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HOUSE BILL 319

48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007

INTRODUCED BY

Peter Wirth

FOR THE LEGISLATIVE HEALTH AND HUMAN SERVICES COMMITTEE

AN ACT

RELATING TO ADULT PROTECTIVE SERVICES; INCREASING PENALTIES;
EXPANDING SYSTEM SERVICES; CLARIFYING DEPARTMENT DUTIES.

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

Section 1. Section 27-7-15 NMSA 1978 (being Laws 1989,
Chapter 389, Section 2, as amended) is amended to read:

"27-7-15. LEGISLATIVE FINDINGS--PURPOSE.--

A. The legislature recognizes that many adults in
the state are unable to manage their own affairs or protect
themselves from [~~exploitation~~] abuse, [~~or~~] neglect [~~Often such~~
~~adults cannot find others able or willing to render~~
~~assistance.~~] or exploitation. The legislature further
recognizes that the state should protect adults by providing
for the detection, correction and elimination of abuse, neglect
or exploitation through a program of short-term services for

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1 adults in need of protective services or protective placement.

2 B. It is the purpose of the Adult Protective
3 Services Act to establish a system of protective services
4 ~~[designed to fill this need]~~ and protective placement and to
5 ~~[assure]~~ ensure the availability of those services or placement
6 to all adults in need of them. It is also the purpose of the
7 Adult Protective Services Act to authorize only the least
8 possible restriction on the exercise of personal and civil
9 rights and religious beliefs consistent with the adult's need
10 for protective services or protective placement and to require
11 that due process be followed in imposing those restrictions.

12 C. Nothing in ~~[this]~~ the Adult Protective Services
13 Act shall be construed to mean an adult, including an
14 incapacitated adult or a protected adult, is abused, neglected,
15 ~~[being denied essential services or in need of protective~~
16 ~~services for the sole reason he]~~ or exploited if the adult
17 relies upon or is being furnished with spiritual treatment
18 through prayer alone in accordance with the express or implied
19 intent of the adult; nor shall anything in ~~[this]~~ that act be
20 construed to authorize or require any medical care or treatment
21 in contravention of the express or implied wish of that adult."

22 Section 2. Section 27-7-16 NMSA 1978 (being Laws 1989,
23 Chapter 389, Section 3, as amended) is amended to read:

24 "27-7-16. DEFINITIONS.--As used in the Adult Protective
25 Services Act:

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1 A. "ability to consent" means an adult's ability to
2 understand and appreciate the nature and consequences of
3 proposed protective services or protective placement, including
4 benefits, risks and alternatives to the proposed services or
5 placement and to make or communicate an informed decision;

6 ~~[A.]~~ B. "abuse" means:

7 (1) knowingly, intentionally or negligently
8 and without justifiable cause inflicting physical pain, injury
9 or mental anguish; ~~[or]~~

10 (2) the intentional deprivation by a caretaker
11 or other person of services necessary to maintain the mental
12 and physical health of an adult; or

13 (3) sexual abuse, including criminal sexual
14 contact, incest and criminal sexual penetration;

15 ~~[B.]~~ C. "adult" means a person eighteen years of
16 age or older;

17 ~~[C. "appropriate facility" means any facility other~~
18 ~~than a jail or detention facility;]~~

19 D. "caretaker" means ~~[an]~~ a facility, provider or
20 individual ~~[or institution]~~ that has assumed the responsibility
21 for the care of an adult;

22 E. "conservator" means a person who is appointed by
23 a court to manage the property or financial affairs, or both,
24 of an incapacitated ~~[person or a minor ward]~~ adult;

25 F. "court" means the district court having

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1 jurisdiction;

2 G. "department" means the [~~children, youth and~~
3 ~~families~~] aging and long-term services department;

4 H. "emergency" means that an adult is living in
5 conditions that present a substantial risk of death or
6 immediate and serious physical harm to [~~himself~~] the adult or
7 others;

8 I. "exploitation" means an unjust or improper use
9 of an adult's money or property for another person's profit or
10 advantage, pecuniary or otherwise;

11 J. "facility" means a hospital, nursing home,
12 residential care facility, group home, foster care home,
13 assisted living facility or other facility licensed by the
14 state, but does not include a jail, prison or detention
15 facility;

16 [~~J.~~] K. "guardian" means a person who has qualified
17 to provide for the care, custody or control of [~~the person or a~~
18 ~~minor or~~] an incapacitated [~~person~~] adult pursuant to
19 testamentary or court appointment, but excludes one who is
20 [~~merely~~] a guardian ad litem;

21 [~~K.~~] ~~"inability to manage his personal care" means~~
22 ~~the inability, as evidenced by recent behavior, to meet one's~~
23 ~~needs for medical care, nutrition, clothing, shelter, hygiene~~
24 ~~or safety so that physical injury, illness or disease has~~
25 ~~occurred or is likely to occur in the near future;~~

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1 ~~L. "inability to manage his property or financial~~
2 ~~affairs" means gross mismanagement, waste or dissipation, as~~
3 ~~evidenced by recent behavior, of an adult's income and~~
4 ~~resources which has led or is likely in the near future to lead~~
5 ~~to financial vulnerability which threatens the adult's ability~~
6 ~~to obtain or pay for his basic requirements for living;~~

7 M.] L. "incapacitated adult" means any adult [who
8 ~~demonstrates over time partial or complete functional~~
9 ~~impairment by reason of mental illness, mental deficiency,~~
10 ~~physical illness or disability, chronic use of drugs, chronic~~
11 ~~intoxication or other causes to the extent that he is unable to~~
12 ~~manage his personal affairs or he is unable to manage his~~
13 ~~estate or financial affairs, but does not include a person who~~
14 ~~refuses services without other evidence of incapacity] with a~~
15 ~~mental, physical or developmental condition that substantially~~
16 ~~impairs the adult's ability to provide adequately for the~~
17 ~~adult's own care or protection;~~

18 ~~[N. "independent living arrangements" means a mode~~
19 ~~of life maintained on a continuing basis outside of a hospital,~~
20 ~~veterans' administration hospital, nursing home or other~~
21 ~~facility licensed by or under the jurisdiction of any state~~
22 ~~agency;~~

23 ~~O. "interested person" means any adult relative,~~
24 ~~any person who has an interest in the welfare of the adult to~~
25 ~~be protected under the Adult Protective Services Act or any~~

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1 ~~official or representative of a protective services agency or~~
2 ~~of any public or nonprofit agency, corporation, board or~~
3 ~~organization eligible for designation as a protective services~~
4 ~~agency;]~~

5 M. "multidisciplinary team" means a team composed
6 of diverse professionals who meet periodically to consult on or
7 enhance appropriate community responses to abuse, neglect or
8 exploitation of adults;

9 [P-] N. "neglect" means the failure of the
10 caretaker of an adult to provide for the basic needs of the
11 adult, such as clothing, food, shelter, supervision and care
12 for the physical and mental health [for] of that adult; [or
13 failure by an adult to provide such basic needs for himself]
14 "neglect" includes self-neglect;

15 [Q-] O. "protected adult" means an adult for whom a
16 guardian or conservator has been appointed or other protective
17 order has been made or an abused, neglected or exploited adult
18 who has [requested] consented to protective services or
19 protective placement;

20 [R-] P. "protective placement" means the [transfer]
21 placement of an adult [from independent living arrangements to
22 a hospital, nursing home, domiciliary or residential care] with
23 a provider or in a facility or the transfer of an adult from
24 one [such institution] provider or facility to another;

25 [S-] Q. "protective services" means the services

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1 furnished by the department or [~~a protective services agency~~
2 ~~or~~] its delegate, as described in Section 27-7-21 NMSA 1978;
3 [and

4 F. ~~"protective services agency" means a~~
5 ~~corporation, board or organization authorized by the department~~
6 ~~pursuant to the Adult Protective Services Act to furnish~~
7 ~~protective services to protected or incapacitated adults or to~~
8 ~~serve as conservators or guardians of protected or~~
9 ~~incapacitated adults upon appointment by a court]~~

10 R. "provider" means a private-residence or health
11 care worker or an unlicensed residential or nonresidential
12 entity that provides personal, custodial or health care;

13 S. "self-neglect" means an act or omission by an
14 incapacitated adult that results in the deprivation of
15 essential services or supports necessary to maintain the
16 incapacitated adult's minimal mental, emotional or physical
17 health and safety;

18 T. "substantiated" means a determination, based on
19 a preponderance of collected and assessed credible information,
20 that abuse, neglect or exploitation of an incapacitated or
21 protected adult has occurred; and

22 U. "surrogate" means a person legally authorized to
23 act on an adult's behalf."

24 Section 3. Section 27-7-17 NMSA 1978 (being Laws 1989,
25 Chapter 389, Section 4, as amended) is amended to read:

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1 "27-7-17. ADULT PROTECTIVE SERVICES SYSTEM.--

2 A. Subject to the availability of funds, the
3 department shall develop a coordinated system of protective
4 services or protective placement for incapacitated or protected
5 adults who have been abused, neglected or exploited. In
6 planning this system, the department shall obtain the advice of
7 agencies, corporations, boards and associations involved in the
8 provision of social, health, legal, nutritional and other
9 services to adults, as well as of organizations of adults.

10 B. The department shall ensure that the adult
11 protective services system for incapacitated or protected
12 adults who have been abused, neglected or exploited includes:

13 (1) a process for the collection and analysis
14 of data relating to adult protective services or protective
15 placement and for the provision of an annual findings and
16 recommendations report to the governor and the appropriate
17 interim committee;

18 (2) the establishment and use of
19 multidisciplinary teams to develop treatment strategies, ensure
20 maximum coordination with existing community resources and
21 provide comprehensive assessment and case consultation on
22 difficult or complex cases, provided that the adults' privacy
23 and confidentiality rights in such cases are protected;

24 (3) coordination among the various state or
25 local agencies that serve incapacitated or protected adults;

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1 and

2 (4) an emphasis on the need for prevention of
3 abuse, neglect or exploitation of adults.

4 ~~[B-]~~ C. Upon establishment of the adult protective
5 services system, the department shall be responsible for
6 continuing coordination and supervision of the system. In
7 carrying out these duties, the department shall:

8 (1) adopt rules ~~[and regulations]~~ necessary to
9 implement and operate the system;

10 (2) monitor and evaluate the effectiveness of
11 the system; and

12 (3) use to the extent available grants from
13 federal, state and other public and private sources to support
14 the system.

15 ~~[C-]~~ D. The department shall administer a public
16 information program regarding the problem of abuse, neglect and
17 exploitation of adults; reporting and prevention of adult
18 abuse, neglect ~~[and]~~ or exploitation; and the availability of
19 treatment and protective services or protective placement for
20 those adults."

21 Section 4. Section 27-7-19 NMSA 1978 (being Laws 1989,
22 Chapter 389, Section 6, as amended) is amended to read:

23 "27-7-19. DEPARTMENT--~~[INVESTIGATIONS--ORDERS--SERVICES~~
24 ~~AND CONTRACTS]~~ DUTIES--PENALTY.--

25 ~~[A. The department shall investigate all reports of~~

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1 ~~suspected abuse, neglect or exploitation of adults. Upon~~
2 ~~receipt of a report, the department shall determine whether the~~
3 ~~adult is abused, neglected or exploited and in need of~~
4 ~~protective services and what services are needed, unless the~~
5 ~~department determines that the adult is knowingly and~~
6 ~~voluntarily refusing services or that the report is frivolous~~
7 ~~or is patently without a factual basis. In determining the~~
8 ~~need for protective services, the department shall visit the~~
9 ~~person and gather information from others having knowledge of~~
10 ~~the facts of the particular case. After making the~~
11 ~~determination, the department or the protective services agency~~
12 ~~shall make a written report of its findings and recommendations~~
13 ~~and take whatever action is necessary.~~

14 ~~B. The department may petition the court for a~~
15 ~~protective order or an order for appointment of a guardian or~~
16 ~~conservator.~~

17 ~~C. The department may provide direct protective~~
18 ~~services and may contract with any protective services agency~~
19 ~~for the provision of protective services. To the extent~~
20 ~~appropriate and available, the department shall utilize~~
21 ~~existing resources and services of public and nonprofit private~~
22 ~~agencies in providing protective services.~~

23 ~~D. Except when prohibited by law]~~

24 A. The department shall:

25 (1) develop, maintain and update as needed a

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1 process to receive a report or referral of suspected abuse,
2 neglect or exploitation of an adult;

3 (2) assess an adult and the adult's situation
4 to determine what immediate protective services or protective
5 placement may be required;

6 (3) conduct an investigation to determine if
7 the report or referral of abuse, neglect or exploitation is
8 substantiated;

9 (4) document evidence, observations and other
10 information obtained in the course of an investigation;

11 (5) develop a plan to provide an adult with or
12 refer an adult for protective services, protective placement or
13 other intervention services, unless the department determines
14 that the adult is knowingly and voluntarily refusing services;
15 and

16 (6) ensure that the protective services or
17 protective placement provided by or through the department is
18 short term and has a termination date; provided that
19 appropriate arrangements have been made for follow-up care if
20 needed, including any long-term services for which the adult
21 may qualify.

22 B. Upon request, the department, in accordance with
23 federal or state laws that protect an adult's right to privacy
24 and confidentiality, shall have immediate access to and may
25 reproduce any record, including medical, personal,

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1 psychological and financial records, of the [~~patient, resident~~
2 ~~or client of any private or public facility or agency which~~
3 adult that the department determines is necessary to pursue
4 [~~any~~] an investigation mandated by this section or by [~~Sections~~
5 ~~30-47-1 through 30-47-10 NMSA 1978~~] the Resident Abuse and
6 Neglect Act if [~~the patient, resident or client~~]:

7 (1) the adult has the ability to consent
8 [~~access may only be obtained by the~~] and has given written
9 consent [~~of the patient, resident or client~~];

10 (2) the adult is unable to consent in writing,
11 and gives oral consent [~~may be given~~] in the presence of a
12 third party as a witness;

13 (3) [~~is under a New Mexico guardianship or~~
14 ~~conservatorship that provides~~] the adult has a guardian, [~~or~~]
15 conservator or surrogate with the authority to approve review
16 of the records and the department [~~shall obtain~~] obtains the
17 permission of the guardian, [~~or~~] conservator or surrogate for
18 review of the record; [~~unless any of the following applies:~~

19 (a) ~~the existence of the guardianship or~~
20 ~~conservatorship unknown to the department, or facility; or~~

21 (b) ~~the guardian or conservator cannot~~
22 ~~be reached within five working days; and~~

23 (4) ~~is unable to express written or oral~~
24 ~~consent and there is no guardian or conservator or the guardian~~
25 ~~or conservator refuses to give consent or notification of the~~

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1 ~~guardian or conservator is not applicable for reasons set forth~~
2 ~~in Paragraph (3) of this subsection; or the patient, resident~~
3 ~~or client is deceased, inspection of records may be made by~~
4 ~~employees of the department upon petition to the district court~~
5 ~~for an order requiring appropriate access if the department can~~
6 ~~demonstrate that access is denied because of the incapacity,~~
7 ~~coercion, extortion or justifiable fear of future abuse,~~
8 ~~neglect, exploitation or abandonment of the adult client]~~

9 (4) the adult is unable to give consent and:

10 (a) has no guardian, conservator or
11 surrogate;

12 (b) the department is unaware of and has
13 no reasonable grounds for believing that there is a guardian,
14 conservator or surrogate; or

15 (c) the department is unable to contact
16 the guardian, conservator or surrogate within three working
17 days of the initiation of the investigation; or

18 (5) the department obtains from the district
19 court an order granting access upon a showing that:

20 (a) consent is being withheld due to
21 coercion, extortion or justifiable fear of future abuse,
22 neglect, exploitation or abandonment of the adult; or

23 (b) there is reasonable cause to believe
24 that the adult has been or is being abused, neglected or
25 exploited and that after notice by the department of the

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1 alleged abuse, neglect or exploitation, the guardian,
2 conservator or surrogate has refused to give consent.

3 ~~[E.]~~ C. Upon request by the department, the
4 provider or a [long-term care] facility in which an adult is or
5 has been residing shall provide to the department the name,
6 address and telephone number of the guardian, conservator,
7 surrogate, attorney-in-fact, legal representative or next of
8 kin of ~~[any patient, resident or client]~~ the adult.

9 ~~[F.]~~ D. The department shall have immediate access
10 to ~~[the person]~~ an adult, whether in a facility or provider
11 setting, who is alleged to be abused, neglected or exploited to
12 determine the accuracy of the report and the necessity of
13 protective services ~~[and]~~ or protective placement, to evaluate
14 the ~~[client's]~~ adult's needs and develop a service plan to meet
15 those needs and to provide for the ~~[delivery of]~~ services or
16 placement by or through the department ~~[or by other service~~
17 ~~providers that the department deems to be appropriate]~~. If the
18 department is denied access to the ~~[person]~~ adult alleged to be
19 abused, neglected or exploited, the ~~[department's investigator]~~
20 department may gain access upon petition to the ~~[district]~~
21 court for an order requiring appropriate access if the
22 department can demonstrate that a ~~[care]~~ facility, provider or
23 ~~[third party]~~ individual has interfered with the department's
24 attempts to access the adult ~~[client]~~ under investigation.

25 ~~[G.]~~ E. Anyone willfully interfering with an

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1 investigation of adult abuse, neglect or exploitation, pursuant
2 to this section, is guilty of a misdemeanor. [~~Interference~~
3 ~~under this section shall include investigations by facilities~~
4 ~~or individuals of alleged abuse, neglect or exploitation within~~
5 ~~their facilities, operation and control without first reporting~~
6 ~~that alleged abuse, neglect or exploitation to the department.~~]

7 Interference under this section shall not include efforts by
8 [~~facilities, or individuals~~] a facility, provider or individual
9 to establish whether there is reasonable cause to believe that
10 there is adult abuse, neglect or exploitation, provided that
11 the department is notified as soon as reasonable cause is
12 established, whether or not the internal investigation has been
13 concluded.

14 F. The department may assess a civil penalty not to
15 exceed ten thousand dollars (\$10,000) per violation against a
16 facility, provider or individual who violates the provisions of
17 Subsection B, C or D of this section. The department may
18 assess and collect the penalty, after notice and an opportunity
19 for hearing before a hearing officer designated by the
20 department to hear the matter, upon a determination that a
21 facility, provider or individual willfully interfered with the
22 department or discriminated, disciplined or retaliated against
23 a person who communicated or disclosed information to the
24 department in good faith pursuant to this section. The hearing
25 officer has the power to administer oaths on request of any

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1 party and issue subpoenas and subpoenas duces tecum.
2 Additionally, if the violation is against a person covered by
3 the Personnel Act, the department shall refer the matter to the
4 agency employing the person for disciplinary action. Any party
5 may appeal a final decision by the department to the court
6 pursuant to the provisions of Section 39-3-1.1 NMSA 1978."

7 Section 5. Section 27-7-21 NMSA 1978 (being Laws 1989,
8 Chapter 389, Section 8, as amended) is amended to read:

9 "27-7-21. NATURE OF PROTECTIVE SERVICES--COSTS.--

10 A. Protective services are short-term services
11 furnished by the department or [~~a protective services agency or~~
12 ~~its delegate~~] under arrangement through the department to an
13 incapacitated or protected [~~person~~] adult who has been abused,
14 neglected or exploited and with the [~~person's~~] adult's consent
15 or appropriate legal authority.

16 B. The protective services furnished in a
17 protective services system may include social, [~~case work~~]
18 psychiatric, [~~and~~] health, [~~evaluation, home care, day care~~]
19 legal [~~assistance, social services, health care, case~~
20 ~~management, guardianship, conservatorship~~] and other services
21 provided on a short-term basis that, if appropriate, transition
22 to other ongoing or long-term services outside the protective
23 services system and that detect, correct or eliminate abuse,
24 neglect or exploitation consistent with the Adult Protective
25 Services Act. [~~C. In order to provide the services listed in~~

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1 ~~Subsection B of this section~~] The adult protective services
2 system established by the department may include outreach,
3 ~~[identifying persons in need of services, counseling, referring~~
4 ~~persons for services, evaluating individuals, arranging for~~
5 ~~services, tracking and following up cases, petitioning the~~
6 ~~courts for the appointment of a conservator or guardian of the~~
7 ~~person]~~ public information and education, prevention programs,
8 referral for health or legal services and other activities
9 consistent with the Adult Protective Services Act.

10 ~~[D-]~~ C. The costs of providing protective services
11 shall be borne by ~~[the provider of those services, or]~~ the
12 department or other appropriate agency ~~[subject to available~~
13 ~~appropriations and resources]~~, unless the adult agrees to pay
14 for them or a court authorizes the provider or the department
15 or other agency to receive reasonable reimbursement from the
16 adult's assets after a finding that the ~~[person]~~ adult is
17 financially able to make payment. As appropriate and as
18 permitted by law, the department may bill the adult or a third
19 party to receive reasonable reimbursement for protective
20 services rendered."

21 Section 6. Section 27-7-23 NMSA 1978 (being Laws 1989,
22 Chapter 389, Section 10, as amended) is amended to read:

23 "27-7-23. VOLUNTARY PROTECTIVE SERVICES--PROTECTIVE
24 PLACEMENT--PENALTY.--

25 A. Any adult who has been abused, neglected or

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1 exploited and is in need of protective services or protective
2 placement as determined by the department and who ~~[requests]~~
3 consents to those services or placement shall receive them
4 ~~[subject to available appropriations and resources]~~. If the
5 ~~[person]~~ adult withdraws or refuses consent, voluntary
6 protective services or protective placement shall not be
7 provided. No legal rights are relinquished as a result of
8 acceptance of voluntary protective services or protective
9 placement.

10 B. ~~[No]~~ A person ~~[shall interfere]~~ who interferes
11 with the provision of protective services or protective
12 placement to an adult who ~~[requests and]~~ consents to receive
13 those services or placement is guilty of a misdemeanor. In the
14 event that interference occurs ~~[on a continuing basis]~~, the
15 department ~~[or a protective services agency]~~ may petition the
16 court to enjoin that interference, may impose a civil penalty
17 or, at the department's discretion, may request criminal
18 prosecution.

19 C. The department may assess a civil penalty not to
20 exceed ten thousand dollars (\$10,000) per violation against a
21 person that violates the provisions of Subsection B of this
22 section. The department may assess and collect the penalty
23 after notice and an opportunity for hearing, before a hearing
24 officer designated by the department to hear the matter, upon a
25 determination that a person willfully interfered with the

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1 department pursuant to this subsection. The hearing officer
2 has the power to administer oaths on request of any party and
3 issue subpoenas and subpoenas duces tecum. Additionally, if
4 the violation is against a person covered by the Personnel Act,
5 the department shall refer the matter to the agency employing
6 the person for disciplinary action. Any party may appeal a
7 final decision by the department to the court pursuant to the
8 provisions of Section 39-3-1.1 NMSA 1978."

9 Section 7. Section 27-7-24 NMSA 1978 (being Laws 1989,
10 Chapter 389, Section 11, as amended) is amended to read:

11 "27-7-24. INVOLUNTARY PROTECTIVE SERVICES AND PROTECTIVE
12 PLACEMENT--PENALTY.--

13 A. If an adult [~~is unable~~] lacks the ability to
14 consent to receive protective services or protective placement,
15 those services or placement may be ordered by a court on an
16 involuntary basis through an emergency order pursuant to the
17 Adult Protective Services Act or through appointment of a
18 guardian or conservator.

19 B. In ordering involuntary protective services or
20 protective placement, the court shall authorize only that
21 intervention [~~which~~] that it finds to be least restrictive of
22 the adult's liberty and rights consistent with the adult's
23 welfare and safety. The basis for such a finding shall be
24 stated in the record by the court.

25 C. The incapacitated or protected adult shall not

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1 be required to pay for involuntary protective services or
2 protective placement unless that payment is authorized by the
3 court upon a showing that the adult is financially able to pay.
4 In this event, the court shall provide for reimbursement of the
5 reasonable costs of the services or placement. [~~The costs of~~
6 ~~involuntary protective services shall be borne by the provider~~
7 ~~of those services, or the department or other appropriate~~
8 ~~agency subject to available appropriations and resources if the~~
9 ~~adult is not financially able to cover those costs.~~]

10 D. ~~[No]~~ A person [shall interfere] who interferes
11 with the provision of involuntary protective services or
12 protective placement to an adult is guilty of a misdemeanor.
13 In the event that interference occurs [~~on a continuing basis~~],
14 the department [~~or protective services agency~~] may petition the
15 court to enjoin interference, may impose a civil penalty or, at
16 the department's discretion, may request criminal prosecution.

17 E. The Adult Protective Services Act does not
18 affect other state statutes governing treatment of an adult
19 admitted to a mental health care institution for mental illness
20 or involuntary commitment of an adult to a mental health care
21 institution for mental illness or any other involuntary mental
22 health treatment.

23 F. The department may petition the court for the
24 appointment of a guardian or conservator if the department
25 determines that a no less restrictive course of care or

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1 treatment is available that is consistent with the
2 incapacitated adult's welfare and safety.

3 G. The department and its employees are prohibited
4 from:

5 (1) taking custody of an adult;

6 (2) acting as guardian, conservator or
7 surrogate for any adult in need of protective services or
8 protective placement, except that an employee may serve in that
9 role when related by affinity or consanguinity to an adult;

10 (3) acting as treatment guardian under the
11 Mental Health and Developmental Disabilities Code, except that
12 an employee may serve in that role when related by affinity or
13 consanguinity to an adult;

14 (4) acting as qualified health care
15 professionals pursuant to the Uniform Probate Code; and

16 (5) acting as visitors under the Uniform
17 Probate Code for any adult in need of protective services or
18 protective placement.

19 H. The department may assess a civil penalty not to
20 exceed ten thousand dollars (\$10,000) per violation against a
21 person that violates the provisions of Subsection D of this
22 section. The department may assess and collect the penalty
23 after notice and an opportunity for hearing, before a hearing
24 officer designated by the department to hear the matter, upon a
25 determination that a person willfully interfered with the

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1 department pursuant to this section. The hearing officer has
2 the power to administer oaths on request of any party and issue
3 subpoenas and subpoenas duces tecum. Additionally, if the
4 violation is against a person covered by the Personnel Act, the
5 department shall refer the matter to the agency employing the
6 person for disciplinary action. Any party may appeal a final
7 decision by the department to the court pursuant to the
8 provisions of Section 39-3-1.1 NMSA 1978."

9 Section 8. Section 27-7-25 NMSA 1978 (being Laws 1990,
10 Chapter 79, Section 6, as amended) is amended to read:

11 "27-7-25. EX-PARTE ORDERS FOR EMERGENCY PROTECTIVE
12 SERVICES OR EMERGENCY PROTECTIVE PLACEMENT--NOTICE--PETITION.--

13 A. Upon petition by the department, the court may
14 issue an order authorizing the provision of involuntary
15 protective services or protective placement on an emergency
16 basis to an adult under the criteria set forth in Subsection B
17 of this section.

18 B. At the time a petition is filed or any time
19 thereafter, the court may issue an ex-parte order authorizing
20 the provision of involuntary protective services or involuntary
21 protective placement upon a sworn written statement of facts
22 showing probable cause exists to believe that:

- 23 (1) the adult is incapacitated;
24 (2) an emergency exists;
25 (3) the adult lacks the [~~capacity~~] ability to

1 consent to receive protective services or protective placement;
2 and

3 (4) no person authorized by law or court order
4 to give consent for the adult is available or willing to
5 consent to the provision of protective services or protective
6 placement on an emergency basis.

7 C. The petition for an emergency ex-parte order
8 shall set forth:

9 (1) the name, address and interest of the
10 petitioner;

11 (2) the name, age and address of the adult in
12 need of protective services;

13 (3) the facts describing the nature of the
14 emergency;

15 (4) the facts describing the nature of the
16 adult's incapacity;

17 (5) the proposed protective services or
18 protective placement;

19 (6) the petitioner's reasonable belief,
20 together with supporting facts, about the need for emergency
21 intervention; and

22 (7) the facts showing the petitioner's
23 attempts to obtain the adult's consent to the proposed
24 protective services or protective placement and the outcome of
25 those attempts.

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1 ~~[G.]~~ D. An affidavit for an ex-parte order for
2 emergency protective services or emergency protective placement
3 may be signed by any person who has knowledge of the facts
4 alleged or is informed of them and believes that they are true.

5 ~~[D.]~~ E. The Rules of Evidence do not apply to the
6 issuance of an emergency ex-parte protective services or
7 protective placement order. ~~[or to hearings held on an~~
8 ~~application for renewal of the original emergency order~~

9 ~~E.]~~ F. In issuing an emergency ex-parte order, the
10 court shall adhere to the following limitations:

11 (1) only the protective services or protective
12 placement necessary to remove the conditions creating the
13 emergency shall be ordered, and the order shall specifically
14 designate the proposed protective services or protective
15 placement;

16 (2) protective services or protective
17 placement authorized by an emergency ex-parte order shall not
18 include hospitalization or a change of residence, unless the
19 order gives specific approval for the action;

20 (3) protective services or protective
21 placement may be provided by emergency ex-parte order only for
22 ten days; provided that the original order may be renewed once
23 for a period of twenty additional days upon application to the
24 court showing that continuation of the original order is
25 necessary to remove the conditions creating the emergency. An

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1 application for renewal of the original order shall be
2 supported by a written report of the results of the evaluation
3 required by [~~Section 27-7-22~~] Subsection C of Section 27-7-27
4 NMSA 1978 and copies of the actual evaluations;

5 (4) the issuance of an emergency ex-parte
6 order shall not deprive the adult of any rights except those
7 provided for in the order;

8 [~~(5) the department and its employees are~~
9 ~~prohibited from:~~

10 (a) ~~taking custody;~~

11 (b) ~~acting as guardians or conservators~~
12 ~~for any adult in need of protective services, except that an~~
13 ~~employee may serve in that capacity when related by affinity or~~
14 ~~consanguinity to an adult;~~

15 (c) ~~acting as treatment guardians under~~
16 ~~the Mental Health and Developmental Disabilities Code except~~
17 ~~that an employee may serve in that capacity when related by~~
18 ~~affinity or consanguinity to an adult;~~

19 (d) ~~acting as qualified health care~~
20 ~~professionals pursuant to the Probate Code; and~~

21 (e) ~~acting as visitors under the Probate~~
22 ~~Code for any adult in need of protective services;~~

23 ~~(6)]~~ (5) to implement an emergency ex-parte
24 order, the court may authorize forcible entry of premises for
25 the purposes of rendering protective services or protective

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1 placement or transporting the adult to another location for the
2 provision of services or placement only if facts contained in
3 the affidavit supporting the petition for ex-parte order show
4 that attempts to gain voluntary access to the premises have
5 failed and forcible entry is necessary; provided that persons
6 making an authorized forcible entry shall be accompanied by a
7 law enforcement officer; and

8 [~~(7)~~] (6) service of an ex-parte order
9 authorizing forcible entry shall be according to the following
10 procedure. The order shall be served on the alleged
11 incapacitated adult by a person authorized to serve arrest
12 warrants and shall direct the officer to advise the adult of
13 the nature of the protective services or protective placement
14 that have been ordered by the court. If the order authorizes
15 emergency protective placement, the order shall direct the
16 officer to assist in transfer of the adult to a place
17 designated by the court.

18 [~~F. The petition for an emergency ex-parte order~~
19 ~~shall set forth:~~

20 [~~(1) the name, address and interest of the~~
21 ~~petitioner;~~

22 [~~(2) the name, age and address of the adult in~~
23 ~~need of protective services;~~

24 [~~(3) facts describing the nature of the~~
25 ~~emergency;~~

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1 ~~(4) facts describing the nature of the adult's~~
2 ~~incapacity;~~

3 ~~(5) the proposed protective services;~~

4 ~~(6) the petitioner's reasonable belief,~~
5 ~~together with supporting facts, about the need for emergency~~
6 ~~intervention; and~~

7 ~~(7) facts showing the petitioner's attempts to~~
8 ~~obtain the adult's consent to the proposed services and the~~
9 ~~outcome of those attempts.]~~

10 G. Notice of the filing of the petition and the
11 issuance of the emergency ex-parte order, including a copy of
12 the petition, the ex-parte order and the affidavit for ex-parte
13 order, shall be given to the adult and the adult's spouse or,
14 if none, ~~[his]~~ the adult children or next of kin, surrogate or
15 guardian, if any. The notice shall be given, in language
16 reasonably understandable by its intended recipients, within
17 twenty-four hours, excluding Saturdays, Sundays and legal
18 holidays, from the time that the ex-parte order authorizing
19 protective services or protective placement is issued by the
20 court or, if the ex-parte order authorizes forcible entry, from
21 the time the ex-parte order is served upon the incapacitated
22 adult. The notice shall inform the recipients that a hearing
23 will be held no later than ten days after the date the petition
24 is filed to determine whether the conditions creating the
25 emergency have been removed and whether the adult should be

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1 released from the court's order for protective services or
2 protective placement.

3 H. Within ten days from the filing of a petition
4 for an emergency order for protective services or protective
5 placement, the court shall hold a hearing upon any application
6 for renewal of the emergency order. The hearing upon an
7 application for renewal shall be held pursuant to the
8 provisions of Section 27-7-27 NMSA 1978.

9 I. The protected adult or any interested person may
10 petition the court to have the emergency order set aside or
11 modified at any time, notwithstanding any prior findings by the
12 court that the adult is incapacitated.

13 J. If the adult continues to need protective
14 services or protective placement after the renewal order
15 provided in Paragraph (3) of Subsection [E] F of this section
16 has expired, the department or original petitioner shall
17 immediately petition the court to appoint a conservator or
18 guardian or to order nonemergency protective services or
19 protective placement pursuant to Section 27-7-26 NMSA 1978.

20 K. The petitioner shall not be liable for filing
21 the petition if [~~he~~] the petitioner acted in good faith."

22 Section 9. Section 27-7-25.1 NMSA 1978 (being Laws 1990,
23 Chapter 79, Section 7, as amended) is amended to read:

24 "27-7-25.1. EMERGENCY PROTECTIVE PLACEMENT BY A LAW
25 ENFORCEMENT OFFICER WITHOUT A COURT ORDER.--

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1 A. When, from personal observation of a law
2 enforcement officer, it appears probable that an incapacitated
3 adult will suffer immediate and irreparable physical injury or
4 death if not immediately placed in [~~an appropriate~~] a facility,
5 that the adult is unable to give consent and that it is not
6 possible due to the emergency nature of the circumstances to
7 follow the procedures of Section 27-7-25 NMSA 1978, the law
8 enforcement officer making that observation may transport the
9 adult to [~~an appropriate~~] a facility. No court order is
10 required to authorize the law enforcement officer to act upon
11 [~~his~~] the officer's observation pursuant to this section.

12 B. A law enforcement officer who transports an
13 incapacitated adult to [~~an appropriate~~] a facility pursuant to
14 the provisions of this section shall immediately notify the
15 department of the placement.

16 C. The department shall file a petition pursuant to
17 Subsection A of Section 27-7-25 NMSA 1978 within two working
18 days after the placement of the adult by the law enforcement
19 officer has occurred unless the department determines that the
20 criteria for emergency removal and placement have not been met
21 or that there is no further need for involuntary protective
22 services or protective placement.

23 D. Upon receipt of notice from a law enforcement
24 officer that an adult has been placed in a facility pursuant to
25 the authority of this section, the department shall give notice

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1 pursuant to Subsection G of Section 27-7-25 NMSA 1978 within
2 two working days after the [~~transfer~~] placement of the adult
3 has taken place.

4 E. The court shall hold a hearing on the petition
5 filed by the department as a result of the law enforcement
6 officer's emergency placement within ten days of the filing of
7 the petition, pursuant to the provisions of Section 27-7-27
8 NMSA 1978, to determine whether the conditions creating the
9 need for the emergency placement have been removed and whether
10 the adult should be released from the protective placement."

11 Section 10. Section 27-7-26 NMSA 1978 (being Laws 1989,
12 Chapter 389, Section 13, as amended) is amended to read:

13 "27-7-26. NONEMERGENCY PROTECTIVE SERVICES OR PROTECTIVE
14 PLACEMENT--FINDINGS--PETITION--ORDER.--

15 A. [~~If the adult is unable to consent~~] Involuntary
16 nonemergency protective services or protective placement [~~or~~
17 ~~services~~] shall not take place unless ordered by a court after
18 a finding on the record based on clear and convincing evidence
19 that:

20 (1) the adult is incapacitated and lacks the
21 ability to consent;

22 (2) the adult is incapable of providing for
23 [~~his~~] the adult's own care or custody and [~~his condition~~] the
24 adult is at significant risk of abuse, neglect or exploitation
25 that creates a substantial risk of serious physical harm to

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1 ~~[himself]~~ the adult or others;

2 (3) the adult needs care or treatment;

3 (4) the proposed order is substantially
4 supported by the evaluation provided for in Subsection E of
5 this section or, if not so supported, there are compelling
6 reasons for ordering those protective services or that
7 protective placement; and

8 (5) no less restrictive alternative course of
9 care or treatment is available that is consistent with the
10 incapacitated ~~[person's]~~ adult's welfare and safety.

11 B. The petition for nonemergency protective
12 services or protective placement [~~or protective services~~] shall
13 state with particularity the factual basis for the allegations
14 specified in Subsection A of this section and shall be based on
15 the most reliable information available to the petitioner.

16 C. Written notice of a petition for nonemergency
17 protective services or protective placement shall be served
18 upon the adult by personal service at least fourteen days prior
19 to the time set for a hearing. Notice shall also be given to
20 the adult's legal counsel, [~~care providers~~] caretaker,
21 guardian, conservator, surrogate spouse and adult children or
22 next of kin, whose names and addresses are known to the
23 petitioner or can with reasonable diligence be ascertained.
24 The person serving the notice shall certify to the court that
25 the petition has been delivered and how the required notice was

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1 given. The notice shall be in language reasonably
2 understandable by the adult who is the subject of the petition
3 and also shall be given orally if necessary. The notice shall
4 include:

- 5 (1) the names of all petitioners;
- 6 (2) the factual basis of the belief that
7 protective services or protective placement is needed;
- 8 (3) the rights of the adult in the court
9 proceedings; and
- 10 (4) the name and address of the proposed
11 protective services or protective placement [~~or services~~].

12 D. Upon the filing of a petition for nonemergency
13 protective services or protective placement, the court shall
14 hold a hearing pursuant to the provisions of Section 27-7-27
15 NMSA 1978.

16 E. In order to make the findings required in
17 Paragraphs (2) through (5) of Subsection A of this section, the
18 court shall direct that a comprehensive evaluation of the adult
19 alleged to be in need of protective services or protective
20 placement be conducted as provided in [~~Section 27-7-22~~]
21 Subsection C of Section 27-7-27 NMSA 1978.

22 F. In ordering nonemergency protective placement,
23 the court shall give consideration to the choice of residence
24 of the adult. The court may order protective placement in
25 [~~facilities such as hospitals, nursing homes, domiciliary or~~

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1 ~~personal care facilities, sheltered care residences or other~~
2 ~~appropriate facilities licensed by the state] a facility or~~
3 with a provider.

4 G. The court may authorize nonemergency protective
5 services or protective placement [~~of or protective services~~]
6 for an adult for a period not to exceed six months.

7 H. At the time of expiration of an order for
8 nonemergency protective services or protective placement [~~or~~
9 ~~protective services~~], the original petitioner may petition the
10 court to extend its order for protective services or protective
11 placement [~~or protective services~~] for an additional period not
12 to exceed six months. The contents of the petition shall
13 conform to the provisions of Subsections A and B of this
14 section. Notice of the petition for the extension of
15 protective services or protective placement [~~or services~~] shall
16 be made in conformity with Subsection C of this section. The
17 court shall hold a hearing to determine whether to renew the
18 order. Any person entitled to a notice under Subsection C of
19 this section may appear at the hearing and challenge the
20 petition. [~~In this event~~] The court shall conduct the hearing
21 pursuant to the provisions [~~in~~] of Section 27-7-27 NMSA 1978.

22 I. The services provided to or the residence of [~~or~~
23 ~~services provided to~~] an adult that had been established
24 pursuant to an order for nonemergency protective services or
25 protective placement [~~or protective services~~] shall not be

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1 changed unless the court authorizes the change of services or
2 transfer of residence [~~or change of services~~].

3 J. Prior to the expiration of the nonemergency
4 protective services or protective placement [~~or protective~~
5 ~~services~~], the department shall review the need for continued
6 [~~protective~~] services or placement, including the necessity for
7 appointment of a conservator or guardian, and shall make such
8 recommendation to the court."

9 Section 11. Section 27-7-27 NMSA 1978 (being Laws 1989,
10 Chapter 389, Section 14, as amended) is amended to read:

11 "27-7-27. HEARING ON PETITION.--

12 A. The hearing on a petition for renewal of an
13 emergency ex-parte order for protective services or protective
14 placement or for an order for nonemergency protective services
15 or protective placement [~~or services~~] shall be held under the
16 following conditions:

17 (1) the adult shall be present unless the
18 court determines it is impossible for the adult to be present
19 or it is not in the adult's best interest because of a threat
20 to that adult's health and safety;

21 (2) the adult has the right to counsel whether
22 or not the adult is present at the hearing. If the [~~person~~]
23 adult is indigent, the court shall appoint counsel no later
24 than the time of the filing of the petition;

25 (3) counsel appointed by the court pursuant to

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1 Paragraph (2) of this subsection shall interview the allegedly
2 incapacitated adult prior to any hearing on the petition or any
3 application for renewal of the original emergency order;

4 (4) the adult shall have the right to trial by
5 jury upon request by the adult or [~~his~~] the adult's counsel
6 only in hearings held on petitions for nonemergency protective
7 services or protective placement [~~or services~~]; and

8 (5) the adult has the right at [~~his~~] the
9 adult's own expense or, if indigent, at the expense of the
10 state to secure an independent medical, psychological or
11 psychiatric examination relevant to the issue involved in any
12 hearing under this section and to present a report of this
13 independent evaluation or the evaluator's personal testimony as
14 evidence at the hearing.

15 B. The duty of counsel representing an adult for
16 whom a petition for an order for emergency protective services
17 or for nonemergency protective services or protective placement
18 [~~or services~~] has been filed shall be to represent the adult by
19 protecting the adult's legal rights and presenting [~~his~~] the
20 adult's declared position to the court.

21 C. The department shall establish an evaluation or
22 assessment process for the conduct of a comprehensive physical,
23 mental and social evaluation of an adult for whom a petition
24 has been filed in a court for an order for nonemergency
25 protective services or protective placement or for whom an

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1 application for renewal of an original emergency order has been
2 made. The court shall consider the department's evaluation or
3 assessment in determining whether to issue an order or renewal
4 of an order for nonemergency protective services or protective
5 placement.

6 [G.] D. The court shall issue for the record a
7 statement of its findings in support of any order for renewal
8 of emergency protective services or for nonemergency protective
9 services or protective placement [or services]."

10 Section 12. Section 27-7-29 NMSA 1978 (being Laws 1989,
11 Chapter 389, Section 16, as amended) is amended to read:

12 "27-7-29. CONFIDENTIALITY OF RECORDS--PENALTY.--

13 A. All records of the department, the department's
14 designee, including a multidisciplinary team, the court and
15 state and local agencies [and protective services agencies]
16 that are created or maintained pursuant to investigations under
17 the Adult Protective Services Act or for whom application has
18 ever been made for protection shall be confidential and shall
19 not be disclosed directly or indirectly to the public.

20 B. The records described in Subsection A of this
21 section shall be open to inspection only by [the following]
22 persons with a legitimate interest in the records as follows:

23 (1) the alleged abused, neglected or exploited
24 [person] adult, or the adult's surrogate, except as to the
25 identity of the referral source and second source information,

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1 such as medical or psychological evaluations;

2 (2) court personnel;

3 [~~(3)~~] ~~personnel of any state agency with a~~
4 ~~legitimate interest in the records;~~

5 ~~(4)~~] (3) law enforcement officials;

6 [~~(5)~~] (4) department personnel;

7 [~~(6)~~] (5) any state government social services
8 agency in any other state;

9 [~~(7)~~] (6) health care or mental health
10 professionals involved in the evaluation, treatment,
11 residential care or protection of the adult;

12 [~~(8)~~] (7) parties and their counsel in all
13 legal proceedings pursuant to the Adult Protective Services Act
14 or legal actions pursuant to the Uniform Probate Code;

15 [~~(9)~~] (8) persons who have been, or will be in
16 the immediate future, providing care or services to the adult,
17 except the alleged [~~abuser~~] perpetrator of the abuse, neglect
18 or exploitation;

19 [~~(10)~~] (9) persons appointed by the court
20 pursuant to the Uniform Probate Code to be the adult's guardian
21 ad litem, guardian, conservator, visitor or qualified health
22 care professional;

23 [~~(11)~~] (10) any of the persons [~~who~~] whom the
24 department petitions the court appoint pursuant to the Uniform
25 Probate Code;

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1 [~~(12)~~] (11) any other person or entity, by
2 order of the court, having a legitimate interest in the case or
3 the work of the court; and

4 [~~(13)~~] (12) protection and advocacy
5 representatives pursuant to the federal Developmental
6 Disabilities Assistance and Bill of Rights Act, [~~and~~]
7 Protection and Advocacy for [~~Mentally Ill~~] Individuals with
8 Mental Illness Act or the protection and advocacy of individual
9 rights provisions of the Rehabilitation Act.

10 C. Records of cases involving substantiated abuse,
11 neglect or exploitation shall be provided as appropriate to the
12 department of health, the district attorney's office, the
13 medicaid fraud control unit in New Mexico, the office of the
14 attorney general and the office of the long-term care ombudsman
15 for appropriate additional action.

16 D. [~~Whoever~~] Any person who intentionally, [~~and~~]
17 unlawfully releases any information or records closed to the
18 public pursuant to this section or releases or makes other
19 unlawful use of records in violation of this section is guilty
20 of a misdemeanor.

21 E. The department may assess a civil penalty not to
22 exceed ten thousand dollars (\$10,000) per violation against any
23 person that intentionally, unlawfully releases any information
24 or records closed to the public pursuant to this section or
25 releases or makes other unlawful use of records. The

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1 department may assess and collect the penalty, after notice and
2 an opportunity for hearing before a hearing officer designated
3 by the department to hear the matter, upon a determination that
4 a person violated the provisions of this subsection. The
5 hearing officer has the power to administer oaths on request of
6 any party and issue subpoenas and subpoenas duces tecum.
7 Additionally, if the violation is against a person covered by
8 the Personnel Act, the department shall refer the matter to the
9 agency employing the person for disciplinary action. Any party
10 may appeal a final decision by the department to the court
11 pursuant to the provisions of Section 39-3-1.1 NMSA 1978."

12 Section 13. Section 27-7-30 NMSA 1978 (being Laws 1989,
13 Chapter 389, Section 17, as amended) is amended to read:

14 "27-7-30. DUTY TO REPORT--PENALTY--

15 A. Any person, including financial institutions,
16 having reasonable cause to believe that an incapacitated adult
17 is being abused, neglected or exploited shall immediately
18 report that information to the department.

19 B. The report required in Subsection A of this
20 section may be made orally or in writing. The report shall
21 include the name, age and address of the adult, the name and
22 address of any other person responsible for the adult's care,
23 the nature and extent of the adult's condition, the basis of
24 the reporter's knowledge and other relevant information.

25 C. Any person failing or refusing to report, or

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1 obstructing or impeding any investigation, as required by
2 Subsection A of this section is guilty of a misdemeanor.

3 D. The department may assess a civil penalty not to
4 exceed ten thousand dollars (\$10,000) per violation against a
5 person that violates the provisions of Subsection A of this
6 section or obstructs or impedes any investigation as required
7 pursuant to Subsection A of this section. The department may
8 assess and collect the penalty, after notice and an opportunity
9 for hearing before a hearing officer designated by the
10 department to hear the matter, upon a determination that a
11 person violated the provisions of Subsection A of this section
12 or obstructed or impeded any investigation as required pursuant
13 to this section. The hearing officer has the power to
14 administer oaths on request of any party and issue subpoenas
15 and subpoenas duces tecum. Additionally, if the violation is
16 against a person covered by the Personnel Act, the department
17 shall refer the matter to the agency employing the person for
18 disciplinary action. Any party may appeal a final decision by
19 the department to the court pursuant to the provisions of
20 Section 39-3-1.1 NMSA 1978."

21 Section 14. REPEAL.--Sections 27-7-20 and 27-7-22 NMSA
22 1978 (being Laws 1989, Chapter 389, Sections 7 and 9, as
23 amended) are repealed.

24 Section 15. EFFECTIVE DATE.--The effective date of the
25 provisions of this act is July 1, 2007.

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