

# **WEST VIRGINIA LEGISLATURE**

## **2016 REGULAR SESSION**

**Introduced**

### **Senate Bill 504**

BY SENATORS ASHLEY, LAIRD, MAYNARD, MILLER,

ROMANO, WALTERS AND PLYMALE

[Introduced February 3, 2016;

Referred to the Committee on the Judiciary.]

1 A BILL to amend and reenact §49-5-101 of the Code of West Virginia, 1931, as amended; to  
 2 amend and reenact §62-6B-2 of said code; and to amend said code by adding thereto a  
 3 new section, designated §62-6B-6, all relating to confidentiality of juvenile records;  
 4 providing that a videotaped or otherwise recorded interview is prohibited from disclosure;  
 5 defining the term “interviewed child”; defining “recorded/videotaped interview”; providing  
 6 that videotaped or otherwise recorded interviews of children are confidential and not  
 7 subject to disclosure; providing that in a criminal proceeding the prosecuting attorney must  
 8 disclose the existence of a recorded interview; providing in child abuse and neglect  
 9 proceedings that the prosecuting attorney, or if no prosecuting attorney is involved in the  
 10 proceeding, then the petitioner therein, disclose the existence of a videotaped or otherwise  
 11 recorded interview; providing that in a circuit court, family court or magistrate court  
 12 proceeding the party in possession of a videotaped or otherwise recorded interview  
 13 disclose the existence of the interview contemporaneously with the disclosure of  
 14 witnesses; and providing the prosecuting attorney or other party in possession of a  
 15 recorded interview disclose for viewing to counsel for a criminal defendant or, in the case  
 16 of a child abuse and neglect proceeding, to the counsel for the respondent parents, the  
 17 guardian ad litem and the court appointed special advocate for the child the existence of  
 18 the recorded interview.

*Be it enacted by the Legislature of West Virginia:*

1 That §49-5-101 of the Code of West Virginia, 1931, as amended, be amended and  
 2 reenacted; that §62-6B-2 of said code be amended and reenacted; and that said code be  
 3 amended by adding thereto a new section, designated §62-6B-6, all to read as follows:

## **CHAPTER 49. CHILD WELFARE.**

### **ARTICLE 5. RECORD KEEPING AND DATABASE.**

**§49-5-101. Confidentiality of records; nonrelease of records; exceptions; penalties.**

1 (a) Except as otherwise provided in this chapter or by order of the court, all records and  
2 information concerning a child or juvenile which are maintained by the Division of Juvenile  
3 Services, the Department of Health and Human Resources, a child agency or facility, court or  
4 law-enforcement agency is confidential and shall not be released or disclosed to anyone,  
5 including any federal or state agency.

6 (b) Notwithstanding the provisions of subsection (a) of this section or any other provision  
7 of this code to the contrary, records concerning a child or juvenile, except adoption records and  
8 records disclosing the identity of a person making a complaint of child abuse or neglect may be  
9 made available:

10 (1) Where otherwise authorized by this chapter;

11 (2) To:

12 (A) The child;

13 (B) A parent whose parental rights have not been terminated; or

14 (C) The attorney of the child or parent;

15 (3) With the written consent of the child or of someone authorized to act on the child's  
16 behalf; or

17 (4) Pursuant to an order of a court of record. However, the court shall review the record  
18 or records for relevancy and materiality to the issues in the proceeding and safety, and may issue  
19 an order to limit the examination and use of the records or any part thereof.

20 (c) In addition to those persons or entities to whom information may be disclosed under  
21 subsection (b) of this section, information related to child abuse or neglect proceedings, except  
22 information relating to the identity of the person reporting or making a complaint of child abuse or  
23 neglect, shall be made available, upon request, to:

24 (1) Federal, state or local government entities, or any agent of those entities, including  
25 law-enforcement agencies and prosecuting attorneys, having a need for that information in order  
26 to carry out its responsibilities under law to protect children from abuse and neglect;

27 (2) The child fatality review team;  
28 (3) Child abuse citizen review panels;  
29 (4) Multidisciplinary investigative and treatment teams; or  
30 (5) A grand jury, circuit court or family court, upon a finding that information in the records  
31 is necessary for the determination of an issue before the grand jury, circuit court or family court.

32 (d) In the event of a child fatality or near fatality due to child abuse and neglect, information  
33 relating to a fatality or near fatality shall be made public by the Department of Health and Human  
34 Resources and to the entities described in subsection (c) of this section, all under the  
35 circumstances described in that subsection. However, information released by the Department of  
36 Health and Human Resources pursuant to this subsection may not include the identity of a person  
37 reporting or making a complaint of child abuse or neglect. For purposes of this subsection, A near  
38 fatality@ means any medical condition of the child which is certified by the attending physician to  
39 be life threatening.

40 (e) Except in juvenile proceedings which are transferred to criminal proceedings, law-  
41 enforcement records and files concerning a child or juvenile shall be kept separate from the  
42 records and files of adults and not included within the court files. Law-enforcement records and  
43 files concerning a child or juvenile shall only be open to inspection pursuant to section one  
44 hundred three of this article.

45 (f) Any person who willfully violates this section is guilty of a misdemeanor and, upon  
46 conviction, shall be fined not more than \$1,000, or confined in jail for not more than six months,  
47 or both fined and confined. A person convicted of violating this section is also liable for damages  
48 in the amount of \$300 or actual damages, whichever is greater.

49 (g) Notwithstanding the provisions of this section, or any other provision of this code to the  
50 contrary, the name and identity of any juvenile adjudicated or convicted of a violent or felonious  
51 crime shall be made available to the public;

52 (h)(1) Notwithstanding the provisions of this section, or any other provision of this code to  
 53 the contrary, the Division of Juvenile Services may provide access to and the confidential use of  
 54 a treatment plan, court records or other records of a juvenile to an agency in another state which:

55 (A) Performs the same functions in that state that are performed by the Division of Juvenile  
 56 Services in this state;

57 (B) Has a reciprocal agreement with this state; and

58 (C) Has legal custody of the juvenile.

59 (2) A record which is shared under this subsection may only provide information which is  
 60 relevant to the supervision, care, custody and treatment of the juvenile.

61 (3) The Division of Juvenile Services is authorized to enter into reciprocal agreements with  
 62 other states and to propose rules for legislative approval in accordance with article three, chapter  
 63 twenty-nine-a of this code to implement this subsection.

64 (4) Other than the authorization explicitly given in this subsection, this subsection may not  
 65 be construed to enlarge or restrict access to juvenile records as provided elsewhere in this code.

66 (5) The records subject to disclosure pursuant to subsection (b) shall not include a  
 67 recorded/videotaped interview, as defined in subsection (6), section two, article six-b, chapter  
 68 sixty-two of this code, the disclosure of which is exclusively subject to the provisions of section  
 69 six, article six-b, chapter sixty-two of this code.

**CHAPTER 62. CRIMINAL PROCEDURE.**

**ARTICLE 6B. PROTECTION AND PRESERVATION OF STATEMENTS AND  
 TESTIMONY OF CHILD WITNESS.**

**§62-6B-2. Definitions.**

1 For the purposes of this article, the words or terms defined in this section, and any variation  
 2 of those words or terms required by the context, have the meanings ascribed to them in this  
 3 section. These definitions are applicable unless a different meaning clearly appears from the

4 context.

5 (1) AChild witness@ means a person under the age of sixteen years of age who is or will  
6 be called to testify in a criminal matter concerning an alleged violation of the provisions of sections  
7 three, four, five and seven, article eight-b, chapter sixty-one of this code in which the child is the  
8 alleged victim.

9 (2) ALive, closed-circuit television@ means a simultaneous transmission, by closed-circuit  
10 television or other electronic means, between the courtroom and the testimonial room.

11 (3) AOperator@ means the individual authorized by the court to operate the closed-circuit  
12 television equipment used in accordance with the provisions of this article.

13 (4) ATestimonial room@ means a room within the courthouse other than the courtroom  
14 from which the testimony of a child witness or the defendant is transmitted to the courtroom by  
15 means of live, closed-circuit television.

1 (5) "Interviewed child" shall mean any person under the age of eighteen who has been  
2 interviewed by means of any recording or videotaping equipment in connection with alleged  
3 criminal behavior or allegations of abuse and neglect of any child under the age of eighteen.

4 (6) "Recorded/videotaped interview" means any audio or video recording of the interview  
5 of an interviewed child conducted by: (1) An employee or representative of a "Child Advocacy  
6 Center" as that term is defined in section one hundred one, article three, chapter forty-nine of this  
7 code; (2) any psychologist, psychiatrist, physician, nurse, social worker or other person appointed  
8 by the court to interview the interviewed child as provided in subsection (c), section three, article  
9 six-b, chapter sixty-two of this code; or (3) a child protective services worker; law-enforcement  
10 officer; prosecuting attorney or any representative of his or her office; or any other person  
11 investigating allegations of criminal behavior or behavior alleged to constitute abuse or neglect of  
12 a child. All written documentation in any form that is related to the recorded/videotaped interview  
13 shall also be deemed confidential.

**§62-6B-6. CONFIDENTIALITY OF RECORDED/VIDEOTAPED INTERVIEWS OF CHILDREN.**

14           (a) Notwithstanding any provisions of this code to the contrary, including, but not limited  
15 to, the West Virginia Rules of Criminal Procedure; the West Virginia Rules of Civil Procedure; the  
16 West Virginia Rules of Practice and Procedure for Family Court; and the West Virginia Rules of  
17 Procedure for Child Abuse and Neglect Proceedings, a recorded/videotaped interview of an  
18 interviewed child in any proceeding pending in this state including any criminal proceeding, a  
19 proceeding alleging child abuse and/or neglect, or any proceeding pending in circuit court, family  
20 Court, or magistrate Court, regardless of whether the recorded/videotaped interview was  
21 conducted prior or subsequent to the institution of the proceeding, shall be confidential and shall  
22 not be duplicated, copied, reproduced, transcribed, distributed or disseminated in any manner  
23 other than as specifically authorized by the provisions of this article.

24           (b) In the event a recorded/videotaped interview of an interviewed child exists:

25           (1) In a criminal proceeding, the prosecuting attorney shall disclose the existence of the  
26 recorded interview in the initial discovery disclosures required pursuant to Rule 16 of the West  
27 Virginia Rules of Criminal Procedure.

28           (2) In a proceeding alleging child abuse and/or neglect, the prosecuting attorney, or if no  
29 prosecuting attorney appears, the petitioner or counsel for the petitioner, shall disclose the  
30 existence of the recorded/videotaped interview in the initial discovery disclosures required  
31 pursuant to Rule 10 (b)(1) of the West Virginia Rules of Procedure for Child Abuse and Neglect  
32 Proceedings.

33           (3) In any other proceeding pending in circuit court, family Court, or magistrate Court, the  
34 party in possession of the recorded/videotaped interview of the interviewed child shall disclose  
35 the existence of the interview contemporaneously with the disclosure of witnesses and exhibits  
36 as ordered by the court in the proceeding, or if no such order is entered, then, as required by the  
37 applicable Rules of Procedure.

38           (c) The prosecuting attorney, or in the case of a proceeding in which no prosecuting

39 attorney appears, the party in possession of the recorded/videotaped interview shall make the  
40 recorded/videotaped interview of the interviewed child reasonably available for viewing to the  
41 following persons:

42 (1) In a criminal proceeding, to counsel for a defendant.

43 (2) In a proceeding alleging child abuse or neglect, to counsel for either or both of the  
44 respondent parents; the guardian ad litem for the child; and the Court Appointed Special Advocate  
45 for the child.

46 (3) In any other proceeding pending in circuit court, family Court, or magistrate Court, only  
47 as may be ordered by the judge or magistrate presiding over the proceeding.

48 (d) In any criminal proceeding or proceeding alleging child abuse or neglect, the  
49 guardian(s) ad litem, counsel for the respondent(s), and counsel for the defendant(s) are entitled  
50 to receive a duplicate copy of a recorded/videotaped interview upon the filing of a written motion  
51 meeting the requirements of paragraph (i), subdivision (1) as contained in this subsection. In all  
52 other cases, the court may authorize duplication of a recorded/videotaped interview only upon the  
53 filing of a written motion meeting the requirements of paragraph (ii), subdivision (1), as contained  
54 in this subsection, together with a showing of good cause.

55 (1) The written motion to authorize duplication of the interview shall include the following  
56 information:

57 (i) The name, business address or residential address, and telephone number of each  
58 person to whom the duplicate copy of the interview is to be provided;

59 (ii) A signed and verified statement by each person to whom a duplicate copy of the  
60 interview is to be provided, acknowledging that the person has read and understands the  
61 provisions and restrictions of paragraphs (i) through (iv), subdivision (2) inclusive, as contained in  
62 this subsection;

63 (iii) In the event the person to whom the duplicate copy is to be provided is a nonresident  
64 of the State of West Virginia, a signed and verified statement by each person to whom a duplicate



65 copy of the interview is to be provided, consenting to the personal jurisdiction of the court before  
66 which the motion has been filed, and acknowledging that service of process via U.S. Mail, postage  
67 prepaid, to the business or residential address of the person as set forth in the motion constitutes  
68 valid and proper service of process for all purposes pertaining to the order authorizing duplication,  
69 including, but not limited to, alleged violations of an order and any proceedings in contempt related  
70 thereto.

71 (2) The order authorizing duplication shall contain provisions as may be reasonably  
72 necessary to maintain the confidentiality of the interviewed child and the content of the interview.  
73 The order shall contain, at a minimum, the following provisions:

74 (i) A provision that the recorded/videotaped interview may not be duplicated, copied,  
75 reproduced, transcribed, distributed or disseminated in any manner other than as specifically  
76 authorized by written order of the court;

77 (ii) A provision that the recorded/videotaped interview may not be viewed by any person  
78 other than counsel; the client; and staff or employees of counsel actually participating in the  
79 investigation or defense of the case.

80 (iii) A provision requiring that the duplicate copy of the recorded/videotaped interview shall  
81 be returned to the prosecuting attorney, or if no prosecuting attorney appears, to the court, at the  
82 conclusion of the case, including any appeals.

83 (iv) A provision advising that violation of the restrictions or provisions contained in the  
84 order authorizing duplication of the recorded/videotaped interview by any person constitutes  
85 criminal contempt of court, punishable by fine or imprisonment as determined by the court.

86 (e) In the event a party to a proceeding in which an interviewed child is reasonably  
87 expected to testify, or in which a recorded/videotaped interview is reasonably expected to be  
88 offered into evidence, wishes to retain an expert witness, the court shall, upon written motion of  
89 the party, authorize duplication of a recorded/videotaped interview for provision to the expert  
90 witness: *Provided*, That the motion shall not be granted unless and until the expert witness

91 provides a written, signed and verified statement meeting all of the requirements of paragraphs  
92 (i) through (iv), subdivision (2), subsection (d) inclusive, above, as contained in this section. The  
93 statement shall also acknowledge:

94 (1) That the expert must maintain the recorded/videotaped interview in strict confidence;

95 (2) That the recorded/videotaped interview may not be viewed by any person other than  
96 the expert, together with any other of the expert's supervisors, partners, associates, employees  
97 or staff actually assisting in the review or investigation of the matter for which the expert is  
98 retained, and who shall be identified by name and address to the court and opposing counsel;

99 (3) That the recorded/videotaped interview may not be duplicated, copied, reproduced,  
100 transcribed, distributed or disseminated in any manner other than as specifically authorized by  
101 written order of the court.

102 (f) Prior to the commencement of formal proceedings as contemplated in subsection (d)  
103 of this section, the persons or agencies listed in subdivisions (1) and (2) of this subsection, shall  
104 be entitled to reasonable access to recorded/videotaped interview of an interviewed child. As  
105 used herein, "reasonable access" means the opportunity to view the interview, on one or more  
106 occasions during normal business hours, at the offices of the Child Advocacy Center or other  
107 agency in possession of the original recording of the interview.

108 (1) Any member of a multidisciplinary investigative team, as defined in section four  
109 hundred two, article four, chapter forty-nine of this code, investigating allegations of criminal  
110 behavior or abuse or neglect of a child;

111 (2) Any psychologist, psychiatrist, or other health care professional treating the  
112 interviewed child for emotional, psychological or psychiatric issues arising from the behavior  
113 which is the subject of the interview.

114 (g) Prior to the commencement of formal proceedings as contemplated in subsection (d)  
115 of this section, the Child Advocacy Center or other agency in possession of the original  
116 recorded/videotaped interview of an interviewed child may provide a duplicate copy of the

117 interview to the prosecuting attorney, law-enforcement agency or child protective services agency  
118 investigating the behavior which is the subject of the interview. No further duplication of the  
119 interview by any person or agency may be the investigation or prosecution of the behavior which  
120 is the subject of the interview.

121 (h) In any proceeding set forth in subsection (b) of this section, the trier of fact shall be  
122 permitted to view the recorded/videotaped interview of the child witness, subject to the  
123 determination of the court that such interview is otherwise competent and admissible evidence.  
124 In any proceeding in which the recorded/videotaped interview is admitted into evidence, in whole  
125 or in part, the portion of the record pertaining to the recorded/videotaped interview shall be sealed.

126 (i) Notwithstanding any provision of this article to the contrary, a Child Advocacy Center  
127 or other agency in possession of an original recorded/videotaped interview of an interviewed child  
128 may, upon consent of a parent or legal guardian of the interviewed child, utilize the  
129 recorded/videotaped interview for peer review and training purposes. In such case, the Child  
130 Advocacy Center or other agency in possession of the original recording of the interview shall  
131 take reasonable precautions to protect the anonymity of the interviewed child, and shall secure  
132 signed confidentiality/nondisclosure agreements from all persons participating in the peer review  
133 or training session. Under no circumstances shall duplicate copies of the recorded/videotaped  
134 interview be provided to participants in the peer review or training session.

135 (j) Violations of any provision of this article or of any order issued pursuant to the terms  
136 of this article shall be punishable through proceedings for contempt of court, and through any  
137 other proceedings as may be properly applicable.

NOTE: The purpose of this bill is to make certain amendments relating to the confidentiality of juvenile records. To this end, the bill: (1) Provides that a videotaped or otherwise recorded interview of a child is prohibited from disclosure; (2) defines the term "interviewed child"; (3) defines the term "recorded/videotaped interview"; (4) provides videotaped or otherwise recorded interviews of children are confidential and not subject to disclosure; (5) provides that in a criminal proceeding the prosecuting attorney must disclose the existence of a recorded interview; (6) provides that in child abuse and neglect proceedings the prosecuting attorney, or if no prosecuting attorney is involved in the proceeding, then the

petitioner therein, must disclose the existence of a videotaped or otherwise recorded interview; (7) provides that in circuit court, family court or magistrate court, the party in possession of a videotaped or otherwise recorded interview disclose the existence of the interview contemporaneously with the disclosure of witnesses; and (8) provides the prosecuting attorney or other party in possession of a recorded interview disclose for viewing to counsel for a criminal defendant or, in the case of a child abuse and neglect proceeding, to the counsel for the respondent parents, the guardian ad litem and the court appointed special advocate for the child, the existence of a recorded interview.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.

§62-6B-6 is totally rewritten.