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I N S E N A T E

May 2, 2012

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

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

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

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

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

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

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

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

19 (O) ANY COMPARABLE OFFENSE IN ANY OTHER JURISDICTION.

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

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

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

36 S 3. The criminal procedure law is amended by adding a new section
37 60.77 to read as follows:

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

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

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

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

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

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

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

7 (III) AN OFFENSE INVOLVING INCEST AS DESCRIBED IN SECTION 255.25,
8 255.26 OR 255.27 OF THE PENAL LAW;

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

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

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

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

24 4. AN OUT-OF-COURT STATEMENT MADE BY A PERSON WITH A DEVELOPMENTAL
25 DISABILITY, AS DEFINED IN SUBDIVISION TWENTY-TWO OF SECTION 1.03 OF THE
26 MENTAL HYGIENE LAW, THAT DESCRIBES ALL OR PART OF AN OFFENSE CONTAINED
27 IN ARTICLE ONE HUNDRED TWENTY-FIVE OF THE PENAL LAW, OR THAT DESCRIBES
28 AN ACT OF DOMESTIC VIOLENCE AS DEFINED IN SUBDIVISION ONE OF SECTION
29 481-C OF THE SOCIAL SERVICES LAW, NOT OTHERWISE ADMISSIBLE BY STATUTE OR
30 COURT RULE THAT PROVIDES AN EXCEPTION TO THE OBJECTION OF HEARSAY, IS
31 ADMISSIBLE IN EVIDENCE IN ANY CRIMINAL, DELINQUENCY, OR CIVIL PROCEEDING
32 IF THE CONDITIONS OF SUBDIVISION FIVE OF THIS SECTION ARE SATISFIED.

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

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

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

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

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

51 7. THE PROPONENT OF THE STATEMENT SHALL GIVE THE ADVERSE PARTY REASON-
52 ABLE NOTICE OF HIS OR HER INTENTION TO OFFER THE STATEMENT AND THE
53 PARTICULARS OF THE STATEMENT.

54 S 4. This act shall take effect immediately.