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FISCAL IMPACT REPORT

		ORIGINAL DATE	02/11/07		
SPONSOR	Miera	**LAST UPDATED**	02/28/07	**HB**	637/aHHGAC/aHJC/HFL#1
SHORT TITLE	Children's Mental Recodification			**SB**	
				ANALYST	Weber

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	**FY08**		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Attorney General's Office (AGO)
Human Services Department (HSD)
Children, Youth and Families Department (CYFD)
Public Education Department (PED)

SUMMARY

Synopsis of HFL Amendment

The House Floor amendment deletes the definition of "peace officer" on page 9 lines 11-14. It is unclear why the definition would be deleted since the term "peace officer" is used ten times in the body of the bill unless it is thought the term is generic and self-explanatory.

Synopsis of HJC Amendment

The House Education Committee amendment does the following;

On page 29, line 5 the following is stricken:

B. A child fourteen years of age or older is presumed to have capacity to consent to psychotropic medications. When psychotropic medications are administered to a child fourteen years of age

or older, the clinician shall provide immediate oral notification followed by written documentation to the child's legal custodian.

And replaced with:

"Psychotropic medications may be administered to a child fourteen years of age or older with the informed consent of the child. When psychotropic medications are administered to a child fourteen years of age or older, the child's legal custodian shall be notified by the clinician."

Synopsis of HHGAC Amendment

The Attorney General summarizes the changes to HB 637 by the HHGAC amendment.

1. Deletes the definition of "individualized education plan";
2. Eliminates the reference to officers in the Corrections Department in the definition of "peace officer";
3. Deletes a reference to "socialization" assessments of a child during development of a treatment or habilitation plan, and substitutes "psychosocial assessment";
4. Deletes references to the Human Rights Commission, and substitutes references to a Human Rights Committee of the Department of Health with regard to the submission and review of certain treatment plans involving aversive intervention;
5. Requires the Children, Youth and Families Department to work in collaboration with the Department of Health to promulgate rules for implementing that Human Rights Committee, and requires the Department of Health to enact those rules;
6. Clarifies that a fourteen year old (or older) child's right to consent to treatment does not provide them with independent consent rights with respect to special education and related services;
7. Allows a child aged fourteen or older to object to a legal custodian's assumption of authority to make mental health or developmental disability treatment decisions or determination of lack of capacity;
8. Changes the time period for providing a child a hearing on a request for release from voluntary residential treatment from five to seven days; and
9. Prohibits "re-release" of previously disclosed information regarding the treatment of a child unless approved by the child or legal custodian authorized under the Children's Mental Health and Developmental Disabilities Act to give consent and any other consent necessary for redisclosure in conformance with state and federal law, including consent that may be required from the professional or the facility that created the document.

The changes do not change the substance of HB 637.

Synopsis of Original Bill

House Bill 637 repeals and replaces the Children's Mental Health and Developmental Disabilities Act, Section 32A-6.1 through 32A-6.22. The proposed changes to the Act expand the rights of the child, particularly with respect to a child who is 14 or older. The child is given decision-making authority over treatment decisions, placement decisions and decisions over disclosure of confidential information. The purposes of the Act are to provide children with access to appropriate assessments that lead to early identification, intervention and treatment, and access to a continuum of services to address habilitation and treatment needs.

Treatments may include the following: individual psychotherapy, group psychotherapy, guidance and counseling, case management, behavioral therapy, family therapy, counseling, substance abuse treatment or other forms of verbal treatment that do no include aversive interventions and psychotropic medications.

CYFD provides background on the process that resulted in the changes. The revisions to the children's code included in this bill reflect the careful review and recommendations of a wide range of professionals and experts in New Mexico, including representatives from the court system, children's attorneys, behavioral health, education, and the juvenile justice and child welfare systems. A Task Force was created to review the Children's Mental Health and Developmental Disabilities Code which last underwent major revision in 1996. It was charged with assessing the code in light of emerging behavioral health practice which is moving away from institutional care toward community based service systems. It met from mid –June until the end of mid--November. In addition to regular Task Force meetings, the group worked in five committees, some of which met twice a month for several hours at a time. This enabled smaller groups to work in detail on the major conceptual issues raised in the Task Force and bring back suggested revisions with some proposed language, to the Task Force for further discussion and resolution.

The Administrative Office of the Courts provides the following section by section recap of the pertinent information.

Section 2: sets out the purposes of the Act. This section is not in the current Act.

Section 3: provides that the provisions of the Act shall apply to all children in New Mexico except as otherwise set forth in the Act.

Section 4: defines terms used within the Act. There are many new definitions and some changed definitions, which include:

- "aversive intervention" = any device or intervention, consequences or procedure intended to cause pain or unpleasant sensations, including…
- "clinician" = a person whose licensure allows the person to make independent clinical decisions, including a physician, licensed psychologist, psychiatric nurse practitioner, licensed independent social worker, licensed marriage and family therapist and licensed professional clinical counselor
- "evaluation facility" = a community mental health or developmental disability program, a medical facility having psychiatric or developmental disability services available or, if none of the foregoing is reasonably available or appropriate, the office of a licensed physician or a licensed psychologist, any of which shall be capable of performing a mental status examination adequate to determine the need for appropriate treatment, including possible involuntary treatment
- "family" = persons with a kinship relationship to a child, including the relationship that exists between a child and a biological or adoptive parent, relative of the child, a stepparent, a godparent, a member of the child's tribe or clan or an adult with whom the child has a significant bond
- "mental disorder" = a substantial disorder of the child's emotional processes,

thought or cognition, not including a developmental disability, that impairs the child's:

(1) functional ability to act in developmentally and age-appropriate ways in any life domain;
(2) judgment;
(3) behavior; and
(4) capacity to recognize reality

- "treatment team" = a team consisting of the child, the child's parents unless parental rights have specifically been limited pursuant to an order of a court, legal custodian, guardian ad litem, treatment guardian, clinician and any other professionals involved in treatment of the child, other members of the child's family, if requested by the child, and the child's attorney if requested by the child, unless in the professional judgment of the treating clinician for reasons of safety or therapy one or more members should be excluded from participation in the treatment team
- "treatment plan" = an individualized plan developed by a treatment team based on assessed strengths and needs of the child and family

Section 5: makes technical language changes to track with other changes in purpose and theme of the bill.

Section 6: provides that the rights set forth in the Act apply to children receiving treatment and habilitation services both within and outside residential settings.

Section 7: provides that a child receiving mental health or habilitation services shall have the right to prompt treatment and habilitation pursuant to an individualized treatment plan and consistent with the least restrictive means principle. The Act requires a preliminary treatment plan be prepared within seven days of initial provision of mental health or habilitation services.

Section 8: sets out special rules applicable to aversive intervention.

Section 9: provides for the right to be free from the use of restraints used for the convenience of a caregiver or as a substitute for a planned program for behavior support. Lists permitted restraints.

Section 10: provides that physical restraint and seclusion shall not be used unless such use is necessary to protect a child or another from imminent, serious physical harm or unless another less intrusive, nonphysical intervention has failed or has been determined inappropriate. Sets out procedures, documentation and action required.

Section 11: Requires training for professionals using restraint or seclusion.

Section 12: sets out the personal rights of a child in an out-of-home treatment or habilitation program.

Section 13: provides that a child shall be represented by an attorney at all commitment or treatment guardianship proceedings under the Act if the child is 14 or older or by a guardian ad litem if the child is under 14. Provides further that when a child has not

retained an attorney or guardian ad litem in a commitment or treatment guardian proceeding and is unable to do so, the court shall appoint an attorney or a guardian ad litem to represent the child.

Section 14: limits the verbal therapy to which a child under 14 may consent absent parental consent to an initial assessment.

Section 15: provides that a child 14 or older is presumed to have capacity to consent to treatment without consent of the child's legal custodian, and capacity to consent to psychotropic medications. Upon administration of psychotropic medications to a child 14 or older, a clinician shall provide immediate oral notification followed by written documentation to the child's legal custodian

Section 16: provides that when a child 14 or older has been determined to lack capacity, the child's legal custodian may make a mental health or habilitation decision for the child unless the child objects to such decision. Further provides that a challenge by a child 14 or older to a determination that the child lacks capacity shall prevail unless otherwise ordered by the court in a proceeding brought pursuant to the treatment guardianship provisions of the Act. The Act provides that a mental health treatment decision made by a legal custodian for a child 14 or older who has been determined to lack capacity is effective without judicial approval unless contested by the child.

Section 17: provides for a clinician to request a children's court attorney petition the court for appointment of a treatment guardian to make a substitute decision for a child 14 or older determined to lack capacity, when a legal custodian is not reasonably available to make decisions or if the clinician who proposes a course of treatment objects to a challenge made by the child to a determination of incapacity. In a treatment guardian proceeding, the court must appoint an attorney for the child unless the child already has an attorney available. A petition is to be served on the child and the child's attorney and a hearing on the petition is to be held within three business days. The child must be represented by council and shall have the right to be present, to present witnesses and to cross-examine opposing witnesses. A decision of a treatment guardian may be contested by a child, physician or other professional by filing a petition with the court within three calendar days or the next business day, whichever is later, of receiving notice of the treatment guardian's decision. The child must be represented by counsel before the court. The court may overrule the decision if it finds that it is against the best interests of the child. The court must rule within seven days of the filing of the petition. If both a petition for enforcement order and a petition to contest the guardian's decision are filed, they shall be heard at the same time in the same proceeding. If, at the end of a court-specified guardianship period, the guardian believes the child still lacks capacity, the guardian is required to petition the court for reappointment or for appointment of a new guardian. If, during the period of a guardian's power, specified individuals believe that the child has regained capacity, an individual may petition the court for termination of the guardianship. If the court finds the child has regained capacity, it shall terminate the power of the guardian and restore to the child the power to make treatment decisions.

Section 18: provides that a child of 14 or older who has capacity also has the right to direct the child's own treatment in the event of later incapacity. A written and signed individual instruction shall be effective without judicial approval. Provides that if the

child's legal custodian refuses to consent to the individual instruction, the child may petition the court for determination of whether the individual instruction is in the child's best interest.

Section 19: provides that if an application is made to the court for an emergency mental health evaluation of a child detained and transported by a peace officer, the court's power to act in furtherance of an emergency admission is limited to ordering that the child be seen by a clinician prior to transport and that a peace officer transport the child to an evaluation facility. Upon arrival at an evaluation facility, a child must be advised of the child's right to a hearing within 7 days, the right to counsel and the child's right to communicate with an attorney or guardian ad litem and an independent mental health professional of the child's own choosing.

Section 20: applies to children younger than 14. Requires that upon the filing of the legal custodian's consent to admission document in the child's records, the director of the residential program or the director's designee shall, on the next business day following the child's admission, notify the district court or the special commissioner regarding the admission. The court or special commissioner shall establish a sequestered court file. Also on the next business day, the director or designee must petition the court to appoint a guardian ad litem for the child. When the court receives the petition, the court shall appoint a guardian ad litem. When a child admitted to a residential program reaches 14, the child may petition the district court for its records regarding all matter pertinent to the child's admission to the residential program. The district court must provide the records, unless there is a showing that release of records would cause substantial harm to the child. Upon turning 18, a person admitted to a program as a child may petition the court for such records, and the court shall provide all records regarding the admission to the petitioner. In the event that a child's legal custodian's request for immediate discharge is rejected because the director of the program, a physician or a licensed psychologist determines that the child requires continued treatment and that the child meets the criteria for involuntary residential treatment, on the first business day following the request for release, there must be a request that the children's court attorney initiate involuntary residential treatment proceedings. The children's court attorney may petition the court for such proceedings. The child has a right to a hearing regarding the child's continued treatment within seven days of the request for release.

Section 21: applies to children 14 or older. Provides that if a child's legal custodian is unable to obtain an independent attorney, the legal custodian may petition the court to appoint one. The Act sets out the procedures that must be followed upon the filing of a child's executed voluntary consent to admission, including the establishment of a sequestered court file upon receipt of notice of voluntary admission. Much of the process and procedures following voluntary admission mirror the procedures set out in Section 20 following consensual admission of a child younger than 14.

Section 22: applies to the involuntary residential treatment of a child. Provides that a child afforded rights under the Act shall be advised of those rights at that child's first appearance before the court on a petition under the Act. Provides that a person who believes that a child is in need of residential services may request that a children's court attorney file a petition with the court for the child's involuntary placement. The Act sets out the necessary contents of the petition. The court must appoint counsel for the child

unless the child has retained an attorney or an attorney or guardian ad litem has been appointed. An involuntary placement hearing must be held within seven days of the emergency admission. A hearing must be held within five days from a child's declaration that the child desires to terminate the child's voluntary admission to a program if the child's clinician has assessed and documented that involuntary placement is necessary. The Act provides for the rights of the child and the child's legal custodian at the hearing. The court can only order involuntary admission upon a showing by clear and convincing evidence of specified facts. The court may order the child to undergo nonresidential treatment or habilitation as may be appropriate and necessary or it may order no treatment.

Section 23: provides for the liability of persons providing treatment or habilitation services.

Section 24: provides that except as otherwise provided in the Act, a person shall not disclose or transmit certain confidential information about a child to specified persons without the authorization of the child. Provides that a disclosure ordered by the court shall be limited to the information that is essential to carry out the purpose of the disclosure.

Section 25: provides that a court may conduct the proceedings required by the Act or may, by general or special order, appoint a special commissioner to do so. The special commissioner shall be a licensed attorney. Upon conclusion of a hearing, the special commissioner must promptly file findings and recommendations with the court.

Section 26: provides that a court ordering placement of or authorizing return of a child may direct appropriate persons to furnish suitable transportation.

Section 27: provides that a child who believes that rights established by the Act or by the U.S. or NM Constitutions have been violated shall have a right to petition the court for redress. The child shall be represented by counsel. The court shall grant relief as appropriate, subject to the provisions of the Tort Claims Act.

Section 28: provides that an indigent child may receive care and treatment at a state-operated facility without charge.

Section 29: provides for district court recognition of tribal court involuntary placement orders.

Section 30: repeals the current Act, Section 32A-6-1 et. seq. NMSA 1978.

FISCAL IMPLICATIONS

All agency responses were in agreement that the bill has no fiscal impact.

SIGNIFICANT ISSUES

The AOC then follows up with the significant changes in section compared to current statute.

1) The New Mexico Children's Mental Health and Developmental Disabilities Revision Task Force reports that the overarching theme for the revised Code is that all children receiving mental health services are to have basic rights regardless of setting, with greater protections provided each child corresponding to the level of restriction.
2) Section 4: A number of the definitions of terms used in the Act may impact the courts or have other significant impact
    - The current Act defines "aversive intervention" to mean "anything that, because it is believed to be unreasonably unpleasant, uncomfortable or distasteful to a child, is administered or done to the child for the purpose of reducing the frequency of a behavior…" HB 637 defines the term to mean "any device or intervention, consequence or procedure intended to cause pain or unpleasant sensations, including…" It appears that the current definition is broader as it includes anything "unreasonably unpleasant, uncomfortable or distasteful," rather than things "intended to cause pain or unpleasant sensations." The definition also includes "over-correction," but does not define what that term means. There is also a question as to whether under Section 8 of the bill and this definition electrical convulsive therapy as a treatment option is eliminated by the inclusion of "electric shock" within the definition, or whether the Human Rights Commission must approve.
    - HB 637 expands the definition of "clinician" to include a psychiatric nurse practitioner and a licensed marriage and family counselor. This expansion may mean that more children will be referred for mental health treatment, and that there will be a corresponding increase in petitions to the court.
    - HB 637 includes within the definition of "family," "an adult with whom the child has a significant bond." This provides for children who do not have active parents/legal custodians to include an appropriate adult in their treatment process.
    - HB 637 defines "mental disorder" to mean a disorder that impairs certain functions. The current statute requires gross impairment for there to be a mental disorder.
    - HB 637 provides that a "treatment plan" be based on the assessed strengths and needs of a child *and the child's family*.
    - HB 637 defines "treatment team" to include parents and others who may be requested by a child.
3) Section 4: Although there is no definition of "children's court attorney" in the Act, Section 32A-1-6 NMSA 1978 provides

> E. In cases involving a child subject to the provisions of the Children's Mental Health and Developmental Disabilities Act [32A-6-1 NMSA 1978] that also involves civil abuse, civil neglect or a family in need of court-ordered services, the attorney selected by and representing the department

is the children's court attorney. In cases involving a child subject to the provisions of the Children's Mental Health and Developmental Disabilities Act that does not also involve civil abuse, civil neglect or a family in need of court-ordered services, the district attorney is the ex-officio children's court attorney.

F. Section 6: HB 637 broadens the scope of rights related to treatment and habilitation to include *all* children receiving out-of-home treatment and habilitation, not just those in residential settings.

4) Section 7: HB 637 provides that a preliminary treatment plan shall be prepared within seven days of *initial provision* of mental health or habilitation services. The current law requires a plan within seven days of admission to a residential treatment program.
5) Section 8: the Human Rights Commission exists pursuant to Section 28-1-3 NMSA 1978.
6) Section 9: the current law applies only to children in residential treatment or habilitation settings.
7) Section 12: HB 637 addresses the varying levels of rights that attach and procedures that apply when children receive treatment and habilitation services in out-of-home and residential treatment and habilitation settings.
8) Section 13: HB 637 clarifies that children are entitled to a court appointed attorney only in commitment and guardianship proceedings. The courts are required to ensure appointment of an attorney or guardian ad litem. The current law has a specific requirement for parents, guardians or legal custodians to obtain representation. This requirement may impact the courts in terms of ensuring timely appointment of attorneys for youth in commitment or guardianship proceedings, and may impact the AOC's court appointed attorney fee fund.
9) Section 14: the current law allows "any child" to consent to verbal therapies without parental consent. HB 637 limits the verbal therapy to which a child under 14 may consent absent parental consent to an initial assessment.
10) Section 16: provides guidance for determining capacity to consent to services for children 14 or older and allows parents to make outpatient treatment or habilitation decision for children 14 or older without judicial involvement. The current code has a provision for treatment guardianship, including appointment of an attorney or guardian ad litem whenever a child 14 or older was unable to consent to medications or treatment. HB 637's allowance for parents to make certain decisions without judicial involvement could theoretically result in fewer court appointments of attorneys.
11) Section 18: provides a framework for parents and youth to discuss treatment options and to allow older youth an opportunity to direct their treatment in the event of later incapacity.
12) Section 21: a child of 14 or above who was a voluntary admittee may petition the district court for the records of the court regarding all matters pertinent to the child's admission. An 18-year-old may petition for the records of any admission. There could be an increased amount of requests for records increasing the work of court staff who are reviewing the petitions.
13) Section 21(L) provides that a child has a right to a hearing on the child's continued voluntary residential treatment within seven days of the child's request for release. Section 22(G) provides that an involuntary placement hearing shall be held within five days from a child's declaration that the child desires to terminate the child's

voluntary admission to a residential treatment or habilitation program. Apparently, the task force intended that when a child wants a hearing it should be held within five days, the time provision contained in the mental health code for adults.

14) Although the new Act, like the old Act, requires and provides for a multitude of actions by the courts, Section 25 provides that a court may conduct the proceedings required by the Act or may, by general or special order appoint a special commissioner to do so.

MW/mt:csd