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FISCAL IMPACT REPORT

ORIGINAL DATE 02/28/11

SPONSOR Kintigh LAST UPDATED HB 559

SHORT TITLE Behavioral Health Informed Consent Capability SB

ANALYST Hanika-Ortiz

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		*See Fiscal Impact			Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Administrative Office of the Courts (AOC)
 Department of Health (DOH)
 Human Services Department (HSD)
 Developmental Disabilities Planning Council (DDPC)
 Aging and Long-Term Services Department (ALTSD)

SUMMARY

Synopsis of Bill

House Bill 559 amends Section 43-1-15 NMSA 1978 of the Mental Health and Developmental Disabilities Code (MHDDC) or (Code) to provide for further procedures and attorney representation in determinations of whether a person is capable of informed consent for behavioral health treatment and for the appointment of a treatment guardian.

More specifically, HB 499 provides for the following:

(C) requires detailed information in the petition, including a showing that the client received ample and clear notice of the need for treatment, refused voluntary mental health treatment, and is not capable of informed consent and the facts that form the basis for this belief; identification of the client's treating mental health professional, if known; the name and location of the treatment facility, if any, where the client is; and potential sources of payment for the client's treatment and evaluation;

(D) requires that DOH provide the client with an attorney for the petition proceedings;

(E) provides the required time frames for the hearing on the petition depending on whether the client is in a treatment facility and provides that the client shall be represented by counsel at the hearing and shall have the right to be present, to present witnesses, and to cross-examine opposing witnesses; where the petitioner is not a mental health professional or physician, the court is to order a competency evaluation within two days of the filing of the petition;

(F) and (G) orders the department to provide the professional or physician to conduct the evaluation where the client does not have a treating professional or physician or such is not available or if there are not sufficient funds to pay for an evaluation;

(H) if the department has no funds available for such an evaluation, the court must dismiss the petition;

(I) requires notice of the evaluation to be served by the sheriff on the client and sets out the court's options if the client fails to comply with the order of evaluation, including dismissing the petition after an ex parte hearing where the court is to make a determination of probable cause as to whether the client is capable of informed consent;

(J) and (K) provide for required content of the evaluation and its effect on whether the petition will proceed or be dismissed;

(M) and (N) provide that if, after notice, the client fails to appear, the court may conduct the hearing in the client's absence, but the court shall not hold the client in contempt of court for failure to comply with a court order;

(P) allows the treatment guardian to rely upon preferences the client has expressed before or previous decisions the client has made under similar circumstances, if the client is unavailable;

(S) provides that during an appeal, the client shall be represented by counsel provided by the department;

(T) the department shall provide counsel to the client for the appeal and funding to the Office of Guardianship that is sufficient to train treatment guardians;

(U) when the court appoints a treatment guardian, the court's decision must be based upon the recommendation of the client's treating mental health professional and client's past history for recovery and compliance;

(V) the department shall provide an attorney on the state's behalf to contest a request that the client be relieved of a treatment guardian if the treating mental health professional has indicated a belief that the client is not capable of making treatment decisions;

(X) provides that a licensed psychologist with prescribing privileges pursuant to the New Mexico Drug, Device and Cosmetic Act, in addition to a licensed physician, may administer emergency medication; and

(Y) requires the department to create model forms, informational materials, and trainings outlining the processes for clients, petitioners, attorneys and district courts.

FISCAL IMPLICATIONS

HB 559 will require HSD's Behavioral Health Services Division, presumably the "department", to fund various activities related to the bill, including informational materials, trainings, funding the treatment guardian program, and providing the services of an attorney to act on behalf of the State if termination of the treatment guardian relationship is requested. Currently, training for the treatment guardian program is performed by NAMI-NM and is funded by the Developmental Disability Planning Council (DDPC) Office of Guardianship. There is no appropriation in the bill to support these activities.

DOH's role appears to be to provide representation to clients in these proceedings. There is also no appropriation in the bill to support those costs.

AGO notes that Subsection D and S which requires the State to provide attorneys to clients, deviates from the rest of the MHDDC. For other proceedings, the Code provides that clients shall be represented by counsel, directs the court to appoint counsel when the client is unable to do so, directs the court to give preference when appointing counsel to nonprofit organizations that specialize in representing persons with mental illnesses or developmental disabilities, and imposes liability for the cost of legal representation on the client, unless the client is indigent.

Any additional fiscal impact on the judiciary will be proportional to the number of times petitions and appeals are brought under this new process as opposed to the current process.

DDPC states the potential for cost savings and other benefits to the state from:

- reducing the length of time clients are retained at mental health facilities;
- reducing the rate of clients returning to mental health facilities;
- reducing the adverse effect on local communities and on our families;
- reducing the number of clients being transported to/ from centralized mental health facilities;
- reducing the number of clients involved in the criminal justice system; and
- reducing the number of clients incarcerated with mental health needs, who may be able to return to localities with appropriate supportive and other services.

SIGNIFICANT ISSUES

AOC notes that the bill provides more specific protections of the client's right to be present and involved and informed of all proceedings. However, in doing so, the bill may remove the judge's discretion to run a courtroom and proceedings as might be required to maintain order and to achieve an efficient and just resolution. For example, new Subsection E seems to give the client the absolute right to be present, to present witnesses and to cross-examine opposing witnesses at the hearing. It is conceivable that some of these clients would not be able to accomplish these actions without being disruptive, which does not help the client or the resolution of the petition.

The AOC and the AGO both commented that Subsection H requires the court to dismiss the petition if DOH has no funds available for such an evaluation, which may not be in the best interest of the client. Once the petition is filed, the court's duty to consider the best interests of the client is triggered, and the decision of the court on the petition or its dismissal should not be dictated by the existence of funding in another state agency.

Subsection N prohibits the court from holding the client in contempt of court for failure to comply with a court order. This restriction may unduly invade the power and discretion of the judge to run the courtroom and to enforce compliance with its orders. Contempt may, in fact, be appropriate for some clients, depending on the degree of their incapacity, and the AOC asserts the judge must have discretion to make that decision.

PERFORMANCE IMPLICATIONS

DDPC notes that there is a great need for education and training for everyone involved with mental health issues related to the possible use of Mental Health Treatment Guardians. There is no uniform process and the current arrangement involves:

- DOH petitions for the appointment of Mental Health Treatment Guardians for clients in DOH facilities;

- district attorneys petition for the appointment of a Mental Health Treatment Guardians where criminal activity may exist;
- prisons/jails/detention centers may petition for the appointment of a Mental Health Treatment Guardians;
- other facilities or professional petitions are unaware of the Court process and availability of Mental Health Treatment Guardians; and
- the DDPC Office of Guardianship provides Mental Health treatment Guardians of last resort for appointment by the Courts.

ADMINISTRATIVE IMPLICATIONS

HSD notes that the bill calls for its Behavioral Health Services Division to provide treatment guardian training to the Office of Guardianship within the Developmental Disabilities Planning Council, to create all documents related to the treatment guardian process described therein, and to offer an annual training to department attorneys or designees, district court judges and court-appointed attorneys.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

House Bill 559 relates to or conflicts with:

- SB 539 provides that commitment petitions be filed when determined to be in the best interest of the client and to provide for district attorney representation of the petitioner.
- HB 497 allows the district attorney to file a petition in criminal prosecution proceedings involving a defendant whose case has been dismissed upon a finding of incompetency or cognitive disability; provides DOH and ALTSD, in lieu of the district attorney, with investigative powers and the power to petition for a civil commitment hearing in matters involving an adult's involuntary commitment for evaluation and treatment.
- HB 498 provides for the verdict of guilty but mentally ill plea.
- HB 499 provides for civil commitment of individuals who are mentally ill and dangerous to others.

TECHNICAL ISSUES

DDPC believes that there may be a conflict of interest in Section 43-1-15D: “The department of health shall provide the attorney assigned to the client.” This is particularly true where a DOH facility is providing the evaluation and treatment.

Subsection D twice refers to the “department of health”. This may be an error since references to “department” in the rest of the Code generally are intended to refer to the BHSD of HSD.

HSD notes that the bill does not provide a definition of “any other interested person.” Often the individual in question may be estranged from immediate family and other relatives, so a family member might not objectively or neutrally be in a position to evaluate the individual’s ‘best interests’.

HB 559’s provisions requiring the state to provide attorneys to clients are inconsistent with each other. Under Subsection D, DOH is required to provide the attorney assigned to a client for purposes of a petition for appointment of a treatment guardian. In contrast, Subsection S states

that the “department” provides a client with counsel for purposes of an appeal of a treatment guardian’s decision. “Department” as used in the Code, is defined as “the behavioral health services division of HSD.”

The bill expands the authority to prescribe emergency psychotropic medications to include prescribing psychologists. Certified nurse practitioners also have prescribing authority but are not included in the bill.

OTHER SUBSTANTIVE ISSUES

DDPC notes that the current stipend for treatment guardians paid by the Office of Guardianship of \$200.00 per appointment of six months or a year is inadequate to recruit and retain trained treatment guardians. A job description should be created with performance expectations, and a pay study should be performed for an appropriate salary for the expanded role. Currently, treatment guardians are generally untrained family members or other volunteers who may be unable to arrange for the supports needed, particularly in the more difficult needs.

DOH and HSD further note that the bill equates the concept of informed consent with compliance with treatment, specifically medication compliance. Individuals have the legal right to refuse medication, so the assessment of one’s capacity to give informed consent is not definitively determined by their choice not to accept treatment. HB 599 also states that mental health treatment will restore a client’s ability to provide informed consent, which may not always occur or be causally related.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

A continuing need to meet the communities need for treatment guardians, particularly in rural areas.

AMENDMENTS

AGO suggested the following amendments:

- Unless there is a reason for having the state provide counsel in the circumstances covered by Section 1(D) & (S) of HB 559, it might be less confusing and consistent with the rest of the Code to have the court appoint counsel under Section 43-1-4 of the Code.
- Delete Section 1(H).

AHO/svb