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## FISCAL IMPACT REPORT

SPONSOR HJC DATE TYPED 2/19/04 HB CS/245/HJCS

SHORT TITLE Health Care Registry Act SB \_\_\_\_\_

ANALYST Dunbar

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY04	FY05	FY04	FY05		
	\$50.0				

Relates to SB9

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Department of Health (DOH)

Human Services Department (HSD)

Children Youth and Families Department (CYFD)

### SUMMARY

#### Synopsis of HAFC Amendment

The House Appropriations and Finance Committee amendment eliminates the \$50 thousand appropriation.

#### Synopsis of Original Bill

House Judiciary Committee Substitute for House Business and Industry Committee substitute for House Bill 245 appropriates \$50,000 from the General Fund to the Department of Health.

The bill enacts the Health Care Registry Act which establishes a registry of employees who have committed abuse, neglect or misappropriation of property to adults or children with developmental disabilities or physical disabilities or to the elderly, including intermediate care facilities for the mentally retarded.

The bill requires DOH to administer the registry; promulgate rules; review reports of abuse, neglect or misappropriation of property; investigate allegations; substantiate findings and hold

hearings on those findings.

### Significant Issues

The major differences in this substitute bill include:

- ❑ Section 2, a definition of “reasonable basis” has been added as subsection H and the definition of “provider” has been amended and clarified in subsection G;
- ❑ Section 3 H. clarifies the process for removal of a name from the Registry, and includes statutory guidelines for possible appeal.
- ❑ Immunity provisions of Section 3 G are clarified and narrowed from previous drafts. It is now clear that the immunity attaches to the provider only as related to the actions of the implicated employee.
- ❑ Section 4 has been amended to amplify the administrative hearing process;
- ❑ Section 4 H states that the department shall not implement the registry if funding is not available.

The amendments to the above-cited sections support the bill’s (HB245 and SB9) objectives and offer due process protections.

The primary provision that affects HSD is Section 3(F), which allows HSD the option of not entering into or renewing a contract with all providers of services to the affected population, including personal care option providers, if they fail to comply with the Act’s requirements. HSD would be required to execute a memorandum of understanding (MOU) or joint powers agreement (JPA) with DOH in order to have access to the Health Care Registry.

The bill offers HSD a useful tool to ensure that HSD providers are ensuring the safety and well being of the Medicaid clients they serve.

### **FISCAL IMPLICATIONS**

The appropriation of \$50.0 contained in this bill is a recurring expense to the General Fund. Any unexpended or unencumbered balance remaining at the end of FY 05 shall revert to the General Fund.

### **ADMINISTRATIVE IMPLICATIONS**

Regulations must be promulgated for the implementation of the bill. There are similar regulations already in existence for the Nurse Aide Registry, which could be used as guidelines.

If the bill is enacted, HSD would be required to enter into an MOU or JPA to gain access to the registry. In addition, HSD’s will have to revise its current policy for community providers to mandate provider compliance with the Act. HSD will also need to create a quality assurance process to ensure that providers check the Health Care Registry before hiring potential services providers. In addition, HSD will have to verify that potential providers are not on the Health Care Registry before contracting with them.

## TECHNICAL ISSUES

Section 4 H states that the department shall not implement the registry if funding is not available. It is unclear whether this applies only to the initial implementation, as the statute contains language, which will control implementation over a period of 3 years.

According to DOH, the definition of “reasonable basis” in the definition section states that providers need this standard to justify a determination of abuse, neglect or misappropriation of property “Reasonable basis” in this statute refers to the standard used by the Department to determine that a complaint is not frivolous or grossly unfounded. To include it in relation to the providers may be confusing as providers are mandated by other legislation to reports all suspected instances of abuse, neglect or misappropriation of property. It is not up to the provider to determine whether abuse, neglect or exploitation has occurred. This can be cleared up through regulation.

HSD points out since Section IV (C) (5) in this bill provides an employee’s failure to request a hearing within 30 days will result in the employee’s name being placed on the registry, it creates a potential loophole in the system that would allow an individual to obtain employment with another agency during the 30-day waiting period.

CYFD provides the following comments:

- DOH is required to promulgate rules to carry out provisions of the Act. In order to prevent potential conflicts, the DOH should consider definitions for terms such as “neglect,” “abuse,” “exploitation,” etc. that are contained in the Adult Protective Services Act and corresponding CYFD policies and procedures to the extent that they are not included in the final bill.
- The bill does not establish any confidentiality provisions. Though the bill would require providers to check with DOH to see if a person is on the list, there is no provision that would prevent anyone from inquiring if a person is on the list. Without a confidentiality provision, the list may be released to the public or the media through a public records request under the Inspection of Public Records Act.
- There is no provision that would prevent a provider from re-releasing information once a person is identified on the list.
- This bill may result in lawsuits against the state and other entities by persons denied employment improperly based upon information in the registry.

## OTHER SUBSTANTIVE ISSUES

The bill removes the Administrative Procedures Act for due process procedure and replaces it with NMSA (1978) Section 39-3-1.1.

The bill provides for a specific hearing procedure to protect the due process rights of any employee accused of abuse, neglect or exploitation. This process is a duplicate of the process already in place for individuals who request a hearing under the Certified Nurse Practitioner Registry, required by the federal government and administrated by the Department.

According to DOH, the legislature has never placed any agency under the APA because the procedures are considered too onerous, and the agency has the duty and ability to regulate the

process for the specific needs of the Department.

All state agencies promulgate regulations to govern administrative process pursuant to the state Rules Act.

APA timelines are not appropriate for every agency and could result in significant increase in the cost or proceedings. The Department will also be severely taxed administratively in the effort to meet these timelines. It is more efficient and effective to design a procedure that meets the needs of the Department as well as the advocates and the public through regulations and public hearing.

DOH says if the concern is judicial review, review is a matter of right and Rule 0-75 applies. To ensure review as a matter of right, NMSA (1978) Section 39-3-1.1 could attach.

DOH indicates the bill contains due process protections for the accused employee, including the right to request a hearing following the finding of abuse, neglect or misappropriation of property and the right to petition the Department for removal of the individual's name in the future if the finding were for neglect only. These protections are important to maintain, as inclusion in the Registry will result in the reporting of such inclusion to any appropriate licensing board. A professional license is a constitutionally protected property right and requires due process protection.

**BD/yr**