

BILL ANALYSIS

S.B. 1520
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Human Services
Committee Report (Unamended)

BACKGROUND AND PURPOSE

In 2005, the U.S. Department of Justice (DOJ) notified the Department of Aging and Disability Services (DADS) of its intent to initiate a Civil Rights of Institutionalized Persons Act (CRIPA) investigation of the Lubbock State School. The DOJ released a letter of findings regarding the school in 2006, and notified DADS of its intent to expand its CRIPA investigation to the Denton State School in March 2008. Five months later, the DOJ notified DADS that it would expand the investigation to include the remaining Texas state schools.

After the Lubbock investigation, the DOJ found that the Lubbock State School substantially departed from generally accepted professional standards of care in its failure to protect residents from harm, to provide adequate behavioral services, to provide freedom from unnecessary or inappropriate restraints; to provide adequate habilitation and medical care, and to provide services in the most integrated setting appropriate to residents' needs.

In December 2008, the DOJ released its letter of findings for the remaining 12 state schools. The most recent letter indicates that the serious problems found at the Lubbock State School are not unique, but illustrative of systemic issues. The DOJ attributes these issues to high staff attrition and vacancy rates for direct care staff and clinical professionals. Since fiscal year 2004, DADS has suspended or fired more than 800 employees for abusing residents. Until DADS can successfully retain, train, and supervise its staff, the problems and deficiencies identified by the DOJ cannot be addressed.

S.B. 1520 adopts recommendations by the DOJ regarding the use of psychoactive medications and restraints in Texas state schools.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTIONS 3 and 5 of this bill.

ANALYSIS

Section 531.0055, Government Code, as amended by Chapter 198 (H.B. 2292), Acts of the 78th Legislature, Regular Session, 2003, expressly grants to the executive commissioner of the Health and Human Services Commission all rulemaking authority for the operation of and provision of services by the health and human services agencies. Similarly, Sections 1.16-1.29, Chapter 198 (H.B. 2292), Acts of the 78th Legislature, Regular Session, 2003, provide for the transfer of a power, duty, function, program, or activity from a health and human services agency abolished by that act to the corresponding legacy agency. To the extent practicable, this bill analysis is written to reflect any transfer of rulemaking authority and to update references as necessary to an agency's authority with respect to a particular health and human services program.

S.B. 1520 amends the Health and Safety Code to establish under the Persons with Mental Retardation Act that each client, defined under that act as a person receiving mental retardation

services from the Department of Aging and Disability Services or a community center, has the right to refuse psychoactive medication as provided by provisions relating to the administration of psychoactive medications.

S.B. 1520 prohibits a person from administering a psychoactive medication to a client receiving voluntary or involuntary residential care services who refuses the administration unless the client is having a medication-related emergency, the refusing client's representative authorized by law to consent on behalf of the client has consented to the administration, the administration of the medication regardless of the client's refusal is authorized by an order issued under law, or the administration of the medication regardless of the client's refusal is authorized by an order issued under provisions relating to court-ordered medications for incompetent defendants. The bill establishes that consent to the administration of psychoactive medication given by a client or by a person lawfully authorized to consent on behalf of the client is valid only if:

- the consent is given voluntarily and without coercive or undue influence;
- the treating physician or a person designated by the physician provides certain specified information relating to the treatment in a standard format approved by the department, to the client and, if applicable, to the client's representative;
- the client and, if appropriate, the client's representative are informed in writing that consent may be revoked; and
- the consent is evidenced in the client's clinical record by a signed form prescribed by the facility or by a statement of the treating physician or a person designated by the physician that documents that consent was given by the appropriate person and the circumstances under which the consent was obtained.

S.B. 1520 requires the treating physician, if the physician designates another person to provide the treatment information, to meet with the client, and, if appropriate, the client's representative who provided consent not later than two working days after the designated person provides the information, excluding weekends and legal holidays, to review the information and answer any questions. The bill requires a client's refusal or attempt to refuse to receive psychoactive medication, whether given verbally or by other indications or means, to be documented in the client's clinical record and requires a treating physician, in prescribing psychoactive medication, to prescribe the medication that has the fewest side effects or the least potential for adverse side effects, unless the class of medication has been demonstrated or justified clinically ineffective and to administer the smallest therapeutically acceptable dosages of medication for the client's condition. The bill requires a physician, if the physician issues an order to administer psychoactive medication to a client without the client's consent because the client is having a medication-related emergency, to document in the client's clinical record in specific medical or behavioral terms the necessity of the order and that the physician has evaluated but rejected other generally accepted, less intrusive forms of treatment, if any, and requires treatment of the client with the medication in such a scenario to be provided in the manner least restrictive of the client's personal liberty.

S.B. 1520 prohibits a person from administering a psychoactive medication to a client who refuses to take the medication voluntarily unless the client is having a medication-related emergency, the client is under an order authorizing the administration of the medication regardless of the client's refusal, or the client is a ward who is 18 years of age or older and the guardian of the person of the ward consents to the administration of psychoactive medication regardless of the ward's expressed preferences regarding treatment with psychoactive medication. The bill authorizes a physician who is treating a client to file an application in a probate court or a court with probate jurisdiction on behalf of the state for an order to authorize the administration of a psychoactive medication regardless of the client's refusal if the physician believes that the client lacks the capacity to make a decision regarding the administration of the medication, the physician determines that the medication is the proper course of treatment for the client, and the client has been committed to a licensed residential care facility or an application

for commitment to such a facility has been filed for the client. The bill sets forth the required content of the physician's application for an order to authorize psychoactive medication and requires the application to be filed separately from an application for commitment to a residential care facility. The bill sets forth provisions relating to the scheduling and venue of the hearing on the application.

S.B. 1520 sets forth the rights entitled to a client for whom an application for an order to authorize the administration of a psychoactive medication is filed and authorizes the court to issue an order authorizing the administration of one or more classes of psychoactive medication to a client who has been committed to a residential care facility or is in custody awaiting trial in a criminal proceeding and was committed to a residential care facility in the six months preceding a hearing. The bill authorizes the court to issue such an order only if the court finds by clear and convincing evidence after the hearing that the client lacks the capacity to make a decision regarding the administration of the proposed medication and that treatment with the medication is in the client's best interest or, if the client was committed to a residential care facility by a criminal court, that the client presents a danger to the client or others in the facility in which the client is being treated as a result of a mental disorder or mental defect and treatment with the proposed medication is in the client's best interest.

S.B. 1520 sets forth required considerations of the court in making the finding that treatment is in the client's best interest and requires a hearing to be conducted on the record by the probate judge or judge with probate jurisdiction. The bill authorizes a judge to refer a hearing to a magistrate or court-appointed master who has training regarding psychoactive medications who may then effectuate the notice, set hearing dates, and appoint attorneys and establishes that a record is not required in such cases. The bill sets forth provisions entitling a party to a hearing de novo by the judge, authorizing the proposed client or the proposed client's attorney to request that a proceeding be transferred to a court with a judge who is licensed to practice law in Texas, and entitling the client to be provided written notification of the court's determinations, including a statement of the evidence on which the court relied and the reasons for the court's determinations. The bill requires an order entered under these provisions to authorize the administration to a client, regardless of the client's refusal, of one or more classes of psychoactive medications specified in the application and consistent with the client's diagnosis and requires the order to permit an increase or decrease in a medication's dosage, restitution of medication authorized but discontinued during the period the order is valid, or the substitution of a medication within the same class. The bill requires the classes of psychoactive medications in the order to conform to classes determined by the department and authorizes an order to be reauthorized or modified on the petition of a party. The bill establishes that the order remains in effect pending action on a petition for reauthorization or modification and defines "modification."

S.B. 1520 requires the court, in making a finding that the client presents a danger to the client or others in the residential care facility in which the client is being treated as a result of a mental disorder or mental defect, to consider an assessment of the client's present mental condition and whether the client has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm to the client's self or to another while in the facility. The bill sets forth general provisions for a client to appeal an order, the effect of an order, and the expiration of an order. The bill defines "capacity," "medication-related emergency," "psychoactive medication," and "ward" as the terms relate to the administration of psychoactive medications.

S.B. 1520 requires the executive commissioner of the Health and Human Services Commission, not later than January 1, 2010, to adopt rules to ensure that:

- a mechanical or physical restraint is not administered to a resident of a state school unless the restraint is necessary to prevent imminent physical injury to the resident or another and is the least restrictive restraint effective to prevent imminent physical injury;

- the administration of a mechanical or physical restraint to a resident of a state school ends immediately once the imminent risk of physical injury abates;
- a mechanical or physical restraint is not administered to a resident of a state school as punishment; and
- a mechanical or physical restraint is not administered as part of a behavior plan to change behavior but only to provide immediate protection from imminent harm.

S.B. 1520 prohibits a person from using a straitjacket to restrain a resident of a state school and prohibits a papoose board or restraint board from being used unless the device is used as a medical restraint as part of a health-related protection that is prescribed by a physician, use of the restraint is necessary for protection during the time a medical or dental condition exists for the purpose of preventing an individual from inhibiting or undoing medical or dental treatment, and medication is not a viable alternative for the individual. The bill establishes that, to the extent of a conflict between these provisions and provisions relating to use of restraint and seclusion in certain health care facilities, these provisions control.

S.B. 1520 amends the Code of Criminal Procedure to make conforming changes regarding the applicability of provisions relating to court-ordered medications to a defendant affected by the bill's provisions.

S.B. 1520 requires a state agency that determines a waiver or authorization from a federal agency is necessary for the implementation of a provision in the bill to request the waiver or authorization and authorizes the state agency to delay implementing the relevant provision until the waiver or authorization is granted.

EFFECTIVE DATE

On passage, or, if the act does not receive the necessary vote, the act takes effect September 1, 2009.