

By Mrs. Gray of Framingham, petition of Barbara E. Gray relative to alternative procedures for taking testimony of children or mentally retarded witnesses in certain judicial proceedings. The Judiciary.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Eighty-Eight.

AN ACT RELATIVE TO ALTERNATIVE PROCEDURES FOR TAKING TESTIMONY OF THE CHILD OR MENTALLY RETARDED WITNESS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Chapter 278, section 16D as appearing in the 1986 Official
2 Edition is amended by inserting in place thereof the following: —
3 ALTERNATIVE PROCEDURES FOR TAKING THE
4 TESTIMONY OF THE CHILD AND MENTALLY
5 RETARDED WITNESS; RIGHTS OF DEPENDENT
6 ADMISSABILITY.

7 Section 16D. (a) For the purpose of this section, the following
8 words shall have the following meanings: —

9 “Child Witness”, a person who is under the age of 15 years and
10 who is alleged to have been a victim of, or witness to an alleged
11 violation of section thirteen B, thirteen F, thirteen H, twenty-two,
12 twenty-two A, twenty-three, twenty-four, or twenty-four B of
13 Chapter 265, or section two, three, four, four A, four B, five, six,
14 seven, eight, twelve, thirteen, sixteen, seventeen, twenty-four,
15 twenty-eight, twenty-nine, twenty-nine A, twenty-nine B, thirty-
16 three, thirty-four, thirty-five A of Chapter 272.

17 “Mentally Retarded Witness”, a person with inadequately
18 developed or impaired intelligence which substantially limits
19 ability to learn or to adapt as judged by established standards
20 available for the evaluation of a person’s ability to function in the
21 community. A mentally retarded person may be considered to be
22 mentally ill, as defined in the Mental Health regulations of the

23 Department, 104 CMR 3.01, provided that no mentally retarded
24 person shall be considered to be mentally ill solely by reasons of
25 his or her mental retardation (Department of Mental Health 104
26 CMR 20.02, 48) and who is alleged to have been a victim of, or
27 a witness to an alleged violation of section thirteen F, twenty-two,
28 or twenty-four of Chapter two hundred and sixty-five, or section
29 two, three, four, five, six, seven, eight, twelve, thirteen, sixteen,
30 seventeen, twenty-four, twenty-nine, thirty-three, thirty-four, or
31 thirty-five of Chapter two hundred seventy-two.

32 “Simultaneous electronic means”, any device capable of
33 projecting a live visual and aural transmission such as closed-
34 circuit television.

35 (b) (1) At any time after the issuance of a complaint or
36 indictment alleging an offense punished by any statutes listed
37 herein, the courts on its own motion or on motion of the
38 proponent of a child/mentally retarded witness, and after a
39 hearing, may order the use of a suitable alternative procedure for
40 taking the testimony of the child/mentally retarded witness, in
41 proceedings pursuant to said complaint of indictment, provided
42 that the court finds by a preponderance of the evidence at the time
43 of the order that the child/mentally retarded witness is likely to
44 suffer psychological or emotional trauma as a result of testifying
45 in open court, as a result of testifying in the presence of the
46 defendant, or as a result of both testifying in open court and
47 testifying in the presence of the defendant. If the court orders the
48 use of a suitable alternative for taking the testimony of a child/
49 or mentally retarded witness pursuant to this section, the court
50 shall make and enter specific findings upon the record describing
51 with particularity the reasons for such order.

52 (2) An order issued under paragraph (1) shall provide the
53 testimony of the child/mentally retarded witness be recorded on
54 videotape or film to be shown in court at a later time or that the
55 testimony be transmitted to the courtroom by simultaneous
56 electronic means.

57 (3) Testimony taken by an alternative procedure pursuant to
58 an order issued under paragraph (1) shall be taken in the presence
59 of the judge, the prosecutor, defense counsel and such other
60 persons as the court may allow. The defendant shall also have the

61 right to be present unless the court's order under paragraph (1)
62 is based wholly or in part upon a finding that the child/mentally
63 retarded witness is likely to suffer trauma as a result of testifying
64 in the presence of the defendant. If the order is based on such
65 a finding, the testimony of the child/mentally retarded witness
66 shall not be taken in the presence of the defendant except as
67 provided in paragraph (4).

68 (4) Testimony taken by an alternative procedure pursuant to
69 an order issued under paragraph (1) shall be taken in a suitable
70 setting outside the courtroom, except that an order based only
71 on a finding that the child/mentally retarded witness is likely to
72 suffer trauma as a result of testifying in the presence of the
73 defendant may provide that the testimony be taken in a suitable
74 setting inside the courtroom in a manner so that the child/
75 mentally retarded witness is not able to see or hear the defendant.

76 (5) When testimony is taken by an alternative procedure
77 pursuant to an order issued under paragraph (1), the counsel shall
78 be given in the opportunity to examine or cross-examine the child/
79 mentally retarded witness to the same extent as would be
80 permitted at trial, and the defendant shall be able to see and hear
81 the child/mentally retarded witness and to have constant private
82 communication with defense counsel.

83 (6) The film, videotape or transmission of testimony taken by
84 an alternative procedure pursuant to an order issued under
85 paragraph (1) shall be admissible as substantive evidence to the
86 same extent as and in lieu of live testimony by the child/mentally
87 retarded witness in any proceeding for which the order is issued
88 or in any related criminal proceeding against the same defendant
89 when consistent with the interests of justice, provided that such
90 an order is entered or re-entered based on current findings at the
91 time when or within a reasonable time before the film, videotape
92 or transmission is offered into evidence. Subsequent testimony of
93 a child/mentally retarded witness in any such proceeding shall
94 also be taken by a suitable alternative procedure pursuant to this
95 section.

96 (7) Whenever pursuant to an order issued under paragraph (1),
97 testimony is recorded on videotape or film or is transmitted to
98 the courtroom by simultaneous electronic means, the court shall
99 ensure that:

100 (a) The recording or transmitting equipment is capable of
101 making an accurate recording or transmission and is operated by
102 a competent operator;

103 (b) The recording or transmission is in color and the witness
104 is visible at all times;

105 (c) Every voice on the recording or transmission is audible and
106 identified;

107 (d) The courtroom is equipped with monitors which permit the
108 jury and others present in the courtroom to see and hear the
109 recording or transmission;

110 (e) In the case of recorded testimony, the recording is accurate
111 and has not been altered;

112 (f) In the case of recorded testimony, each party is afforded the
113 opportunity to view the recording before it is shown in the
114 courtroom.

115 (8) Nothing in this section shall be deemed to prohibit the court
116 from using other appropriate means, consistent with this section
117 and other laws and with the defendant's rights, to protect a child/
118 mentally retarded witness from trauma during a court proceeding.