



**To: Superintendents of County Board of MRDD
Superintendents of Developmental Centers
Investigative Agents and DC Investigators
All Providers**

**From: Christine Oliver, Deputy Director
Division of Legal and MUI Services**

Date: July 29, 2004

Re: Record Check and Abuser Registry Changes

The purpose of this information notice is to describe the changes SB 178 made to the following:

Revised Record Check Requirements

Abuser Registry Changes

- Changes to definitions
- Prohibited sexual relations
- Changes in Department Abuser Registry responsibilities
- New Abuser Registry offenses
- Annual written notice requirement
- Annual notice (attachment)

***A. Ohio Revised Code (ORC) 5126.28. Revised Record Check Requirement
Includes New Offense of Patient Endangerment***

The ORC 5126.28 states that a county board shall not employ an individual who has been convicted of any of the offenses listed in that statute. SB 178 created a new criminal offense, ORC 2903.341, Patient Endangerment, and

amended ORC 5126.28 to add conviction of “Patient Endangerment” to the list of disqualifying offenses. It is “patient endangerment” in violation of ORC 2903.341 when an “MR/DD caretaker” creates a substantial risk to the health or safety of an individual with mental retardation or a developmental disability. An “MR/DD caretaker” is any person who assumes a duty to provide care or protection to an individual with MR/DD either voluntarily, as a paid caretaker, by order of a court, or as a result of a family relationship to the individual. “MR/DD caretaker” includes an employee of a care facility and other provider agency employees. An “MR/DD caretaker” is not guilty of patient endangerment if ordered to commit the conduct by a person with supervisory authority or authority pursuant to a contract for service provision. An “MR/DD caretaker” is not committing patient endangerment when the caretaker treats a physical or mental illness by prayer alone in accordance with the tenets of a recognized religious body.

An “MR/DD caretaker” does not include an owner, operator or administrator of a care facility who does not personally provide care to an individual with MR/DD although the law prohibits an owner, operator, or administrator of a care facility from condoning or knowingly permitting an employee of such facility to create a substantial risk to the health or safety of an individual with MR/DD. The owner, administrator or operator of a care facility is not violating the law if he or she is following the individual’s service plan, is acting in accordance with the admission, discharge, transfer rule, or if the owner, administrator or operator does not have readily available means to prevent the harm to the individual and has taken reasonable steps to summon aid for the individual.

The ORC 5126.281 states that a contracting entity of a county board shall not employ an individual in a direct services position if the individual has a conviction for an offense listed in ORC 5126.28. Similarly, ORC 5123.082(B) states that the Director shall deny or revoke a certificate or evidence of registration if the Director finds pursuant to an adjudication conducted in accordance with ORC Chapter 119 that the holder of the certificate or evidence of registration has pleaded guilty to any of the offenses listed in ORC 5126.28. Although neither ORC 5123.082 nor ORC 5126.281 was amended, the change to ORC 5126.28 results in the addition

of the offense of "Patient Endangerment" to the list of disqualifying offenses for county board contract entities and for those certified or holding registration from the Department.

B. *Abuser Registry Changes*

1. ORC 5123.50. Changes to Abuser Registry Definitions

SB 178 made several changes to ORC 5123.50, which defines terms used in the Abuser Registry statutes. The Registry statutes are Ohio Revised Code Sections 5123.50 through 5123.542.

The definition of "Abuse" in ORC 5123.50(A) continues to include "Sexual abuse." "Sexual abuse" for Abuser Registry purposes continues to mean unlawful "sexual conduct" or unlawful "sexual contact." "Sexual conduct" and "sexual contact" continue to have the same meaning as they do in the criminal code. S.B. 178 retained the same definition of "sexual abuse" but split up the definition into two parts, ORC 5123.50(F) defining "sexual abuse" and ORC 5123.50(I) defining "sexual conduct" and "sexual contact."

The term "spouse" is now defined in ORC 5123.50(I). The definition of "spouse" is the same as in ORC 2907.01(L), which states that "spouse" means "a person married to an offender at the time of an alleged offense" except when the parties have entered into a written separation agreement or during the pendency of an action between the parties for annulment, divorce, or dissolution of marriage.

2. ORC 5123.541. Provider/consumer sexual contact prohibited (Prohibited sexual relationship)

It continues to be an Abuser Registry offense for an MR/DD employee to have unlawful (non-consensual) sexual conduct or sexual contact with an individual with MR/DD. ORC 5123.541, newly enacted by SB 178, makes it an Abuser Registry offense for an MR/DD employee to engage in consensual sexual conduct (intercourse or other penetration) or to have consensual sexual contact (touching the erogenous zone of another for purposes of sexual gratification of either party) with an individual for whom

the MR/DD employee is employed or under contract to provide care unless the individual is the employee's spouse. Providing "care" is not defined in the statute but it logically includes any MR/DD employee providing direct care and those in the employee's supervisory chain of command. ORC 5123.541 also requires mandated reporters of abuse/neglect to report to the Department, provider/consumer sexual conduct or sexual contact and states that any person (meaning non-mandated reporters) may report such conduct to the Department.

3. Changes in Department Abuser Registry Responsibilities

ORC 5123.51(A) now requires the Department to review a notice informing the Department that an MR/DD employee has engaged in sexual contact or sexual conduct with an individual with MR/DD in the employee's care. ORC 2930.061, newly enacted by SB 178, requires a prosecutor to notify the Department if the prosecutor has knowledge that someone has been charged with a crime and the victim is an individual with MR/DD. ORC 5123.51(A) now requires the Department to review such notice from a prosecutor that an individual with MR/DD has been the victim of an alleged crime.

ORC 5123.51(C)(2) now permits the Department to conduct Registry proceedings while a criminal action is pending against the accused person if the prosecutor consents. ORC 5123.51(D)(4) now requires the Department to indicate in the Abuser Registry, next to the person's name, the disposition of any arbitration or criminal proceeding regarding the same conduct. In addition, the Department, after properly notifying an accused person of the person's right to a hearing, need conduct a hearing only if one is requested before placing that person's name on the Registry. If the person does not request a hearing, the Department will conduct an administrative adjudication to determine if the person's name shall be placed on the Registry.

4. New Abuser Registry Offenses

Under prior law, it was a Registry offense for an MR/DD employee to misappropriate the property of an individual with MR/DD. Now ORC 5123.51(C)(3)(a)(i) and (ii) make it a Registry offense only if the

misappropriated property (from one or more individuals) has a value, in the aggregate, of at least one hundred dollars except that misappropriation of a check, credit card, ATM card, and the like are Registry offenses without regard to their monetary value.

ORC 5123.51(C)(3)(a)(iii) previously made “knowing” neglect a Registry offense. That was removed. Added was the Registry offense of “recklessly” neglecting an individual with MR/DD if that reckless neglect creates “a substantial risk of serious physical harm” to the individual.

SB 178 added two entirely new Abuser Registry offenses. It is now a Registry offense for an MR/DD employee to engage in sexual conduct (sexual intercourse or other penetration) or have sexual contact (touching the erogenous zone of another for purposes of sexual gratification of either party) with an individual with MR/DD in the employee’s care unless the MR/DD employee is the spouse of the individual with MR/DD. It is also a Registry offense for an MR/DD employee required by ORC 5123.61 to report abuse or neglect of an individual with MR/DD (required reporters include all public and private providers of services to individuals with MR/DD) to “unreasonably” fail to report abuse or neglect when the MR/DD employee knew or should have known that the failure to report resulted in a substantial risk of harm to the individual with MR/DD. These two new Registry offenses are found in ORC 5123.51(C)(3)(a)(vii) and (viii).

5. ORC 5123.542. Annual Written Notice of Registry Conduct Required

ORC 5123.542, newly enacted by S.B. 178, requires that the Department, each county board, each contracting entity of a county board, each owner, operator, or administrator of a licensed facility (as defined in ORC 5123.19), and each owner, operator or administrator of a program certified by the Department to provide supported living, provide its MR/DD employees with an *annual written notice*, prescribed by the Department, explaining the conduct that may result in placement on the Abuser Registry. The fact that an MR/DD employee does not receive the required notice does not exempt the employee from inclusion on the Abuser Registry. Attached is the information that is to be contained in the written notice you are to provide to

your MR/DD employees for calendar year 2004. It is advised that you implement the requirements of this statute in a manner that allows you to demonstrate that each of your MR/DD employees received written notice (see attached notice).

For any questions, please contact the MUI/Registry Unit at (614) 995-3810 or 995-3818.

This information notice is provided to raise awareness of SB 178 requirements and should not be considered legal advice. Readers are encouraged to contact your legal counsel for specific advice.

c: Distribution List

ABUSER REGISTRY ANNUAL NOTICE

The Ohio Department of Mental Retardation and Developmental Disabilities (“Department”) maintains an Abuser Registry which is a list of MR/DD employees who the Department has determined have abused, neglected, had sexual contact with, stolen property from, or did not report the abuse or neglect of an individual with MR/DD. If your name is placed on the Abuser Registry you are barred from employment as an MR/DD employee in this state for a minimum of 5 years.

- **Employees whose names may be placed on the Abuser Registry.** The name of any “MR/DD employee” may be placed on the Abuser Registry. MR/DD employee includes any Department employee, any employee of a county board of MR/DD, and any employee providing specialized services to an individual with MR/DD. A specialized service is a program or service designed to primarily serve individuals with MR/DD including services by an entity licensed or certified by the Department.
- **Abuser Registry Offenses.** The Department may place the name of an MR/DD employee on the Abuser Registry if it determines that the employee has committed any of the below offenses against an individual with MR/DD.
 - **Abuse**
 - Abuse includes the use of any physical force that could reasonably be expected to result in physical harm.
 - Abuse includes unlawful sexual conduct (unprivileged intercourse or other sexual penetration) and unlawful sexual contact (unprivileged touching of another’s erogenous zone).
 - Abuse includes verbal abuse. Verbal abuse means purposely using words to threaten, coerce, intimidate, harass or humiliate an individual.
 - **Sexual Contact.** Sexual contact means the touching of an erogenous zone for sexual gratification, whether or not consensual, by an MR/DD employee of an individual in the employee’s care who is not the employee’s spouse.
 - **Neglect.** Neglect means, when there is a duty to do so, failing to provide an individual with any treatment, care, goods or services necessary to maintain the health or safety of the individual.
 - **Misappropriation (theft).** This means obtaining the property of an individual or individuals, without consent, with an aggregate (combined) value of at least \$100. Theft of any check, credit card, ATM card and the like are also Abuser Registry offenses.
 - **Failure to Report Abuse, Neglect or Misappropriation.** An MR/DD employee may be placed on the Abuser Registry if the employee unreasonably does not report abuse, neglect or misappropriation of the property of an individual with MR/DD, or the substantial risk to such an individual of abuse, neglect or misappropriation, when the employee should know that his/her non-reporting will result in a substantial risk of harm to such individual.

ORC 5123.542 requires the Department, each county MR/DD board, each entity providing specialized services under contract with an MR/DD board, and each owner, operator or administrator of a residential facility as defined in ORC 5123.19 or of a program certified by the Department to provide supported living services to annually provide written notice to each of its MR/DD employees explaining the conduct for which an MR/DD employee may be placed on the Abuser Registry. More information about the Abuser Registry is on the Department’s website at <http://odmrdd.state.oh.us/CountyBoardsDoc/BoardsInfo.htm> or may be obtained by calling (614) 995-3810.