F I S C A L I M P A C T R E P O R T

SPONSOR HHGAC **ORIGINAL DATE** 2/0/08 **LAST UPDATED** **HB** 364/aHHGAC

SHORT TITLE Children's Mental Health & Disabilities Act **SB**

ANALYST Lucero

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	$0.1	$0.1	$0.1	$0.1	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION
LFC Files

Responses Received From
Children, Youth and Families Department (CYFD)
Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Department of Health (DOH)
Governor's Commission on Disability
New Mexico Health Policy Commission

SUMMARY

Synopsis of HHGAC Amendement

This House Health and Government Affairs Committee amendment to House Bill 364 incorporates technical changes to address conflicts that the original bill would have created with other existing statutes. The amended language appears to resolve these issues. The amendment removes the term "mechanical restraint" from the definition of aversive intervention, thus eliminating it from the Human Rights Committee process. Removal of "mechanical restraint" in line 24 on page 1 is intended to clarify that mechanical restraints do not necessarily cause pain and therefore may not be appropriate for inclusion in this definition for aversive interventions. Mechanical restraint and mechanical support are otherwise still defined and addressed in the act as amended.

The bill also amends language regarding the use of mechanical restraints only in licensed and certified hospitals accredited by the Joint Commission for the Accreditation of Health Care Organizations, but also in facilities created pursuant to the Adolescent Treatment Hospital Act.

Another amendment would address an addition created by the original HB 364 that would have mandated that the Children, Youth, and Families Department have some regulating authority over hospitals, but the amendment, instead, now leaves that authority with the Department of Health.

The other two changes clarify that hospital settings follow separate requirements through their relevant accreditation bodies. Without the changes proposed in this amendment, hospitals may be subject to contradictory requirements imposed by state, federal and accreditation agencies.

Synopsis of Original Bill

HB 364 amends and enacts sections of the Children's Mental Health and Developmental Disabilities Act, Section 32A-6A-1 NMSA 1978 et. seq., as follows:

Section 1: Amends Section 32A-6A-4 NMSA 1978 striking the language "a protective or stabilizing device" from the definition of a "mechanical restraint," and states that mechanical restraint does not include "mechanical supports or protective device", adds paragraph "S" which defines "mechanical support" as "a device used to achieve proper body position, designed by a physical therapist and approved by a physician or designed by an occupational therapist, such as braces, standers or gait belts, but not including protective devices" and re-letters all paragraphs following paragraph "S".

Re-lettered paragraph "W" adds the language "psychiatric hospitals, psychiatric residential treatment facilities and non-medical and community-based " treatment centers to the definition of "out-of-home treatment or rehabilitation program." Re-lettered paragraph "Y" strikes the language "but does not include (1) briefly holding a child in order to calm or comfort the child : (2) holding a child's hand or arm to escort the child safely from area to another; or (3) intervening in a physical fight" from the definition of "physical restraint".

Adds paragraph "Z" to define protective devices' as "helmets, safety goggles or glasses, guards, mitts, gloves, pads or other common safety devices that are normally used or recommended for use by persons without disabilities while engaged in a sport or occupation or during transportation".

Section 2: Amends Section 32A-6A-9 NMSA 1978 striking the current paragraph regarding restraint and adds paragraph "A" to provide that nothing in the Act shall be interpreted to diminish the rights and protections accorded to children in hospitals or psychiatric residential treatment or habilitation facilities as provided by federal law and regulation, and paragraph "B" providing that restraint and seclusion as provided for in the Act is not considered treatment but is rather emergency intervention to be used only until the emergency cases. Paragraph "C" allows the following devices and actions:

- Mechanical supports or protective devices
- Holding a child for a very short period of time without undue force to calm or comfort the child or holding a child's hand to escort the child safely from one area to another

Section 3: Amends Section 32A-6A-10 to provide that physical restraint and seclusion shall not be used unless an emergency situation arises in which it is necessary to protect a

child or another from imminent, serious physical harm or unless another less intrusive, nonphysical intervention has failed or been determined ineffective. The bill further amends this statutory section to prohibit use of a mechanical restraint in a hospital that is unlicensed.

Section 4: Amends Section 32A-6A-13 to provide that a child shall have access to the state's designated protection and advocacy system pursuant to the Federal Developmental Disabilities Assistance and Bill of Rights Act and Federal Protection and Advocacy for Individuals with Mental Illness Act and access to an attorney of the child's choice regarding any matter related to the Act.

Section 5: Amends Section 32A-6A-20 to replace the phrase "least drastic means principle" with the phrase "least restrictive means principle" in discussing consent to placement of children younger than fourteen in a residential treatment or habilitation program.

Section 6: Amends Section 32A-6A-24 to provide that authorization from a child or legal custodian for a child less than 14 shall not be required for the disclosure or transmission of confidential information under specified circumstances.

Section 7: enacts the new Section 32A-6A-30 to provide that the department shall promulgate rules for the operation of out-of-home treatment and habilitation programs identified as hospitals, psychiatric residential treatment facilities or non-medical community-based residential programs in keeping with the purposes of the Act and in conformance with applicable federal law and regulation.

FISCAL IMPLICATIONS

There are no appropriations associated with this bill.

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

SIGNIFICANT ISSUES

The bill proposes to make CYFD responsible for promulgating regulations for out-of-home treatment and other programs, identified as treatment foster care, group homes, hospitals, psychiatric residential treatment facilities or non-medical community-based residential programs. While CYFD is currently responsible for regulations related to treatment foster care, behavioral health group homes, and residential treatment centers under the Children's Code, DOH is responsible for licensing and certification for hospitals and developmental disabilities group homes under NMSA 1978 Section 24-1-1 et seq. This bill presents a conflict in this regard.

The Department of Health (DOH) states that best practice in the field of developmental disabilities for many years has recommended the limited use of these types of interventions (www.naddds.org) when working with people with developmental disabilities. DOH's Developmental Disabilities Supports Division (DDSD) has had policies to prohibit or limit the use of aversive interventions, physical chemical and mechanical restraints since 1996. DDSD requires the use of Human Rights Committees to monitor the use and promote the use of positive behavioral supports for individuals exhibiting aggressive behaviors. The use of physical restraint

is to be limited to protecting the individual from harm or the potential for harm of others only for the duration of the episode. Psychotropic medications administered or prescribed to alleviate or manage symptoms associated with psychiatric diagnoses are not to be considered chemical restraints.

As part of the Centers for Medicare and Medicaid required conditions of participation, states must comply with restrictions on the use of aversive interventions and restraints (www.cms.gov). Recent research supports the limited use of antipsychotic drugs as part of treating aggressive behaviors in individuals with intellectual disabilities.

The Governor's Commission on Disability reports that the passage of the Federal Americans with Disabilities Act of 1990 marked the recognition of the importance of providing proper access of public building, and facilities to persons with disabilities. Providing proper access to persons with disabilities is not limited to physical access but also to remove any stereotypes, offensive language or other behavior from other persons that will obstruct persons with disabilities from receiving the services they need. The commission found that this bill amended many outdated and offensive terms referring to the sections of the Children's Mental Health and Developmental Disabilities care.

See "Technical Issues."

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. It does not appear that enactment of this bill would impact performance measures as they relate to judicial budgeting.

ADMINISTRATIVE IMPLICATIONS

CYFD already promulgates regulations concerning specific out-of-home treatment programs out of existing resources. This bill would expand the regulations CYFD is required to promulgate, requiring the use of additional existing CYFD resources.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to Appropriation in the General Appropriation Act

TECHNICAL ISSUES

Effective date of the amendments is not noted.

The new material in 32A-6A-30 conflicts with the Public Health Act in that it requires CYFD to promulgate regulations for out-of-home treatment and habilitation programs for which the Public Health Act holds the Department of Health specifically responsible. The sponsor of the bill may want to amend Section 6 to clarify whether CYFD, DOH, or both are responsible for regulating hospitals.

DOH recommends that a new Section (8) be added to address the establishment of Human Rights Committees as part of implementation of the new requirements related to the use of aversive interventions and physical, chemical and mechanical restraints.

OTHER SUBSTANTIVE ISSUES

DOH notes that current safeguards for individuals receiving services through the Developmental Disabilities service delivery system protect adults and children with intellectual disabilities from excessive or inappropriate use of aversive interventions and restraints. Children with intellectual disability who are receiving services in residential settings through the New Mexico mental health system do not have the same protections. Passage of HB 364 would apply the same types of requirements upon the children's mental health service delivery system.

The Health Policy Commission notes that all residential placements of children for purposes of the treatment of mental disorders or habilitation for developmental disabilities are governed by the MHDD Act. In general, habilitation refers to the services provided to children with developmental disabilities that assist them in acquiring and maintaining basic life skills and socially appropriate behaviors. Treatment refers to efforts to accomplish significant changes in the mental or emotional condition or behavior of a child suffering from mental health problems. (Source :JEC Child Welfare Handbook http://jec.unm.edu/resources/benchbooks/child_law/ch_32.htm)

Because children 14 years of age or older have the independent right to consent to residential placement, the attorney or guardian ad litem (GAL) must meet with the child and determine, within seven days after admission, whether or not the child consents to the placement. (Source: JEC Child Welfare Handbook http://jec.unm.edu/resources/benchbooks/child_law/ch_32.htm)
Under the MHDD Act, a child fourteen years of age or older may voluntarily admit himself to a residential treatment or habilitation program, with the informed consent of the parent, guardian or custodian. Instead of a guardian ad item, the law requires that the child have an attorney. An attorney has a duty to advocate for the child's stated position while a guardian ad litem has the duty to advocate the child's best interest. (Source: JEC Child Welfare Handbook http://jec.unm.edu/resources/benchbooks/child_law/ch_32.htm)

As a general rule, when involuntary placement is needed, CYFD will petition for the child's placement under the MHDD Act. All residential placements of children for purposes of the treatment of mental disorders or habilitation for developmental disabilities are governed by the MHDD Act. In general, habilitation refers to the services provided to children with developmental disabilities that assist them in acquiring and maintaining basic life skills and socially appropriate behaviors. Treatment refers to efforts to accomplish significant changes in the mental or emotional condition or behavior of a child suffering from mental health problems. (Source: JEC Child Welfare Handbook http://jec.unm.edu/resources/benchbooks/child_law/ch_32.htm)

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