

## **Alternative Testimony for Adults With Disabilities**

Nine states provide statutorily for alternative testimony by adults with disabilities under certain circumstances. These nine states are: California, Colorado, Florida, Indiana, Louisiana, Michigan, Ohio, Oregon, and Vermont. Although there are some commonalities among the statutes, states have taken difference approaches to these laws. Some distinctions are noted below.

### **Procedural Context for Allowing Alternative Testimony**

- *Only certain criminal cases (generally crimes related to sex, abuse, or violence):* Indiana, Louisiana, Michigan, Ohio,
- *All criminal cases:* Colorado
- *Certain criminal and civil cases (generally cases related to sex, abuse or violence):* California, Oregon, Vermont
- *All civil and criminal cases:* Florida

### **Types of Alternative Testimony**

- *Closed Circuit television:* California, Colorado, Florida, Indiana, Louisiana, Michigan, Ohio, Oregon, and Vermont
- *Taped Deposition:* California, Florida, Indiana, Michigan, Ohio.
  - Taped depositions may have more limited purposes.
- *Rearranged Courtroom:* California, Michigan

### **Consideration of Alternative Testimony:**

- *Prosecution's Motion* – Ohio
- *Judge or Prosecution's Motion* - California
- *Judge or Either Party's Motion* - Colorado, Oregon, Florida, Indiana, Louisiana, Michigan, Vermont

### **Required Finding to Use Alternative Testimony**

- *Severe/Serious Emotional Harm* – Colorado, Oregon, Indiana, Louisiana, Ohio, Vermont
- *Moderate Harm* - Florida
- *Other Factors* - California, Michigan, Ohio

### **Evidence Required to Make Finding**

- *Expert Testimony Required* – Oregon, Louisiana
- *Other Evidence Permissible* - California, Indiana, Florida, Colorado, Michigan, Ohio, Vermont

### **Disability Definition**

- *Reference to Mental Health Statutes* – California, Colorado, Florida, Louisiana, Michigan, Ohio, Vermont
- *Defined within Alternative Testimony statute* – Indiana, Oregon

**North Carolina General Statutes**  
**Chapter 122C – Mental Health**  
**Definitions of Developmental Disability and Mental Retardation**

G.S. 122C-3(12) Definitions

- (12a) "Developmental disability" means a severe, chronic disability of a person which:
- a. Is attributable to a mental or physical impairment or combination of mental and physical impairments;
  - b. Is manifested before the person attains age 22, unless the disability is caused by a traumatic head injury and is manifested after age 22;
  - c. Is likely to continue indefinitely;
  - d. Results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, capacity for independent living, learning, mobility, self-direction and economic self-sufficiency; and
  - e. Reflects the person's need for a combination and sequence of special interdisciplinary, or generic care, treatment, or other services which are of a lifelong or extended duration and are individually planned and coordinated; or
  - f. When applied to children from birth through four years of age, may be evidenced as a developmental delay.
- (22) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22.

## **Autism in the Criminal Justice System**

**By Judge Kimberly Taylor (retired), Dr. Gary Mesibov and Dennis Debbaudt**

**2009**

Autism Spectrum Disorder (ASD) diagnoses are increasing at an alarming rate in North Carolina, across the country, and around the world. This increase in the incidence of ASD suggests that the criminal justice system (CJS) will certainly see increased contact with individuals with autism as victims, witnesses, and/or offenders. All criminal justice professionals who have contact with individuals who have ASD need to establish clear and consistent communication methods, verify facts, make appropriate accommodations, and insure fair justice and consequences for all concerned. Communications, behaviors, intent, and ability levels of people with autism vary greatly and present challenges for even the most experienced criminal justice professionals. Attorneys and judges must avoid misinterpretation of behaviors and characteristics typical of those with autism since these behaviors and characteristics could be misinterpreted as evidence of guilt, indifference, or lack of remorse (1).

### **What Is Autism?**

Autism is defined as a neuro-developmental disability, meaning that it involves the brain and starts very early in life when the brain is still forming, still plastic, and still changeable. Autism involves differences and difficulties in several areas: social interaction; communication; the presence of narrow, repetitive behaviors; and difficulty adjusting to change. ASD occurs more frequently in males than females—usually a four-to-one ratio. Additionally, there is a wide range in intellectual ability for individuals with ASD where IQ's range from below 25 to above 150.

### **Low functioning individuals**

The term low functioning may be used to describe persons with lower IQs. These persons have difficulty with basic life skills such as safely crossing a street, negotiating a financial transaction, and making sense of social interactions. They typically have a caregiver with them at all times. Oftentimes, these low functioning individuals are also non verbal. Those who are non verbal may use alternative communication such as American or other Sign Language, Picture Exchange Communications Systems (PECS) or computers that can speak for them.

Although individuals with ASD could commit a criminal offense, their intent to do so could be difficult to determine, questionable in court, and their competency may not reach the level of responsibility for an offense. Also, in most circumstances, individuals would be greatly compromised in their ability to assist in their own defense.

up to seven times more contacts with law enforcement during their lifetimes, than members of the general population (3). While there is no evidence to suggest that they will commit crime at a higher rate than the general population, those that do and can be held responsible for their acts will typically be the more independent, so-called higher functioning person with autism or Asperger syndrome (4).

Persons with ASD often get into trouble without even realizing they have committed an offense. Offenses such as making threatening statements; personal, telephone, or internet stalking; inappropriate sexual advances; downloading child pornography; accomplice crime with false friends; and making physical outbursts at school or in the community, would certainly strike most of society as offenses which demand some sort of punishment. This assumption, though valid at face value, may not take into account the particular issues that challenge the ASD individual. Problems with sensory overload, poor social awareness, semantic misunderstandings, inability to deal with changes in routine or structure, and little to no understanding of non-verbal communications, are the very kinds of things that make more appropriate responses to society very difficult for someone with ASD. For example, what appears as anti-social behavior to the “regular” world is often simply the manifestation of the ASD person’s social misunderstandings. While most would see too many phone calls in the middle of the night as aberrant phone stalking, the ASD person might well view the situation as one friend wanting to talk to another, no matter the time or frequency of calls. And a physical outburst at school might well be related to the ASD person’s sensory dysfunction, inability to deal with interruptions in the daily routine or emotional lability. Emotional lability means to be susceptible to change, error, or instability and stems from its Latin roots meaning prone to slip. This often presents itself in individuals with ASD; their emotions can change very quickly. They can become upset, scared, or anxious very quickly. They may also be very anxious one minute and then calm the next or vice versa. So, while the individual with ASD might have committed the offense in question, the intent might well have been anything other than to do harm (5).

The offender may appear as normal, be more able academically and more independent than a person with classic or low-functioning autism. Yet, these strengths can mask social and communication deficits that go unseen or misunderstood by those with whom they have contact.

Their communication difficulties include hardships in making sense of the verbal and body language of others. Their difficulty in maintaining eye contact or insistence on changing the subject of conversation to a topic of their choice—all typical diagnostic behaviors of a person with autism—can mislead an investigator, attorney, or judge. They may see someone who seems to lack respect and observe a “rude, fidgety and belligerent” person who, by nature of his lack of eye contact and evasive conversation, appears to have something to hide. Standard interrogation techniques that utilize trickery and deceit can confuse the concrete thinking person who has autism or Asperger syndrome into producing a misleading statement or false confession. They can become overly influenced by the friendly interrogator. Isolated and in a never-

Criminal justice professionals should be aware that a person with autism has less ability to understand verbal communication and is more limited than their overall skills. The simplest thing professionals can do to be helpful is to speak slowly. Individuals with ASD process information much more slowly than typical people who have their same intelligence level and skills.

Another helpful tool is to always have a pen and paper available. If in doubt, write it down. If they are in doubt, let them write it down. Their visual skills are much stronger than their auditory skills.

Individuals with ASD are a concrete group; therefore, criminal justice professionals must not mistake their concreteness for making a wise-crack. One child with autism was given an intelligence test in which he had to take felt pieces and put them together to make another child's face. The child made a face with a big smile. The child with autism was then asked, "How's the child feel?" And he said, "Soft." A teenager with autism was asked by a questioner who knew he had recently turned fifteen, "How old are you? The teen replied "Fifteen". The questioner then asked, "When was that?" "On my birthday", he replied. Somebody could take this type of response as a wise-crack because most people would understand what the questioner meant. However, very often people with autism have trouble with the context, connotation, and/or the meaning of the sentence. For this reason, professionals must be very direct and very concrete in their language choice when interacting with autistic individuals, and they must never rush to judgment concerning the responses of people with autism. Frequently, their responses seem to be disrespectful, "smart aleck" and off topic, but this behavior is normal for the autism spectrum.

Weak verbal abilities often mask much higher intelligence levels in people with autism. A lot of times when they go through life, particularly in school, they don't understand what the teacher is saying. That gets them in trouble because the teacher thinks they're not listening and they're not obeying. Very often to get out of this situation, they'll just agree. As a result the teacher keeps saying, "Do you hear me; do you understand me?" They don't understand but they can tell the teacher is getting annoyed. Finally they just say "yes". They have learned that an affirmative answer gets them out of the situation. Thus in interview settings the effects of pushing too hard or too intensely for answers will generate affirmative answers from individuals with autism which do not necessarily reflect any truth.

People with autism have reported that it is really hard for them to concentrate and understand what they are saying when they are looking directly at somebody. Many people in society see this as rude behavior. A judge or attorney who asks questions and then observes that the person with autism is looking off into the distance may assume this reflects a lack of respect. In reality, this is normal behavior for the individual. When interviewed, one young man with autism made the point. "I keep telling people 'I'm looking at you. I'm looking at you. I'm looking at you. I'm looking at you. I don't understand a word that you're saying, but I'm looking at you. I'm looking at you". And some people with autism have actually said, "You can have your choice

methods of communication will help the person with autism to answer in a way that can be understood and make sense to all involved parties.

### **Environmental Accommodations**

People with autism may have more difficulty in that they are over stimulated by the sensory environment—the sights and sounds that will distress them. Noises are louder for them. Normal background noise that may seem negligible to the average person can be completely overwhelming or overpowering to this population. When this occurs, not only can they not hear what people are asking them, but they can sometimes become very anxious and even terrorized by the situation or by the noise.

Additionally, lights are often brighter for those with ASD. For example, when a person with autism is outside on a sunny day—which in North Carolina most of us love—the light may be very over stimulating causing the person to become upset. For the person with ASD, it would be like somebody shining a very, very bright flashlight right in the eye. Therefore, in many environments, the lighting itself causes distress.

Intense sensitivity can extend to any of the senses and really interrupt functioning on many levels. Many very, very capable people with autism will score high on an IQ test but can have horrible school records. The common noise, disruption, and movement in a typical classroom in a typical school can be so disruptive, annoying, upsetting, distracting that they cannot focus on that one thing in the classroom on which they are supposed to focusing—which is the teacher or maybe an assignment. The same situation may exist in a courtroom or interview room.

As a result, adjustments in the environment can be crucial to a successful interview. Consider making accommodations to the sensory environment when interacting with victim, witness, or offender who has autism or Asperger syndrome. Keep lighting low; use subdued colors; limit distracting images or pictures; eliminate the presence of non-essential personnel; avoid using perfume, aftershave, or scented soaps; and avoid touching the person with autism.

### **Sentencing Considerations**

In those cases where it has become clear that the person has committed the crime and qualifies for a diversion or probation program, the offender may be further stymied by his autism. Traditional options might include group therapy with other offenders. Meeting with strangers, group discussions about personal feelings, sharing personal information or contributing comments about others will be difficult conditions for the person ASD to meet (9).

Corrections professionals can find success with the ASD population when they create diversion or probation programs that:

- Use language and terms the person will understand.

language the questioner is using. Each case will be different, each fact pattern is different, and the ability of people with ASD to form intent and to control actions certainly differs from one individual to the next. All concerned parties should consider choosing an expert who can both interpret and testify in court if needed . There are so many things in life that the person with autism can misunderstand even though they are trying hard and doing their best. The world is just complicated for them.

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#### Support Agencies:

TEACCH [teacch.com](http://teacch.com) 919-966-2174

Autism Society of North Carolina [autismsociety-nc.org](http://autismsociety-nc.org) 800-442-2762

## **Autism Principles for Prosecutors**

1. Prosecutors should take the nature and effects of Autism Spectrum Disorder (ASD) into account in determining both whether to prosecute and how to resolve a criminal case involving a defendant affected by ASD. .
2. Because of the broad range of behaviors manifested in persons affected by ASD (as illustrated below), objective ASD resources and objective ASD experts should be sought out in local communities to assist law enforcement and prosecutors in understanding ASD and evaluating the appropriateness of such cases for prosecution.
3. In determining whether to charge or prosecute a case, prosecutors should be aware that some individuals affected by ASD may require little more than giving explicit instructions to prevent recurrence of the offensive behavior. Objective ASD experts may be of assistance to the prosecutor in determining the corrective action necessary to prevent future or recurrent behavior. As persons with ASD age, they may also become better adapted and present different behaviors than in their youth; therefore, both the age, and the aging, of a person affected by ASD should be considered by the prosecutor in resolving relevant criminal cases.
4. Prosecutors should consider deferring criminal prosecution in cases involving young persons affected by ASD who are first offenders.
5. When considering alternate dispositions of criminal matters, prosecutors and judges often look for expressions of remorse from the offender to gain reassurance of future compliance with the law. Prosecutors and judges should be aware that ASD may impair the ability of some offenders to respond with expressions of remorse.
6. Prosecutors should be aware that in an interrogation setting a person affected by ASD may appear deceptive because of deficits in communication skills, such as the inability to make normal eye contact. At the same time persons affected by ASD may be over compliant with suggestions made by police officers. Conversely, some persons affected by ASD may have learned to lie through experience and can become skillful liars. An objective ASD expert can aid interrogators in developing a pre-test to gauge the autistic person's ability for, and quality of, deception.
7. Prosecutors should encourage therapeutic intervention in cases of suspected child pornography use by persons affected by ASD and seriously consider probationary periods and deferred prosecutions to monitor compliance before actual prosecutions in such cases. Prosecutors should pay particular attention to whether the offender has ASD, whether there is any prior history of directly offending against children, having produced or distributed child pornography and whether there is a prior history involving child pornography.



8. Persons with ASD experience lifelong difficulties. While, many persons affected by ASD live independent, full lives; some persons affected by ASD are not able to live independently, and need to live with their families – their parents and/or siblings. Therefore sex offender registration and residency restrictions should be considered by prosecutors in sentencing negotiations based upon the offender's functioning level, individual circumstances and risk of recurrent behavior.

**NOTE: These principals were adapted for use in the State of North Carolina by District Attorney Michael D. Parker, elected District Attorney for Judicial District 22A.**



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OF PARENTS

## Bullying And Autism: Study Finds Almost Half Of Adolescents With An Autism Spectrum Disorder Have Been Victimized

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All bullying is troubling -- no matter where, when or to whom it occurs.

But a new study published in the *Journal of Autism and Developmental Disorders* suggests that teenagers with autism spectrum disorders (ASDs) -- who "may be uniquely vulnerable to [bullying] given the social and relational problems that are hallmarks of their condition," the authors write -- are targeted much more often than their peers who don't have ASDs.

The study, which draws information from a decade-long examination of "adolescents receiving special education services" done on behalf of the U.S. Department of Education, shows that 46.3% -- or nearly half -- of young men and women with ASDs are victims of bullying, while 14.8% engage in "perpetration" themselves. Another 8.9% fall into both categories simultaneously ("victimization/perpetration").

The conclusions were based on interviews with more than 900 parents of children with ASDs; researchers also collected feedback from staff members at the students' schools and from school principals. This is the first nationally representative study to look at victimization as well as perpetration in this population, the authors write.

While the figures for perpetration and "victimization/perpetration" hew closely to estimates for non-spectrum teens (13% and 6.8%, respectively), the victimization statistic for adolescents on the spectrum is far higher than the 10.6% estimate for teens without ASDs.

Students with ADHD *as well as* an ASD were victimized more often than their non-ADHD peers on the spectrum (55.6% vs. 41.4%), the researchers found. They were also more likely to be perpetrators of bullying (20.9% vs. 11.5%) and to experience the "victimization/perpetration" mix.

The statistics also reveal that the integration of teens with ASDs into general education classes (vs. special) is not always a solution to the bullying problem; in fact, it may exacerbate it. This conclusion "contradicts previous research," according to the authors. While previous studies have shown that kids with ASDs would benefit from learning and working with the general student population at school, this research found that students on the spectrum who had more than three quarters of their classes in general education were more likely to be victimized (but less likely to be bullies themselves) than other students. In fact, more than 70% of students with 76-100% of their classes in general education were found to be victims of bullying.

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The researchers acknowledged that the study was likely limited by a broad definition of "bullying" and by parental underreporting.

Still, they call for improved anti-bullying programs that are more sensitive to the specific experiences of students with ASDs and ADHD. "The study's lead author, Dr. Paul R. Sterzing, said the research documented "a profound public health problem."

Caroline Miller, editorial director at the Child Mind Institute, said that the research "wasn't exactly a surprise" -- but held out hope that behaviors might already have changed in the more than ten years since the survey's data were collected in 2000-1.

**Read more on HuffPost Parents:**

**§ 15A-1225.1. Child witnesses; remote testimony.****(a) Definitions:**

- (1) **Child.** – For the purposes of this section, a minor who is under the age of 16 years old at the time of the testimony.
- (2) **Criminal proceeding.** – Any hearing or trial in a prosecution of a person charged with violating a criminal law of this State, and any hearing or proceeding conducted under Subchapter II of Chapter 7B of the General Statutes where a juvenile is alleged to have committed an offense that would be a criminal offense if committed by an adult.
- (3) **Remote testimony.** – A method by which a child witness testifies in a criminal proceeding outside of the physical presence of the defendant.

**(b) Remote Testimony Authorized.** – In a criminal proceeding, a child witness who has been found competent to testify may testify, under oath or affirmation, other than in an open forum when the court determines:

- (1) That the child witness would suffer serious emotional distress, not by the open forum in general, but by testifying in the defendant's presence, and
- (2) That the child's ability to communicate with the trier of fact would be impaired.

**(c) Hearing Procedure.** – Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. Hearings in the superior court division, and hearings conducted under Subchapter II of Chapter 7B of the General Statutes, shall be recorded. The presence of the child witness is not required at the hearing unless ordered by the presiding judge.

**(d) Order.** – An order allowing or disallowing the use of remote testimony shall state the findings of fact and conclusions of law that support the court's determination. An order allowing the use of remote testimony shall do the following:

- (1) State the method by which the child is to testify.
- (2) List any individual or category of individuals allowed to be in, or required to be excluded from, the presence of the child during the testimony.
- (3) State any special conditions necessary to facilitate the cross-examination of the child.
- (4) State any condition or limitation upon the participation of individuals in the child's presence during his or her testimony.
- (5) State any other condition necessary for taking or presenting the testimony.

**(e) Testimony.** – The method used for remote testimony shall allow the judge, jury, and defendant or juvenile respondent to observe the demeanor of the child as the child testifies in a similar manner as if the child were in the open forum. The court shall ensure that the defense counsel, except a pro se defendant, is physically present where the child testifies, has a full and fair opportunity for cross-examination of the child witness, and has the ability to communicate privately with the defendant or juvenile respondent during the remote testimony. Nothing in this section shall be construed to limit the provisions of G.S. 15A-1225.

**(f) Nonexclusive Procedure and Standard.** – Nothing in this section shall:

- (1) Prohibit the use or application of any other method or procedure authorized or required by statute, common law, or rule for the introduction into evidence of the statements or testimony of a child in a criminal or noncriminal proceeding.
- (2) Be construed to require a court, in noncriminal proceedings, to apply the standard set forth in subsection (b) of this section, or to deviate from a standard or standards authorized by statute, common law, or rule, for allowing the use of remote testimony in noncriminal proceedings.

**(g)** This section does not apply if the defendant is an attorney pro se, unless the defendant has a

court-appointed attorney assisting the defendant in the defense, in which case only the court-appointed attorney shall be permitted in the room with the child during the child's testimony. (2009-356, s. 1.)

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**Rule 616. Alternative testimony of witnesses with developmental disabilities or mental retardation in civil cases and special proceedings.**

(a) Definitions. – The following definitions apply to this section:

- (1) The definitions set out in G.S. 122C-3.
- (2) "Remote testimony" means a method by which a witness testifies outside of an open forum and outside of the physical presence of a party or parties.

(b) Remote Testimony Authorized. – A person with a developmental disability or a person with mental retardation who is competent to testify may testify by remote testimony in a civil proceeding or special proceeding if the court determines by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the presence of a named party or parties or from testifying in an open forum and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the presence of a named party or parties or from testifying in an open forum.

(c) Hearing Procedure. – Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. The hearing shall be recorded unless recordation is waived by all parties. The presence of the witness is not required at the hearing unless so ordered by the presiding judge.

(d) Order. – An order allowing or disallowing the use of remote testimony shall state the findings and conclusions of law that support the court's determination. An order allowing the use of remote testimony also shall do all of the following:

- (1) State the method by which the witness is to testify.
- (2) List any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony.
- (3) State any special conditions necessary to facilitate the cross-examination of the witness.
- (4) State any condition or limitation upon the participation of individuals in the presence of the witness during the testimony.
- (5) State any other conditions necessary for taking or presenting testimony.

(e) Testimony. – The method of remote testimony shall allow the trier of fact and all parties to observe the demeanor of the witness as the witness testifies in a similar manner as if the witness were testifying in the open forum. Except as provided in this section, the court shall ensure that the counsel for all parties is physically present where the witness testifies and has a full and fair opportunity for examination and cross-examination of the witness. In a proceeding where a party is representing itself, the court may limit or deny the party from being physically present during testimony if the court finds that the witness would suffer serious emotional distress from testifying in the presence of the party. A party may waive the right to have counsel physically present where the witness testifies.

(f) Nonexclusive Procedure and Standard. – Nothing in this section shall prohibit the use or application of any other method or procedure authorized or required by law for the introduction into evidence of statements or testimony of a person with a developmental disability or a person with mental retardation. (2009-514, s. 1.)

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**Rule 804. Hearsay exceptions; declarant unavailable.**

(a) Definition of unavailability. – "Unavailability as a witness" includes situations in which the declarant:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
- (3) Testifies to a lack of memory of the subject matter of his statement; or
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) Former Testimony. – Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (2) Statement Under Belief of Impending Death. – A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.
- (3) Statement Against Interest. – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.
- (4) Statement of Personal or Family History. – (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
- (5) Other Exceptions. – A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his

intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. (1983, c. 701, s. 1.)

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**§ 15A-1225.2. Witnesses with developmental disabilities or mental retardation; remote testimony.**

(a) Definitions. – The following definitions apply to this section:

- (1) The definitions set out in G.S. 122C-3.
- (2) "Remote testimony" means a method by which a witness testifies outside of an open forum and outside of the physical presence of a party or parties.

(b) Remote Testimony Authorized. – A person with a developmental disability or a person with mental retardation who is competent to testify may testify by remote testimony in a prosecution of a person charged with violating a criminal law of this State and in any hearing or proceeding conducted under Subchapter II of Chapter 7B of the General Statutes where a juvenile is alleged to have committed an offense that would be a criminal offense if committed by an adult if the court determines by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the presence of the defendant and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the presence of the defendant.

(c) Hearing Procedure. – Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. The hearing shall be recorded unless recordation is waived by all parties. The presence of the witness is not required at the hearing unless so ordered by the presiding judge.

(d) Order. – An order allowing or disallowing the use of remote testimony shall state the findings and conclusions of law that support the court's determination. An order allowing the use of remote testimony also shall do all of the following:

- (1) State the method by which the witness is to testify.
- (2) List any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony.
- (3) State any special conditions necessary to facilitate the cross-examination of the witness.
- (4) State any condition or limitation upon the participation of individuals in the presence of the witness during the testimony.
- (5) State any other conditions necessary for taking or presenting testimony.

(e) Testimony. – The method of remote testimony shall allow the trier of fact and all parties to observe the demeanor of the witness as the witness testifies in a similar manner as if the witness were testifying in the open forum. The court shall ensure that the counsel for all parties, except a pro se defendant, is physically present where the witness testifies and has a full and fair opportunity for examination and cross-examination of the witness. The court shall ensure that the defendant or juvenile respondent has the ability to communicate privately with defense counsel during the remote testimony. A party may waive the right to have counsel physically present where the witness testifies. Nothing in this section shall be construed to limit the provisions of G.S. 15A-1225.

(f) Nonexclusive Procedure and Standard. – Nothing in this section shall prohibit the use or application of any other method or procedure authorized or required by law for the introduction into evidence of statements or testimony of a person with a developmental disability or a person with mental retardation. (2009-514, s. 2.)

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**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009**

**SESSION LAW 2009-270  
HOUSE BILL 1438**

AN ACT TO PROVIDE FOR A PILOT PROGRAM TO DETERMINE THE EFFECTIVENESS OF USING VIDEOCONFERENCE TECHNOLOGY TO CONDUCT COURT PROCEEDINGS, OTHER THAN TRIALS, INVOLVING PERSONS IN THE CUSTODY OF THE DEPARTMENT OF CORRECTION AND IN LOCAL CONFINEMENT FACILITIES.

The General Assembly of North Carolina enacts:

**SECTION 1.** The Administrative Office of the Courts, in consultation with the Department of Correction, shall conduct a pilot program to test the feasibility of using videoconference or similar technology to conduct court proceedings involving defendants in the custody of the Department of Correction, instead of requiring live appearances in court for those defendants. The Administrative Office of the Courts shall designate two counties to participate in the pilot, and the Department of Correction shall designate one prison facility. The Administrative Office of the Courts may also designate one or more counties to participate in a pilot program involving persons in the custody of local confinement facilities to test the feasibility of using videoconferencing equipment to conduct proceedings authorized by this act but not otherwise authorized by law.

**SECTION 2.** Notwithstanding any other provision of law, the courts participating in the pilot program authorized by this act may conduct proceedings required under G.S. 15A-511, Article 26 of Chapter 15A of the General Statutes, G.S. 15A-601, and G.S. 15A-941 by videoconference without the consent of the defendant. If a defendant voluntarily and knowingly waives his or her right to appear in person, the court may also accept guilty pleas and impose sentences in cases in which the plea is taken by videoconference, conduct hearings on motions, and conduct probation modification or revocation proceedings. The waiver may be taken by videoconference. In the jurisdictions participating in the pilot programs, no proceeding in which a person is charged with a capital felony may be conducted using videoconferencing equipment, but nothing in this act shall be construed to limit the use of testimony at a trial taken by videoconferencing equipment when the testimony is otherwise allowed by law to be taken in that manner.

**SECTION 3.** The equipment used in conducting the videoconference proceedings authorized by this act shall be used in a manner that ensures that the judicial official conducting the proceeding and the defendant can see and hear each other and that ensures that the defendant and his or her attorney may communicate during the proceeding in a manner that preserves the defendant's right to confidential communication with counsel.

**SECTION 4.** The North Carolina Rural Courts Commission, in cooperation with the Department of Correction, shall study the effectiveness of the use of videoconferences for these proceedings and report its findings and recommendations for expansion or modification to the Chief Justice, the Secretary of Correction, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Senate and House Appropriations Committees. The study shall address the costs of implementing videoconferencing on a statewide basis for these purposes, as well as the cost savings obtained through the use of such equipment, the quality of the transmissions, the frequency of use, and any other relevant information the Commission deems appropriate. The report shall be submitted no later than May 1, 2010. The Administrative Office of the Courts and the Department of Correction may seek grant funds to offset any costs associated with the study that cannot be provided by appropriations to those agencies.



**SECTION 5.** This act is effective when it becomes law.  
In the General Assembly read three times and ratified this the 1<sup>st</sup> day of July, 2009.

s/ Walter H. Dalton  
President of the Senate

s/ Joe Hackney  
Speaker of the House of Representatives

s/ Beverly E. Perdue  
Governor

Approved 10:38 a.m. this 10<sup>th</sup> day of July, 2009

**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009**

**SESSION LAW 2009-514  
HOUSE BILL 775**

AN ACT TO PROVIDE FOR ALTERNATIVE MEANS OF TESTIMONY FOR PERSONS WITH DEVELOPMENTAL DISABILITIES AND PERSONS WITH MENTAL RETARDATION, AS RECOMMENDED BY THE JOINT STUDY COMMITTEE ON AUTISM SPECTRUM DISORDER AND PUBLIC SAFETY.

The General Assembly of North Carolina enacts:

**SECTION 1.** Article 6 of Chapter 8C of the General Statutes is amended by adding a new section to read:

**"Rule 616. Alternative testimony of witnesses with developmental disabilities or mental retardation in civil cases and special proceedings.**

(a) Definitions. – The following definitions apply to this section:

(1) The definitions set out in G.S. 122C-3.

(2) "Remote testimony" means a method by which a witness testifies outside of an open forum and outside of the physical presence of a party or parties.

(b) Remote Testimony Authorized. – A person with a developmental disability or a person with mental retardation who is competent to testify may testify by remote testimony in a civil proceeding or special proceeding if the court determines by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the presence of a named party or parties or from testifying in an open forum and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the presence of a named party or parties or from testifying in an open forum.

(c) Hearing Procedure. – Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. The hearing shall be recorded unless recordation is waived by all parties. The presence of the witness is not required at the hearing unless so ordered by the presiding judge.

(d) Order. – An order allowing or disallowing the use of remote testimony shall state the findings and conclusions of law that support the court's determination. An order allowing the use of remote testimony also shall do all of the following:

(1) State the method by which the witness is to testify.

(2) List any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony.

(3) State any special conditions necessary to facilitate the cross-examination of the witness.

(4) State any condition or limitation upon the participation of individuals in the presence of the witness during the testimony.

(5) State any other conditions necessary for taking or presenting testimony.

(e) Testimony. – The method of remote testimony shall allow the trier of fact and all parties to observe the demeanor of the witness as the witness testifies in a similar manner as if the witness were testifying in the open forum. Except as provided in this section, the court shall ensure that the counsel for all parties is physically present where the witness testifies and has a full and fair opportunity for examination and cross-examination of the witness. In a proceeding where a party is representing itself, the court may limit or deny the party from being physically present during testimony if the court finds that the witness would suffer serious emotional distress from testifying in the presence of the party. A party may waive the right to have counsel physically present where the witness testifies.

(f) Nonexclusive Procedure and Standard. – Nothing in this section shall prohibit the use or application of any other method or procedure authorized or required by law for the introduction into evidence of statements or testimony of a person with a developmental disability or a person with mental retardation."

**SECTION 2.** Article 73 of Chapter 15A of the General Statutes is amended by adding a new section to read:

**"§ 15A-1225.2. Witnesses with developmental disabilities or mental retardation; remote testimony.**

(a) Definitions. – The following definitions apply to this section:

(1) The definitions set out in G.S. 122C-3.

(2) "Remote testimony" means a method by which a witness testifies outside of an open forum and outside of the physical presence of a party or parties.

(b) Remote Testimony Authorized. – A person with a developmental disability or a person with mental retardation who is competent to testify may testify by remote testimony in a prosecution of a person charged with violating a criminal law of this State and in any hearing or proceeding conducted under Subchapter II of Chapter 7B of the General Statutes where a juvenile is alleged to have committed an offense that would be a criminal offense if committed by an adult if the court determines by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the presence of the defendant and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the presence of the defendant.

(c) Hearing Procedure. – Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. The hearing shall be recorded unless recordation is waived by all parties. The presence of the witness is not required at the hearing unless so ordered by the presiding judge.

(d) Order. – An order allowing or disallowing the use of remote testimony shall state the findings and conclusions of law that support the court's determination. An order allowing the use of remote testimony also shall do all of the following:

(1) State the method by which the witness is to testify.

(2) List any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony.

(3) State any special conditions necessary to facilitate the cross-examination of the witness.

(4) State any condition or limitation upon the participation of individuals in the presence of the witness during the testimony.

(5) State any other conditions necessary for taking or presenting testimony.

(e) Testimony. – The method of remote testimony shall allow the trier of fact and all parties to observe the demeanor of the witness as the witness testifies in a similar manner as if the witness were testifying in the open forum. The court shall ensure that the counsel for all parties, except a pro se defendant, is physically present where the witness testifies and has a full and fair opportunity for examination and cross-examination of the witness. The court shall ensure that the defendant or juvenile respondent has the ability to communicate privately with defense counsel during the remote testimony. A party may waive the right to have counsel physically present where the witness testifies. Nothing in this section shall be construed to limit the provisions of G.S. 15A-1225.

(f) Nonexclusive Procedure and Standard. – Nothing in this section shall prohibit the use or application of any other method or procedure authorized or required by law for the introduction into evidence of statements or testimony of a person with a developmental disability or a person with mental retardation."

**SECTION 3.** This act becomes effective December 1, 2009, and applies to any hearings or trials held on or after that date. Nothing in this act shall be construed to abrogate any judicial rulings or decisions prior to the effective date of this act that allowed or disallowed witness testimony in any criminal proceeding or abrogate any judicial rulings that prohibit a psychological evaluation of an unwilling witness.

In the General Assembly read three times and ratified this the 7<sup>th</sup> day of August, 2009.

s/ Marc Basnight  
President Pro Tempore of the Senate

s/ Joe Hackney  
Speaker of the House of Representatives

s/ Beverly E. Perdue  
Governor

Approved 3:27 p.m. this 26<sup>th</sup> day of August 2009