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SENATE BILL 118

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

INTRODUCED BY

John Arthur Smith

AN ACT

RELATING TO EXECUTIVE ORGANIZATION; MERGING THE AGING AND LONG-TERM SERVICES DEPARTMENT AND THE HUMAN SERVICES DEPARTMENT; PROVIDING FOR THE TRANSFER OF FUNCTIONS, MONEY, APPROPRIATIONS, RECORDS, PROPERTY, CONTRACTUAL OBLIGATIONS AND STATUTORY REFERENCES; REPEALING THE AGING AND LONG-TERM SERVICES DEPARTMENT ACT; AMENDING, REPEALING AND ENACTING SECTIONS OF THE NMSA 1978.

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

Section 1. Section 9-8-3 NMSA 1978 (being Laws 1977, Chapter 252, Section 3, as amended) is amended to read:

"9-8-3. PURPOSE.--The purpose of the Human Services Department Act is to establish a single, unified department to administer laws and exercise functions relating to human services [and] formerly administered and exercised by the

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1 administrative services unit, the state welfare and social
2 services agencies of the health and social services department
3 [~~and~~], the committee on children and youth and the aging and
4 long-term services department."

5 Section 2. Section 9-8-4 NMSA 1978 (being Laws 1977,
6 Chapter 252, Section 4, as amended) is amended to read:

7 "9-8-4. DEPARTMENT ESTABLISHED.--

8 A. There is created in the executive branch the
9 "human services department". The department shall be a cabinet
10 department and shall consist of, but not be limited to, [~~six~~]
11 ten divisions as follows:

- 12 (1) the income support division;
- 13 (2) the administrative services division;
- 14 (3) the medical assistance division;
- 15 (4) the child support enforcement division;
- 16 (5) the behavioral health services division;

17 [~~and~~]

- 18 (6) the information technology division;
- 19 (7) the consumer and elder rights division;
- 20 (8) the aging network services division;
- 21 (9) the long-term care division; and
- 22 (10) the adult protective services division.

23 B. All references in the law to the behavioral
24 health services division of the department of health or to the
25 mental health division of the department of health in Sections

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1 29-11-1 through 29-11-7 NMSA 1978 or to the department of
2 health in Sections 43-2-1.1 through 43-2-23 NMSA 1978 shall be
3 construed as referring to the human services department.

4 C. All references in law to the aging and long-term
5 services department shall be deemed to be references to the
6 human services department."

7 Section 3. A new section of the Human Services Department
8 Act is enacted to read:

9 "[NEW MATERIAL] DIVISIONS--GENERAL DUTIES.--In addition to
10 the duties assigned to each division of the department by the
11 secretary:

12 A. the consumer and elder rights division shall
13 administer the long-term care ombudsman program and provide
14 health insurance and benefits counseling and legal services;

15 B. the aging network services division shall
16 administer the federal Older Americans Act of 1965 programs;

17 C. the long-term care division shall administer
18 home- and community-based long-term care programs; and

19 D. the adult protective services division shall
20 provide adult protective services."

21 Section 4. A new section of the Human Services Department
22 Act is enacted to read:

23 "[NEW MATERIAL] OFFICE OF INDIAN ELDER AFFAIRS CREATED.--
24 The "office of Indian elder affairs" is created within the
25 office of the secretary. The office of Indian elder affairs

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1 shall assume the responsibilities of the Indian area agency on
2 aging, including contract management, program compliance
3 monitoring, technical assistance, advocacy and training to
4 pueblo and Apache tribe Older Americans Act of 1965 programs
5 and establishing relationships that support the efforts of the
6 Navajo area agency on aging and shall participate with the
7 other divisions of the department to review and make
8 recommendations regarding other health and social programs of
9 the department that serve Indian elders."

10 Section 5. Section 6-29-9 NMSA 1978 (being Laws 2008,
11 Chapter 81, Section 3) is amended to read:

12 "6-29-9. TRIBAL CAPITAL OUTLAY REVERSIONS.--

13 A. The unexpended balances of a capital outlay
14 appropriation made after [~~January 1, 2007~~] July 1, 2010 from
15 the general fund to the department or to the [~~aging and long-~~
16 ~~term~~] human services department for projects located on lands
17 of an Indian nation, tribe or pueblo shall revert to the
18 project fund.

19 B. For the purpose of this section, "unexpended
20 balance" means the remainder of an appropriation after
21 reserving for unpaid costs and expenses covered by binding
22 written obligations to third parties."

23 Section 6. Section 27-7-16 NMSA 1978 (being Laws 1989,
24 Chapter 389, Section 3, as amended) is amended to read:

25 "27-7-16. DEFINITIONS.--As used in the Adult Protective

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1 Services Act:

2 A. "ability to consent" means an adult's ability to
3 understand and appreciate the nature and consequences of
4 proposed protective services or protective placement, including
5 benefits, risks and alternatives to the proposed services or
6 placement and to make or communicate an informed decision;

7 B. "abuse" means:

8 (1) knowingly, intentionally or negligently
9 and without justifiable cause inflicting physical pain, injury
10 or mental anguish;

11 (2) the intentional deprivation by a caretaker
12 or other person of services necessary to maintain the mental
13 and physical health of an adult; or

14 (3) sexual abuse, including criminal sexual
15 contact, incest and criminal sexual penetration;

16 C. "adult" means a person eighteen years of age or
17 older;

18 D. "caretaker" means a facility, provider or
19 individual that has assumed the responsibility for the care of
20 an adult;

21 E. "conservator" means a person who is appointed by
22 a court to manage the property or financial affairs, or both,
23 of an incapacitated adult;

24 F. "court" means the district court having
25 jurisdiction;

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1 G. "department" means the [~~aging and long-term~~
2 human services department;

3 H. "emergency" means that an adult is living in
4 conditions that present a substantial risk of death or
5 immediate and serious physical harm to the adult or others;

6 I. "exploitation" means an unjust or improper use
7 of an adult's money or property for another person's profit or
8 advantage, pecuniary or otherwise;

9 J. "facility" means a hospital, nursing home,
10 residential care facility, group home, foster care home,
11 assisted living facility or other facility licensed by the
12 state, but does not include a jail, prison or detention
13 facility;

14 K. "guardian" means a person who has qualified to
15 provide for the care, custody or control of an incapacitated
16 adult pursuant to testamentary or court appointment, but
17 excludes one who is a guardian ad litem;

18 L. "incapacitated adult" means any adult with a
19 mental, physical or developmental condition that substantially
20 impairs the adult's ability to provide adequately for the
21 adult's own care or protection;

22 M. "multidisciplinary team" means a team composed
23 of diverse professionals who meet periodically to consult on or
24 enhance appropriate community responses to abuse, neglect or
25 exploitation of adults;

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1 N. "neglect" means the failure of the caretaker of
2 an adult to provide for the basic needs of the adult, such as
3 clothing, food, shelter, supervision and care for the physical
4 and mental health of that adult; "neglect" includes self-
5 neglect;

6 O. "protected adult" means an adult for whom a
7 guardian or conservator has been appointed or other protective
8 order has been made or an abused, neglected or exploited adult
9 who has consented to protective services or protective
10 placement;

11 P. "protective placement" means the placement of an
12 adult with a provider or in a facility or the transfer of an
13 adult from one provider or facility to another;

14 Q. "protective services" means the services
15 furnished by the department or its delegate, as described in
16 Section 27-7-21 NMSA 1978;

17 R. "provider" means a private-residence or health
18 care worker or an unlicensed residential or nonresidential
19 entity that provides personal, custodial or health care;

20 S. "self-neglect" means an act or omission by an
21 incapacitated adult that results in the deprivation of
22 essential services or supports necessary to maintain the
23 incapacitated adult's minimal mental, emotional or physical
24 health and safety;

25 T. "substantiated" means a determination, based on

1 a preponderance of collected and assessed credible information,
2 that abuse, neglect or exploitation of an incapacitated or
3 protected adult has occurred; and

4 U. "surrogate" means a person legally authorized to
5 act on an adult's behalf."

6 Section 7. Section 27-7A-2 NMSA 1978 (being Laws 2005,
7 Chapter 256, Section 2) is amended to read:

8 "27-7A-2. DEFINITIONS.--As used in the Employee Abuse
9 Registry Act:

10 A. "abuse" means:

11 (1) knowingly, intentionally or negligently
12 and without justifiable cause inflicting physical pain, injury
13 or mental anguish; or

14 (2) the intentional deprivation by a caretaker
15 or other person of services necessary to maintain the mental
16 and physical health of a person;

17 B. "department" means the department of health;

18 C. "direct care" means face-to-face services
19 provided or routine and unsupervised physical or financial
20 access to a recipient of services;

21 D. "employee" means a person employed by or on
22 contract with a provider, either directly or through a third
23 party arrangement to provide direct care. "Employee" does not
24 include a New Mexico licensed health care professional
25 practicing within the scope of the profession's license or a

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1 certified nurse aide;

2 E. "exploitation" means an unjust or improper use
3 of a person's money or property for another person's profit or
4 advantage, pecuniary or otherwise;

5 F. "neglect" means, subject to a person's right to
6 refuse treatment and subject to a provider's right to exercise
7 sound medical discretion, the failure of an employee to provide
8 basic needs such as clothing, food, shelter, supervision and
9 care for the physical and mental health of a person or failure
10 by a person that may cause physical or psychological harm;

11 G. "provider" means an intermediate care facility
12 for the mentally retarded; a rehabilitation facility; a home
13 health agency; a homemaker agency; a home for the aged or
14 disabled; a group home; an adult foster care home; a case
15 management entity that provides services to elderly people or
16 people with developmental disabilities; a corporate guardian; a
17 private residence that provides personal care, adult
18 residential care or natural and surrogate family services
19 provided to persons with developmental disabilities; an adult
20 daycare center; a boarding home; an adult residential care
21 home; a residential service or habilitation service authorized
22 to be reimbursed by medicaid; any licensed or medicaid-
23 certified entity or any program funded by the [~~aging and long-~~
24 ~~term~~] human services department that provides respite,
25 companion or personal care services; programs funded by the

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1 [children, youth and families] human services department that
2 provide homemaker or adult daycare services; and any other
3 individual, agency or organization that provides respite care
4 or delivers home- and community-based services to adults or
5 children with developmental disabilities or physical
6 disabilities or to the elderly, but excluding a managed care
7 organization unless the employees of the managed care
8 organization provide respite care or deliver home- and
9 community-based services to adults or children with
10 developmental disabilities or physical disabilities or to the
11 elderly;

12 H. "registry" means an electronic database that
13 provides information on substantiated employee abuse, neglect
14 or exploitation; and

15 I. "secretary" means the secretary of health."

16 Section 8. Section 27-7A-5 NMSA 1978 (being Laws 2005,
17 Chapter 256, Section 5) is amended to read:

18 "27-7A-5. ADULT PROTECTIVE SERVICES DIVISION REPORT OF
19 ABUSE, NEGLECT OR EXPLOITATION.--

20 A. The adult protective services division of the
21 [~~aging and long-term~~] human services department shall
22 investigate allegations of abuse, neglect and exploitation
23 consistent with its statutory responsibilities.

24 B. If the adult protective services division
25 determines that abuse, neglect or exploitation has occurred, it

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1 shall notify the employee and the provider of that
2 determination, and such determination shall include a
3 determination of whether the abuse, neglect or exploitation was
4 the result of conduct by the employee, the provider or both.

5 C. The adult protective services division shall
6 report to the department of health any substantiated finding of
7 abuse, neglect or exploitation made against an employee of a
8 provider under waiver or other programs administered by the
9 [~~aging and long-term~~] human services department and not
10 otherwise licensed by or under contract with the department."

11 Section 9. Section 27-7A-6 NMSA 1978 (being Laws 2005,
12 Chapter 256, Section 6) is amended to read:

13 "27-7A-6. PLACEMENT ON REGISTRY AND HEARING PROCESS.--

14 A. If the department or the adult protective
15 services division of the [~~aging and long-term~~] human services
16 department determines that abuse, neglect or exploitation by an
17 employee has occurred, the department making that determination
18 shall notify the employee and the provider, in person or by
19 certified mail, of the following:

20 (1) the nature of the determination of the
21 abuse, neglect or exploitation;

22 (2) the date and time of the occurrence;

23 (3) the employee's right to a hearing;

24 (4) the department's intent to report the
25 substantiated findings, once the employee has had the

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1 opportunity for a hearing, to the registry; and

2 (5) that the employee's failure to request a
3 hearing in writing within thirty days from the date of the
4 notice shall result in the department reporting substantiated
5 findings to the registry and the provider.

6 B. If an employee requests a hearing, that hearing
7 shall be conducted by an independent hearing officer of the
8 department that made the determination of abuse, neglect or
9 exploitation.

10 C. After expiration of the time period for
11 requesting a hearing, or if a determination of abuse, neglect
12 or exploitation is substantiated through the hearing process,
13 the substantiated finding of abuse, neglect or exploitation
14 shall be placed on the registry through a report of the
15 appropriate department.

16 D. An employee aggrieved by the final decision
17 following a hearing shall have the right to judicial review
18 pursuant to the provisions of Section 39-3-1.1 NMSA 1978."

19 Section 10. Section 27-15-2 NMSA 1978 (being Laws 2006,
20 Chapter 112, Section 2) is amended to read:

21 "27-15-2. DEFINITION.--As used in the Money Follows the
22 Person in New Mexico Act, "department" means the [~~aging and~~
23 ~~long-term~~] human services department."

24 Section 11. Section 28-4-5 NMSA 1978 (being Laws 1979,
25 Chapter 203, Section 2) is amended to read:

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1 "28-4-5. AGENCY DUTIES.--The [~~state agency on aging~~]
2 human services department shall establish and maintain a
3 comprehensive statewide program designed to meet the social
4 service needs of the state's aged population, including but not
5 limited to the following:

6 A. strengthen and coordinate services of state and
7 local public bodies for the benefit of the aged;

8 B. promote the [~~utilization~~] use of older persons
9 in all phases of employment;

10 C. disseminate information to the aged relative to
11 federal, state and local services for the aged;

12 D. encourage training programs, retraining programs
13 and opportunities for older workers;

14 E. develop new methods of job placement for older
15 workers;

16 F. promote public recognition of the advantages of
17 hiring and retaining older workers; and

18 G. promote and develop programs of community
19 resources and facilities designed to meet the social needs of
20 older persons."

21 Section 12. Section 28-4-6 NMSA 1978 (being Laws 1979,
22 Chapter 203, Section 3, as amended) is amended to read:

23 "28-4-6. [~~AGENCY~~] DEPARTMENT POWERS.--

24 A. The [~~state agency on aging~~] human services
25 department:

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1 (1) may receive on behalf of the state any
2 gifts, donations or bequests from any source to be used in
3 carrying out its duties; and

4 (2) is designated as the state agency for
5 handling all programs of the federal government related to the
6 aged, except those designated by law as the responsibility of
7 another state agency, and may enter into agreements and
8 contracts with agencies of the federal government for this
9 purpose.

10 B. The ~~[state agency on aging]~~ human services
11 department may adopt and promulgate ~~[such]~~ reasonable rules
12 ~~[and regulations]~~ as are deemed necessary to carry out its
13 duties. Unless otherwise provided by law, no rule ~~[or~~
14 ~~regulation]~~ affecting any person or agency outside the ~~[state~~
15 ~~agency on aging]~~ human services department shall be adopted,
16 amended or repealed without a public hearing on the proposed
17 action before the ~~[director of the state agency on aging]~~
18 secretary of human services or a hearing officer designated by
19 ~~[him]~~ the secretary. The public hearing shall be held in Santa
20 Fe unless otherwise permitted by statute. Notice of the
21 subject matter of the rule ~~[or regulation]~~, the action proposed
22 to be taken, the time and place of the hearing, the manner in
23 which interested persons may present their views and the method
24 by which copies of the proposed rule ~~[or regulation]~~ or
25 proposed amendment or repeal of an existing rule ~~[or~~

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1 ~~regulation~~] may be obtained shall be published once at least
2 thirty days prior to the hearing in a newspaper of general
3 circulation and mailed at least thirty days prior to the
4 hearing date to all persons who have made a written request for
5 advance notice of hearing. The [~~director of the state agency~~
6 ~~on aging~~] secretary of human services shall also provide [~~such~~]
7 notice to the director of each senior citizen center no later
8 than forty days prior to the public hearing. All rules [~~and~~
9 ~~regulations~~] shall be filed in accordance with the State Rules
10 Act.

11 C. To ensure that the health and safety needs of
12 the state's aged population are being met, the [~~state agency on~~
13 ~~aging~~] human services department may conduct unannounced
14 quality care evaluations of health and long-term care
15 facilities that provide services to the aged, including the use
16 of undercover patients or employees. Any employee or
17 contractor of the [~~state agency on aging~~] human services
18 department who participates in such an evaluation shall be
19 immune from liability in any civil action related to the
20 evaluation, provided it is conducted in good faith. The
21 purpose of this subsection is to confirm and clarify the
22 authority of the [~~state agency on aging~~] human services
23 department to conduct quality care evaluations to protect the
24 interests of the state's aged population."

25 Section 13. Section 28-4-8 NMSA 1978 (being Laws 1979,

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1 Chapter 203, Section 5) is amended to read:

2 "28-4-8. REPORTS.--The [~~state agency on aging~~] human
3 services department shall submit reports on its work for the
4 preceding year to the governor and the legislature at least
5 forty-five days prior to each regular legislative session. The
6 reports shall contain recommendations on present and future
7 needs of the aged."

8 Section 14. Section 28-4-9 NMSA 1978 (being Laws 1979,
9 Chapter 203, Section 6, as amended) is amended to read:

10 "28-4-9. ADVISORY COMMITTEE.--The governor shall appoint
11 an eleven-member advisory committee to the [~~state agency on~~
12 ~~aging~~] human services department in accordance with the
13 provisions of the Executive Reorganization Act. In
14 establishing the committee, the governor shall take note of any
15 federal requirements regarding membership and shall appoint
16 members for staggered terms of four years. Members of the
17 committee shall be reimbursed for services as provided for in
18 the Per Diem and Mileage Act and shall receive no other
19 compensation, perquisite or allowance."

20 Section 15. Section 29-17-4 NMSA 1978 (being Laws 1998,
21 Chapter 68, Section 3, as amended) is amended to read:

22 "29-17-4. DEFINITIONS.--As used in the Caregivers
23 Criminal History Screening Act:

24 A. "applicant" means a person who seeks and is
25 offered employment or contractual service as a caregiver or

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1 hospital caregiver with a care provider;

2 B. "caregiver" means a person, not otherwise
3 required to undergo a nationwide criminal history screening by
4 the New Mexico Children's and Juvenile Facility Criminal
5 Records Screening Act, whose employment or contractual service
6 with a care provider includes direct care or routine and
7 unsupervised physical or financial access to any care recipient
8 served by that provider;

9 C. "care provider" or "provider" means a skilled
10 nursing facility; an intermediate care facility; a care
11 facility for the mentally retarded; a general acute care
12 facility; a psychiatric facility; a rehabilitation facility; a
13 home health agency; a homemaker agency; a home for the aged or
14 disabled; a group home; an adult foster care home; a guardian
15 service provider; a case management entity that provides
16 services to people with developmental disabilities; a private
17 residence that provides personal care, adult residential care
18 or nursing care for two or more persons not related by blood or
19 marriage to the facility's operator or owner; an adult daycare
20 center; a boarding home; an adult residential care home; a
21 residential service or habilitation service authorized to be
22 reimbursed by medicaid; any licensed or medicaid-certified
23 entity or any program funded by the [~~aging and long-term~~] human
24 services department that provides respite, companion or
25 personal care services; or programs funded by the [~~children,~~

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1 ~~youth and families]~~ human services department that provide
2 homemaker or adult daycare services. "Care provider" or
3 "provider" does not include resident care facilities located at
4 or performing services exclusively for any correctional
5 facility, outpatient treatment facilities, diagnostic and
6 treatment facilities, ambulatory surgical centers and
7 facilities, end-stage renal dialysis and treatment facilities,
8 rural health clinics, private physicians' offices or other
9 clinics that operate in the same manner as private physicians'
10 offices in group practice settings;

11 D. "care recipient" means any person under the care
12 of a provider who has a physical or mental illness, injury or
13 disability or who suffers from any cognitive impairment that
14 restricts or limits the person's activities;

15 E. "conviction" means a plea, judgment or verdict
16 of guilty, a plea of nolo contendere, an Alford plea or any
17 plea or judgment entered in connection with a suspended
18 sentence, in this state or any other state or jurisdiction;

19 F. "hospital caregiver" means a person who provides
20 direct unsupervised patient care in an inpatient setting and is
21 not a licensed New Mexico health care professional practicing
22 within the scope of a profession's license;

23 G. "nationwide criminal history screening" means a
24 criminal history background investigation of an applicant,
25 caregiver or hospital caregiver through the use of fingerprints

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1 collected by the department of public safety and submitted to
2 the federal bureau of investigation, resulting in generation of
3 a nationwide criminal history record for that applicant,
4 caregiver or hospital caregiver;

5 H. "nationwide criminal history record" means
6 information concerning a person's arrests, indictments or other
7 formal criminal charges and any dispositions arising therefrom,
8 including convictions, dismissals, acquittals, sentencing and
9 correctional supervision, and collected by criminal justice
10 agencies; and

11 I. "statewide criminal history screening" means a
12 criminal history background investigation of an applicant or
13 caregiver through the comparison of identifying information
14 with the department of public safety's criminal record
15 repository."

16 Section 16. TEMPORARY PROVISION--TRANSFER OF FUNCTIONS,
17 APPROPRIATIONS, MONEY, RECORDS, PROPERTY, CONTRACTUAL
18 OBLIGATIONS AND STATUTORY REFERENCES.--

19 A. On the effective date of this act, all
20 functions, appropriations, money, records, furniture,
21 equipment, supplies and other property of the aging and long-
22 term services department are transferred to the human services
23 department.

24 B. On the effective date of this act, all
25 contractual obligations of the aging and long-term services

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1 department shall be deemed to be contractual obligations of the
2 human services department.

3 C. On the effective date of this act, all
4 references in law to the aging and long-term services
5 department shall be deemed to be references to the human
6 services department.

7 Section 17. REPEAL.--Sections 9-23-1 through 9-23-12,
8 28-4-1 through 28-4-4 and 28-4-7 NMSA 1978 (being Laws 2004,
9 Chapter 23, Sections 1 through 11, Laws 2004, Chapter 46,
10 Section 15, Laws 1969, Chapter 55, Section 2, Laws 1977,
11 Chapter 252, Section 17, Laws 1969, Chapter 55, Section 3 and
12 Laws 1979, Chapter 203, Sections 1 and 4) are repealed.

13 Section 18. EFFECTIVE DATE.--The effective date of the
14 provisions of this act is July 1, 2010.