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HOUSE BILL 1229

48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007

INTRODUCED BY

Janice E. Arnold-Jones

AN ACT

RELATING TO CHILDREN; REQUIRING A PARENT'S CONSENT FOR MENTAL HEALTH TREATMENT OR RELEASE FROM TREATMENT FOR A CHILD UNDER EIGHTEEN YEARS OF AGE; REPEALING A PROVISION OF THE CHILDREN'S MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES ACT THAT PERMITS CHILDREN FROM FOURTEEN TO SEVENTEEN YEARS OF AGE TO RECEIVE AND TERMINATE MENTAL HEALTH TREATMENT WITHOUT PARENTAL CONSENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 32A-6-11.1 NMSA 1978 (being Laws 1995, Chapter 207, Section 13, as amended) is amended to read:

"32A-6-11.1. CONSENT TO PLACEMENT IN A RESIDENTIAL TREATMENT OR HABILITATION PROGRAM--CHILDREN YOUNGER THAN [FOURTEEN] EIGHTEEN YEARS OF AGE.--

A. A child younger than [~~fourteen~~] eighteen years of age shall not receive residential treatment for mental

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1 disorders or habilitation for developmental disabilities,
2 except as provided in this section or Section 32A-6-13 NMSA
3 1978.

4 B. A child younger than [~~fourteen~~] eighteen years
5 of age may be admitted to a residential treatment or
6 habilitation program with the informed consent of the child's
7 parent, guardian or legal custodian for a period not to exceed
8 sixty days, subject to the requirements of this section.

9 C. In order to admit a child younger than
10 [~~fourteen~~] eighteen years of age to a residential treatment or
11 habilitation program, the child's parent, guardian or legal
12 custodian shall knowingly and voluntarily execute a consent to
13 admission document prior to the child's admission. The consent
14 to admission document shall be in a form designated by the
15 supreme court. The consent to admission document shall include
16 a clear statement of the parent's, guardian's or legal
17 custodian's right to voluntarily consent to or refuse the
18 child's admission; the parent's, guardian's or legal
19 custodian's right to request the child's immediate discharge
20 from the residential treatment program at any time; and the
21 parent's, guardian's or legal custodian's rights when the
22 parent, guardian or legal custodian requests the child's
23 discharge and the child's physician, licensed psychologist or
24 the director of the residential treatment facility determines
25 that the child needs continued treatment. The facility shall

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1 ensure that each statement is clearly explained in the child's
2 and parent's, guardian's or legal custodian's primary language,
3 if that is their language of preference, and in a manner
4 appropriate to the child's and parent's, guardian's or legal
5 custodian's developmental abilities. Each statement shall be
6 initialed by the child's parent, guardian or legal custodian.

7 D. The parent's, guardian's or legal custodian's
8 executed consent to admission document shall be filed with the
9 child's hospital records within twenty-four hours of the time
10 of admission.

11 E. Upon the filing of the parent's, guardian's or
12 legal custodian's consent to admission document in the child's
13 hospital records, the director of the residential treatment or
14 habilitation program or the director's designee shall, on the
15 next business day following the child's admission, notify the
16 district court or the special commissioner regarding the
17 admission and provide the child's name, date of birth and the
18 date and place of admission. The court or special commissioner
19 shall, upon receipt of notice regarding a child's admission to
20 a residential treatment or habilitation program, establish a
21 sequestered court file.

22 F. The director of a residential treatment or
23 habilitation program or the director's designee shall, on the
24 next business day following the child's admission, petition the
25 court to appoint a guardian ad litem for the child. When the

1 court receives the petition, the court shall appoint a guardian
2 ad litem. The court may order the parent to reimburse the
3 state pursuant to the provisions of the Children's Code.

4 G. Within seven days of a child's admission to a
5 residential treatment or habilitation program, a guardian ad
6 litem, representing the child's best interests and in
7 accordance with the provisions of the Children's Mental Health
8 and Developmental Disabilities Act, shall meet with the child,
9 the child's parent, guardian or legal custodian and the child's
10 clinician. The guardian ad litem shall determine the
11 following:

12 (1) whether the child's parent, guardian or
13 legal custodian understands and consents to the child's
14 admission to a residential treatment or habilitation program;

15 (2) whether the admission is in the child's
16 best interests; and

17 (3) whether the admission is appropriate for
18 the child and is consistent with the least drastic means
19 principle.

20 H. If a guardian ad litem determines that the
21 child's parent, guardian or legal custodian understands and
22 consents to the child's admission and that the admission is in
23 the child's best interests, is appropriate for the child and is
24 consistent with the least drastic means principle, the guardian
25 ad litem shall so certify on a form designated by the supreme

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1 court. The form, when completed by the guardian ad litem,
2 shall be filed in the child's patient record kept by the
3 residential treatment or habilitation program, and a copy shall
4 be forwarded to the court or special commissioner within seven
5 days of the child's admission. The guardian ad litem's
6 statement shall not identify the child by name.

7 I. Upon reaching the age of majority, a child who
8 was admitted to a residential treatment or habilitation program
9 pursuant to this section may petition the district court for
10 the records of the district court regarding all matters
11 pertinent to the child's admission to a residential treatment
12 or habilitation program. The district court, upon receipt of
13 the petition and upon a determination that the petitioner is in
14 fact a child who was admitted to a residential treatment or
15 habilitation program, shall provide all court records regarding
16 the admission to the petitioner, including all copies in the
17 court's possession.

18 J. [~~Any~~] A child's parent, guardian or legal
19 custodian who consents to admission of [~~his~~] the child to a
20 residential treatment or habilitation program has the right to
21 request the child's immediate discharge from the residential
22 treatment or habilitation program, subject to the provisions of
23 this section. If a child's parent, guardian or legal custodian
24 informs the director, a physician or any other member of the
25 residential treatment or habilitation program staff that the

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1 parent, guardian or legal custodian desires the child to be
2 discharged from the program, the director, physician or other
3 staff shall provide for the child's immediate discharge and
4 remit the child to the parent's, guardian's or legal
5 custodian's care. The residential treatment or habilitation
6 program shall also notify the child's guardian ad litem. A
7 child whose parent, guardian or legal custodian requests [~~his~~]
8 the child's immediate discharge shall be discharged to the
9 parent; except when the director of the residential treatment
10 program, a physician or a licensed psychologist determines that
11 the child requires continued treatment and that the child meets
12 the criteria for involuntary residential treatment. In that
13 event, the director, physician or licensed psychologist shall,
14 on the first business day following the child's parent's,
15 guardian's or legal custodian's request for release of the
16 child from the program, request that the children's court
17 attorney initiate involuntary residential treatment
18 proceedings. The children's court attorney may petition the
19 court for such proceedings. The child has a right to a hearing
20 regarding [~~his~~] the child's continued treatment within seven
21 days of the request for release.

22 K. A child who is admitted to a residential
23 treatment or habilitation program pursuant to this section
24 shall have [~~his~~] the child's admission reviewed at the end of
25 the sixty-day period following the date of the child's initial

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1 admission to the program. The child's physician or licensed
2 psychologist shall review the child's residential treatment or
3 habilitation program and determine whether it is in the best
4 interests of the child to continue the admission. If the
5 child's physician or licensed psychologist concludes that
6 continuation of the residential treatment or habilitation
7 program is in the child's best interests, the child's clinician
8 shall so state in a form to be filed in the child's patient
9 records. The residential treatment or habilitation program
10 shall notify the guardian ad litem for the child at least seven
11 days prior to the date that the sixty-day period is to end or,
12 if necessary, request a guardian ad litem pursuant to the
13 provisions of the Children's Mental Health and Developmental
14 Disabilities Act. The guardian ad litem shall then personally
15 meet with the child, the child's parent, guardian or legal
16 custodian and the child's clinician and ensure that the child's
17 parent, guardian or legal custodian understands and consents to
18 the child's continued admission to the residential treatment or
19 habilitation program. If the guardian ad litem determines that
20 the child's parent, guardian or legal custodian understands and
21 consents to the child's continued admission to the residential
22 treatment or habilitation program, that the continued admission
23 is in the child's best interest, that the placement continues
24 to be appropriate for the child and consistent with the least
25 drastic means principle and that the clinician has recommended

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1 the child's continued stay in the program, the guardian ad
2 litem shall so certify on a form designated by the supreme
3 court. The disposition of these forms shall be as set forth in
4 this section, with one copy going in the child's patient record
5 and the other being sent to the district court in a manner that
6 preserves the child's anonymity. This procedure shall take
7 place every sixty days following the child's last admission or
8 a guardian ad litem's certification, whichever occurs first.

9 L. When a guardian ad litem determines that the
10 child's parent, guardian or legal custodian does not understand
11 or consent to the child's admission to a residential treatment
12 or habilitation program, that the admission is not in the
13 child's best interests, that the placement is inappropriate for
14 the child or is inconsistent with the least drastic means
15 principle or that the child's clinician has not recommended a
16 continued stay by the child in the residential treatment or
17 habilitation program, ~~[the child shall be released or]~~
18 involuntary placement procedures shall be initiated.

19 M. If the child's parent, guardian or legal
20 custodian is unavailable to take custody of the child ~~[and~~
21 ~~immediate discharge of the child would endanger the child]~~, the
22 residential treatment or habilitation program may detain the
23 child until a safe and orderly discharge is possible. If the
24 child's family refuses to take physical custody of the child,
25 the residential treatment or habilitation program shall refer

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1 the case to the department for an abuse and neglect or family
2 in need of court-ordered services investigation. The
3 department may take the child into protective custody pursuant
4 to the provisions of the Abuse and Neglect Act or the Family in
5 Need of Services Act."

6 Section 2. Section 32A-6-14 NMSA 1978 (being Laws 1995,
7 Chapter 207, Section 16) is amended to read:

8 "32A-6-14. TREATMENT AND HABILITATION OF CHILDREN--
9 LIABILITY.--

10 A. Any child shall have the right, with [~~or~~
11 ~~without~~] parental consent, to consent to and receive individual
12 psychotherapy, group psychotherapy, guidance, counseling or
13 other forms of verbal therapy that do not include any aversive
14 stimuli or substantial deprivations.

15 B. No psychosurgery or convulsive treatment shall
16 be performed on a child except by order of a court upon a
17 finding that the treatment is necessary to prevent serious harm
18 to the child. Consent of a child or [~~his~~] the child's parent,
19 guardian or legal custodian to the treatment without a court
20 order shall be invalid and shall not be a defense against any
21 legal action that might be brought against the provider of the
22 treatment.

23 C. No psychotropic medications or interventions
24 involving aversive stimuli or substantial deprivation shall be
25 administered to any child without proper consent of the child's

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1 parent. If the child is capable of understanding the proposed
2 nature of treatment and its consequences and is capable of
3 informed consent, [~~his~~] the child's consent shall be obtained
4 before the treatment is performed.

5 D. Psychotropic medications or interventions
6 involving aversive stimuli may be administered to a child under
7 the age of fourteen only with the informed consent of the
8 child's parent, guardian or legal custodian. When psychotropic
9 medications or interventions involving aversive stimuli are
10 administered to a child under the age of fourteen, the child's
11 guardian ad litem shall be notified by the residential
12 treatment or habilitation program.

13 E. Psychotropic medications or interventions
14 involving aversive stimuli may be administered to a child
15 fourteen years of age or older with the informed consent of the
16 [~~child~~] child's parent. When psychotropic medications or
17 interventions involving aversive stimuli are administered to a
18 child fourteen years of age or older, the child's parent,
19 guardian or legal custodian shall be notified by the
20 residential treatment or habilitation program. If the consent
21 of the child is not obtained, or if the mental health or
22 developmental disabilities professional or physician who is
23 proposing this or any other course of treatment or any other
24 interested person believes that the child is incapable of
25 informed consent, and the treatment provider or another

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1 interested person believes that the administration of the drug
2 or program is necessary to protect the child from serious harm,
3 any interested party may request that the children's court
4 attorney petition the court for appointment of a treatment
5 guardian to make a substitute decision for the child. The
6 petition shall be served on the child and the child's attorney.
7 A hearing on the petition shall be held within three court
8 days. At the hearing, the child shall be represented by
9 counsel and shall have the right to be present, to present
10 witnesses and to cross-examine opposing witnesses. If after
11 the hearing the court finds that the child is not capable of
12 making treatment decisions, the court may order the appointment
13 of a treatment guardian. When appointing a treatment guardian
14 for the child, the court shall appoint the child's parent or
15 guardian unless the child is in the custody of the department
16 or the court finds that the child's parent or guardian is
17 unable or unwilling to act in the child's best interests. When
18 the child is in the custody of the department, the court shall
19 appoint the child's legal custodian as treatment guardian,
20 unless the court finds that the legal custodian is unable or
21 unwilling to act in the child's best interests. The treatment
22 guardian shall make a decision on behalf of the child whether
23 to accept treatment, depending on whether the treatment appears
24 to be in the child's best interests and is consistent with the
25 least drastic means principle for accomplishing the treatment

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1 objective. In making this decision, the treatment guardian
2 shall consult with the child and consider the child's expressed
3 opinions, if any, even if those opinions do not constitute
4 valid consent or rejection of treatment. The treatment
5 guardian shall give consideration to any previous decisions
6 made by the child in similar circumstances when the child was
7 able to make treatment decisions. If a child, who is not a
8 resident of a medical facility and for whom a treatment
9 guardian has been appointed, refuses to comply with the
10 decision of the treatment guardian, the treatment guardian may
11 apply to the court for an enforcement order. The enforcement
12 order may authorize any peace officer to take the child into
13 custody and to transport the child to an evaluation facility
14 and may authorize the facility to forcibly administer
15 treatment. The treatment guardian shall consult with the
16 physician or other professional who is proposing treatment, the
17 child's attorney and interested friends or relatives of the
18 child as the treatment guardian deems appropriate in making
19 this decision. A child, physician or other professional
20 wishing to appeal the decision of the treatment guardian may do
21 so by filing an appeal with the court within three calendar
22 days of receiving notice of the treatment guardian's decision.
23 In such a decision, the child shall be represented by counsel.
24 The court may overrule the treatment guardian's decision if it
25 finds that decision to be against the best interests of the

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1 child.

2 F. When the court appoints a treatment guardian, it
3 shall specify the length of time during which the treatment
4 guardian may exercise treatment guardian powers, up to a
5 maximum period of one year. If at the end of the guardianship
6 period the treatment guardian believes that the child is still
7 incapable of making treatment decisions, the treatment guardian
8 shall petition the court for reappointment or for appointment
9 of a new treatment guardian. The guardianship shall be
10 extended or a new guardian shall be appointed only if the court
11 finds the child is, at the time of the hearing, incapable of
12 understanding and expressing an opinion regarding treatment
13 decisions. The child shall be represented by counsel and shall
14 have the right to be present and to present evidence at all
15 such hearings.

16 G. If during the period of a treatment guardian's
17 power the treatment guardian, the child, the treatment
18 provider, a member of the child's family or the child's
19 attorney believes that the child has regained competence to
20 make treatment decisions, that person may petition the court
21 for a termination of the treatment guardianship. If the court
22 finds the child is capable of making treatment decisions, it
23 shall terminate the power of the treatment guardian and restore
24 to the child the power to make treatment decisions.

25 H. A treatment guardian shall only have those

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1 powers enumerated in the Children's Mental Health and
2 Developmental Disabilities Act.

3 I. If a licensed physician believes that the
4 administration of psychotropic medication is necessary to
5 protect the child from serious harm that could occur while the
6 provisions of this section are being satisfied, the licensed
7 physician may administer the medication on an emergency basis.
8 When medication is administered to a child on an emergency
9 basis, the treating physician shall prepare and place in the
10 child's medical records a report explaining the nature of the
11 emergency and the reason that no treatment less drastic than
12 administration of psychotropic medication without proper
13 consent would have protected the child from serious harm. When
14 medication is administered to a child on an emergency basis,
15 the child's parent, guardian or legal custodian and the child's
16 attorney or guardian ad litem shall be notified by the
17 residential treatment or habilitation program.

18 J. Liability of persons providing mental health and
19 developmental disability services to children shall be as
20 follows:

21 (1) no mental health or developmental
22 disability professional or treatment facility is required to
23 detain, treat or provide services to a child when the child
24 does not require detention, treatment or services;

25 (2) no mental health or developmental

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1 disability professional or facility may be held liable solely
2 on the basis of misrepresentations made to them by a child
3 seeking treatment or habilitation services or by a child's
4 parent, provided the professional or the facility's staff acted
5 in good faith;

6 (3) no mental health or developmental
7 disability professional or facility may be held liable solely
8 on the basis of reliance upon a tribal court order, provided
9 the mental health or developmental professional or the
10 facility's staff acted in good faith;

11 (4) nothing in the Children's Mental Health
12 and Developmental Disabilities Act shall be construed to
13 relieve any professional or facility from liability for
14 negligence in the diagnosis, treatment or services provided to
15 any child; and

16 (5) nothing in the Children's Mental Health
17 and Developmental Disabilities Act shall be construed to
18 relieve any professional or facility from duties placed on them
19 by reporting laws relating to the detection of child abuse.

20 K. A parent shall be responsible for the cost of
21 mental health services provided to the parent's child. This
22 section does not affect the right of any child to receive free
23 mental health or developmental disability services under any
24 publicly supported program or the right of any parent to
25 reimbursement from, or payment on the child's behalf by, any

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1 publicly supported program or private insurer; provided that
2 the state shall pay no more than four hundred dollars (\$400)
3 per day for the cost of such services. The state may adjust
4 this rate. However, any adjustment should be based on a cost
5 analysis conducted by the department and reviewed by the
6 legislative finance committee."

7 Section 3. REPEAL.--Section 32A-6-12 NMSA 1978 (being
8 Laws 1995, Chapter 207, Section 14, as amended) is repealed.

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