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SENATE BILL 260

**56TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2023**

INTRODUCED BY

Linda M. Lopez and William E. Sharer

AN ACT

RELATING TO DISABILITIES; UPDATING STATUTORY REFERENCES  
PERTAINING TO DEVELOPMENTAL AND INTELLECTUAL DISABILITIES;  
REVISING THE DEFINITION OF "DEVELOPMENTAL DISABILITY" IN THE  
MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES CODE; REPEALING  
SECTION 24-1-5.4 NMSA 1978 (BEING LAWS 1997, CHAPTER 217,  
SECTION 2).

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

SECTION 1. Section 15-7-3 NMSA 1978 (being Laws 1978,  
Chapter 166, Section 8, as amended) is amended to read:

"15-7-3. ADDITIONAL POWERS AND DUTIES OF THE RISK  
MANAGEMENT DIVISION.--

A. The risk management division of the general  
services department may:

- (1) enter into contracts;

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1 (2) procure insurance, reinsurance or employee  
2 group benefits; provided that any proposal or contract for the  
3 procurement of any group health care benefits shall be subject  
4 to the provisions of the Health Care Purchasing Act; and  
5 provided further that reinsurance or excess coverage insurance  
6 may be placed by private negotiation, notwithstanding the  
7 provisions of the Procurement Code, if the insurance or  
8 reinsurance has a restricted number of interested carriers, the  
9 board determines that the coverage is in the interest of the  
10 state and cannot otherwise be procured for a reasonable cost  
11 and the director seeks the advice and review of the board in  
12 the placement and in designing private negotiation procedures;

13 (3) in the manner prescribed by Subsection E  
14 of Section 9-17-5 NMSA 1978, after a notice and a public  
15 hearing, prescribe by ~~[regulation]~~ rule reasonable and  
16 objective underwriting and safety standards for governmental  
17 entities and reasonable standards for municipal self-insurance  
18 pooling agreements covering liability under the Tort Claims Act  
19 and adopt such other regulations as may be deemed necessary;

20 (4) compromise, adjust, settle and pay claims;

21 (5) pay expenses and costs;

22 (6) in the manner prescribed by Subsection E  
23 of Section 9-17-5 NMSA 1978, prescribe by rule ~~[or regulation]~~  
24 the rating bases, assessments, penalties and risks to be  
25 covered by the public liability fund, the workers' compensation

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1 retention fund and the public property reserve fund and the  
2 extent such risks are to be covered;

3 (7) issue certificates of coverage in  
4 accordance with Paragraph (6) of this subsection:

5 (a) to any governmental entity for any  
6 tort liability risk covered by the public liability fund;

7 (b) to any governmental entity for any  
8 personal injury liability risk or for the defense of any errors  
9 or act or omission or neglect or breach of duty, including the  
10 risks set forth in Paragraph (2) of Subsection B and Paragraph  
11 (2) of Subsection D of Section 41-4-4 NMSA 1978; and

12 (c) to any governmental entity for any  
13 part of risk covered by the workers' compensation retention  
14 fund, the surety bond fund or the public property reserve fund;

15 (8) study the risks of all governmental  
16 entities;

17 (9) initiate the establishment of safety  
18 programs and adopt [~~regulations~~] rules to carry out such  
19 programs in the manner prescribed by Subsection E of Section  
20 9-17-5 NMSA 1978;

21 (10) hire a safety program director who shall  
22 coordinate all safety programs of all state agencies;

23 (11) consult with and advise local public  
24 bodies on their risk management problems; and

25 (12) employ full-time legal counsel who shall

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1 be under the exclusive control and supervision of the director  
2 and the secretary of general services.

3 B. The risk management division of the general  
4 services department shall provide liability coverage for the  
5 following risks:

6 (1) a claim made pursuant to the provisions of  
7 42 USC Section 1983 against a nonprofit corporation, members of  
8 its board of directors or its employees when the claim is based  
9 upon action taken pursuant to the provisions of a contract  
10 between the corporation and the department of health under  
11 which the corporation provides developmental or intellectual  
12 disability services to clients of the department and the claim  
13 is made by or on behalf of a client; and

14 (2) a claim made pursuant to the provisions of  
15 42 USC Section 1983 against a nonprofit corporation, members of  
16 its board of directors or its employees when the corporation  
17 operates a facility licensed by the department of health as an  
18 intermediate care facility for [~~the mentally retarded~~]  
19 individuals with developmental or intellectual disabilities and  
20 the claim is based upon action taken pursuant to the provisions  
21 of the license and is made by or on behalf of a resident of the  
22 licensed facility.

23 C. The director shall report [~~his~~] findings and  
24 recommendations, if any, for the consideration of each  
25 legislature. The report shall include the amount and name of

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1 any person receiving payment from the public liability fund of  
2 any claim paid during the previous fiscal year exceeding one  
3 thousand dollars (\$1,000). The report shall be made available  
4 to the legislature on or before December 15 preceding each  
5 regular legislative session."

6 SECTION 2. Section 24-26-2 NMSA 1978 (being Laws 2004,  
7 Chapter 53, Section 2) is amended to read:

8 "24-26-2. DEFINITIONS.--As used in the Patient Care  
9 Monitoring Act:

10 A. [~~"agency"~~] "department" means the [~~state agency~~  
11 ~~on~~] aging and long-term services department;

12 B. "facility" means a long-term care facility  
13 licensed pursuant to the provisions of Section 24-1-5 NMSA  
14 1978, other than an intermediate care facility for [~~the~~  
15 ~~mentally retarded~~] individuals with developmental or  
16 intellectual disabilities, and may also include:

- 17 (1) a skilled nursing facility;
- 18 (2) an intermediate care nursing facility;
- 19 (3) a nursing facility;
- 20 (4) an adult residential shelter care home;
- 21 (5) a boarding home;
- 22 (6) any adult care home or adult residential  
23 care facility; and
- 24 (7) any swing bed in an acute care facility or  
25 extended care facility;

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1 C. "monitoring device" means a surveillance  
2 instrument that broadcasts or records activity, but does not  
3 include a still camera;

4 D. "patient" means a person who is a resident of a  
5 facility;

6 E. "program" means the New Mexico long-term care  
7 ombudsman program; and

8 F. "surrogate" means a legal guardian or a legally  
9 appointed substitute decision-maker who is authorized to act on  
10 behalf of a patient."

11 SECTION 3. Section 27-2-6.1 NMSA 1978 (being Laws 1978,  
12 Chapter 30, Section 1) is amended to read:

13 "27-2-6.1. SUPPLEMENTAL POSTNATAL ASSISTANCE.--The  
14 [~~health and social services~~] department shall establish a  
15 program of supplemental postnatal assistance for those  
16 [~~mentally retarded~~] developmentally or intellectually disabled  
17 persons who during pregnancy received [~~aid to families with~~  
18 ~~dependent children~~] temporary assistance for needy families but  
19 whose [~~aid~~] assistance was revoked upon relinquishment of the  
20 newly born child for adoption. The supplemental postnatal  
21 assistance provided for in this section shall be at the same  
22 rate as [~~aid to families with dependent children~~] temporary  
23 assistance for needy families, but [~~such~~] supplemental  
24 postnatal assistance shall not exceed a period of sixty days.  
25 The [~~health and social services~~] department shall promulgate  
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1 rules [~~and regulations in order~~] to carry out the provisions of  
2 this section."

3 SECTION 4. Section 27-2-12.6 NMSA 1978 (being Laws 1994,  
4 Chapter 62, Section 22) is amended to read:

5 "27-2-12.6. MEDICAID PAYMENTS--MANAGED CARE.--

6 A. The department shall provide for a statewide,  
7 managed care system to provide cost-efficient, preventive,  
8 primary and acute care for medicaid recipients by July 1, 1995.

9 B. The managed care system shall ensure:

10 (1) access to medically necessary services,  
11 particularly for medicaid recipients with chronic health  
12 problems;

13 (2) to the extent practicable, maintenance of  
14 the rural primary care delivery infrastructure;

15 (3) that the department's approach is  
16 consistent with national and state health care reform  
17 principles; and

18 (4) to the maximum extent possible, that  
19 medicaid-eligible individuals are not identified as such except  
20 as necessary for billing purposes.

21 C. The department may exclude nursing homes,  
22 intermediate care facilities for [~~the mentally retarded~~]  
23 individuals with developmental or intellectual disabilities,  
24 medicaid in-home and community-based waiver services and  
25 residential and community-based mental health services for

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1 children with serious emotional disorders from the provisions  
2 of this section."

3 SECTION 5. Section 27-2A-4 NMSA 1978 (being Laws 1994,  
4 Chapter 87, Section 4, as amended) is amended to read:

5 "27-2A-4. DEPARTMENT TO SEEK RECOVERY OF MEDICAL  
6 ASSISTANCE PAYMENTS--RESTRICTION.--

7 A. The department shall seek recovery from the  
8 estate of an individual:

9 (1) for medical assistance paid on behalf of  
10 an individual who was an inpatient in a nursing facility,  
11 intermediate care facility for [~~the mentally retarded~~]  
12 individuals with developmental or intellectual disabilities or  
13 other medical institution if the individual was required, as a  
14 condition of receiving services in the facility or institution  
15 pursuant to the state plan, to spend for costs of services all  
16 but a minimal amount of the individual's income required for  
17 personal needs, and with respect to whom the department  
18 determined, after opportunity for a hearing in accordance with  
19 procedures established by the department, could not reasonably  
20 have been expected to have been discharged from the facility or  
21 institution to return home; and

22 (2) for medical assistance payments made for  
23 nursing facility services, home- and community-based services  
24 and related hospital and prescription drug services on behalf  
25 of an individual who was fifty-five years of age or older when

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1 the individual received medical assistance.

2 B. In the case of an individual who has  
3 participated in the state's qualified state long-term care  
4 insurance partnership program pursuant to Section [~~2 of this~~  
5 ~~2013 act~~] 27-2-12.17 NMSA 1978, the department shall seek  
6 recovery of medical assistance paid on behalf of the individual  
7 only of the value of the individual's estate that exceeds the  
8 amount that the department has disregarded from the  
9 individual's countable resources pursuant to Paragraph (2) of  
10 Subsection A of Section [~~2 of this 2013 act~~] 27-2-12.17 NMSA  
11 1978 in making its eligibility determination for medical  
12 assistance for institutional care or a medical assistance home-  
13 and community-based long-term care program."

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

16 "27-7A-2. DEFINITIONS.--As used in the Employee Abuse  
17 Registry Act:

18 A. "abuse" means:

19 (1) knowingly, intentionally or negligently  
20 and without justifiable cause inflicting physical pain, injury  
21 or mental anguish; or

22 (2) the intentional deprivation by a caretaker  
23 or other person of services necessary to maintain the mental  
24 and physical health of a person;

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

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1 C. "direct care" means face-to-face services  
2 provided or routine and unsupervised physical or financial  
3 access to a recipient of services;

4 D. "employee" means a person employed by or on  
5 contract with a provider, either directly or through a third  
6 party arrangement to provide direct care. "Employee" does not  
7 include a New Mexico licensed health care professional  
8 practicing within the scope of the profession's license or a  
9 certified nurse aide;

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

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

19 G. "provider" means an intermediate care facility  
20 for ~~[the mentally retarded]~~ individuals with developmental or  
21 intellectual disabilities; a rehabilitation facility; a home  
22 health agency; a homemaker agency; a home for the aged or  
23 disabled; a group home; an adult foster care home; a case  
24 management entity that provides services to elderly people or  
25 people with developmental disabilities; a corporate guardian; a

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1 private residence that provides personal care, adult  
2 residential care or natural and surrogate family services  
3 provided to persons with developmental disabilities; an adult  
4 daycare center; a boarding home; an adult residential care  
5 home; a residential service or habilitation service authorized  
6 to be reimbursed by medicaid; any licensed or medicaid-  
7 certified entity or any program funded by the aging and long-  
8 term services department that provides respite, companion or  
9 personal care services; programs funded by the children, youth  
10 and families department that provide homemaker or adult daycare  
11 services; and any other individual, agency or organization that  
12 provides respite care or delivers home- and community-based  
13 services to adults or children with developmental disabilities  
14 or physical disabilities or to the elderly, but excluding a  
15 managed care organization unless the employees of the managed  
16 care organization provide respite care or deliver home- and  
17 community-based services to adults or children with  
18 developmental disabilities or physical disabilities or to the  
19 elderly;

20 H. "registry" means an electronic database that  
21 provides information on substantiated employee abuse, neglect  
22 or exploitation; and

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

24 SECTION 7. Section 28-16-15.2 NMSA 1978 (being Laws 1993,  
25 Chapter 84, Section 2) is amended to read:

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1 "28-16-15.2. DEVELOPMENTAL DISABILITIES [~~PLANNING~~]  
2 COUNCIL--ADDITIONAL DUTIES.--The developmental disabilities  
3 [~~planning~~] council shall cooperate with the department of  
4 health and the human services department to:

5 A. provide data to support an amendment to the  
6 developmental disabilities medicaid waiver program to increase  
7 the number of eligible persons served;

8 B. develop a contingency plan to describe the role  
9 and control the growth of intermediate care facilities for [~~the~~  
10 ~~mentally retarded~~] individuals with developmental or  
11 intellectual disabilities; and

12 C. develop flexibility in the system of  
13 prioritization for admission to allow persons to move within  
14 the service system to an appropriate level of service,  
15 including movement of residents of intermediate care facilities  
16 for [~~the mentally retarded~~] individuals with developmental or  
17 intellectual disabilities to the developmental disabilities  
18 medicaid waiver program."

19 SECTION 8. Section 29-17-4 NMSA 1978 (being Laws 1998,  
20 Chapter 68, Section 3, as amended) is amended to read:

21 "29-17-4. DEFINITIONS.--As used in the Caregivers  
22 Criminal History Screening Act:

23 A. "applicant" means a person who seeks and is  
24 offered employment or contractual service as a caregiver or  
25 hospital caregiver with a care provider;

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

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

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1 children, youth and families department that provide homemaker  
2 or adult daycare services. "Care provider" or "provider" does  
3 not include resident care facilities located at or performing  
4 services exclusively for any correctional facility, outpatient  
5 treatment facilities, diagnostic and treatment facilities,  
6 ambulatory surgical centers and facilities, end-stage renal  
7 dialysis and treatment facilities, rural health clinics,  
8 private physicians' offices or other clinics that operate in  
9 the same manner as private physicians' offices in group  
10 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 9. Section 30-47-3 NMSA 1978 (being Laws 1990,  
17 Chapter 55, Section 3, as amended) is amended to read:

18 "30-47-3. DEFINITIONS.--As used in the Resident Abuse and  
19 Neglect Act:

20 A. "abuse" means any act or failure to act  
21 performed intentionally, knowingly or recklessly that causes or  
22 is likely to cause harm to a resident, including:

23 (1) physical contact that harms or is likely  
24 to harm a resident of a care facility;

25 (2) inappropriate use of a physical restraint,

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1 isolation or medication that harms or is likely to harm a  
2 resident;

3 (3) inappropriate use of a physical or  
4 chemical restraint, medication or isolation as punishment or in  
5 conflict with a physician's order;

6 (4) medically inappropriate conduct that  
7 causes or is likely to cause physical harm to a resident;

8 (5) medically inappropriate conduct that  
9 causes or is likely to cause great psychological harm to a  
10 resident; or

11 (6) an unlawful act, a threat or menacing  
12 conduct directed toward a resident that results and might  
13 reasonably be expected to result in fear or emotional or mental  
14 distress to a resident;

15 B. "care facility" means a hospital; skilled  
16 nursing facility; intermediate care facility; care facility for  
17 ~~[the mentally retarded]~~ individuals with developmental or  
18 intellectual disabilities; psychiatric facility; rehabilitation  
19 facility; kidney disease treatment center; home health agency;  
20 ambulatory surgical or outpatient facility; home for the aged  
21 or disabled; group home; adult foster care home; private  
22 residence that provides personal care, sheltered care or  
23 nursing care for one or more persons; a resident's or care  
24 provider's home in which personal care, sheltered care or  
25 nursing care is provided; adult ~~[day care]~~ daycare center;

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1 boarding home; adult residential shelter care home; and any  
2 other health or resident care related facility or home, but  
3 does not include a care facility located at or performing  
4 services for any correctional facility;

5 C. "department" means the human services department  
6 or its successor, contractor, employee or designee;

7 D. "great psychological harm" means psychological  
8 harm that causes mental or emotional incapacitation for a  
9 prolonged period of time or that causes extreme behavioral  
10 change or severe physical symptoms that require psychological  
11 or psychiatric care;

12 E. "great physical harm" means physical harm of a  
13 type that causes physical loss of a bodily member or organ or  
14 functional loss of a bodily member or organ for a prolonged  
15 period of time;

16 F. "neglect" means, subject to the resident's right  
17 to refuse treatment and subject to the caregiver's right to  
18 exercise sound medical discretion, the grossly negligent:

19 (1) failure to provide any treatment, service,  
20 care, medication or item that is necessary to maintain the  
21 health or safety of a resident;

22 (2) failure to take any reasonable precaution  
23 that is necessary to prevent damage to the health or safety of  
24 a resident; or

25 (3) failure to carry out a duty to supervise

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1 properly or control the provision of any treatment, care, good,  
2 service or medication necessary to maintain the health or  
3 safety of a resident;

4 G. "person" means any individual, corporation,  
5 partnership, unincorporated association or other governmental  
6 or business entity;

7 H. "physical harm" means an injury to the body that  
8 causes substantial pain or incapacitation; and

9 I. "resident" means any person who resides in a  
10 care facility or who receives treatment from a care facility."

11 SECTION 10. Section 31-9-1.6 NMSA 1978 (being Laws 1997,  
12 Chapter 153, Section 1, as amended) is amended to read:

13 "31-9-1.6. HEARING TO DETERMINE [~~MENTAL RETARDATION~~]  
14 DEVELOPMENTAL OR INTELLECTUAL DISABILITY.--

15 A. Upon motion of the defense requesting a ruling,  
16 the court shall hold a hearing to determine whether the  
17 defendant has [~~mental retardation~~] a developmental or  
18 intellectual disability as defined in Subsection E of this  
19 section.

20 B. If the court finds by a preponderance of the  
21 evidence that the defendant has [~~mental retardation~~] a  
22 developmental or intellectual disability and that there is not  
23 a substantial probability that the defendant will become  
24 competent to proceed in a criminal case within a reasonable  
25 period of time not to exceed nine months from the date of the

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1 original finding of incompetency, then, no later than sixty  
2 days from notification to the secretary of health or [~~his~~] the  
3 secretary's designee of the court's findings, the department of  
4 health shall perform an evaluation to determine whether the  
5 defendant presents a likelihood of serious harm to [~~himself~~]  
6 self or [~~a likelihood of serious harm to~~] others.

7 C. If the department of health evaluation results  
8 in a finding that the defendant presents a likelihood of  
9 serious harm to [~~himself~~] self or [~~a likelihood of serious harm~~  
10 ~~to~~] others, within sixty days of the department's evaluation,  
11 the department shall commence proceedings pursuant to Chapter  
12 43, Article 1 NMSA 1978 if the defendant was charged with  
13 murder in the first degree, first degree criminal sexual  
14 penetration, criminal sexual contact of a minor or arson in the  
15 initial proceedings, and the court presiding over the initial  
16 proceedings shall enter a finding that the respondent presents  
17 a likelihood of harm to others.

18 D. The criminal charges shall be dismissed without  
19 prejudice after the hearing pursuant to Chapter 43, Article 1  
20 NMSA 1978 or upon expiration of fourteen months from the  
21 court's initial determination that the defendant is incompetent  
22 to proceed in a criminal case.

23 E. As used in this section, [~~"mental retardation"~~]  
24 "developmental or intellectual disability" means significantly  
25 subaverage general intellectual functioning existing

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1 concurrently with deficits in adaptive behavior. An  
2 intelligence quotient of seventy or below on a reliably  
3 administered intelligence quotient test shall be presumptive  
4 evidence of [~~mental retardation~~] developmental or intellectual  
5 disability."

6 SECTION 11. Section 38-6-8 NMSA 1978 (being Laws 1993,  
7 Chapter 333, Section 1) is amended to read:

8 "38-6-8. WITNESSES WITH [~~MENTAL RETARDATION~~]  
9 DEVELOPMENTAL OR INTELLECTUAL DISABILITY--COMPETENCY  
10 EVALUATION.--

11 A. As used in this section:

12 (1) "witness with [~~mental retardation~~] a  
13 developmental or intellectual disability" means a witness in a  
14 proceeding whom the court has found after hearing, as provided  
15 in Subsection B of this section, to have [~~mental retardation~~] a  
16 developmental or intellectual disability; and

17 (2) "[~~mental retardation~~] developmental or  
18 intellectual disability" means a substantial [~~limitations~~]  
19 limitation in present functioning characterized by  
20 significantly subaverage intellectual functioning, existing  
21 concurrently with related limitations in two or more of the  
22 following applicable skill areas: communication, self-care,  
23 home living, social skills, community use, self-direction,  
24 health and safety, functional academics, leisure and work.

25 B. In any judicial proceeding wherein a witness

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1 with [~~mental retardation~~] a developmental or intellectual  
2 disability may or will testify, the court on its own motion or  
3 on motion of the proponent of the witness with [~~mental~~  
4 ~~retardation~~] a developmental or intellectual disability, and  
5 after hearing, may order the use of one of the alternative  
6 procedures for determining competency to testify or for taking  
7 the testimony of the witness with [~~mental retardation~~] a  
8 developmental or intellectual disability described below,  
9 provided that the court finds at the time of the order, by a  
10 preponderance of the evidence in the case, that the witness  
11 with [~~mental retardation~~] a developmental or intellectual  
12 disability is likely, as a result of submitting to usual  
13 procedures for determining competency or as a result of  
14 testifying in open court:

15 (1) to suffer unreasonable and unnecessary  
16 mental or emotional harm; or

17 (2) to suffer a temporary loss of or  
18 regression in cognitive or behavioral functioning or  
19 communicative abilities such that [~~his~~] the witness's ability  
20 to testify will be significantly impaired.

21 C. If the court orders the use of an alternative  
22 procedure pursuant to this section, the court shall make and  
23 enter specific findings on the record describing the reasons  
24 for such order.

25 D. A court that makes findings in accordance with

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1 Subsection B of this section may order any of the following  
2 suitable alternative procedures for determining the competency  
3 to testify or for taking the testimony of the witness with  
4 ~~[mental retardation]~~ a developmental or intellectual  
5 disability:

6 (1) taking the testimony of the witness with  
7 ~~[mental retardation]~~ a developmental or intellectual disability  
8 while permitting a person familiar to the witness such as a  
9 family member, clinician, counselor, social worker or friend to  
10 sit near or next to ~~[him]~~ the witness;

11 (2) taking the testimony of the witness with  
12 ~~[mental retardation]~~ a developmental or intellectual disability  
13 in court but off the witness stand;

14 (3) if the proceeding is a bench proceeding,  
15 taking the testimony of the witness with ~~[mental retardation]~~ a  
16 developmental or intellectual disability in a setting familiar  
17 to the witness;

18 (4) if the proceeding is a jury trial,  
19 videotaping of testimony, out of the presence of the jury or in  
20 a location chosen by the court or by agreement of the parties;  
21 or

22 (5) the procedure set forth in Paragraph (1)  
23 in combination with Paragraph (2), (3) or (4) of this  
24 subsection.

25 E. Testimony taken by a videotape pursuant to an

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1 order ~~[under]~~ issued as provided in Subsection B of this  
2 section shall be taken in the presence of the judge, counsel  
3 for all parties and such other persons as the court may allow.  
4 Counsel shall be given the opportunity to examine, confront or  
5 cross-examine the witness with ~~[mental retardation]~~ a  
6 developmental or intellectual disability to the same extent as  
7 would be permitted if ordinary procedures had been followed,  
8 subject to such protection of the ~~[mentally retarded]~~ witness  
9 as the judge deems necessary.

10 F. An order issued ~~[under]~~ pursuant to provisions  
11 of Subsection B of this section that the testimony of the  
12 witness with ~~[mental retardation]~~ a developmental or  
13 intellectual disability be videotaped out of the presence of  
14 the jury shall provide that the videotape be shown in court to  
15 the jury in the presence of the judge, the parties and the  
16 parties' counsel. At such courtroom showing, the audio portion  
17 of the video shall be entered into the record as would any oral  
18 testimony and shall be treated in all respects as oral  
19 testimony to the jury.

20 G. The videotape or giving of testimony taken by an  
21 alternative procedure pursuant to an order issued ~~[under]~~ as  
22 provided in Subsection B of this section shall be admissible as  
23 substantive evidence to the same extent as and in lieu of live  
24 testimony by the witness in any proceeding for which the order  
25 is issued or in any related proceeding against the same party

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1 when consistent with the interests of justice; provided that  
2 such an order is entered or re-entered based on current  
3 findings at the time when, or within a reasonable time before,  
4 the videotape or testimony is offered into evidence, and  
5 provided, in the case of a related criminal proceeding, that  
6 the requirements of Subsection E of this section were satisfied  
7 when the videotape was recorded or the alternative procedure  
8 was used.

9 H. Whenever, pursuant to an order issued [~~under~~] as  
10 provided in Subsection B of this section, testimony is recorded  
11 on videotape, the court shall ensure that:

12 (1) the recording equipment is capable of  
13 making an accurate recording and is operated by a competent  
14 operator;

15 (2) the recording is in color and is taken in  
16 well-lit conditions;

17 (3) the presence of the presiding judge, the  
18 attorneys, the defendant or parties, if in the room, and all  
19 other persons present is stated on the recording;

20 (4) the witness with [~~mental retardation~~] a  
21 developmental or intellectual disability is visible at all  
22 times and, to the extent reasonably possible, the recording  
23 shows all persons present in the room as a jury would perceive  
24 them in open court;

25 (5) every voice on the recording is audible

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1 and identifiable;

2 (6) the recording is accurate, undistorted in  
3 picture or sound quality and has not been altered except as  
4 ordered by the court; and

5 (7) each party is afforded the opportunity to  
6 view the recording before it is shown in the courtroom.

7 I. The fact that the witness with [~~mental~~  
8 ~~retardation~~] a developmental or intellectual disability has  
9 been found in a court proceeding to be incompetent to make  
10 informed decisions of a personal, medical or financial nature  
11 or is under a guardianship or conservatorship shall not  
12 preclude the witness from testifying if found competent to  
13 testify and, further, shall not preclude a determination of  
14 competency to testify.

15 J. The use of alternative procedures shall not be  
16 denied because they may take significantly more time than  
17 conventional procedures.

18 K. Expert opinion shall be admissible at any  
19 hearing held pursuant to this section, including hearings to  
20 determine the competency of a witness with [~~mental retardation~~]  
21 a developmental or intellectual disability to testify.

22 L. Nothing in this section shall be deemed to  
23 prohibit the court from using other appropriate means,  
24 consistent with this section and other laws and with the  
25 defendant's rights, to protect a witness with [~~mental~~

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1 ~~retardation]~~ a developmental or intellectual disability from  
2 trauma during a court proceeding."

3 SECTION 12. Section 43-1-3 NMSA 1978 (being Laws 1977,  
4 Chapter 279, Section 2, as amended) is amended to read:

5 "43-1-3. DEFINITIONS.--As used in the Mental Health and  
6 Developmental Disabilities Code:

7 A. "aversive stimuli" means anything that, because  
8 it is believed to be unreasonably unpleasant, uncomfortable or  
9 distasteful to the client, is administered or done to the  
10 client for the purpose of reducing the frequency of a behavior,  
11 but does not include verbal therapies, physical restrictions to  
12 prevent imminent harm to self or others or psychotropic  
13 medications that are not used for purposes of punishment;

14 B. "client" means any patient who is requesting or  
15 receiving mental health services or any person requesting or  
16 receiving developmental disabilities services or who is present  
17 in a mental health or developmental disabilities facility for  
18 the purpose of receiving such services or who has been placed  
19 in a mental health or developmental disabilities facility by  
20 the person's parent or guardian or by any court order;

21 C. "code" means the Mental Health and Developmental  
22 Disabilities Code;

23 D. "consistent with the least drastic means  
24 principle" means that the habilitation or treatment and the  
25 conditions of habilitation or treatment for the client,

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1 separately and in combination:

2 (1) are no more harsh, hazardous or intrusive  
3 than necessary to achieve acceptable treatment objectives for  
4 the client;

5 (2) involve no restrictions on physical  
6 movement and no requirement for residential care except as  
7 reasonably necessary for the administration of treatment or for  
8 the protection of the client or others from physical injury;  
9 and

10 (3) are conducted at the suitable available  
11 facility closest to the client's place of residence;

12 E. "convulsive treatment" means any form of mental  
13 health treatment that depends upon creation of a convulsion by  
14 any means, including [~~but not limited to~~] electroconvulsive  
15 treatment and insulin coma treatment;

16 F. "court" means a district court of New Mexico;

17 G. "department" or "division" means the behavioral  
18 health services division of the human services department;

19 H. "developmental or intellectual disability" means  
20 a [~~disability of a person that is attributable to mental~~  
21 ~~retardation, cerebral palsy, autism or neurological dysfunction~~  
22 ~~that requires treatment or habilitation similar to that~~  
23 ~~provided to persons with mental retardation~~] severe chronic  
24 disability of an individual, which disability:

25 (1) is attributable to a mental or physical

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1 impairment, including the result from trauma to the brain, or  
2 combination of mental and physical impairments;

3 (2) is manifested before the person reaches  
4 the age of twenty-two years;

5 (3) is expected to continue indefinitely;

6 (4) results in substantial functional  
7 limitations in three or more of the following areas of major  
8 life activity:

9 (a) self-care;

10 (b) receptive and expressive language;

11 (c) learning;

12 (d) mobility;

13 (e) self-direction;

14 (f) capacity for independent living; and

15 (g) economic self-sufficiency; and

16 (5) reflects the person's need for a  
17 combination and sequence of special, interdisciplinary or  
18 generic care treatment or other support and services that are  
19 lifelong or of extended duration and are individually planned  
20 or coordinated;

21 I. "evaluation facility" means a community mental  
22 health or developmental disability program or a medical  
23 facility that has psychiatric or developmental or intellectual  
24 disability services available, including the New Mexico  
25 behavioral health institute at Las Vegas, the Los Lunas medical

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1 center or, if none of the foregoing is reasonably available or  
2 appropriate, the office of a physician or a certified  
3 psychologist, and that is capable of performing a mental status  
4 examination adequate to determine the need for involuntary  
5 treatment;

6 J. "experimental treatment" means any mental health  
7 or developmental disabilities treatment that presents  
8 significant risk of physical harm, but does not include  
9 accepted treatment used in competent practice of medicine and  
10 psychology and supported by scientifically acceptable studies;

11 K. "grave passive neglect" means failure to provide  
12 for basic personal or medical needs or for one's own safety to  
13 such an extent that it is more likely than not that serious  
14 bodily harm will result in the near future;

15 L. "habilitation" means the process by which  
16 professional persons and their staff assist a client with a  
17 developmental or an intellectual disability in acquiring and  
18 maintaining those skills and behaviors that enable the person  
19 to cope more effectively with the demands of the person's self  
20 and environment and to raise the level of the person's  
21 physical, mental and social efficiency. "Habilitation"  
22 includes but is not limited to programs of formal, structured  
23 education and treatment;

24 M. "likelihood of serious harm to oneself" means  
25 that it is more likely than not that in the near future the

1 person will attempt to commit suicide or will cause serious  
2 bodily harm to the person's self by violent or other self-  
3 destructive means, including grave passive neglect;

4 N. "likelihood of serious harm to others" means  
5 that it is more likely than not that in the near future a  
6 person will inflict serious, unjustified bodily harm on another  
7 person or commit a criminal sexual offense, as evidenced by  
8 behavior causing, attempting or threatening such harm, which  
9 behavior gives rise to a reasonable fear of such harm from the  
10 person;

11 O. "mental disorder" means substantial disorder of  
12 a person's emotional processes, thought or cognition that  
13 grossly impairs judgment, behavior or capacity to recognize  
14 reality, but does not mean developmental or intellectual  
15 disability;

16 P. "mental health or developmental or intellectual  
17 disabilities professional" means a physician or other  
18 professional who by training or experience is qualified to work  
19 with persons with a mental disorder or a developmental or  
20 intellectual disability;

21 Q. "physician" or "certified psychologist", when  
22 used for the purpose of hospital admittance or discharge, means  
23 a physician or certified psychologist who has been granted  
24 admitting privileges at a hospital licensed by the department  
25 of health, if such privileges are required;

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1           R. "protected health information" means  
2 individually identifiable health information transmitted by or  
3 maintained in an electronic form or any other form or media  
4 that relates to the:

5                   (1) past, present or future physical or mental  
6 health or condition of an individual;

7                   (2) provision of health care to an individual;  
8 or

9                   (3) payment for the provision of health care  
10 to an individual;

11           S. "psychosurgery":

12                   (1) means those operations currently referred  
13 to as lobotomy, psychiatric surgery and behavioral surgery and  
14 all other forms of brain surgery if the surgery is performed  
15 for the purpose of the following:

16                           (a) modification or control of thoughts,  
17 feelings, actions or behavior rather than the treatment of a  
18 known and diagnosed physical disease of the brain;

19                           (b) treatment of abnormal brain function  
20 or normal brain tissue in order to control thoughts, feelings,  
21 actions or behavior; or

22                           (c) treatment of abnormal brain function  
23 or abnormal brain tissue in order to modify thoughts, feelings,  
24 actions or behavior when the abnormality is not an established  
25 cause for those thoughts, feelings, actions or behavior; and

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1 (2) does not include prefrontal sonic  
2 treatment in which there is no destruction of brain tissue;

3 T. "qualified mental health professional licensed  
4 for independent practice" means an independent social worker, a  
5 licensed professional clinical mental health counselor, a  
6 marriage and family therapist, a certified nurse practitioner  
7 or a clinical nurse specialist with a specialty in mental  
8 health, all of whom by training and experience are qualified to  
9 work with persons with a mental disorder;

10 U. "residential treatment or habilitation program"  
11 means diagnosis, evaluation, care, treatment or habilitation  
12 rendered inside or on the premises of a mental health or  
13 developmental disabilities facility, hospital, clinic,  
14 institution or supervisory residence or nursing home when the  
15 client resides on the premises; and

16 V. "treatment" means any effort to accomplish a  
17 significant change in the mental or emotional condition or  
18 behavior of the client."

19 SECTION 13. REPEAL.--Section 24-1-5.4 NMSA 1978 (being  
20 Laws 1997, Chapter 217, Section 2) is repealed.