admissible at trial. If the testimony is admissible, the court must also determine whether the victim should be required to provide limited additional testimony. At the hearing, the defendant and the prosecutor may present any evidence that is relevant to the issues to be determined, but the victim cannot be required to testify. After the hearing, the court cannot require the victim to testify at the trial, unless it determines that both of the following apply: (1) the testimony of the victim is necessary because evidence that was not available at the time of the preliminary hearing has been discovered, the circumstances surrounding the case have changed sufficiently to necessitate that the functionally impaired victim testify at the trial, or both, and (2) the testimony of the victim is necessary to protect the defendant's right to a fair trial.

The court must enter its finding and the reasons for it in the journal. If the court requires the victim to testify at the trial, the testimony of the victim must be limited to the new evidence and changed circumstances. The victim cannot otherwise be required to testify. The functionally impaired victim's testimony may be given in person or, on motion of the prosecution, may be taken by deposition in accordance with the bill's provisions described above (in "*Deposition of a victim who is a functionally impaired person*") provided the deposition is admitted as evidence, may be taken outside of the courtroom and televised into the courtroom in accordance with the bill's provisions described above, or may be taken outside

of the courtroom and recorded for showing in the courtroom in accordance with provisions described above.

If videotaped testimony of a functionally impaired victim is admitted at trial, the victim cannot be compelled to appear as a witness at the trial, except as described above. An order issued pursuant to the above-described provisions must specifically identify the victim to whose testimony it pertains. The order only applies during the testimony of the victim it specifically identifies.

Definitions

The bill defines "victim" and "functionally impaired person" for purposes of the provisions dealing with court proceedings as follows:

(1) "Functionally impaired person" means any person who has a physical or mental impairment that prevents the person from providing for the person's own care or protection or whose infirmities caused by aging prevent the person from providing for the person's own care or protection.

(2) "Victim" includes any functionally impaired person who was a victim of any violation listed above 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, or any functionally impaired person against whom was directed any conduct that constitutes, or that is an element of, any violation listed above 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 the preliminary hearing provisions, the meaning of the term is limited to felony violations.

Offense of "endangering a functionally impaired person"

(R.C. 2903.16)

The bill

The bill creates a new offense related to the endangerment of a functionally impaired person by a caretaker. Specifically, the bill prohibits a caretaker from creating a substantial risk to the health or safety of a functionally impaired person under the caretaker's care. A violation of this prohibition is the offense of "endangering a functionally impaired person," a misdemeanor of the first degree, and the offender can be included in the MR/DD employee registry, described below.

As used in this provision:



(1) "Caretaker" means a person who assumes the duty to provide for the care and protection of a functionally impaired 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. "Caretaker" does not include a person who owns, operates, administers, or is an agent or employee of, a care facility as defined in existing law (R.C. 2903.33).

(2) "Functionally impaired person" means any person who has a physical or mental impairment that prevents the person from providing for the person's own care or protection or whose infirmities caused by aging prevent the person from providing for the person's own care or protection.

Related existing provisions

(R.C. 2903.10 and 5123.52)

Existing offenses. Existing law, unchanged by the bill, prohibits a caretaker from doing either of the following: (1) knowingly failing to provide a functionally impaired person under the caretaker's care with any treatment, care, goods, or service necessary to maintain the health or safety of the person when the failure results in physical harm or serious physical harm to the person, or (2) recklessly failing to provide a functionally impaired person under the caretaker's care with any treatment, care, goods, or service necessary to maintain the health or safety of the person when the failure results in serious physical harm to the person. A violation of the prohibition described in clause (1) is the offense of "knowingly failing to provide for a functionally impaired person"; that offense is generally a misdemeanor of the first degree, but is a felony of the fourth degree if the functionally impaired person under the offender's care suffers serious physical harm as a result. A violation of the prohibition described in clause (2) is the offense of "recklessly failing to provide for a functionally impaired person"; that offense is generally a misdemeanor of the second degree, but it is a felony of the fourth degree if the functionally impaired person under the offender's care suffers serious physical harm as a result. The definitions of "caretaker" and "functionally impaired person" described above apply to these provisions.

Registry of MR/DD employees. Existing law requires the Department of Mental Retardation and Developmental Disabilities (DMRDD) to establish a registry consisting of the names of MR/DD employees included in the registry pursuant to existing law. Before a person or government entity hires, contracts with, or employs an individual as an MR/DD employee, the person or government entity must inquire whether the individual is included in the registry. When it receives such an inquiry, DMRDD must inform the person making the inquiry whether the individual is included in the registry. Information contained in the registry is a public record under the public records law and is thus subject to

inspection and copying. Regarding the registry: (1) except as otherwise provided in a collective bargaining agreement entered into under the version of the public employee collective bargaining law that was in effect on November 22, 2000, a person or government entity is prohibited from hiring, contracting with, or employing an individual who is included in the registry as an MR/DD employee, (2) no agreement entered into under the public employee collective bargaining law after November 22, 2000, may contain any provision that limits the effect or operation of the registry provisions, (3) neither DMRDD nor any county board of mental retardation and developmental disabilities may enter into a new contract or renew a contract with a person or government entity that fails to comply with (1), above, until DMRDD or the board is satisfied that the person or government entity will comply, (4) a person or government entity that fails to hire or retain a person as an MR/DD employee because the person is included in the registry cannot be liable in damages in a civil action brought by the employee or applicant for employment, and (5) termination of employment pursuant to (1), above, constitutes a discharge for just cause for the purposes of employment law. (R.C. 5123.52--not in the bill.)

Offense of "patient endangerment"

(R.C. 2903.341)

The bill

The bill creates a new offense related to the endangerment of a functionally impaired person by a person affiliated with a care facility. Specifically, the bill prohibits a person who owns, operates, administers, or is an agent or employee of a "care facility" (see below) from creating a substantial risk to the health or safety of a "functionally impaired person" under the person's care. A violation of this prohibition is the offense of "patient endangerment." Patient endangerment is generally a misdemeanor of the first degree, but it is a felony of the fifth degree if the offender previously has been convicted of, or pleaded guilty to, patient endangerment.

The bill provides that a person who relies on treatment by spiritual means through prayer alone, in accordance with the tenets of a recognized religious denomination, cannot be considered "endangered" under the prohibition described above for that reason alone. The bill also provides that it is an affirmative defense to a charge of "patient endangerment" that the actor's conduct was committed in good faith solely because the actor was ordered to commit the conduct by a person with supervisory authority over the actor.

As used in this provision, "care facility" means any of the following: (1) a "home" as described in existing law governing nursing homes and similar



residential facilities, (2) a "residential facility" for persons with mental retardation, (3) an institution or facility operated or provided by DMRDD, (4) a residential facility for persons with mental illness, (5) any unit of a hospital that provides the same services as a nursing home, (6) 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, (7) an adult care facility, (8) an adult foster home certified by the Department of Aging or its designee, or (9) a community alternative home for persons with AIDS.

The bill does not define the term "functionally impaired person" as it is used in the offense, and the existing definition of that term does not apply to the section in which the bill creates the offense (the R.C. 2903.10 definition of "functionally impaired person" applies only to R.C. 2903.13 and 2903.16).

Related existing law

(R.C. 2903.34)

Related to the new offense of patient endangerment, existing law prohibits a person who owns, operates, administers, or is an agent or employee of a care facility from abusing, neglecting, or grossly neglecting a resident or patient of the facility. Patient abuse is generally a felony of the fourth degree, but is a felony of the third degree if the offender has been convicted of any violation of this section. Gross patient neglect is generally a misdemeanor of the first degree, but is a felony of the fifth degree if the offender has been convicted of any violation of this section. Patient neglect is generally a misdemeanor of the second degree, but is a felony of the fifth degree if the offender has been convicted of any violation of this section.

A person who relies on treatment by spiritual means through prayer alone, in accordance with the tenets of a recognized religious denomination, cannot be considered "neglected" for that reason alone. It is an affirmative defense to a charge of gross neglect or neglect under the prohibitions that the actor's conduct was committed in good faith solely because the actor was ordered to by a person with supervisory authority. The definition of "care facility" described above applies to these provisions.

Agreement of applicant not to engage in sexual activity with an individual in the applicant's care

(R.C. 5123.084 and 5126.282)

The bill enacts provisions that require DMRDD's Director and the superintendent of a county board of mental retardation and developmental

disabilities (county board), prior to employing an applicant, to require the applicant to sign an agreement under which the applicant agrees not to engage in any "sexual conduct" or "sexual contact" (see below) with an individual with mental retardation or a developmental disability in the applicant's care. The agreement must inform the applicant that the failure to comply with the agreement may result in the individual's placement on the existing MR/DD employee registry.

As used in these provisions:

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

(2) "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.

Reports of abuse or neglect of a person with mental retardation or a developmental disability

(R.C. 5123.61 and 5123.99)

Existing law

Mandatory reports. Existing law requires certain professionals with 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, to immediately report or cause reports to be made to a law enforcement agency or the county board. If the report concerns a resident of a facility operated by DMRDD, however, the report must be made either to a law enforcement agency or DMRDD. The professions to which the mandatory reporting provision applies are physicians, including hospital interns and residents; dentists; podiatrists; chiropractors; massage therapists; 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; long-term care 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 for persons with mental retardation or of any other 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 immediately by telephone or in person, be followed by a written report, and contain: the 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. Existing law also requires 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, to notify the person in charge of the institution or that person's designated delegate, who must make the necessary reports.

Discretionary reports. Existing law 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 or the county board. If the person is a resident of a facility operated by DMRDD, the report may be made to a law enforcement agency or 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 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, 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. In addition, 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 that must be 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, 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, and consents, 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 a written report of its findings to the county board.

Existing law provides a qualified immunity from civil and criminal liability for persons, hospitals, institutions, schools, health departments, agencies, and other specified entities relative to the making of reports, and involvement in related proceedings or conduct. It 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 on request the information they contain 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, existing 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 and reports received from county boards. DMRDD must establish committees to review reports of abuse, neglect, and other major unusual incidents.

Penalties. Existing law provides that 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 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, must be fined not more than \$500.

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

The bill

The bill modifies some of the existing 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. A summary of the modifications follows.

(1) The mandatory reporting requirement for professionals is expanded to require a report when the person has reason to believe that a person with mental retardation or a developmental disability *faces the threat of suffering* any such wound, injury, disability, or condition.

(2) Professionals subject to the mandatory reporting requirement who discover or suspect that a child under age 18 or a mentally retarded, developmentally disabled, or physically impaired child under age 21 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, must 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.

(3) Any person who fails to make a report under the mandatory reporting provisions is eligible to be included in the MR/DD employee registry.

(4) Investigations of a mandatory or discretionary report by a law enforcement agency or DMRDD must be in accordance with the memorandum of understanding prepared under its provisions, described below.

(5) Existing penalties provided for violations of the reporting law are revised, and the penalties are made applicable to a person who violates the new provision described above in (2). Under the bill, 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 a notice to the head of the institution and requiring the head of the institution to file a report, 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, or the new provision described above in (2) is guilty of a misdemeanor of the fourth degree or, if the abuse or neglect constitutes a felony, a misdemeanor of the

second degree. In addition, the offender is eligible to be included in the MR/DD employee registry established under existing law, as described above in "Registry of MR/DD employees."

(6) Each county board of mental retardation and developmental disabilities must prepare a memorandum of understanding signed as follows:

(a) The memorandum of understanding must be signed by all of the following: (i) if there is only one probate judge in the county, the probate judge of the county or the probate judge's representative, (ii) if there is more than one probate judge, 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, (iii) 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, (iv) the prosecuting attorney of the county, (v) the public children services agency, if the mentally retarded or developmentally disabled person is a child, and (vi) the coroner of the county.²

(b) The memorandum of understanding must set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities and must have as two of its primary goals the elimination of all unnecessary interviews of persons who are the subject of reports made pursuant to these provisions and, when feasible, providing for only one interview of a person who is the subject of a report. A failure to follow the procedure by the concerned officials is not grounds for, and cannot result in, the dismissal of any charge or complaint arising from any reported case of abuse, neglect, or exploitation or the suppression of any evidence obtained as a result of any reported abuse, neglect, or exploitation and does not give any rights or grounds for appeal or post-conviction relief to any person.

(c) The memorandum of understanding must include, but is not limited to, all of the following: (i) the roles and responsibilities for handling emergency and nonemergency cases of abuse, neglect, or exploitation, (ii) standards and procedures to be used in handling and coordinating investigations of reported cases of abuse, neglect, or exploitation and methods to be used in interviewing the person who is the subject of the report and allegedly was abused, neglected, or exploited, (iii) standards and procedures addressing the categories of persons who

² *The bill requires the public children services agency to sign the memorandum only if the mentally retarded or developmentally disabled person is a child. The memorandum, however, is signed before the identities of victims are known.*

may interview the subject of the report, (iv) standards and procedures to be used in providing victim services to mentally retarded and developmentally disabled persons pursuant to the existing crime victims rights law, and (v) standards and procedures for the filing of criminal charges against persons alleged to have abused, neglected, or exploited mentally retarded or developmentally disabled persons.

(d) The memorandum of understanding may be signed by any other person whose participation furthers the goals of a memorandum of understanding.

Abuse or neglect or misappropriation of property by DMRDD employee

(R.C. 5123.51)

Existing law

Existing 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 alleges 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. 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 (R.C. Chapter 119.).

DMRDD, or DMRDD and a union representative in certain circumstances, must appoint an independent hearing officer to conduct any hearing pursuant to the above provisions. 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. Unless DMRDD's Director determines there are extenuating circumstances (these include an employee's use of physical force that was necessary as self-defense) and subject to the exceptions

described below, the Director must include in the registry of MR/DD employees the name of an MR/DD employee if the Director finds that there is clear and convincing evidence the employee has done one or more of the things described above. 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 of an offense arising from the same facts. Regarding an allegation concerning an employee of DMRDD, after the hearing, 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" (this reference is ambiguous and unclear). 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.

The bill

The bill revises the existing provisions regarding reports of abuse, neglect, and misappropriation of property by an MR/DD employee in the following ways:

(1) Requires DMRDD to review a report it receives from a prosecutor pursuant to the provisions described below when the person who is the subject of the report is charged;

(2) Repeals the prohibition against conducting an Administrative Procedure Act hearing until any criminal proceeding or collective bargaining arbitration concerning the same allegation has been concluded;

(3) Expands the matters that a hearing officer must determine at a hearing conducted under the provisions to include determinations of whether the MR/DD employee has done any of the following: (a) created a substantial risk to the health and safety of such an individual in his or her care, (b) engaged in a sexual relationship with such an individual in his or her care, or (c) failed to make a required report;



(4) Repeals the prohibition against DMRDD's Director including in the registry of MR/DD employees 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) Specifies 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, DMRDD is not required to hold a hearing. Unless DMRDD's Director determines there are extenuating circumstances, the Director must include in the registry of MR/DD employees the name of the MR/DD employee if the Director finds there is clear and convincing evidence that the employee has done any of the specified prohibited acts.

Prosecutor's report

(R.C. 5123.511)

The bill requires the prosecutor in any case involving a victim that the prosecutor knows or reasonably should know has mental retardation or a developmental disability to send written notice on the filing of charges to DMRDD. The notice must specifically identify the person charged. As used in this provision, "prosecutor" includes the county prosecuting attorney and any assistant prosecutor designated to assist the county prosecuting attorney, and, in courts inferior to courts of common pleas, includes the village solicitor, city director of law, or similar municipal chief legal officer, any assistants of the municipal chief legal officer, or any attorney designated by the prosecuting attorney of the county to appear for the prosecution of a given case.

Protective service order

(R.C. 5126.31 and 5126.33)

Provision of services

Existing law. Existing law requires a county board of mental retardation and developmental disabilities to review reports of abuse and neglect of a person with mental retardation or a developmental disability and reports referred to it to determine whether the subject of the report is an adult with mental retardation or a developmental disability in need of services to deal with the abuse or neglect. The law specifies procedures that must be followed in the review, and imposes duties on the county board in performing it. The board must arrange for the provision of services for the prevention, correction, or discontinuance of abuse or neglect or of a condition resulting from abuse or neglect for any adult who has been determined to need the services and consents to receive them. The services may include, but

are not limited to, service and support administration, fiscal management, medical, mental health, home health care, homemaker, legal, and residential services and the provision of temporary accommodations and necessities such as food and clothing, but do not include acting as a guardian, trustee, or protector.

To arrange services, the board must: (1) develop an individualized *service plan* identifying the types of services required for the adult, the goals for the services, and the persons or agencies that will provide them; and, obtain the consent, in accordance with rules established by DMRDD's Director, of the adult or the adult's guardian to the provision of the services and obtain the signature of the adult or guardian on the individual service plan. The board must ensure that the adult receives the services it arranges from the provider and must have the services terminated if the adult withdraws consent.

The bill. The bill changes these provisions in only one regard. Under the bill, to arrange the services, the board must develop an individualized *protective service plan* identifying the types of services required for the adult, the goals for the services, and the persons or agencies that will provide them.

Probate court order

Existing law. Under existing law, a county board of mental retardation and developmental disabilities that is unable to obtain consent 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* described in the preceding part of this analysis. 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, there is a substantial risk to the adult of immediate physical harm or death, the adult is in need of the services, and 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 or 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.

The bill. The bill modifies these provisions in the following ways:

(1) Revises the existing 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.

(2) Requires the board to develop a detailed *protective service plan* describing the *services* that the board will provide to the adult to prevent further abuse, neglect, or exploitation, requires the board to submit the plan to the court for approval, and specifies that the plan may be changed by court order.

(3) Revises the existing provision that requires the court, if it issues an order for services, to limit the provision of the services to a period not exceeding 14 days with the possibility of renewal for another 14 days to instead require the court to limit 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.

(4) Enacts provisions regarding *ex parte* emergency orders for protective services. Under the bill, on the filing of a complaint for a protective services order, a probate judge may grant by telephone an *ex parte* emergency order authorizing the county board to provide emergency protective services to an adult or to remove the adult from the adult's place of residence or legal settlement or the place where the abuse, neglect, or exploitation occurred, if there is reasonable cause to believe that the adult is mentally retarded or developmentally disabled or is incapacitated, and there is a substantial risk to the adult of immediate physical harm or death. If a judge or referee issues an *ex parte* emergency order to remove the adult, the court must hold a hearing to determine whether there is probable cause for the emergency order. The hearing must be held before the end of the next business day after the day on which the emergency order is issued, except that it cannot be held later than 72 hours after the emergency order is issued.

(5) Enacts provisions regarding temporary orders related to protective services. Under the bill, after the filing of a complaint for a protective services order, the court, prior to the final disposition, may enter any temporary order that it finds necessary to protect the adult from abuse, neglect, or exploitation including, but not limited to, the following: (a) a temporary protection order, (b)



an order requiring the evaluation of the adult, or (c) an order requiring a party to vacate the adult's place of residence or legal settlement. The court may grant an *ex parte* order pursuant to this provision on its own motion or if a party files a written motion or makes an oral motion 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, must give notice of its intent or of the request to the adult, the adult's caretaker, the adult's legal counsel, if any, and the Legal Rights Service. If it issues an *ex parte* order, the court must hold a hearing to review the order within 72 hours after it is issued or before the end of the next day after the day on which it is issued, whichever occurs first. The court must give written notice of the hearing to all parties to the action.

Definitions

The following definitions apply to the provisions discussed above concerning protective orders:

(1) "Adult" means a person age 18 or older with mental retardation or a developmental disability.

(2) "Abuse" and "neglect" have the same meanings as in existing law governing DMRDD, except that "abuse" includes a misappropriation, as defined in that law.

(3) "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.

(4) "Emergency protective services" means protective services furnished to a person with mental retardation or a developmental disability to prevent immediate physical harm.

(5) "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 of an adult's resources.

(6) "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.



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

(8) "Substantial risk" means a strong possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist.

Notice to coroner regarding certain deaths

(R.C. 313.12)

Existing law

Existing law provides that, 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, immediately must 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 by existing law. In such cases, if a request is made for cremation, the funeral director called in attendance must notify the coroner immediately.

The bill

In the portion of the coroner notification provision that currently requires health care, emergency, and law enforcement personnel to notify the office of the coroner when any person dies suddenly when in apparent good health, the bill specifically includes a person with mental retardation or a developmental disability as a person to whom the provision applies.

Consent for autopsy or post-mortem examination

(R.C. 2108.50)

Existing law

Existing law provides that 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 age 18 or older in a "written instrument" (defined as including a telegram or cablegram) executed by the person or on the person's behalf at the person's express direction: (1) the deceased person during the deceased person's lifetime, (2) the deceased person's spouse, (3) if there

is no surviving spouse, the surviving spouse's address is unknown or outside the United States, the surviving spouse is physically or mentally unable or incapable of giving consent, or the deceased person was separated and living apart from the surviving spouse, 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 above, 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 death, was serving as guardian of the person for the deceased person. 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 bill

The bill adds to the persons who may give consent in a written instrument to an autopsy or post-mortem examination as the seventh option, in circumstances in which the deceased person had mental retardation or a developmental disability, DMRDD or the county board of mental retardation and developmental disabilities. As under current law, the consent must be given "in the order named" and the person giving the consent must be "of sound mind and 18 years of age or older."

Appointment of an interpreter

(R.C. 2311.14)

Existing law

Existing law provides that, 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 the person. The interpreter must take an oath that he or she will make a true interpretation of the proceedings to the party or witness and will truly repeat the statements made by the party or witness to the court, to the best of his or her ability. The court is required to determine a reasonable fee for interpreter services, which must be paid out of the same funds as witness fees.

The bill

The bill specifies that: (1) the existing interpreter-appointment provision 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 person, such as a person with



mental retardation or a developmental disability, 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 bill also specifies 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" as under existing law.

Reports of child abuse or neglect--mandatory reporters

(R.C. 2151.421)

Existing law

Existing law prohibits a person in any of the specified professions who is acting in an official or professional capacity and knows or suspects that a child under age 18 or a mentally retarded, developmentally disabled, or physically impaired person under age 21 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, 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.³ The professions to which the mandatory reporting provision applies are attorneys; physicians; dentists; podiatrists; nurses; other health care professionals; 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. A violation of the prohibition against failing to

³ Existing law permits anyone who knows or suspects that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired person under 21 years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect of the child, to report or cause reports to be made of that knowledge or suspicion to the public children services agency or to a municipal or county peace officer (R.C. 2151.421(B)). Reports made under this provision generally are subject to the same procedures and rules, as reports made under the mandatory reporting provision.

make the report is a misdemeanor of the fourth degree. Existing law provides procedures for making a report, rules and procedures for investigation of a report, a qualified civil immunity regarding making a report, rules regarding the use or confidentiality of a report, and rules and procedures regarding protective services based on a report.

The bill

The bill adds to the professionals subject to the existing mandatory child abuse and neglect reporting provision. Under the bill, in addition to the professions to which the provision currently applies, the provision applies to chiropractors; hospital administrators; employees of a hospital; employees of an ambulatory health facility; employees of a home health agency; employees of an adult care facility; employees of a community mental health facility; superintendents, board members, and employees of a county board of mental retardation and developmental disabilities; administrators, board members, and employees of a residential facility for persons with mental retardation; administrators, board members, and employees of any other public or private provider of services to a person with mental retardation or a developmental disability; employees of DMR/DD; members of a citizen's advisory council established at an institution or branch institution of DMRDD; long-term care residents' rights advocates; members of the clergy, rabbis, priests, and regularly ordained, accredited, or licensed ministers of an established and legally cognizable church, denomination, or sect; and peace officers.

COMMENT

1. Existing law contains provisions that, in cases in a juvenile court or criminal court in which a person is charged with certain crimes or an act that would be an offense of violence if committed by an adult *and in which an alleged victim of the violation was a child who was less than 13 years of age* when the document charging the violation was filed, provide mechanisms for the taking and use in the proceedings of depositions and videotaped depositions of the child victim, the closed circuit telecast into the courtroom of testimony of the child victim that is taken outside the courtroom, the recording, for showing in the courtroom, of the testimony of the child victim, and the videotaping and use of preliminary hearing testimony of the child victim. The crimes are unlawful restraint, child enticement, rape, sexual battery, sexual imposition, importuning, public indecency, compelling prostitution, procuring, soliciting, disseminating matter harmful to juveniles, pandering obscenity, pandering sexually oriented matter involving a minor, illegal use of a minor in a nudity-oriented material or performance, and endangering children.



The existing mechanisms are similar to those contained in the bill regarding cases in a juvenile court or criminal court in which a person is charged with one of the violations specified in the bill or an offense of violence and in which an alleged victim of the violation was a functionally impaired person. Existing law also contains a provision that provides for the use of preliminary hearing, prior trial, or deposition testimony of a person, if the person giving the testimony has died, cannot be produced at trial, or has become incapacitated to testify; the existing provision appears to be identical to the provision contained in the bill at R.C. 2945.491(A)(3). (R.C. 2152.81, 2945.481, and 2945.49.)

2. Existing law provides that, as used in the Revised Code, "offense of violence" includes the following: (a) murder, manslaughter, assault, permitting child abuse, menacing, kidnapping, extortion, rape, sexual battery, gross sexual imposition, arson, terrorism, robbery, inciting violence, riot, inducing panic, domestic violence, intimidation, escape, improperly discharging a firearm, burglary, certain types of child endangering, or felonious sexual penetration in violation of former R.C. 2907.12, (b) a violation of an existing or former municipal ordinance or law of Ohio or any other state or the United States, substantially equivalent to any section, division, or offense listed in clause (a) of this paragraph, (c) an offense, other than a traffic offense, under an existing or former municipal ordinance or law of Ohio or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons, or (d) a conspiracy or attempt to commit, or complicity in committing, any offense under clause (a), (b), or (c) of this paragraph.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-23-03	p. 72

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