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FISCAL IMPACT REPORT

SPONSOR Strickler/Schmedes/ Papan ORIGINAL DATE 2/7/19 LAST UPDATED 2/11/19 HB 348
 SHORT TITLE Emergency Behavioral Health Evaluations SB _____
 ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY19 | FY20 | FY21 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|----------|----------|-------------------|---------------------------|---------------|
| Total | | Minimal* | Minimal* | Minimal* | Recurring | General Fund |

(Parenthesis () Indicate Expenditure Decreases)

- *See Fiscal Implications, below

Related to House Bill 106, 2018 House Bill 221

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Health (DOH)
 New Mexico Attorney General (NMAG)
 Administrative Office of the Courts (AOC)
 Children, Youth and Families Department (CYFD)
 Department of Public Safety (DPS)
 Human Service Department (HSD)

SUMMARY

Synopsis of Bill

House Bill 348 would amend the Mental Health and Developmental Disabilities Code, Section 43-1-3 NMSA 1978, to specify new standards for intervention by law enforcement agencies and personnel in the cases of people with mental or developmental disorders deemed to be a danger to themselves, to others, or to property. In addition, the bill specifies that the mental health of individuals in contact with the law must be kept confidential.

Sections of the act and their provisions are as follows:

| Section | Provisions |
|---------|---|
| 1 | <p>Definitions: New definitions are added to the code, including the following</p> <ul style="list-style-type: none"> • Admitting professional: a physician or psychologist with admitting privileges at a hospital • Authorizing professional: physician, psychologist, nurse with prescribing authority, qualified mental health professional (further defined as independent social worker, licensed professional mental health counselor, marriage and family therapist, certified nurse practitioner of mental health clinical nurse specialist) affiliated with agency or mental health center or peace officer • Crisis intervention: assistance by a trained peace officer or team to prevent harm when encountering a distressed person appearing to have a mental disorder • Developmental disabilities professional: a professional trained and experienced in working with persons with developmental disabilities • Developmental disability (altered definition): a person at least nine years old with severe , chronic and persistent disability that results in problems in activities of daily life; in a person less than 9 years, needing assistance with activities of daily life due to specific conditions |
| 2 | <p>Throughout this section, the term “client” is used in place of “person” in need of help.</p> <p>A client thought to have a mental disorder at risk to himself or others may be detained and transported for treatment if an emergency order is in place or if one is requested with reference to a professional’s opinion. Criteria and requirements for issuing an emergency order are specified, including a risk assessment based in part of statements made by the client, his/her past history, and access to weapons. Applications for emergency orders could be signed by authorized professionals or by others if also signed by a peace officer or court clerk. The order to be signed by a judge or district court commissioner would state the facts gathered and could include, if the court officer has determined that attempts have been made to allow the client to come forward without force, an order that a peace officer could enter a structure in which the client is thought to be. When the client has been taken to an admitting facility, the peace officer must present the reasons for having detained and transported the client, delivering a copy of the application for detention to the client and to the admitting professional at the evaluation facility.</p> <p>Before entering a structure believed to contain a client under emergency order, the officer must attempt to convince that client to come out voluntarily, unless it is thought that doing so would result in damage to that client or another person. In an emergency, when the peace officer reasonably believes that there is a danger to any person or property, the peace officer could enter the structure.</p> |

| | |
|---|---|
| | <p>If the admitting professional to whom the client has been taken determined there are grounds to detain him/her, further detention is authorized; otherwise the client is to be released.</p> <p>The county must reimburse the law enforcement agency for the costs of the transport, with a proviso for treble damages if the county fails to do so in a “timely manner.”</p> <p>Penalties are prescribed for persons misrepresenting the facts in these matters.</p> |
| 3 | <p>The legal basis for “disclosure of information” (Section 43-1-19 NMSA 1978) is changed in the following ways:</p> <ul style="list-style-type: none"> • Certification that a client’s authorization is not needed to release information about that client could be made by a mental health professional or a developmental disabilities professional. • DPS must create a form to be used to record information about clients’ mental health disorders, suicide attempts or risk for suicide, and risk to other people. This form is to be used <u>instead</u> of other police reports for this person, and this form must be kept confidential according to the provisions of HIPAA, the federal medical records confidentiality law. This information would be kept sealed. • Those alleged to have committed crimes would have aspects of the alleged crime reported in a criminal report, but that person’s mental health disorder information could not be released without a court order. Audio or video recordings made of a client’s actions relevant to establishing his/her mental health status could not be released except through the client’s or guardian’s permission or through a court order. |
| 4 | <p>Transportation provided by a peace officer would be authorized to a residential treatment facility, and, if directed by the residential facility, back to the county of origin, at the expense of the county of origin.</p> |

FISCAL IMPLICATIONS

An appropriation is not made.

DPS states that “There would be a potentially large operational and fiscal impact on the Department of Public Safety (DPS) related to the required creation and use of new forms, the likely need for a new, and separate database, and all related training.” However, on further review, DPS personnel indicated that the cost to that agency would probably be low, given that it would only need to generate a form for general use and then deal with only those forms generated by the State Police. Each local law enforcement agency would have to develop a method to handle the forms in a way that did not endanger a client’s HIPAA privacy rights.

AOC comments that “There is no data in the New Mexico judicial caseload to predict the number of cases that will be brought pursuant to this new action. The strict timelines will most likely create the need for additional staffing to ensure that a judge or district court commissioner is available during business hours as well as after hours for emergency applications (Section)

2(D)(1) and (2), and that orders are issued within the mandatory twenty-four (24) hour timeframe. It is estimated that courts will need to obtain a cell phone for after-hours calls, need at least one additional Judicial Specialist II to be available to process petitions, one judge or district court commissioner and one Trial Court Administrative Assistant to respond to inquiries and issue orders.”

SIGNIFICANT ISSUES

DOH notes that there are few New Mexico communities in which specialized law enforcement teams with experience dealing with mental health and developmental disabilities issues, and that law enforcement without relevant training would often be called upon to intervene in the manners contemplated under this bill.

The Department of Public Safety expresses concern that “HB348 would prohibit law enforcement agencies from utilizing their usual incident reports, and instead require the creation of a completely separate system of reporting, that must be separately maintained, and sealed. This is extremely problematic, especially given the fact that the forms are to be used even when the “client” has injured others or destroyed property, i.e. committed potentially criminal activity. It would also apply to ALL cases involving mental disorders, which means that the responding officer to any incident would have to independently evaluate the perpetrator’s mental condition, and use the correct form. The DPS New Mexico State Police Division’s officers are exceptional, but not medical professionals, and will not likely be able to accurately make that determination in every case. Failure to do so may result in legal liability.

“Moreover, the creation and use of the separate form is not necessary. Although it is not subject to HIPAA, the DPS already redacts health information prior to release pursuant to NMSA 1978, Section 14-6-1, which prohibits the release of an individual’s health information which is held by governmental agencies. If concerns remain, confidentiality may be assured by simply stating that information about behavioral or other health matters are not subject to the Inspection of Public Records Act. However, it does not seem advisable to have all information about incidents that may have resulted from mental health events protected from public view. It may also violate federal laws related to criminal history database requirements.”

The law as it exists at present states that if the client must be taken to a detention facility, s/he must be treated with respect, cannot be held in a cell with other prisoners, and suicide precautions must be taken. With respect to children, CYFD notes that

Per New Mexico’s Children’s Code, children ten years of age and under *cannot* be detained. This bill, however, suggests that children beginning at nine years of age could be detained because the mental health or developmental disabilities they suffer from could present an extreme risk to self or others. It seems that children younger than fourteen years of age could be excluded from this bill due to the fact they are currently authorized for evaluation or treatment by their legal guardian and do not have to consent.

Simply, youth nine to thirteen years of age should not need to be incarcerated in order to receive emergency evaluation or services. The acute hospital setting should suffice in identifying their needs and stabilizing them before releasing them back to their community. However, as older youth can refuse treatment, youth after fourteen years of age could be detained in order to receive an authorized evaluation to identify their risk to

self and or others. A CYFD Juvenile Probation Officer (JPO) team along with a CYFD Community Behavioral Health Clinician (CBHC) can meet with youth and their families inside or outside of detention to help them identify supportive services and help refer to those services.

The Juvenile Detention Alternative Initiative aligns a least restrictive placement model with the Children’s Code and CMS Medical Necessity. Children or youth presenting for detainment by law enforcement must present as a high risk to public safety to be detained. Children or youth who are exhibiting emergent mental health or substance abuse symptomology are currently routed through local emergency department for medical clearance. That is another check and balance where children/youth can receive emergency evaluation prior to being detained if their needs/risk is acute.

AOC points out several areas in which the language of the bill’s provisions may conflict with the Fourth and 14th Amendments.

RELATIONSHIP

- House Bill 106 (HB106) which proposes to eliminate in-service training for law enforcement on crisis management and crisis intervention from Section 29.7.7.5 NMAC 1978 (which outlines law enforcement training on interaction with persons with mental impairments).
- HB173 which proposes to enact the Child and Family Databank Act and amend sections of the Children’s Mental Health and Disabilities Act and the Mental Health and Developmental Disabilities Code.
- HB267 proposes requiring the New Mexico Sentencing Commission to create a data-sharing network for criminal justice data and amend a section of the Mental Health and Developmental Disabilities Code regarding disclosure.
- SB152 proposes to add language to the Mental Health and Developmental Disabilities Code to require NMDOH to establish a grievance procedure relating to patient consent for treatment.

TECHNICAL ISSUES

NMAG offers the following recommendations for changes:

- The definition of “mental disorder” appears to be rather broad. This should be reviewed to consider strengthening so as to provide law enforcement with a clear indication as to what would require them to write a HIPAA protected report or store their recordings in a separate HIPAA maintaining storage system.
- Similarly, a definition for “mental behavior” should be considered to provide law enforcement with a clear indication as to what would require them to write a HIPAA protected report or store their recordings in a separate HIPAA maintaining storage system.

- 43-1-10(A)(2) points to subsection G as an exception to detaining and transporting a person without a court order, but subsection G does not provide any authority or guidelines to detaining and transporting without a court order. Rather, subsection G offers a professional opinion to aid the court in making their determination as to whether or not to issue an order.
- HB 348 would require law enforcement to significantly alter the manner in they report, record, and store information when dealing with those who may have mental disorders. Subsections “I” and “J” of 41-1-19 NMSA 1978 would potentially force law enforcement to draft two separate reports of the same incident, one in which their observations of attempted or perpetrated harm may be mentioned, and one in which it may not.

AOC offers several other considerations:

- There is no definition provided for “applicant.” However, it can be inferred from the language of the bill that an applicant can be anyone other than an “authorized professional.” [Section 2(C)]. If the definition of “an applicant” is anyone other than an “authorized professional,” this definition could have a significant impact on the judicial caseload, staffing requirements, and short-term psychiatric facilities who lack inpatient capacity.
- There is no definition provided for “structure.” The aggravated burglary statute, NMSA 1978 § 30-16-4 defines “structure” as “any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable.”
- Section 2(H)(2) provides that a peace officer may detain and transport if he/she has reasonable grounds to believe that a client has “recently” attempted suicide. “Recently” is vague and subjective.
- The content of an application for an emergency order as set forth in Section 2(B) requires all four subsections be met, “if known.” Theoretically, an applicant could obtain an emergency order even if they do not submit any specific information in support of a risk assessment (subsection (3)) (i.e., person’s access to weapons; statements or conduct that the person will commit a violent or dangerous act).
- Section 2(B)(3)(c) “the client’s history of harm to self or others and negative response to law enforcement” is subjective and could have a disproportionate impact on persons of color.
- Section 3 amends NMSA 1978 § 43-1-9 Disclosure of Information. The proposed changes may conflict with the Inspection of Public Records Act, § 14-2-1 et seq.
- As currently written, Section 2(E) is confusing. The Act provides for a civil process and a civil emergency order for an evaluation. It appears to remove discretion from the court and combines civil process with the criminal process.
- Section 2(B) provides that an applicant “shall make an application to a court setting....” Under the current Mental Health and Developmental Disabilities Code, proceedings involving the “court” means a district court of New Mexico. *See* NMSA § 43-1-3(B)(F).

Yet, Section (2)R(2) provides for an exception, allowing emergency orders to be issued in either “a *metropolitan* or *district* court.” (emphasis added). The district court has exclusive jurisdiction over matters involving the Mental Health and Developmental Disabilities Code. N.M. Const. art. VI § 13. Whereas, a metropolitan court is a court of limited jurisdiction and hears cases ranging from contracts and landlord/tenant matters to misdemeanor, DWI/DUI, domestic violence and traffic violations. N.M. Const. art. 6, §§ 1 and 26; NMSA 1978 § 34-8A-3. In New Mexico, there is one metropolitan court and it is located in Bernalillo County. Other counties have magistrate and/or municipal courts which entertains landlord/tenant matters, petty misdemeanors, DWI/DUI, and traffic violations. NMSA 1978 § 35-3-3; § 35-14-2.

- The proposed legislation places a burden on the Court to obtain evidence in the case; specifically, it provides that before issuing a ruling for an emergency order, the court may seek to obtain an authorized professional. *See* Section 2(G). The Court is not responsible for producing evidence in a case. The Court may take judicial notice of records, but should not be required to actively research and find evidence. Further, the Act mandates that an opinion **shall** be obtained within twelve (12) hours of receiving the application. This would place a significant burden on a court. This duty is more appropriately placed on the Petitioner.
- In addition, Section 2(G) mandates the court to issue an order within twenty-four (24) hours of receiving the application. This would place a significant burden on a court.

DOH has other recommendations:

- The language on page 4 in paragraph I (2), which states: “by a peace officer or a team of individuals, which peace officer or team is trained in these techniques,” is unclear.
- The definition of “residential treatment or habilitation program” on page 10, paragraph X would be more accurate if the word “facility” were omitted and replaced with the term developmental disabilities “*service provider agency*”.
- HB348 defines “residential treatment or habilitation program” as evaluation, treatment, or habilitation rendered inside or on the premises of, among other things, a “developmental disabilities *facility*” [emphasis added]. Since 1997, when Los Lunas Hospital and Training School discharged their last resident from the facility, there have not been any developmental disabilities *facilities* operating in New Mexico.
- HB348 defines developmental disability differently than the definition approved by the Centers for Medicaid and Medicare Services (CMS) for the New Mexico Department of Health (NMDOH) to determine eligibility for the Central Registry Wait List for access to the Developmental Disability and Mi Via Self Directed Waivers.

Finally, HSD notes the following:

- Page 11, line 5 references Subsection G regarding emergency detention and transport in the absence of an emergency order. The reference should be a subsection H. Similarly, p.18, line 2 references Subsection G; the reference should be Subsection H.

- The bill should address the potential liability issues surrounding a “misdiagnosis” by a peace officer.
- Among other things, the bill’s Section 1(B)(5) authorizes a “peace officer” to conduct a scant mental health evaluation, in emergency situations, without extensive education and training. This could result in the infringement of Due Process. Peace officers are not qualified health professionals, as they lack the background and experience, and which cannot be fulfilled by taking a handful of hours of training. Declaring peace officers as health care professionals does not make them so.
- The bill also seemingly infringes on the public record, regarding the mental health context, as dashcam video, belt tape audio, and lapel cam video are routinely public record, subject to some limitations. Additionally, the bill alludes to the use of a prepared form/report to be used by peace officers, yet it mandates that no identifiable information contained in said report, can allude to the possibility of a mental health issue.

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