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SENATE BILL 321

51ST LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2014

INTRODUCED BY

Howie C. Morales

AN ACT

RELATING TO TORTS; ESTABLISHING A CLAIMS RESOLUTION FRAMEWORK TO SETTLE AND COMPROMISE CERTAIN CLAIMS MADE BY ELIGIBLE CLAIMANTS FOR ALLEGED VIOLATIONS OF RIGHTS, PRIVILEGES OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES OR THE CONSTITUTION AND LAWS OF NEW MEXICO AGAINST THE STATE AND PUBLIC EMPLOYEES ARISING OUT OF THE 2013 AUDIT OF FIFTEEN BEHAVIORAL HEALTH PROVIDERS; PROVIDING PENALTIES; WAIVING IMMUNITY; MAKING AN APPROPRIATION; DECLARING AN EMERGENCY.

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

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be cited as the "Behavioral Health Provider Compensation Act".

SECTION 2. [NEW MATERIAL] PURPOSE.--The purpose of the Behavioral Health Provider Compensation Act is to cost-

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1 effectively, expeditiously and globally resolve claims of
2 alleged violations of rights, privileges or immunities secured
3 by the constitution and laws of the United States or the
4 constitution and laws of New Mexico brought by eligible
5 claimants against the state and public employees arising out of
6 the 2013 audit of fifteen behavioral health providers.

7 SECTION 3. [NEW MATERIAL] DEFINITIONS.--As used in the
8 Behavioral Health Provider Compensation Act:

9 A. "audit" means the 2013 audit of claims submitted
10 for payment by fifteen behavioral health providers that
11 resulted in the June 24, 2013 suspension of payments, based
12 upon a determination of credible allegation of fraud as to each
13 such provider by the human services department and the
14 subsequent referral of such providers by the human services
15 department to the office of the attorney general for
16 investigation. "Audit" includes the events leading up to the
17 audit and subsequent actions taken or statements made by public
18 employees after the referral that are alleged to have
19 proximately caused loss or injury to a claimant through June
20 24, 2014;

21 B. "claim" means a demand for compensation from the
22 state;

23 C. "claimant" means a person filing a claim;

24 D. "collateral source compensation" means the
25 proceeds of:

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- 1 (1) any health or commercial insurance; or
2 (2) a compromise and settlement of claims for
3 damages or injuries allegedly suffered as a result of the audit
4 other than a compromise and settlement under the Behavioral
5 Health Provider Compensation Act;

6 E. "economic loss" does not include suspended
7 payments due and owing to a behavioral health provider pursuant
8 to contract but means any pecuniary loss allegedly suffered as
9 a result of alleged violations of the constitutional rights of
10 eligible claimants by public employees arising out of the
11 audit, including:

12 (1) the loss of past or future earnings or
13 other benefits related to employment;

14 (2) the loss of past or future business or
15 employment opportunities;

16 (3) damages related to the forced sale and
17 liquidation of assets;

18 (4) damage to creditworthiness;

19 (5) loss of savings and retirement funds;

20 (6) out-of-pocket expenses;

21 (7) interest and penalties;

22 (8) loss of business goodwill;

23 (9) legal and accounting fees;

24 (10) uninsured business losses;

25 (11) losses due to business interruption;

- 1 (12) expenses of relocation, storage or
2 moving;
3 (13) increased insurance expense; and
4 (14) other expenses, indebtedness or pecuniary
5 losses;

6 F. "eligible claimant" means a person determined to
7 be eligible for compensation;

8 G. "fifteen behavioral health providers" means the
9 behavioral health providers that were the subject of the audit:

- 10 (1) border area mental health services,
11 incorporated;
12 (2) counseling associates, incorporated;
13 (3) the counseling center, incorporated;
14 (4) Easter seals el Mirador;
15 (5) families and youth, incorporated;
16 (6) Hogares, incorporated;
17 (7) partners in wellness, incorporated;
18 (8) pathways, incorporated;
19 (9) Presbyterian medical services,
20 incorporated;
21 (10) service organization for youth,
22 incorporated;
23 (11) southern New Mexico human development,
24 incorporated;
25 (12) southwest counseling center,

1 incorporated;

2 (13) teambuilders counseling services,
3 incorporated;

4 (14) Valencia counseling services,
5 incorporated; and

6 (15) youth development, incorporated;

7 H. "noneconomic loss" means injury, such as
8 physical and emotional pain, suffering, inconvenience, mental
9 anguish, injury to reputation, loss of consortium and all other
10 nonpecuniary losses;

11 I. "notice" means written notice of a compensable
12 claim or injury related to the audit in accordance with the
13 requirements of the Tort Claims Act;

14 J. "proximately caused" means an act or omission
15 that contributed to bringing about a harm or injury that would
16 not have occurred in the absence of such an act or omission;

17 K. "public employee" means an officer or employee
18 of the state, excluding independent contractors, and including
19 elected or appointed officials;

20 L. "settling eligible claimant" means an eligible
21 claimant that has agreed to settle and compromise its claim and
22 that has executed a required release of claim and such other
23 documents as required by the attorney general to consummate a
24 settlement of its claim; and

25 M. "special master" means a licensed attorney

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1 experienced in litigation and in the management and resolution
2 of mass claims.

3 SECTION 4. [NEW MATERIAL] ELIGIBILITY FOR COMPENSATION.--

4 A. A claimant is eligible for compensation under
5 the Behavioral Health Provider Compensation Act if the
6 claimant:

7 (1) was an independent contractor, employee,
8 officer, director, owner, partner or shareholder of any of the
9 fifteen behavioral health providers at any time during the
10 twelve months preceding June 24, 2013;

11 (2) suffered economic or noneconomic losses
12 proximately caused by an act or omission of a public employee
13 acting in the course and scope of employment arising out of the
14 audit;

15 (3) gave notice as required by the Tort Claims
16 Act on or before January 1, 2014;

17 (4) has not previously settled or compromised
18 or received compensation for the matters included in the
19 claimant's claim against the state and for which the claimant
20 seeks compensation; and

21 (5) or the behavioral health provider of which
22 the claimant was an independent contractor, employee, officer,
23 director, owner, partner or shareholder has not been charged
24 with civil or criminal fraud arising out of the audit as of the
25 date when the claimant finally compromises and settles the

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1 claimant's claims against the state.

2 B. A party to a civil action in any state or
3 federal court against the state or its public employees for
4 damages, excluding amounts due and owing for suspended
5 payments, sustained as a result of the audit shall not submit a
6 claim for compensation under the Behavioral Health Provider
7 Compensation Act.

8 C. In the case of a decedent who qualifies as an
9 eligible claimant, the personal representative of the decedent
10 may file a claim on behalf of the decedent.

11 SECTION 5. [NEW MATERIAL] DUTIES AND RESPONSIBILITIES OF
12 THE ATTORNEY GENERAL AND THE RISK MANAGEMENT DIVISION OF THE
13 GENERAL SERVICES DEPARTMENT.--

14 A. By August 1, 2014, the attorney general shall,
15 through competitive procurement, contract for a special master
16 to:

- 17 (1) determine the eligibility of claimants;
18 (2) review and evaluate claims;
19 (3) make a determination regarding
20 compensation to be paid or denied to each claimant; and

21 (4) administer the process of consummating a
22 global settlement with settling eligible claimants, including
23 the:

- 24 (a) execution of releases of claims and
25 such other documents as required by the attorney general; and

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1 (b) the tender of state warrants to
2 settling eligible claimants.

3 B. The attorney general shall:

4 (1) promulgate all procedural and substantive
5 rules for the settlement and compromise of claims in accordance
6 with the requirements of the Behavioral Health Provider
7 Compensation Act;

8 (2) employ and supervise administrative
9 personnel to assist the special master in the performance of
10 the special master's duties;

11 (3) pay such sums as may be necessary for
12 administrative and support costs for the special master in
13 carrying out the special master's duties;

14 (4) approve and authorize periodic payment to
15 the special master;

16 (5) prepare releases and other settlement
17 documentation as the attorney general deems necessary that
18 reflect the determination of the special master regarding the
19 amount of compensation due each eligible claimant and the terms
20 and conditions of compromise and settlement as set forth in the
21 Behavioral Health Provider Compensation Act; and

22 (6) within ten days of receipt of the special
23 master's report, approve payment and authorize the risk
24 management division of the general services department to pay
25 each settling eligible claimant through the special master.

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1 C. Costs of the special master and administrative
2 personnel to assist the special master in the performance of
3 the special master's duties shall be recouped from the human
4 services department pursuant to Section 8-5-4 NMSA 1978.

5 D. Within thirty days of receipt of authorization
6 from the attorney general to pay claims under the Behavioral
7 Health Provider Compensation Act and copies of executed
8 releases of settling eligible claimants from the special
9 master, the risk management division of the general services
10 department shall pay each settling eligible claimant through
11 the special master.

12 E. No discovery of any eligible claimant related to
13 the audit shall be conducted by the state, or of the state by
14 any eligible claimant, during the pendency of proceedings under
15 the Behavioral Health Provider Compensation Act.

16 SECTION 6. [NEW MATERIAL] POWERS AND DUTIES OF SPECIAL
17 MASTER.--

18 A. The special master shall regulate all
19 proceedings before the special master and do all acts and take
20 all measures necessary and proper for the efficient performance
21 of the special master's duties in accordance with the
22 Behavioral Health Provider Compensation Act. The special
23 master may require the production of evidence relating to:

24 (1) claimant eligibility for compensation from
25 the public liability fund; and

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1 (2) damages and injury claimed by an eligible
2 claimant.

3 B. The special master may rule upon the
4 authenticity and weight of the evidence and has the authority
5 to place witnesses under oath and may examine them under oath.

6 C. The special master shall prepare a written
7 global report on:

8 (1) the special master's determination of each
9 claimant's eligibility for compensation;

10 (2) the special master's determination of the
11 amount of compensation due each eligible claimant and indicate
12 any adjustment made pursuant to Section 9 of the Behavioral
13 Health Provider Compensation Act; and

14 (3) the aggregate amount of compensation due
15 eligible claimants pursuant to the special master's
16 determinations.

17 D. The report required by Subsection C of this
18 section shall be presented to the attorney general, the risk
19 management division of the general services department, the
20 legislative finance committee and the interim legislative
21 health and human services committee on or before August 1,
22 2015.

23 E. The special master shall be responsible for
24 ensuring proper execution of releases and such other documents
25 as required by the attorney general by each settling eligible

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1 claimant before any tender of payment and shall be responsible
2 for the distribution of state warrants to all settling eligible
3 claimants.

4 F. The special master shall provide two copies of
5 each set of executed releases and such other documents as
6 required by the attorney general for each settling eligible
7 claimant to the attorney general and the risk management
8 division of the general services department not later than
9 September 1, 2015.

10 SECTION 7. [NEW MATERIAL] REQUIRED CLAIM FORM.--

11 A. The special master shall:

12 (1) develop a claim form that a claimant shall
13 use when submitting a claim for compensation under the
14 Behavioral Health Provider Compensation Act; and

15 (2) ensure that the claim form and any
16 supporting documentation can be filed electronically, at the
17 election of the claimant.

18 B. The claim form shall contain a request for:

19 (1) a true and correct copy of the claimant's
20 notice of compensable claim or injury under the Tort Claims
21 Act, served on or before January 1, 2014;

22 (2) a detailed sworn statement from the
23 claimant describing the harm that the claimant alleges to have
24 suffered as a result of the audit;

25 (3) a detailed sworn statement and

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1 documentation from the claimant to support or substantiate
2 economic or noneconomic damages allegedly suffered as a result
3 of the audit;

4 (4) a sworn statement regarding whether the
5 claimant has received or is entitled to receive compensation
6 from collateral sources for economic or noneconomic damages for
7 which the claimant seeks compensation;

8 (5) a sworn statement from the claimant
9 averring that it has not previously settled or compromised its
10 claim against the state for which it seeks compensation under
11 the Behavioral Health Provider Compensation Act; and

12 (6) a sworn statement from the claimant that
13 neither the claimant nor the behavioral health provider of
14 which the claimant was an independent contractor, employee,
15 officer, director, owner, partner or shareholder has been
16 charged with civil or criminal fraud arising out of the audit
17 as of the date of service of its claim upon the attorney
18 general.

19 C. The special master and administrative staff or
20 hearing officers assisting the special master shall:

21 (1) keep claim forms and supporting
22 documentation submitted by a claimant to effectuate a
23 compromise and settlement of a disputed claim under the
24 Behavioral Health Provider Compensation Act confidential; and

25 (2) not disclose such documents or the

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1 contents of such documents to third parties, including the
2 state, in the absence of a court order.

3 D. Any person who reveals records protected
4 pursuant to Subsection C of this section to another person in
5 violation of this section is guilty of a misdemeanor and shall,
6 upon conviction, be fined not more than one thousand dollars
7 (\$1,000). The state shall not employ any person so convicted
8 for a period of five years after the date of conviction.

9 SECTION 8. [NEW MATERIAL] REQUIREMENTS OF CLAIMANTS.--

10 A. A claimant shall file a claim for compensation
11 under the Behavioral Health Provider Compensation Act with the
12 special master by serving a copy of the claim form developed by
13 the special master upon the attorney general.

14 B. A claim for compensation shall be served upon
15 the attorney general by September 1, 2014.

16 C. A claimant shall be required to submit all sworn
17 statements and information required by the claim form. Failure
18 to provide all required information shall be grounds for the
19 special master to deny a claim in whole or in part.

20 D. Not more than one claim may be filed by a
21 claimant.

22 E. Upon submission of a claim for compensation, a
23 claimant waives the right to file a civil action in any federal
24 or state court against the state or public employees for
25 damages, excluding amounts due and owing for suspended

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1 payments, sustained as a result of the audit; provided that a
2 claimant may withdraw its submission of claim at any time,
3 whereupon limitations shall no longer be tolled.

4 F. As a condition precedent to settlement, an
5 eligible claimant shall execute a release of claims and such
6 other documents as required by the attorney general by the
7 deadline established by the special master to effectuate a
8 global resolution of claims of all settling eligible claimants.

9 SECTION 9. [NEW MATERIAL] REVIEW AND DETERMINATION BY
10 SPECIAL MASTER.--

11 A. The special master shall review a claim and
12 determine:

13 (1) whether the claimant is an eligible
14 claimant pursuant to Section 4 of the Behavioral Health
15 Provider Compensation Act; and

16 (2) with respect to each claimant determined
17 to be an eligible claimant:

18 (a) the extent of harm arising from the
19 audit suffered by the eligible claimant, including economic and
20 noneconomic losses; and

21 (b) the amount of compensation to which
22 the eligible claimant is entitled, based upon the harm to the
23 eligible claimant, the facts of the claim and the individual
24 circumstances of the eligible claimant.

25 B. The special master shall determine, based upon

1 the greater weight of evidence, whether each of the various
2 economic and noneconomic losses for which the eligible claimant
3 seeks compensation were proximately caused by an act or
4 omission of a public employee acting in the course and scope of
5 employment.

6 C. As to the eligible claimant, the special master
7 shall not consider fault or any other theory of liability in
8 its determination regarding the amount of an eligible
9 claimant's compensation.

10 D. In making the determination regarding
11 compensation, the special master shall not include:

12 (1) amounts for punitive damages;
13 (2) amounts due and owing to a behavioral
14 health provider from the state pursuant to contract as a result
15 of suspended payments; or

16 (3) prejudgment interest on the compensation
17 awarded by the special master.

18 E. The special master shall reduce the amount of
19 compensation by the amount of collateral source compensation
20 the eligible claimant has received or is entitled to receive as
21 a result of the audit.

22 F. No later than January 1, 2015, the special
23 master shall notify each claimant in writing of the special
24 master's determination regarding eligibility for compensation.

25 G. No later than July 1, 2015, the special master

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1 shall complete the special master's review of all claims of
2 eligible claimants and shall have made a determination as to
3 each eligible claimant's compensable damages.

4 H. The special master's determination regarding
5 eligibility for compensation and each eligible claimant's
6 compensable damages shall be final and not subject to revision
7 by any state agency or to judicial review.

8 SECTION 10. [NEW MATERIAL] MAXIMUM LIABILITY.--

9 A. Unless limited by Subsection B of this section,
10 compensation awarded to an eligible claimant for its claim
11 against the state or a public employee as provided in the
12 Behavioral Health Provider Compensation Act shall not exceed:

13 (1) two hundred thousand dollars (\$200,000)
14 for damage to or destruction of real property;

15 (2) three hundred thousand dollars (\$300,000)
16 for all past and future medical and medically related expenses;
17 and

18 (3) four hundred thousand dollars (\$400,000)
19 per claim for all damages other than damages specified in
20 Paragraphs (1) and (2) of this subsection.

21 B. The total liability for each claim pursuant to
22 Paragraphs (1) and (3) of Subsection A of this section shall
23 not exceed seven hundred fifty thousand dollars (\$750,000).

24 SECTION 11. [NEW MATERIAL] RIGHTS OF CLAIMANTS.--A

25 claimant shall have the right to:

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- 1 A. be represented by an attorney;
- 2 B. present evidence, including the presentation of
- 3 witnesses and documents, subject to the authority granted to
- 4 the special master to regulate all proceedings before the
- 5 special master and the deadlines set forth in the act to
- 6 effectuate a timely and global resolution of claims of all
- 7 settling eligible claimants;
- 8 C. withdraw the claimant's claim submission from
- 9 consideration for compensation at any time; and
- 10 D. refuse to compromise and settle its claim.

11 SECTION 12. [NEW MATERIAL] TOLLING.--

12 A. The filing of a claim for compensation by an

13 eligible claimant pursuant to the Behavioral Health Provider

14 Compensation Act shall toll the limitations period for claims

15 made against the state or a public employee pursuant to the

16 Tort Claims Act for alleged violations of constitutional

17 rights.

18 B. Tolling of limitations shall cease upon:

19 (1) a claimant's receipt of notification from

20 the special master that the claimant is not eligible for

21 compensation as provided in the Behavioral Health Provider

22 Compensation Act;

23 (2) a claimant's or eligible claimant's

24 withdrawal of its claim submission from consideration for

25 compensation; or

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1 (3) an eligible claimant's refusal to
2 compromise and settle its claim for the compensation as
3 determined by the special master in accordance with Sections 9
4 and 10 of the Behavioral Health Provider Compensation Act and
5 in accordance with the deadline set by the special master to
6 globally resolve all claims.

7 SECTION 13. [NEW MATERIAL] CLAIMS--EXCEPTIONS.--Claims
8 compromised and settled pursuant to the Behavioral Health
9 Provider Compensation Act shall not include:

10 A. claims against contractors hired by the state or
11 against subcontractors of contractors hired by the state
12 related to the audit; or

13 B. claims for amounts due and owing to any of the
14 fifteen behavioral health providers pursuant to contract as a
15 result of the human services department's suspension of
16 payments for services rendered to medicaid recipients or to
17 other behavioral health consumers.

18 SECTION 14. [NEW MATERIAL] SPECIFIC WAIVER OF IMMUNITY.--
19 The state waives its defense of sovereign immunity in
20 connection with any claims made pursuant to the Behavioral
21 Health Provider Compensation Act. This is a limited waiver and
22 does not waive the state's immunity from suit or liability for
23 any other purpose.

24 SECTION 15. APPROPRIATION.--Four hundred thousand dollars
25 (\$400,000) is appropriated from the general fund to the office

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1 of the attorney general for expenditure in fiscal year 2015 to
2 hire a special master and support staff and to pay other
3 expenses of the special master under the provisions of the
4 Behavioral Health Provider Compensation Act. Any unexpended or
5 unencumbered balance remaining at the end of fiscal year 2015
6 shall revert to the general fund.

7 SECTION 16. DELAYED REPEAL.--This act is repealed
8 effective January 1, 2016.

9 SECTION 17. EMERGENCY.--It is necessary for the public
10 peace, health and safety that this act take effect immediately.