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FISCAL IMPACT REPORT

ORIGINAL DATE 1/30/2019

SPONSOR Stafanics LAST UPDATED _____ HB _____

SHORT TITLE Mental Health Consent to Treatment SB 152

ANALYST Chenier

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$30.0	\$25.0	\$55.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Health (DOH)
 New Mexico Attorney General (NMAG)
 Human Services Department (HSD)
 Developmental Disabilities Planning Council (DDPC)

SUMMARY

Synopsis of Bill

Senate Bill 152 proposes to amend Section 43-1-15, which generally sets forth the procedures that physicians, patients, and patient families must follow in order to deliver medical treatment to a patient who may be incapable of consent. The bill would modify the section by requiring the DOH to promulgate rules to establish and then subsequently implement a new grievance procedure for resolving patient complaints and concerns. This provision would only apply to concerns with respect to the patient’s rights under Section 43-1-15. As a result, the grievance procedure would be limited in scope to issues of consent and decisions made by treatment guardians.

As it is currently written, the statute provides that an “interested person,” including a physician or other mental health professional, may petition a District Court to appoint a substitute “treatment guardian” to make decisions for the patient. Section 43-1-15 also currently provides for appeals of a treatment guardian’s decision, the length of a treatment guardian’s appointment, and emergency medical decisions by physicians (among other provisions).

FISCAL IMPLICATIONS

DOH stated that initially, the bill would require DOH to promulgate a rule that would incur costs related to the rule promulgation, including hearing officer, publication fees, etc. Those costs are estimated to be about \$5 thousand. Once the rule has been promulgated, the bill will require DOH to use a FTE or partial FTE to process the incoming grievances. That cost is estimated to be about \$25 thousand per year.

If the bill is enacted, DOH will be required to administer a grievance program. The extent of the program will impact its cost. If the grievance program was to be used for entities outside of DOH, that may increase the cost as it would entail memoranda of agreement and other interagency work.

SIGNIFICANT ISSUES

NMAC stated that the bill would authorize DOH to resolve patient complaints, but it does not provide what remedies, if any, the department would be authorized to grant. The bill does not state what sanctions or awards the department could provide to resolve the grievance process. This would create ambiguity with respect to the validity of the department's rules and the enforceability of any orders it might issue following a particular grievance process.

DDPC provided the following:

Having a grievance procedure in place through the Department of Health to resolve issues regarding consent to treatment offers an additional layer of protection for individuals who are served by mental health treatment guardians. While the court holds the balance of power in guardianship cases, having a procedure for Department of Health is important since they might be contacted or need to resolve an issue involving a physician decision to pursue treatment. The physician decision could be made hastily due to safety concerns, but later be challenged by the person who is given the treatment. This could address issues where the court is unable to intervene in a short term or urgent situation.

The only other potential issue could come from how prompt and fair are defined. The timelines in the rest of the existing Mental Health and Developmental Disabilities Code are specific. For instance, the client or other professional has three calendar days to petition the court regarding any disagreement with a treatment guardian's decision to seek treatment. The DOH process needs to establish specific timelines for their decisions that do not cause any unnecessary delay when compared to the timeline for the court. Otherwise, the DOH process won't be able to lead to actions or remedies in a timely enough manner to impact a guardianship.

DOH provided the following:

The bill proposes to establish a new grievance procedure that would, to a significant extent, duplicate grievance processes that already exist. The bill would also require DOH to establish this grievance procedure, despite the fact that the Department lacks authority in many instances to directly address the concerns that are raised in the grievances.

Section 43-1-15 NMSA identifies numerous rights afforded to those who are receiving psychiatric services. Some rights pertain to consenting to the administration of

medications and other psychiatric services, and other rights pertain to the legal process in the courts whereby a treatment guardian is appointed.

It would be difficult for DOH to administer a grievance process related to the rights afforded to clients in the legal process within the courts. DOH has no authority or input into the court process, so it would have very limited ability to take action on a grievance related to the court process. In addition, each of these clients has an appointed legal counsel, and the statute identifies a legal process whereby clients can have claims of right violations heard by a judge. Section 43-1-15, subsection I, outlines the appeal process clients may utilize when they feel their rights are violated. A grievance process managed by DOH that relates to the court-related legal rights in this section may be redundant and confusing, since the statute also includes an appeal process, and many clients may not know when to use a grievance process as opposed to the statutorily allowed appeal process. DOH also lacks any enforcement authority over the courts and its decisions. Therefore, it may be more appropriate for clients to address violations of these legal rights through the courts rather than through an DOH administered grievance process.

With regard to grievances related to actions of the treatment guardians themselves, DOH has no oversight authority over treatment guardians of any kind. However, the New Mexico Developmental Disabilities Planning Council Office of Guardianship oversees and manages the contracts for treatment guardians in New Mexico. DDPC Office of Guardianship has promulgated rules outlining a grievance and complaint process against contracted guardians NMSA 9.4.21.14.

In order to obtain a treatment guardian through the Office of Guardianship, an individual must qualify on an economic needs basis. As a result, families who do not qualify for these services utilize family members or other community members for treatment guardians; these guardians are not overseen by Office of Guardianship, and those clients are not afforded the use of the DDPC grievance process. In addition, pursuant to NMSA 43-1-15(I), a client who disagrees with the decision of a treatment guardian can file an appeal related to that decision with the courts, so there is an internal grievance process of sorts already contained within the statutory scheme.

With respect to potential grievances against providers that may arise out of this section of law, DOH has no oversight authority over individual providers that have the ability to prescribe medications. However, individual boards such as the New Mexico Medical Board do have oversight authority over individual providers and they currently have grievance and complaint processes in place. A separate grievance process administered by DOH may be redundant.

As for grievances against facilities that may arise out of this section of law, DOH does regulate and license many of the facility types that could be implicated. The Division of Health Improvement (DHI) is the division within DOH that regulates facilities. DHI currently has a grievance process in the form of the Health Facility Complaints Hotline and an online Health Facility Consumer Complaint Form that a client or community member could use if they believe that the facility has violated their rights under the statute.

Given that there is currently a grievance process in place for the vast majority of

grievances that may arise out of the statute, with the exception of grievances against non-corporate treatment guardians, the bill runs the risk of creating redundant and competing grievance processes.

There are currently regulations that outline a grievance process for treatment guardians promulgated by DDPC Office of Guardianship. This statute may conflict with those and other regulations related to grievances against providers and facilities.

OTHER SUBSTANTIVE ISSUES

NMAG said the grievance procedures mandated by the bill are redundant given the overall purpose of Section 43-1-15. That Section primarily relates to judicial proceedings: petitions for the appointment of a treatment guardian, judicial enforcement orders for decisions made by the treatment guardian, appeals to District Court of a treatment guardian's decision, and termination and length of treatment guardian appointments. At judicial hearings related to those issues, patient complaints could be raised and addressed by the District Court. As drafted, Senate Bill 152 would seemingly provide a forum for patients to raise complaints and concerns about the judicial process, which could infringe on the separation of powers.

DDPC said one issue is how the DOH process will align with the court process, since the court and judges are the final arbitrators in guardianship cases. If the procedure from DOH leads to outcomes that conflict with the court or judge in the Guardianship case, that will be a problem. The new procedure must involve the courts and judges that are overseeing the guardianships in question.

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