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I N   S E N A T E

May 2, 2012

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Introduced by Sen. McDONALD -- read twice and ordered printed, and when printed to be committed to the Committee on Mental Health and Developmental Disabilities

AN ACT to amend the mental hygiene law and the penal law, in relation to disqualification of employment for certain criminal history information and deeming an individual with a developmental disability incapable of giving consent; and to amend the criminal procedure law, in relation to providing an exception to the hearsay rule to allow testimony from persons with developmental disabilities

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. The mental hygiene law is amended by adding a new section  
2     13.40 to read as follows:  
3     S 13.40 DISQUALIFICATION FOR CERTAIN CRIMINAL HISTORY INFORMATION.  
4     NOTWITHSTANDING ARTICLE TWENTY-THREE-A OF THE CORRECTION LAW AND ANY  
5     OTHER LAW TO THE CONTRARY, THE OFFICE SHALL DENY OR DISAPPROVE AN APPLI-  
6     CATION FOR EMPLOYMENT OR VOLUNTEER SERVICE FOR A PROSPECTIVE EMPLOYEE OR  
7     VOLUNTEER OF THE OFFICE OR OF A PROVIDER OF SERVICES THAT CONTRACTS WITH  
8     OR IS APPROVED OR OTHERWISE AUTHORIZED BY THE OFFICE TO PROVIDE  
9     SERVICES, WHERE CRIMINAL HISTORY INFORMATION RECEIVED PURSUANT TO A  
10    CRIMINAL HISTORY RECORD CHECK CONCERNING THE PROSPECTIVE EMPLOYEE OR  
11    VOLUNTEER REVEALS A CONVICTION FOR:  
12    (A) ANY OFFENSE PURSUANT TO ARTICLE ONE HUNDRED TWENTY-FIVE OF THE  
13    PENAL LAW;  
14    (B) ANY OFFENSE PURSUANT TO ARTICLE ONE HUNDRED THIRTY OF THE PENAL  
15    LAW;  
16    (C) ANY FELONY OFFENSE PURSUANT TO ARTICLE ONE HUNDRED TWENTY OF THE  
17    PENAL LAW;  
18    (D) ANY OFFENSE PURSUANT TO ARTICLE ONE HUNDRED FIFTY OF THE PENAL  
19    LAW;  
20    (E) ENDANGERING THE WELFARE OF A CHILD PURSUANT TO SECTION 260.10 OF  
21    THE PENAL LAW;  
22    (F) ENDANGERING THE WELFARE OF AN INCOMPETENT OR PHYSICALLY DISABLED  
23    PERSON PURSUANT TO SECTION 260.25 OF THE PENAL LAW;

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets  
[ ] is old law to be omitted.

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(G) ENDANGERING THE WELFARE OF A VULNERABLE ELDERLY PERSON, OR AN INCOMPETENT OR PHYSICALLY DISABLED PERSON IN THE SECOND DEGREE PURSUANT TO SECTION 260.32 OF THE PENAL LAW;

(H) ENDANGERING THE WELFARE OF A VULNERABLE ELDERLY PERSON, OR AN INCOMPETENT OR PHYSICALLY DISABLED PERSON IN THE FIRST DEGREE PURSUANT TO SECTION 260.34 OF THE PENAL LAW;

(I) ANY OFFENSE PURSUANT TO ARTICLE TWO HUNDRED SIXTY-THREE OF THE PENAL LAW;

(J) KIDNAPPING IN THE FIRST DEGREE PURSUANT TO SECTION 135.25 OF THE PENAL LAW;

(K) KIDNAPPING IN THE SECOND DEGREE PURSUANT TO SECTION 135.20 OF THE PENAL LAW;

(L) ROBBERY IN THE SECOND DEGREE PURSUANT TO SECTION 160.10 OF THE PENAL LAW;

(M) ROBBERY IN THE FIRST DEGREE PURSUANT TO SECTION 160.15 OF THE PENAL LAW;

(N) ANY ATTEMPT TO COMMIT ANY OF THE CRIMES REFERENCED IN THIS SECTION; OR

(O) ANY COMPARABLE OFFENSE IN ANY OTHER JURISDICTION.

S 2. Paragraph (h) of subdivision 3 of section 130.05 of the penal law, as amended by chapter 264 of the laws of 2003, is amended and a new paragraph (i) is added to read as follows:

(h) a client or patient and the actor is a health care provider or mental health care provider charged with rape in the third degree as defined in section 130.25, criminal sexual act in the third degree as defined in section 130.40, aggravated sexual abuse in the fourth degree as defined in section 130.65-a, or sexual abuse in the third degree as defined in section 130.55, and the act of sexual conduct occurs during a treatment session, consultation, interview, or examination[.]; OR

(I) AN INDIVIDUAL WITH A DEVELOPMENTAL DISABILITY RECEIVING SERVICES FROM A PROGRAM OR FACILITY OPERATED, CERTIFIED OR AUTHORIZED BY, OR FUNDED THROUGH, CONTRACT BY THE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES WHERE THE ACTOR IS NOT MARRIED TO SUCH INDIVIDUAL AND IS AN EMPLOYEE, INTERN, CONSULTANT, CONTRACTOR OR VOLUNTEER OF SUCH PROGRAM OR FACILITY WHERE THE INDIVIDUAL RECEIVES SERVICES.

S 3. The criminal procedure law is amended by adding a new section 60.77 to read as follows:

S 60.77 STATEMENTS OF PERSONS WITH DEVELOPMENTAL DISABILITIES; HEARSAY EXCEPTION.

1. AN OUT-OF-COURT STATEMENT MADE BY A PERSON WITH A DEVELOPMENTAL DISABILITY, AS DEFINED IN SUBDIVISION TWENTY-TWO OF SECTION 1.03 OF THE MENTAL HYGIENE LAW, NOT OTHERWISE ADMISSIBLE BY A STATUTE OR COURT RULE THAT PROVIDES AN EXCEPTION TO THE OBJECTION OF HEARSAY IS ADMISSIBLE IN ANY CRIMINAL OR DELINQUENCY PROCEEDING IN WHICH THE PERSON IS ALLEGED TO HAVE BEEN A VICTIM IF THE CONDITIONS OF SUBDIVISION FIVE OF THIS SECTION ARE SATISFIED.

2. (A) AN OUT-OF-COURT STATEMENT MADE BY A PERSON WITH A DEVELOPMENTAL DISABILITY, AS DEFINED IN SUBDIVISION TWENTY-TWO OF SECTION 1.03 OF THE MENTAL HYGIENE LAW, THAT DESCRIBES ALL OR PART OF AN OFFENSE DESCRIBED IN PARAGRAPH (B) OF THIS SUBDIVISION PERFORMED WITH, BY, ON, OR IN THE PRESENCE OF THE DECLARANT, AND THAT IS NOT OTHERWISE ADMISSIBLE BY A STATUTE OR COURT RULE THAT PROVIDES AN EXCEPTION TO THE OBJECTION OF HEARSAY, IS ADMISSIBLE IN ANY CRIMINAL, DELINQUENCY, OR CIVIL PROCEEDING IF THE CONDITIONS OF SUBDIVISION FIVE OF THIS SECTION ARE SATISFIED.

(B) THE EXCEPTION DESCRIBED IN PARAGRAPH (A) OF THIS SUBDIVISION APPLIES TO AN OUT-OF-COURT STATEMENT MADE BY A PERSON WITH A DEVELOP-

MENTAL DISABILITY, WHICH STATEMENT DESCRIBES ALL OR PART OF ANY OF THE FOLLOWING OFFENSES:

(I) ANY OFFENSE DESCRIBED IN ARTICLE ONE HUNDRED THIRTY OF THE PENAL LAW;

(II) LABOR TRAFFICKING AS DESCRIBED IN SECTION 135.35 OF THE PENAL LAW;

(III) AN OFFENSE INVOLVING INCEST AS DESCRIBED IN SECTION 255.25, 255.26 OR 255.27 OF THE PENAL LAW;

(IV) SEX TRAFFICKING AS DESCRIBED IN SECTION 230.34 OF THE PENAL LAW;

(V) ANY OFFENSE DESCRIBED IN ARTICLE TWO HUNDRED THIRTY-FIVE OF THE PENAL LAW;

(VI) CRIMINAL ATTEMPT TO COMMIT ANY OF THE ACTS SPECIFIED IN THIS PARAGRAPH.

3. AN OUT-OF-COURT STATEMENT BY A PERSON WITH A DEVELOPMENTAL DISABILITY, AS DEFINED IN SUBDIVISION TWENTY-TWO OF SECTION 1.03 OF THE MENTAL HYGIENE LAW, THAT DESCRIBES ANY ACT OF CHILD ABUSE, CHILD NEGLECT OR CHILD MALTREATMENT TO WHICH THE DECLARANT WAS SUBJECTED OR WHICH THE DECLARANT WITNESSED, AND THAT IS NOT OTHERWISE ADMISSIBLE BY A STATUTE OR COURT RULE THAT PROVIDES AN EXCEPTION TO THE OBJECTION OF HEARSAY, IS ADMISSIBLE IN EVIDENCE IN ANY CRIMINAL, DELINQUENCY, OR CIVIL PROCEEDING IN WHICH A CHILD IS ALLEGED TO BE A VICTIM OF CHILD ABUSE, NEGLECT OR MALTREATMENT, IF THE CONDITIONS OF SUBDIVISION FIVE OF THIS SECTION ARE SATISFIED.

4. AN OUT-OF-COURT STATEMENT MADE BY A PERSON WITH A DEVELOPMENTAL DISABILITY, AS DEFINED IN SUBDIVISION TWENTY-TWO OF SECTION 1.03 OF THE MENTAL HYGIENE LAW, THAT DESCRIBES ALL OR PART OF AN OFFENSE CONTAINED IN ARTICLE ONE HUNDRED TWENTY-FIVE OF THE PENAL LAW, OR THAT DESCRIBES AN ACT OF DOMESTIC VIOLENCE AS DEFINED IN SUBDIVISION ONE OF SECTION 481-C OF THE SOCIAL SERVICES LAW, NOT OTHERWISE ADMISSIBLE BY STATUTE OR COURT RULE THAT PROVIDES AN EXCEPTION TO THE OBJECTION OF HEARSAY, IS ADMISSIBLE IN EVIDENCE IN ANY CRIMINAL, DELINQUENCY, OR CIVIL PROCEEDING IF THE CONDITIONS OF SUBDIVISION FIVE OF THIS SECTION ARE SATISFIED.

5. THE EXCEPTIONS TO THE OBJECTION OF HEARSAY DESCRIBED IN SUBDIVISIONS ONE, TWO, THREE AND FOUR OF THIS SECTION SHALL APPLY ONLY IF THE COURT FINDS IN A HEARING CONDUCTED OUTSIDE THE PRESENCE OF THE JURY THAT THE TIME, CONTENT, AND CIRCUMSTANCES OF THE STATEMENT PROVIDE SUFFICIENT SAFEGUARDS OF RELIABILITY; AND EITHER:

(A) THE STATEMENT IS A NON-TESTIMONIAL STATEMENT; OR

(B) (I) THE DECLARANT TESTIFIES AT THE PROCEEDINGS; OR

(II) IF THE DECLARANT IS UNAVAILABLE TO TESTIFY, THE DEFENDANT HAS HAD AN OPPORTUNITY TO CROSS-EXAMINE THE DECLARANT IN A PREVIOUS PROCEEDING AND THERE IS CORROBORATIVE EVIDENCE OF THE ACT WHICH IS THE SUBJECT OF THE STATEMENT.

6. IF A STATEMENT IS ADMITTED PURSUANT TO THIS SECTION, THE COURT SHALL INSTRUCT THE JURY IN THE FINAL WRITTEN INSTRUCTIONS THAT DURING THE PROCEEDING THE JURY HEARD EVIDENCE REPEATING A PERSON'S OUT-OF-COURT STATEMENT, THAT IT IS FOR THE JURY TO DETERMINE THE WEIGHT AND CREDIT TO BE GIVEN THE STATEMENT, AND THAT, IN MAKING THE DETERMINATION, THE JURY SHALL CONSIDER THE NATURE OF THE STATEMENT, THE CIRCUMSTANCES UNDER WHICH THE STATEMENT WAS MADE, AND ANY OTHER RELEVANT FACTOR.

7. THE PROPONENT OF THE STATEMENT SHALL GIVE THE ADVERSE PARTY REASONABLE NOTICE OF HIS OR HER INTENTION TO OFFER THE STATEMENT AND THE PARTICULARS OF THE STATEMENT.

S 4. This act shall take effect immediately.