SUBJECT: Administering, authorizing psychoactive medications to DADS clients

COMMITTEE: Public Health — favorable, without amendment

VOTE: 9 ayes — Kolkhorst, Naishtat, Collier, Cortez, S. Davis, Guerra, S. King, Laubenberg, J.D. Sheffield

0 nays

2 absent — Coleman, Zedler

WITNESSES: For — Beth Mitchell, Disability Rights Texas; Lee Spiller, Citizens Commission on Human Rights; (*Registered, but did not testify*: Katherine Barillas, One Voice Texas; Chase Bearden, Coalition of Texans with Disabilities; Leah Gonzalez, The National Association of Social Workers Texas Chapter; Harry Holmes, One Voice Texas; Ginger Mayeaux, The Arc of Texas; Gyl Switzer, Mental Health America of Texas)

Against — None

On — Nina Jo Muse, DSHS; Scott Schalchlin, DADS

BACKGROUND: The Texas Department of Aging and Disability Services (DADS) administers long-term services and supports for individuals with intellectual and physical disabilities. Health and Safety Code, sec. 591.003, defines "client" as a person receiving mental retardation services from the department or a community center.

Health and Safety Code, ch. 592, governs the rights of individuals with mental retardation (now commonly referred to as intellectual or developmental disabilities). Sec. 592.038 states that each client has the right to not receive unnecessary or excessive medication and prohibits medication from being used for certain purposes. Sec. 592.054(b) requires directors and superintendents of state facilities to gain consent for all surgical procedures.

DIGEST: CSHB 1739 would establish provisions regarding the right to refuse psychoactive medications, create informed consent procedures, and establish due process medication hearings for clients receiving residential

care services from DADS.

Right to refuse. HB 1739 would give clients receiving voluntary or involuntary residential care services the right to refuse psychoactive medications. For clients committed to the residential care facility, the residential care facility could seek court authorization for the medication, despite the refusal.

If a client refused a psychoactive medication, the bill would prohibit the administration of the medication unless:

- the client was having a medication-related emergency;
- an authorized consenter had given permission;
- a court authorized the medication after a hearing; or
- the medication was authorized by an order under the Code of Criminal Procedure.

Consent. The bill would establish requirements for administering psychoactive medications to clients receiving residential care services. It would require a superintendent or director to gain consent for the administration of all psychoactive medications unless the client fell under one of the exceptions.

Consent for a psychoactive medication would need to be given voluntarily and without coercive or undue influence by the client or his or her authorized consenter. The treating physician (or designee) would have to provide specific information about the condition, medication, potential beneficial effects, side effects, risks, and possible alternatives to the medication.

The consent would have to be recorded on a form provided by the residential care facility. It could also be recorded with a statement by the physician (or designee) documenting that consent was given by an authorized individual and the circumstances under which consent was obtained. If the treating physician designated another person to document the consent, the physician would be required to meet with the client or authorized consenter within two business days to review the information and answer any questions.

If a client refused or attempted to refuse a psychoactive medication — either verbally or by other means — it would have to be documented in

the client's clinical record.

Administering psychoactive medications. When prescribing a psychoactive medication, the bill would require a physician to prescribe an effective medication with the fewest side effects or the least potential for adverse side effects and to administer the smallest possible dosage for the client's condition.

If a psychoactive medication was administered without consent because a client was having a medication-related emergency, the physician would have to document the necessity with specific medical or behavioral terms and that the physician evaluated, but rejected, less intrusive forms of treatment. The treatment with psychoactive medication would need to be provided in the manner least restrictive of the client's personal liberty.

Application for a court order. A physician could seek court authorization to administer a psychoactive medication if the physician believed the client lacked the capacity to make a medication decision, determined the medication was the proper course of treatment, and the client had been committed to a residential care facility (or a commitment application had been filed). The application for court-ordered medication would need to explain why the physician believed the client lacked the capacity to make a medication decision, the physician's diagnosis, and specific information about the medications, among other things.

Although an application for court-ordered medication would have to be filed separately from a commitment application, the hearings could be held on the same day. The bill also would establish when a hearing would have to be held, when an extension could be granted, and when a case could be transferred to a different county.

A client for whom a medication application had been filed would be entitled to notice about the hearing, representation by an attorney, independent review by an expert, and notification about the court's determination of the client's capacity and best interest.

Court order. To order a psychoactive medication, the court would need clear and convincing evidence that the client lacked the capacity to make a medication decision and the medication was in the client's best interest. After a hearing, the client and attorney would be entitled to written notification of the court's determinations, reasons for the decision, and a

statement of the evidence. When determining if the medication was in the client's best interest, the court would need to consider a number of factors, including the client's expressed preferences, religious beliefs, the medication's risks and benefits, and any less intrusive treatments.

A court order also could be issued for client awaiting a criminal trial, if the client was committed to a residential treatment facility within six months of the medication hearing. If the client was criminally committed to a residential treatment facility or was confined in a correctional facility, a court could authorize a medication if, by clear and convincing evidence, the court determined the medication was in the client's best interest and the client was dangerous to the client or to others. When determining if a client presented a danger, the court would need to assess the client's current mental state and whether the client had made serious threats of physical harm.

A medication hearing would be conducted by a probate judge, but the hearing could be transferred to a magistrate or associate judge with psychoactive medication training. The bill would establish procedures for appealing a magistrate or associate judge's decision and transferring a case to judge also licensed as an attorney.

Effect of a court order. A court order would allow the administration of a psychoactive medication to a client, even if the client refused. Conversely, a client with a court order would not be able to consent to a psychoactive medication, but the order would not be a determination of mental incompetency or limit a client's rights. A court order would permit dosage changes, stopping or restarting a medication, and substitutions within the same medication class, as determined by DADS. If a client was confined to a correctional facility, the order would authorize any appropriate pre-transfer mental health treatment, but would not authorize retaining the client for competency restoration treatment.

A party could petition for reauthorization or modification (change of medication class) of a court order. A client also could appeal an order. All orders would remain in effect until a court made a final decision on the petition or appeal. An order would expire a year from the date it was issued, unless it was issued for a client awaiting a criminal trial. In that case, it would be reviewed every six months and expire when there was a final decision in the case.

Additional hearings. If a client found incompetent to stand trial did not meet the criteria for court-ordered psychoactive medication under this bill, HB 1739 would allow a state attorney to file a motion to compel medication under the Code of Criminal Procedure.

This bill would take effect September 1, 2013.

SUPPORTERS SAY:

HB 1739 would amend current law by defining how clients receiving residential care services, including residents of state-supported living centers (SSLCs), could be given psychoactive medications. There are currently no statutes outlining the requirements for administering these powerful medications to this population. The bill would help residential care facilities and protect clients by ensuring informed consent and due process, improving the continuity of care, and promoting uniformity within current law.

Right to refuse and informed consent. HB 1739 would protect clients receiving residential care services by ensuring that clients and authorized consenters were adequately informed about their medical care and codifying the right to refuse psychoactive medications.

Due process. The U.S. Supreme Court has ruled that a person has a constitutional right to refuse psychoactive medications. This refusal can be overridden only if the person is confined (or committed) and there is a due process hearing. By formalizing the right to refuse psychoactive medications and establishing procedures by which a facility could seek a court order, HB 1739 would establish important due process procedures for clients committed to residential care facilities.

Continuity of care. Due to an injunction, an SSLC cannot administer a psychoactive medication if a client refuses, even if the physician believes the treatment is in the client's best interest. As a result, an SSLC must transfer a client to a state hospital, which has procedures for due process medication hearings. These transfers are stressful and disruptive for clients, while placing additional burdens on state hospitals. By establishing due process hearing procedures for residential care facilities, this bill would eliminate the need for these transfers. This would improve the quality and continuity of care for clients, while streamlining the medication process for both SSLCs and state hospitals.

Uniformity. The bill would promote uniformity by mirroring

requirements in the Mental Health Code and the Nursing Home Act. Similar procedures for residents of state hospitals and nursing homes have existed for many years. This bill would allow clients receiving residential care services to enjoy the same due process rights and protections as other populations.

OPPONENTS SAY:

By increasing informed consent requirements, HB 1739 could place additional administrative burdens on doctors. Similarly, new due process procedures could increase probate court caseloads. It is unclear how many individuals would be affected by this bill, so it is difficult to determine the extent of the impact on doctors and courts.

NOTES:

The identical companion bill, SB 34 by Zaffirini, was passed by the Senate by a vote of 31-0 on April 17.