SENATE DOCKET, NO. 133 FILED ON: 1/11/2023

SENATE . . . . . No. 366

The Commonwealth of Massachusetts

PRESENTED BY:

James B. Eldridge

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act protecting vulnerable elders from abuse.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
James B. Eldridge	*Middlesex and Worcester*

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SENATE . . . . . No. 366

By Mr. Eldridge, a petition (accompanied by bill, Senate, No. 366) of James B. Eldridge for legislation to protect vulnerable elders from abuse. Elder Affairs.

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Third General Court
(2023-2024)

An Act protecting vulnerable elders from abuse.

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

SECTION 1. Section 4 of chapter 19A of the General Laws, as appearing in the 2020 Official Edition, is hereby amended by striking out the first paragraph and inserting in place thereof the following paragraph:-

The department shall be the principal agency of the commonwealth to mobilize the human, physical, and financial resources available to plan, develop, and implement innovative programs to insure the dignity and independence of all elderly persons in the commonwealth, including the planning, development, and implementation of a home care program for the elderly in the communities of the commonwealth.

SECTION 2. Section 14 of said chapter 19A, as so appearing, is hereby amended by striking out the second paragraph, and inserting in place thereof the following paragraphs:-

"Abuse", (a) an act or omission which results in serious physical or emotional injury to an elderly person or financial exploitation of an elderly person; (b) the failure, inability or

resistance of a caretaker to provide for the elderly person one or more of the necessities essential for physical and emotional well-being without which the elderly person's safety would be compromised; or (c) the failure, inability, or resistance of an elderly person to provide for themself one or more of the necessities essential for physical and emotional well-being without which the elderly person's safety would be compromised. No person shall be considered to be abused or neglected for the sole reason that such person is being furnished or relies upon treatment in accordance with the tenets and teachings of a church or religious denomination by a duly accredited practitioner thereof. No elderly person residing in a prison or house of correction shall be considered to be abused or neglected for the sole reason that a staff member, contractor, or volunteer uses physical contact with the person which harms that person, if: (a) the physical contact with the elderly person occurs in the course of carrying out the staff member, contractor, or volunteer's official duties performed in accordance with the regulations contained at 103 C.M.R.; and (c) both the type of physical contact involved and the amount of force used are necessary in order to carry out the staff member, contractor, or volunteer's official duties.

Physical contact with an elderly person residing in a prison or house of correction which harms that elderly person, and which occurs for the purpose of retaliating against that elderly person, shall constitute abuse.

SECTION 3. Said section 14 of said chapter 19A, as so appearing, is hereby further amended by striking out the third paragraph, and inserting in place thereof the following paragraph:-

"Caretaker", the person or agency responsible for the care of an elderly person, which responsibility may arise: (a) as the result of a family relationship; (b) by a voluntary or

contractual duty undertaken on behalf of an elderly person, or (b) by a fiduciary duty imposed by law. Caretakers shall include any person or agency responsible for an elderly person's health or welfare in any custodial or residential facility unless that facility is licensed under sections 51, 57D or 71 of chapter 111. A person or agency responsible for the health or welfare of an elderly person who has been involuntarily committed under chapter 123 shall be a caretaker, even if the facility in which the elder resides is licensed under sections 51, 57D, or 71 of chapter 111.

SECTION 4. Said section 14 of said chapter 19A, as so appearing, is hereby further amended by adding the following paragraph:-

"State agency", any agency of the commonwealth, including town, city, county, and other municipal government agencies, that provides services or treatment to elderly persons, including private agencies providing such services or treatment pursuant to a contract or agreement with an agency of the commonwealth.

SECTION 5. Section 15 of said chapter 19A, as so appearing, is hereby amended by striking out subsections (d), (e), and (f) and inserting in the place thereof the following subsections:-

(d) No person required to report pursuant to the provisions of subsection (a) shall be liable in any civil or criminal action by reason of such report; provided, however, that such person did not perpetrate, inflict or cause said abuse. No other person making such a report pursuant to the provisions of subsection (b) or (c) shall be liable in any civil or criminal action by reason of such report if it was made in good faith; provided, however, that such person did not perpetrate, inflict or cause said abuse. Any person making a report under subsection (a), (b) or

(c) who, in the determination of the department or the district attorney may have perpetrated, inflicted or caused said abuse may be liable in a civil or criminal action by reason of such report.

(e) No person, employer, or agency may discharge, demote, transfer, reduce pay, benefits or work privileges, prepare a negative work performance evaluation, or in any manner discriminate against or thereafter take any other retaliatory action against any employee, client or other person for filing a report with the department, testifying in any department proceeding or providing information to the department or their designee in the course of an investigation of alleged abuse of an elderly person. Any person who takes such prohibited action against an employee, client or other person may be liable to that employee, client or other person for treble damages, costs and attorney's fees. If the party alleged to have retaliated under this section was a state agency, sovereign immunity shall not be a defense to the action. A violation of an employee's rights under this section shall constitute a prohibited retaliatory action under subsection (b) of section 185 of chapter 149 if the employee is an employee for purposes of said section 185. A person who willfully files a false report of abuse with the department or willfully testifies falsely or willfully provides the department or any designated investigating agency with false information in the course of an investigation or any other department proceeding shall not be afforded the protections of this subsection.

(f) Reports made pursuant to subsections (a) and (b) shall contain the name, address where the elderly person may be contacted, and approximate age of the elderly person who is the subject of the report, information regarding the nature and extent of the abuse, the name of the person's caretaker, if known, any medical treatment being received or immediately required, if known, any other information the reporter believes to be relevant to the investigation, and the name and address of the reporter and where said reporter may be contacted, if the reporter wishes

to provide said information. The department shall publicize the provisions of this section and the process by which reports of abuse shall be made.

SECTION 6. Said section 15 of said chapter 19A, as so appearing, is hereby amended by adding the following subsection:-

(g) Any privilege established by sections one hundred and thirty-five A and one hundred and thirty-five B of chapter one hundred and twelve or section twenty B of chapter two hundred and thirty-three relating to the exclusion of confidential communications shall not prohibit the filing of a report pursuant to the provisions of subsection (a), (b) or (c).

SECTION 7. Section 16 of said chapter 19A, as so appearing, is hereby amended by striking out subsection (a) and asserting in place thereof the following subsection:-

(a) Subject to appropriation, the department shall develop a coordinated system of protective services for all elderly persons in the commonwealth, except those residing in facilities licensed under sections 51, 57D, or 71 of chapter 111, who are determined to be abused. The protective services system shall also extend to any elderly persons who have been involuntarily committed pursuant to chapter 123, even if they reside in a facility licensed under sections 51, 57D, or 71 of chapter 111. In planning this system, the department shall require input from other protective service agencies and other agencies currently involved in the provision of social, health, legal, nutritional and other services to the elderly, as well as elderly advocacy organizations.

SECTION 8. Section 16 of said chapter 19A, as so appearing, is hereby amended by adding the following subsections:-

(g) If the department receives a report which alleges the abuse of an elderly person whose caretaker is a state agency, the department shall notify the general counsel of the office of the secretary of health and human services, or his designee, within such office, and the state agency which provides services to the elderly person. The department shall investigate the abuse and arrange for protective services, as provided in section 18. The department shall take reasonable steps to avoid unnecessary, unwarranted or counterproductive duplication between any internal investigation or inquiry by the state agency and the department's investigation. The state agency may, at its discretion, utilize the department's investigation in lieu of an internal investigation conducted by said state agency.

(h) The department is authorized to gain immediate access to facilities controlled by state agencies upon receiving a report of elder abuse in such facilities, and to request the disclosure of documents pertaining to allegations of abuse occurring within such facilities.

(i) If the department receives a report which alleges the abuse of an elderly person whose caretaker is not a state agency, and who: (1) resides in a facility not licensed under sections 51, 57D or 71 of chapter 111; or (2) is involuntarily committed pursuant to chapter 123, the department shall investigate the abuse and arrange for protective services, as provided in section 18.

(j) If the department receives a report which alleges the abuse of an elderly person who resides in a facility licensed under sections 51, 57D, or 71 of chapter 111, who is not involuntarily committed pursuant to chapter 123, the department shall refer immediately such report to the department of public health.

(k) The department shall provide training to all employees conducting investigations or furnishing protective services to elderly persons in the care of state agencies that is specifically focused on best practices when responding to claims of abuse in prisons, jails, commitment centers, and other custodial settings.

(l) The department shall issue and implement regulations to ensure that elders in prisons, jails, civil commitment centers, houses of correction, and similar facilities are notified of the department’s protective services program and how to report abuse under this chapter.

SECTION 9. Said chapter 19A is hereby further amended by striking out section 18, as so appearing, and inserting in place thereof the following section:-

(a) The department or its designated agency shall assess and evaluate the information reported pursuant to the provisions of section fifteen.

Such assessment shall include a visit to the residence of the elderly person who is the subject of the report, or the facility in which they are living, and may include consultations with appropriate service agencies and individuals who have knowledge of the elderly person's situation including the person filing the report. The elderly person who is the subject of the report shall receive written notice that an assessment is being conducted and shall have the right to review the file and report developed as a result of the assessment.

(b) If the elderly person resides in a facility, the assessment shall include a visit to the facility, an evaluation of the environment of the facility, and a written determination of the risk of physical or emotional injury to any other residents or elderly persons in the same facility.

(c) If the assessment results in a determination that the elderly person is suffering from abuse, the department or the designated agency shall evaluate the elderly person's functional capacity, situation, and resources and shall develop a service plan for the provision of protective services. Said plan shall be appropriate to the needs of the elderly person and shall utilize the least restrictive alternatives.

The department shall adopt rules and regulations establishing time limits for the completion of assessments and evaluations and for the implementation of service plans; provided, however, that if an emergency exists, assessments shall be completed within twenty-four hours of the receipt of the report.

If an assessment results in a determination that the elderly person has suffered serious abuse, the department or designated agency shall report such determination to the district attorney of the county where the abuse occurred within forty-eight hours. The district attorney may investigate and decide whether to initiate criminal proceedings.

(d) If the elderly person’s caretaker is a state agency, upon the completion of the assessment, the department may forward a copy of the report developed as a result of the assessment to the state agency and any other agency of the Commonwealth who has jurisdiction over the alleged victim, the matter under investigation, or associated professional misconduct, including, but not limited to, the attorney general or appropriate district attorney, for possible prosecution or the imposition of remedial or disciplinary measures in accordance with the requirements of any applicable law or regulation.

The report shall contain the information acquired during the assessment and all other information deemed appropriate by the department, including appropriate recommendations to

remedy any substantiated abuse and improve the safety of elderly persons cared for by the state agency.

In addition, regardless of whether abuse is substantiated or not, the designated investigator may make a determination that a violation of other state statutes and/or regulations may exist and whether such a violation poses a risk of harm to elderly persons. If such a violation is suspected the investigator may make recommendations regarding actions needed to remedy the suspected violation, including, but not limited to, referral of the matter to the appropriate agency of the commonwealth that has jurisdiction over the violation.

(e) The department or the designated agency shall provide or arrange for protective services in accordance with the service plan developed pursuant to the provisions of subsection (c). Protective services shall include, but not be limited to, the following: the capacity to respond to an emergency; protective services case work; the capacity to provide or arrange for a homemaker, home-health aide, transportation, legal assistance, counseling, nutrition services, guardianship and conservatorship, protective order through the court, emergency shelter, foster care, adult day care services, assistance in applying for medical parole, as described in section 119A of chapter 127, and assistance in applying for a reasonable accommodation.

(g) The department or the designated agency is authorized to arrange for additional services necessary to assist and protect elderly persons who have been abused, including, but not limited to, the following: medical care, mental health care and emergency financial assistance.

SECTION 10. Section 22 of said chapter 19A, as so appearing, is hereby amended by adding the following paragraph:-

No elderly person residing in a prison, jail, civil commitment center, house of correction, or similar facility shall be charged for the provision of protective services.

SECTION 11. Said chapter 19A is hereby further amended by striking out section 24, as so appearing, and inserting in place thereof the following section:-

(a) Within 120 days following the end of each fiscal year, the department shall submit a report to the governor, the general court and the public which shall include a description of the activities of the department and all designated agencies pursuant to sections fourteen to 26, inclusive, during the preceding fiscal year. Said report shall contain:

(1) statistical information about the number and types of reports received under section fifteen;

(2) the results of the assessments and evaluations conducted and the amount, type and costs of services provided under section eighteen;

(3) information on the quality of services provided and the results of such services in terms of alleviating abuse;

(4) the number of reports of abuse of elderly persons in the care of a state agency;

(5) the number of reports of abuse of elderly persons in the care of a state agency that resulted in a substantiated finding of abuse;

(6) the number of cases referred by the department to a prosecutor;

(7) the number of cases referred to a prosecutor in which the elderly person who was abused was in the care of a state agency;

(8) any recommendations issued by the department to a state agency for the purpose of preventing and remediating elder abuse;

(9) the number of reports of abuse of elderly persons in covered facilities, who are not in the care of a state agency; and

(10) the number of reports of abuse of elderly persons in covered facilities, who are not in the care of a state agency, which resulted in a substantiated finding of abuse.

(b) Said report shall identify problems that may arise in the implementation of this chapter and shall contain the recommendations of the department for action on the part of the legislature.

(c) Within 120 days following the end of each fiscal year, each state agency responsible for the care or custody of elderly persons shall submit a report to the governor, the general court and the public, describing the state agency's actions taken during the preceding three fiscal years in response to recommendations issued to the state agency by Elder Affairs, if any recommendations were made during the preceding three fiscal years. Said report shall also include the number and type of employment actions taken as a result of substantiated findings of abuse of elderly persons within the agency's care.

SECTION 12. Section 25 of said chapter 19A, as so appearing, is hereby amended by striking out the word "twenty-four," and inserting in place thereof the word "twenty-six."

SECTION 13. Said chapter 19A is hereby further amended by striking out section 26, as so appearing, and inserting in place thereof the following section:-

Section 26.

(a) Nothing in this chapter shall be construed to be a limitation of the powers and responsibilities assigned by law to other departments or agencies, nor shall this chapter be construed to relieve any such department or agency of its obligations to investigate and respond appropriately to alleged incidents of abuse.

(b) If the department determines that an investigation under this section or section 18 would duplicate or interfere with an ongoing investigation by law enforcement officials concerning possible criminal conduct arising out of the same conduct, it may, in consultation with the secretary of health and human services, delay or defer such investigation, if the department determines that the health and the safety of elderly persons shall not be adversely affected thereby and that the department's ability to conduct a later investigation shall not be unreasonably impaired by such delay or deferral. In all cases including, but not limited to, those in which the department agrees to delay or defer its investigation, the attorney general or district attorney shall keep the department informed of the status of the criminal investigation and the department shall provide to the attorney general or the district attorney any and all information that may be relevant to the criminal investigation. In cases in which the department agrees to delay or defer its investigation, it shall monitor the progress of the criminal investigation and shall determine, after consultation with such law enforcement agencies, when or whether the department’s investigation should be initiated or resumed.

(c) If the department or a protective services agency receives a report of abuse of an elderly person who is in the care or custody of a state agency, the state agency shall immediately allow the department or the protective services agency to enter and inspect facilities of the state agency. The state agency shall furnish a space in which an investigator or investigators may meet confidentially with the elderly person and any necessary witnesses for any length of time deemed

necessary by the protective services agency. The state agency shall allow the investigator to meet with the elderly person and any necessary witnesses. If the elderly person is in need of medical care, the investigator shall collaborate with the state agency to ensure that the elderly person receives appropriate medical care.

(d) The department shall have full access to any facility run by a state agency which is responsible for the care of elderly persons, in consultation with the leaders of the state agency. The state agency shall provide the department access to any relevant records pertaining to a report of abuse and the alleged victim.

(e) If, upon completion of investigation of a report of abuse of an elderly person whose caretaker is a state agency there is reasonable cause to conclude that such abuse did occur, or whenever, upon its own motion, the department determines that a formal hearing is necessary to ascertain the scope and remedy of such abuse of elderly persons whose caretaker is a state agency, the department may initiate a formal investigation, including a hearing, to determine the nature and the extent of such abuse and what recommendations, if any, should be made with respect to such occurrence. Testimony in department proceedings may, in the discretion of the department, be recorded and taken under oath. The department may, in its discretion, permit any party to testify, to call and examine witnesses, to introduce evidence or to cross-examine witnesses. Before testifying, all witnesses shall be given a copy of the regulations governing the department proceedings. Each witness shall be entitled to be represented by counsel and may refuse to submit evidence or give testimony if such evidence or testimony could tend to incriminate him. All proceedings of the department shall be public unless the department, in consultation with the secretary of health and human services, votes to go into executive session. Any person whose name is mentioned during a proceeding under this section and who may be

adversely affected by any action of the department as a result of the proceedings shall have the right to appear personally, to be represented by counsel in connection with the proceedings, to call and examine witnesses, to introduce evidence or to cross-examine witnesses.

(f) Upon the completion of any formal investigation, the department shall: (1) issue a written report and refer the same to the appropriate state agency. Such report shall contain findings of fact concerning the alleged occurrence of abuse that was the subject of the investigation, together with a finding as to whether or not such abuse did occur and, if so, what actions are necessary to remedy the causes of such abuse or to prevent its reoccurrence; (2) refer any matters for which there is reason to believe that a crime has been committed to the attorney general, the United States attorney or a district attorney for the county wherein such crime was committed; (3) refer any matters for which there is reason to believe that employee misconduct has occurred to the state agency employing such person for imposition of disciplinary measures in accordance with the requirements of any applicable law, regulation or collective bargaining agreement; or (4) refer any matters for which there is reason to believe that misconduct has occurred by a contractor with a state agency or by such contractor's agent, to the state agency contracting with such party for termination of such contract or for such other action as may be deemed appropriate by such state agency.