

House Bill 1097

By: Representatives Petrea of the 166<sup>th</sup>, Dempsey of the 13<sup>th</sup>, Hilton of the 48<sup>th</sup>, Cameron of the 1<sup>st</sup>, and Sainz of the 180<sup>th</sup>

A BILL TO BE ENTITLED

AN ACT

1 To amend Title 37 of the Official Code of Georgia Annotated, relating to mental health, so  
2 as to provide for criminal background, license status, and registry checks for owners,  
3 applicants, and employees of certain mental health facilities; to provide for the Department  
4 of Behavioral Health and Developmental Disabilities to submit fingerprints to the Federal  
5 Bureau of Investigation and Georgia Crime Information Center for the purpose of  
6 background checks to find disqualifying records; to provide for maintenance of personnel  
7 files; to provide for procedures relating to applicants or employees with ineligible  
8 determinations; to provide for civil penalties for failure to terminate employees with  
9 ineligible determinations; to provide for notice for applicants; to provide for revocation of  
10 licenses; to provide for administrative review; to provide for appeals of administrative  
11 decisions; to provide for civil immunity; to provide for rules and regulations; to provide for  
12 definitions; to provide for related matters; to repeal conflicting laws; and for other purposes.

13 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

**SECTION 1.**

Title 37 of the Official Code of Georgia Annotated, relating to mental health, is amended in Chapter 1, relating to governing and regulation of mental health, by revising subsections (a) through (d) of Code Section 37-1-28, relating to conviction data, as follows:

"(a) As used in this Code section, the term:

(1) 'Client' means any person who receives developmental disability, mental health or substance use treatment support, or prevention services authorized or funded by the department.

(2) 'Contractor' means any person, entity, or agency that enters into a contract with the department to provide goods or services.

(3) 'Conviction 'conviction data' means a record of a finding or verdict of guilty or a plea of guilty or a plea of nolo contendere with regard to any crime, regardless of whether an appeal of the conviction has been sought.

(4) 'GCIC' means the Georgia Crime Information Center established under Article 2 of Chapter 3 of Title 35.

(b) The department may receive from any law enforcement agency conviction data that is relevant to a person whom the department or its contractors is considering as a final selectee for employment, or is employing, in a position the duties of which involve direct care, treatment, custodial responsibilities, or any combination thereof for its clients.

(c) The department may receive from any law enforcement agency conviction data which is relevant to a person whom the department or its contractors is considering as a final selectee for employment, or is employing, in any position the duties of which give that person access to another person's financial information, protected health information as defined in the federal Health Insurance Portability and Accountability Act, criminal history information or criminal records, or other information the privacy of which is protected by law in a position if, ~~in the judgment of the employer, a final employment decision regarding the selectee can only be made by a review of conviction data in relation to the~~

41 particular duties of the position and the security and safety of clients, the general public,  
42 or other employees.

43 (d) The department is authorized to conduct national background checks by the submission  
44 of fingerprints to the Federal Bureau of Investigation through the GCIC. In order to  
45 determine the suitability of a license candidate, owner, applicant, or employee, the  
46 department shall require such person to furnish the department with a full set of  
47 fingerprints to enable a criminal background investigation to be conducted. The  
48 department shall establish a uniform method of obtaining conviction data under  
49 subsection (a) subsections (b) and (c) of this Code section which shall be applicable to the  
50 department and its contractors. Such uniform method shall require the ~~submission to the~~  
51 ~~Georgia Crime Information Center of fingerprints and the records search fee in accordance~~  
52 ~~with Code Section 35-3-35.~~ Upon receipt thereof, the Georgia Crime Information Center  
53 shall promptly transmit fingerprints to the Federal Bureau of Investigation for a search of  
54 bureau records and an appropriate report and shall promptly conduct a search of its own  
55 records and records to which it has access. After receiving the fingerprints and fee, the  
56 Georgia Crime Information Center shall notify the department in writing of any derogatory  
57 finding, including, but not limited to, any conviction data regarding the fingerprint records  
58 check or if there is no such finding department to submit fingerprints to GCIC, along with  
59 the records research fee in accordance with Code Section 35-3-35. If no disqualifying  
60 record is identified at the state level, GCIC is authorized to submit the fingerprints to the  
61 Federal Bureau of Investigation for a national criminal history record check. If a criminal  
62 record is identified at the state level, GCIC shall request a national criminal history record  
63 check from the Federal Bureau of Investigation through a national identifier number system  
64 used for identifying fingerprints. After receiving acceptable fingerprints and such fee from  
65 the department, GCIC shall notify the department in writing of any criminal record found  
66 in the records of GCIC and the Federal Bureau of Investigation or if there is no such

67 finding. Upon receipt of GCIC's report, the department shall make a determination about  
68 an owner's, applicant's, or employee's criminal record."

69 **SECTION 2.**

70 Said title is further amended in said chapter by adding a new article to read as follows:

71 "ARTICLE 8

72 37-1-140.

73 As used in this article, the term:

74 (1) 'Applicant' means a person applying to be a direct access employee at a facility.

75 (2) 'Conviction' means a finding or verdict of guilty or a plea of guilty, including a plea  
76 of guilty pursuant to Code Section 42-8-60, regardless of whether an appeal of the  
77 conviction has been sought.

78 (3) 'Crime' means commission of:

79 (A) Any of the following offenses:

80 (i) A violation of Code Section 16-5-3;

81 (ii) A violation of Code Section 16-5-70;

82 (iii) A violation of Code Section 16-5-101;

83 (iv) A violation of Code Section 16-5-102;

84 (v) A violation of Code Section 16-6-3;

85 (vi) A violation of Code Section 16-6-4;

86 (vii) A violation of Code Section 16-6-5;

87 (viii) A violation of Code Section 16-6-5.1;

88 (ix) A violation of Code Sections 16-7-60, 16-7-60.1, 16-7-61, or 16-7-62;

89 (x) A violation of Chapter 8 of Title 16;

90 (xi) A violation of Code Section 16-10-31; or

- 91        (xii) A violation of Code Section 30-5-8;  
92        (B) A felony violation of:  
93        (i) Chapters 5, 6, 9 or 13 of Title 16;  
94        (ii) Code Section 16-4-1;  
95        (iii) Code Section 16-7-2; or  
96        (iv) Subsection (f) of Code Section 31-7-12.1; or  
97        (C) Any other offense committed in another jurisdiction which, if committed in this  
98        state, would be deemed to constitute an offense identified in this paragraph without  
99        regard to its designation elsewhere.  
100       (4) 'Criminal background check' means a search of the criminal records maintained by  
101       GCIC and the Federal Bureau of Investigation to determine whether an owner, applicant,  
102       or employee has a criminal record.  
103       (5) 'Criminal record' means any of the following:  
104       (A) Conviction of a crime;  
105       (B) Arrest, charge, and sentencing for a crime when:  
106       (i) A plea of nolo contendere was entered to the crime;  
107       (ii) First offender treatment without adjudication of guilt was granted to the crime;  
108       or  
109       (iii) An adjudication or sentence was otherwise withheld or not entered for the crime;  
110       or  
111       (C) Arrest and charges for a crime if the charge is pending, unless the time for  
112       prosecuting such crime has expired pursuant to Chapter 3 of Title 17.  
113       (6) 'Direct access' means having, or expecting to have, duties that involve routine  
114       personal contact with a patient, resident, or client, including, but not limited to,  
115       face-to-face contact, hands-on physical assistance, verbal cuing, reminding, standing by  
116       or monitoring or activities that require the person to be routinely alone with the patient's,  
117       resident's, or client's property or access to such property or financial information,

118 including, but not limited to, the patient's, resident's, or client's checkbook, debit and  
119 credit cards, resident trust funds, banking records, stock accounts, or brokerage accounts.

120 (7) 'Eligible determination' means a written determination that a person for whom a  
121 criminal background check was performed and was found to have no criminal record.

122 (8) 'Employee' means any individual who has direct access to, and who is hired by, a  
123 facility through employment, or through a contract with such facility, including, but not  
124 limited to, housekeepers, maintenance personnel, dieticians, and any volunteer who has  
125 duties that are equivalent to the duties of an employee providing such services. Such  
126 term shall not include a person who contracts with the facility, whether personally or  
127 through a company, to provide utility, construction, communications, accounting, quality  
128 assurance, human resource management, information technology, legal, or other services  
129 if the contracted services are not directly related to providing services to a patient,  
130 resident, or client of the facility.

131 (9) 'Facility' means:

132 (A) A community living arrangement to be licenced under Article 1 of Chapter 13 of  
133 this title;

134 (B) A drug abuse treatment and education program required to be licensed under  
135 Article 1 of Chapter 5 of Title 26; or

136 (C) An adult residential mental health program required to be licensed pursuant to  
137 Article 7 of Chapter 3 of Title 37.

138 (10) 'Fingerprint records check determination' means an eligible or ineligible  
139 determination by the department based upon fingerprint based national criminal history  
140 information.

141 (11) 'GCIC' means the Georgia Crime Information Center established under Article 2 of  
142 Chapter 3 of Title 35.

143 (12) 'Indirect ownership interest' means an ownership interest in a corporation,  
144 partnership, legal entity, or association which owns an ownership interest in another

145 corporation, partnership, legal entity, or association. This term includes an ownership  
146 interest in any corporation, partnership, legal entity, or association that has an indirect  
147 ownership interest in a facility or in a license candidate.

148 (13) 'Ineligible determination' means a written determination that a person for whom a  
149 criminal background check was performed was found to have a criminal record.

150 (14) 'License' means the document issued by the department to authorize a facility to  
151 operate.

152 (15) 'License candidate' means a person, corporation, partnership, legal entity, or  
153 association applying for a license to operate a facility.

154 (16) 'Owner' means a person with an ownership interest in a facility or license candidate  
155 or with an ownership interest in a corporation, partnership, legal entity, or association  
156 which has any ownership interest in a facility or license candidate, including an indirect  
157 ownership interest.

158 (17) 'Ownership interest' means the possession of equity in the capital, stock, or profits  
159 of either a:

160 (A) Facility or license candidate; or

161 (B) Corporation, partnership, legal entity, or association that holds a license for a  
162 facility.

163 (18) 'Records check application' means fingerprints in such form and of such quality as  
164 prescribed by GCIC under standards adopted by the Federal Bureau of Investigation and  
165 a records search fee to be established by the department by rule and regulation, payable  
166 in such form as the department may direct to cover the cost of obtaining a criminal  
167 background check.

168 (19) 'Registry check' means a review of the nurse aide registry provided for in Code  
169 Section 31-2-14, the national and state sexual offender registries, and the List of  
170 Excluded Individuals and Entities as authorized in Sections 1128 and 1156 of the federal

171 Social Security Act, as it existed on February 1, 2018, or any other registry useful for the  
172 administration of this article as specified by rules of the department.

173 37-1-141.

174 (a)(1) A registry check of an owner, applicant, or employee shall be required prior to a  
175 criminal background check and shall be initiated by the applicable facility or license  
176 candidate.

177 (2) A registry check shall be performed by such facility or license candidate and may  
178 include reviewing registries of any other states in which the applicant previously resided.

179 (3) If an applicant has not resided in this state for at least two years, the facility or license  
180 candidate shall conduct registry checks of each state in which the applicant resided for  
181 the previous two years as represented by such applicant or as otherwise determined by  
182 the applicable facility or license candidate.

183 (b) If applicable to an owner, applicant, or employee, a query of available information  
184 maintained by the Georgia Composite Medical Board, the Secretary of State, or other  
185 applicable licensing boards shall be conducted prior to a criminal background check to  
186 validate that such individual's professional license is in good standing.

187 (c) Except as provided in subsection (c) of Code Section 37-1-148, nothing in this Code  
188 section shall be construed to limit the responsibility or ability of a facility or license  
189 candidate to screen owners, applicants, or employers through additional methods.

190 37-1-142.

191 (a) Accompanying any application for a new license, the license candidate, each owner  
192 and applicant, and each employee of the license candidate shall complete a records check  
193 in accordance with rules set by the department. The department is authorized to conduct  
194 national background checks by the submission of fingerprints to the Federal Bureau of  
195 Investigation through GCIC. In order to determine the suitability of a license candidate,

196 owner, applicant, or employee, the department shall require such person to furnish the  
197 department with a full set of fingerprints to enable a criminal background investigation to  
198 be conducted. The department may receive from any law enforcement agency conviction  
199 data that is relevant to a person who is a license candidate, owner, applicant, or employee.

200 (b)(1) The department shall submit fingerprints to GCIC. If no disqualifying record is  
201 identified at the state level, GCIC is authorized to submit the fingerprints to the Federal  
202 Bureau of Investigation for a national criminal history record check.

203 (2) If a criminal record is identified at the state level, GCIC shall request a national  
204 criminal history record check from the Federal Bureau of Investigation through a national  
205 identifier number system used for identifying fingerprints.

206 (3) Within ten days after receiving acceptable fingerprints from the department, GCIC  
207 shall notify the department in writing of any criminal record found in the records of  
208 GCIC and the Federal Bureau of Investigation, or if there is no such finding. Upon  
209 receipt of GCIC's report, the department shall make a determination about an owner's,  
210 applicant's, or employee's criminal record.

211 (c) Neither GCIC, the department, any law enforcement agency, nor the employees of any  
212 such entities shall be responsible for the accuracy of the information nor have liability for  
213 defamation, invasion of privacy, negligence, or any other claim in connection with any  
214 dissemination of information or determination based thereon pursuant to this Code section.

215 (d) All information received from GCIC or the Federal Bureau of Investigation shall be  
216 used exclusively for employment or licensure purposes and shall not be released or  
217 otherwise disclosed to any other person or agency. All such information collected by the  
218 department shall be maintained by the department pursuant to the rules and regulations of  
219 GCIC and the Federal Bureau of Investigation as are applicable. Penalties for unauthorized  
220 release or disclosure of any such information shall be prescribed pursuant to state law or  
221 rules or regulations of GCIC and the Federal Bureau of Investigation as are applicable.

222 (e) If the department is participating in the program described in subparagraph (a)(1)(F)  
223 of Code Section 35-3-33, the Georgia Bureau of Investigation and the Federal Bureau of  
224 Investigation shall be authorized to retain fingerprints obtained pursuant to this Code  
225 section for such program, and the department shall notify the individual whose fingerprints  
226 were taken of the parameters of such retention.

227 37-1-143.

228 (a) An applicant seeking employment with a facility or a current employee at a facility  
229 shall consent to a national and state background check that includes a registry check, a  
230 check of information maintained by a professional licensing board, if applicable, and a  
231 criminal background check in accordance with rules set by the department. The  
232 department is authorized to conduct national background checks by the submission of  
233 fingerprints to the Federal Bureau of Investigation through GCIC. In order to determine  
234 an applicant's suitability as an employee of a facility, the department shall require such  
235 applicant to furnish the department with a full set of fingerprints to enable a criminal  
236 background investigation to be conducted. Such criminal background investigations shall  
237 be conducted in the manner set forth in subsections (b), (c), (d), and (e) of Code  
238 Section 37-1-142. The department may receive from any law enforcement agency  
239 conviction data that is relevant to such an applicant or to any employee of the facility.

240 (b)(1) A person required to submit to a registry check and criminal background check  
241 shall not be employed by, contracted with, or allowed to work as an employee at a facility  
242 if:

243 (A) The person appears on a registry check;

244 (B) There is a substantiated finding of neglect, abuse, or misappropriation of property  
245 by a state or federal agency pursuant to an investigation conducted in accordance with  
246 42 U.S.C. Section 1395-i or 1396r as it existed on February 1, 2018;

247 (C) The person's professional license, if applicable, is not in good standing; or

248 (D) The facility receives notice from the department that the person has been found to  
249 have an ineligible determination.

250 (2) A person whose professional license is not in good standing may be employed by a  
251 facility in a position where his or her duties do not require professional licensure,  
252 provided that he or she provides a fingerprint record check determination in the same  
253 manner as an applicant.

254 (c) An applicant or employee may:

255 (1) Obtain information concerning the accuracy of his or her criminal record, and the  
256 department shall refer the person to the appropriate state or federal law enforcement  
257 agency that was involved in the arrest or conviction;

258 (2) Challenge the finding that he or she is the true subject of the results from a registry  
259 check, and the department shall refer the person to the agency responsible for maintaining  
260 the registry; and

261 (3) Appeal his or her disqualifying determination pursuant to Code Section 37-1-147.

262 37-1-144.

263 (a) A personnel file for each employee shall be maintained by each facility. Such files  
264 shall be available for inspection by the department and other appropriate enforcement  
265 authorities but shall otherwise be maintained to protect the confidentiality of the  
266 information contained within. The information shall include, but not be limited to,  
267 evidence of each employee's eligible determination, registry check, and licensure check,  
268 if applicable.

269 (b)(1)(A) The department may require a criminal background check on any owner or  
270 employee of a facility during the course of an investigation involving such owner or  
271 employee or if the department receives information the owner or employee was arrested  
272 for a crime.

273 (B) The criminal background check provided in subparagraph (A) of this paragraph  
274 may be fingerprint based and shall be conducted in the manner set forth in subsections  
275 (b), (c), (d), and (e) of Code Section 37-1-142. The department may receive from any  
276 law enforcement agency conviction data that is relevant to any owner or employee of  
277 the facility.

278 (C) GCIC shall notify the department in writing of any ineligible determination,  
279 including, but not limited to, any criminal record obtained through the fingerprints  
280 records check determination or if there is no finding of a criminal record.

281 (D) If the department is participating in the program described in  
282 subparagraph (a)(1)(F) of Code Section 35-3-33, the Georgia Bureau of Investigation  
283 and the Federal Bureau of Investigation shall be authorized to retain fingerprints  
284 obtained pursuant to this Code section for such program, and the department shall  
285 notify the person whose fingerprints were taken of the parameters of fingerprint  
286 retention.

287 (2) When the department determines that an applicant or employee has an ineligible  
288 determination, the department shall notify the facility that the applicant or employee is  
289 ineligible to hire or employ and shall take the necessary steps so that the employee is no  
290 longer employed at the facility; provided, however, that a facility may retain a current  
291 employee during the period of any administrative review or appeal provided for in  
292 paragraph (4) of this subsection.

293 (3) When the department determines that an owner has an ineligible determination, the  
294 department shall notify the owner of the ineligible status for ownership and shall take the  
295 necessary steps to revoke the facility's license.

296 (4) An owner, applicant, or employee may appeal his or her disqualifying ineligible  
297 status determination pursuant to Code Section 37-1-147.

298 37-1-145.

299 A facility that does not terminate an employee who has been found to have an ineligible  
300 determination or failed a registry check shall be liable for a civil monetary penalty in the  
301 amount of \$500.00 for each day that a violation occurs, not to exceed a total of \$10,000.00.  
302 The daily civil monetary penalty shall be imposed only from the time the facility knew or  
303 should have known that it employed a person with a criminal record and until the date such  
304 individual's employment is terminated; provided, however, that the penalty shall not be  
305 imposed for any period of time during which the facility may retain the employee under  
306 the provisions of paragraph (2) of subsection (b) of Code Section 37-1-144.

307 37-1-146.

308 Each employment application form provided by a facility to an applicant shall  
309 conspicuously state the following: 'FOR THIS TYPE OF EMPLOYMENT, STATE LAW  
310 REQUIRES A NATIONAL AND STATE BACKGROUND CHECK AS A CONDITION  
311 OF EMPLOYMENT.'

312 37-1-147.

313 (a)(1) An owner of a facility with an ineligible determination or whose name appears on  
314 a registry check shall not operate or hold a license, and the department shall revoke the  
315 license of, or refuse to issue a license to, any facility with an owner with an ineligible  
316 determination or whose name appears on a registry check.

317 (2) Prior to approving any license for a facility and periodically as established by the  
318 department by rule, the department shall require each owner, applicant, and employee to  
319 submit to a registry check and criminal background check pursuant to Code  
320 Sections 37-1-141 and 37-1-142.

321 (3) The department may provide by rule for a process where an owner, applicant, or  
322 employee can request an administrative review of an ineligible determination or of a

323 determination that the owner's, applicant's, or employee's name appears on a registry  
324 check. If such administrative review is provided for in the rules of the department, it  
325 shall be timely requested by the owner, applicant, or employee and completed before any  
326 appeal provided for in paragraph (4) of this subsection may be filed or requested.

327 (4)(A) An owner, employee, or applicant who received an ineligible determination or  
328 a determination that his or her name appears on a registry check and who has exhausted  
329 any administrative review rights provided for in this Code section shall be eligible to  
330 appeal such determination pursuant to Chapter 13 of Title 50, the 'Georgia  
331 Administrative Procedure Act.'

332 (B) In a hearing held pursuant to subparagraph (A) of this paragraph, the hearing  
333 officer shall consider in mitigation the length of time since the crime was committed,  
334 the absence of additional criminal charges, the circumstances surrounding the  
335 commission of the crime, and other indicia of rehabilitation.

336 (5)(A) Any action by the department revoking or refusing to grant a license based on  
337 any owner's ineligible determination or determination that the owner's name appears on  
338 a registry check shall constitute a contested case for purposes of Chapter 13 of Title 50,  
339 the 'Georgia Administrative Procedure Act,' except that any hearing required to be held  
340 pursuant to such Act may be held reasonably expeditiously after such determination or  
341 action by the department.

342 (B)(i) In a hearing held pursuant to subparagraph (A) of this paragraph, the hearing  
343 officer shall consider in mitigation the:

344 (I) Length of time since the crime was committed;

345 (II) Absence of additional criminal charges;

346 (III) Circumstances surrounding the commission of the crime;

347 (IV) Other indicia of rehabilitation;

348 (V) Facility's history of compliance with the regulations; and

349 (VI) Owner's involvement with the licensed facility in arriving at a decision as to  
350 whether the criminal record requires the denial or revocation of the license to  
351 operate the facility.

352 (ii) When a hearing is required, the hearing officer shall notify the office of the  
353 prosecuting attorney who initiated the prosecution of the crime in question at least 30  
354 days prior to the hearing to allow the prosecuting attorney to object to a possible  
355 determination that the conviction would not be a bar for the grant or continuation of  
356 a license as contemplated by this Code section. If objections are made, the hearing  
357 officer shall take such objections into consideration.

358 (b) The requirements of this Code section are supplemental to any requirements for a  
359 license imposed by other applicable Code sections.

360 37-1-148.

361 (a) No person, including the department, a facility, or a person acting on behalf of such  
362 entities, shall be liable for civil damages or be subject to any claim, demand, cause of  
363 action, or proceeding of any nature as a result of actions taken in good faith to comply with  
364 this article, including the disqualification of an applicant from employment on the basis of  
365 a disqualifying crime or ineligible determination.

366 (b)(1) A facility that has obtained an eligible determination on an owner, applicant, or  
367 employee in accordance with this article or confirmation that such owner, applicant, or  
368 employee has obtained a favorable final administrative review or appeal decision  
369 pursuant to Code Section 37-1-147, shall be immune from liability for claims of negligent  
370 hiring when such claims are based on the criminal record of such owner, applicant, or  
371 employee, even when the information contained in the criminal background check used  
372 by the department is later determined to have been incomplete or inaccurate; provided,  
373 however, that such immunity shall not preclude the liability of a facility concerning  
374 claims based on information beyond the scope of the criminal record and eligible

375 determination about the owner, applicant, or employee of which the facility knew or  
376 should have known.

377 (2) When a facility has obtained an eligible determination on an owner, applicant, or  
378 employee, there shall be a rebuttable presumption of due care for claims of negligent  
379 hiring, negligent retention, or other similar claims to the extent the claims are based on  
380 an owner's, applicant's, or employee's criminal record.

381 (c) Nothing in this article shall require a facility to conduct any other type of criminal  
382 history check of an owner, applicant, or employee, and a facility shall not be held liable for  
383 claims of negligent hiring, negligent retention, or other similar claims based solely or in  
384 part on its failure to conduct other types of criminal history checks.

385 (d) Nothing in this article shall be construed to waive the sovereign immunity of the state,  
386 the department, or any other entity of the state.

387 37-1-149.

388 The department shall promulgate written rules and regulations related to the requirements  
389 and implementation of this article, including, but not limited to, establishing percentages  
390 of ownership interest relevant for the enforcement of this article. In establishing such  
391 percentages of ownership, the department may regard any percentage of ownership greater  
392 than zero as constituting an ownership interest as defined in this article, or the department  
393 may by rule or regulation deem that a higher percentage of ownership is necessary to  
394 constitute such ownership."

395 **SECTION 3.**

396 All laws and parts of laws in conflict with this Act are repealed.