

By Mr. DiMasi of Boston, petition of Salvatore F. DiMasi relative to alternative procedures for determining competency to testify and for taking the testimony of a witness with mental retardation. The Judiciary.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Ninety-Five.

AN ACT RELATIVE TO ALTERNATIVE PROCEDURES FOR DETERMINING COMPETENCY TO TESTIFY AND FOR TAKING TESTIMONY OF A WITNESS WITH MENTAL RETARDATION.

1 Whereas, The deferred operation of this act would tend to
2 defeat its purpose, which is to immediately establish alternative
3 procedures for determining competency to testify and for taking
4 testimony of a party or witness with mental retardation, therefore
5 it is hereby declared to be an emergency law, necessary for the
6 immediate preservation of the public convenience.

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

1 Section 1. Chapter 417 of the Acts of 1993 is hereby repealed.

2 Section 2. Chapter 278 of the General Laws, as amended by
3 Chapter 417 of the Acts of 1993, is hereby amended by striking
4 section 16E.

5 Section 3. Chapter 233 of the General Laws, as appearing in
6 the 1992 Official Edition, is hereby amended by inserting after
7 section 23D the following section:—

8 Section 23E. (a) For the purposes of this section, the following
9 words shall have the following meanings unless the context
10 clearly requires otherwise:

11 “Witness or party with mental retardation”, a witness in a
12 proceeding whom the presiding justice has found after hearing,
13 as provided in paragraph (1) of subsection (b), to have mental
14 retardation.

15 “Mental retardation”, substantial limitations in present func-
16 tioning, manifesting before age eighteen, and characterized by
17 significantly subaverage intellectual functioning, existing concur-
18 rently with related limitations in two or more of the following
19 applicable skill areas: communication, self-care, home living,
20 social skills, community use, self-direction, health and safety,
21 functional academics, leisure and work.

22 (b)(1) In any judicial proceeding in which a witness or party
23 with mental retardation will testify, the court, on its own motion
24 or on motion of the party or proponent of the witness with mental
25 retardation and after hearing, may order the use of alternative pro-
26 cedures for taking testimony of the witness or party with mental
27 retardation, provided that the court finds at the time of the order,
28 by clear and convincing evidence in the case of a criminal pro-
29 ceeding, and by a preponderance of the evidence, in the case of a
30 noncriminal proceeding, that the witness or party with mental
31 retardation is likely, as a result of submitting to usual procedures
32 for determining competency or as a result of testifying in open
33 court, as the case may be, (i) to suffer severe psychological or
34 emotional trauma; or (ii) to suffer a temporary loss of or regres-
35 sion in cognitive or behavioral functioning or communicative
36 abilities, such that his ability to testify will be significantly
37 impaired. If the court so finds, the court may order the use of
38 alternative procedures for determining competency to testify or
39 for taking testimony of the party or witness with mental retarda-
40 tion including, but not limited to, the following:

41 (i) permitting a person familiar to the witness or party, such as
42 a family member, clinician, counselor, social worker or friend, to
43 sit near or next to him;

44 (ii) permitting the witness or party with mental retardation to
45 testify in court but off the witness stand; if the proceeding is a
46 bench proceeding, testimony may be taken at another location
47 within the courthouse but outside the courtroom; if the proceeding
48 is a jury trial, testimony may be taken on videotape out of the
49 presence of the jury or in a location chosen by the court or by
50 agreement of the parties; or

51 (iii) combining alternative procedures provided in (i) and (ii).

52 (c) When the proceedings are not criminal or juvenile delin-
53 quency related, testimony taken by videotape pursuant to an order
54 under paragraph (b)(1) shall be taken in the presence of the judge,

55 counsel for all parties, and such other persons as the court may
56 allow. Counsel shall be given the opportunity to examine or cross-
57 examine the witness or party with mental retardation to the same
58 extent as he would be permitted if ordinary procedures had been
59 followed.

60 (d) When the proceedings are criminal or juvenile delinquency
61 related, the defendant shall have the right to be present during the
62 taking of the testimony, to have an unobstructed view of the wit-
63 ness or party with mental retardation, and to have the witness or
64 party's view of the defendants be unobstructed.

65 (e) If the court orders that the testimony of the witness or party
66 with mental retardation be videotaped out of the presence of the
67 jury, the videotape shall be shown in court to the jury in the pres-
68 ence of the judge, the parties, and the parties' counsel. The video-
69 tape shall be marked as an exhibit and retained by the court as
70 part of the record of the case.

71 (f) Testimony taken by alternative procedures authorized by
72 this statute shall be admissible as substantive evidence to the
73 same extent as and in lieu of live testimony by the party or
74 witness in any proceeding in which such testimony is taken.

75 (g) The party or witness requesting that testimony be taken by
76 videotape shall bear the responsibility of producing an acceptable
77 videotape of the testimony. The Commonwealth shall reimburse
78 such party or witness for reasonable costs of producing such
79 videotape. Each party shall be afforded an opportunity to view the
80 recording before it is shown in the courtroom.

81 (h) The fact that the witness or party with mental retardation
82 has been found in a court proceeding to be incompetent to make
83 informed decisions of a personal, medical or financial nature, or
84 that he is under a guardianship or conservatorship, shall not pre-
85 clude the witness or party from testifying if he is found to be
86 competent to testify, and shall not preclude a determination of
87 competency to testify.

88 (i) A party or witness shall not be denied the benefit of appro-
89 priate alternative procedures provided by this act and the court
90 shall allow additional time or continuances to permit application
91 of such procedures.

92 (j) A person with expertise in mental retardation may be called
93 by the party or proponent of the witness to testify in all relevant
94 matters, including the competency of such party or witness.

95 (k) Nothing in this section shall be construed to prohibit a court
96 from using other appropriate means, consistent with this section
97 and other general or special laws and with the defendant's rights,
98 to accomplish the purposes of this act.