

CHAPTER 308

COURTS

HOUSE BILL 03-1326

BY REPRESENTATIVE(S) Fritz, Mitchell, Rhodes, Spradley, Fairbank, Jahn, Lee, Spence, Boyd, Clapp, Crane, Paccione, Rippy, Stengel, Williams S., and Williams T.;
also SENATOR(S) Dyer.

AN ACT

CONCERNING LIMITATIONS ON LIABILITY FOR PROVIDERS OF SERVICES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 13-21-117.5, Colorado Revised Statutes, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

13-21-117.5. Civil liability - developmental disability service providers.

(1) **Legislative declaration.** (a) IN RECOGNITION OF THE VARIED, EXTENSIVE, AND SUBSTANTIAL NEEDS OF PERSONS WITH DEVELOPMENTAL DISABILITIES, THE GENERAL ASSEMBLY HEREBY FINDS AND DECLARES THAT THE PURPOSES OF THIS SECTION ARE:

(I) TO REAFFIRM THE HIGH VALUE COLORADO PLACES ON THE RIGHTS OF PERSONS WITH DEVELOPMENTAL DISABILITIES TO RECEIVE SERVICES AND SUPPORTS THAT ENABLE THEM TO LIVE IN INTEGRATED COMMUNITY SETTINGS, TO PARTICIPATE FULLY IN COMMUNITY LIFE, AND TO EXERCISE CHOICE AND SELF-DIRECTION IN THEIR LIVES;

(II) TO RECOGNIZE THAT THERE ARE INHERENT RISKS IN SUCH INTEGRATION, PARTICIPATION, AND SELF-DIRECTION DUE TO THE COGNITIVE LIMITATIONS EXPERIENCED BY PERSONS WITH DEVELOPMENTAL DISABILITIES;

(III) TO RECOGNIZE THAT PROVIDERS TO SUCH PERSONS ARE EXPOSED TO RISK OF LIABILITY WHEN THEY ASSIST OR PERMIT PERSONS WITH DEVELOPMENTAL DISABILITIES TO EXPERIENCE COMMUNITY INTEGRATION, PARTICIPATION, AND SELF-DIRECTION;

(IV) TO RECOGNIZE THAT PROVIDERS PROVIDE ESSENTIAL SERVICES AND

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

FUNCTIONS AND THAT UNLIMITED LIABILITY COULD DISRUPT OR MAKE PROHIBITIVELY EXPENSIVE THE PROVISION OF SUCH ESSENTIAL SERVICES;

(V) TO RECOGNIZE THAT PROVIDERS SHOULD BE PROVIDED WITH PROTECTION FROM UNLIMITED LIABILITY SO THAT PROVIDERS ARE NOT DISCOURAGED FROM PROVIDING SUCH SERVICES AND FUNCTIONS.

(b) THE GENERAL ASSEMBLY, THEREFORE, DECLARES THAT IT IS THE INTENT OF THE GENERAL ASSEMBLY TO MITIGATE THE RISK OF LIABILITY TO PROVIDERS TO THE DEVELOPMENTALLY DISABLED TO THE EXTENT THAT SUCH MITIGATION IS REASONABLE AND POSSIBLE.

(2) **Definitions.** AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "COMMUNITY CENTERED BOARD" MEANS A PRIVATE CORPORATION, FOR PROFIT OR NOT FOR PROFIT, WHICH, WHEN DESIGNATED PURSUANT TO SECTION 27-10.5-105, C.R.S., PROVIDES CASE MANAGEMENT TO PERSONS WITH DEVELOPMENTAL DISABILITIES, IS AUTHORIZED TO DETERMINE ELIGIBILITY OF SUCH PERSONS WITHIN A SPECIFIED GEOGRAPHICAL AREA, SERVES AS THE SINGLE POINT OF ENTRY FOR PERSONS TO RECEIVE SERVICES AND SUPPORTS UNDER ARTICLE 10.5 OF TITLE 27, C.R.S., AND PROVIDES AUTHORIZED SERVICES AND SUPPORTS TO SUCH PERSONS EITHER DIRECTLY OR BY PURCHASING SUCH SERVICES AND SUPPORTS FROM SERVICE AGENCIES.

(b) "DEPARTMENT" MEANS THE DEPARTMENT OF HUMAN SERVICES.

(c) "DEVELOPMENTAL DISABILITY" SHALL HAVE THE SAME MEANING AS DEFINED IN SECTION 27-10.5-102 (11), C.R.S.

(d) "FAMILY PROVIDER" MEANS A MEMBER OF A FAMILY OF A PERSON WITH A DEVELOPMENTAL DISABILITY WHO PROVIDES SERVICES TO PERSONS WITH DEVELOPMENTAL DISABILITIES AS A CONTRACTOR UNDER PROGRAMS OF THE DEPARTMENT.

(e) "HOST HOME" MEANS A PRIVATE HOME THAT HOUSES UP TO THREE PERSONS WITH DEVELOPMENTAL DISABILITIES AND WHOSE OWNER OR RENTER PROVIDES RESIDENTIAL SERVICES, AS DESCRIBED IN SECTION 27-10.5-104 (1) (f), C.R.S., TO THOSE PERSONS AS AN INDEPENDENT CONTRACTOR OF A COMMUNITY CENTERED BOARD OR SERVICE AGENCY.

(f) "PROVIDER" MEANS ANY COMMUNITY CENTERED BOARD, SERVICE AGENCY, HOST HOME, FAMILY PROVIDER, AND THE DIRECTORS, OFFICERS, AND EMPLOYEES OF THESE ENTITIES, WHO PROVIDE SERVICES OR SUPPORTS TO PERSONS WITH DEVELOPMENTAL DISABILITIES PURSUANT TO ARTICLE 10.5 OF TITLE 27, C.R.S.

(g) "SERVICE AGENCY" MEANS A PRIVATELY OPERATED PROGRAM-APPROVED SERVICE AGENCY DESIGNATED PURSUANT TO THE RULES OF THE DEPARTMENT.

(3) A PERSON FILING AN ACTION AGAINST A PROVIDER FOR INJURY WHICH LIES IN TORT OR COULD LIE IN TORT REGARDLESS OF WHETHER THAT MAY BE THE TYPE OF ACTION OR THE FORM OF RELIEF CHOSEN BY A CLAIMANT SHALL DEMONSTRATE

LIABILITY BY A PREPONDERANCE OF THE EVIDENCE. IF A PROVIDER RAISES THE ISSUE THAT A CLAIMANT CANNOT DEMONSTRATE LIABILITY BY A PREPONDERANCE OF THE EVIDENCE OR RAISES ANY OTHER LIMITATION ON LIABILITY PURSUANT TO THIS SECTION PRIOR TO OR AFTER THE COMMENCEMENT OF DISCOVERY, THE COURT SHALL SUSPEND DISCOVERY, EXCEPT ANY DISCOVERY NECESSARY TO DECIDE THE ISSUE OF LIMITATION OF LIABILITY, AND SHALL DECIDE SUCH ISSUE ON MOTION. THE COURT'S DECISION ON SUCH MOTION SHALL BE A FINAL JUDGMENT AND SHALL BE SUBJECT TO INTERLOCUTORY APPEAL.

(4) **Duty of care.** THE PERFORMANCE OF A SERVICE OR AN ACT OF ASSISTANCE FOR THE BENEFIT OF A PERSON WITH A DEVELOPMENTAL DISABILITY OR ADOPTION OR ENFORCEMENT OF A POLICY, PROCEDURE, GUIDELINE, OR PRACTICE FOR THE PROTECTION OF ANY SUCH PERSON'S HEALTH OR SAFETY BY A PROVIDER SHALL NOT CREATE ANY DUTY OF CARE WITH RESPECT TO A THIRD PERSON, NOR SHALL IT CREATE A DUTY FOR ANY PROVIDER TO PERFORM OR SUSTAIN SUCH A SERVICE OR AN ACT OF ASSISTANCE NOR TO ADOPT OR ENFORCE SUCH A POLICY, PROCEDURE, GUIDELINE, OR PRACTICE; HOWEVER, NOTHING IN THIS SECTION SHALL BE CONSTRUED TO RELIEVE A PROVIDER OF A DUTY OF CARE EXPRESSLY IMPOSED BY FEDERAL OR STATE LAW OR DEPARTMENT RULE, NOR SHALL ANYTHING IN THIS SECTION BE DEEMED TO CREATE ANY DUTY OF CARE.

(5) NO ACTION IN TORT UNDER THIS SECTION MAY BE MAINTAINED ON BEHALF OF, FOR, OR BY A PERSON WITH A DEVELOPMENTAL DISABILITY OR BY A FAMILY MEMBER OF A PERSON WITH A DEVELOPMENTAL DISABILITY AGAINST A PROVIDER UNLESS THAT PERSON CLAIMING TO HAVE SUFFERED AN INJURY OR GRIEVANCE OR THAT PERSON'S GUARDIAN OR REPRESENTATIVE HAS FILED FOR DISPUTE RESOLUTION OR OTHER APPLICABLE INTERVENTION, IF ANY, BY THE DEPARTMENT OR COMMUNITY CENTERED BOARD PURSUANT TO DEPARTMENT RULES PROMULGATED UNDER ARTICLE 10.5 OF TITLE 27, C.R.S., WITHIN ONE YEAR AFTER THE DATE OF THE DISCOVERY OF THE INJURY OR GRIEVANCE, REGARDLESS OF WHETHER THE PERSON THEN KNEW ALL OF THE ELEMENTS OF A CLAIM OR OF A CAUSE OF ACTION FOR SUCH INJURY OR GRIEVANCE. COMPLIANCE WITH THE PROVISIONS OF THIS SUBSECTION (5), DOCUMENTED BY A LETTER FROM THE DEPARTMENT CERTIFYING THAT ANY AND ALL SUCH INTERVENTIONS AND DISPUTE RESOLUTION PROCEDURES, WITH EITHER THE DEPARTMENT OR THE COMMUNITY CENTERED BOARD, APPLICABLE TO THE MATTER AT HAND HAVE BEEN EXHAUSTED, OR BY SUBMISSION OF EVIDENCE THAT SUCH AN INTERVENTION OR DISPUTE RESOLUTION REQUEST HAS BEEN FILED AND NO ACTION HAS BEEN TAKEN BY THE DEPARTMENT WITHIN NINETY DAYS, SHALL BE A JURISDICTIONAL PREREQUISITE TO ANY ACTION BROUGHT UNDER THE PROVISIONS OF THIS SECTION, AND FAILURE OF COMPLIANCE SHALL FOREVER BAR ANY SUCH ACTION AND SHALL RESULT IN A DISMISSAL OF ANY CLAIM WITH PREJUDICE. CERTIFICATION BY THE DEPARTMENT THAT ALL APPLICABLE INTERVENTIONS AND DISPUTE RESOLUTION PROCEDURES HAVE BEEN EXHAUSTED SHALL NOT RESULT IN THE DEPARTMENT BECOMING A PARTY TO THE TORT CLAIM ACTION.

(6) A PROVIDER SHALL NOT BE LIABLE FOR DAMAGES IN ANY CIVIL ACTION FOR FAILURE TO WARN OR PROTECT ANY PERSON AGAINST THE VIOLENT, ASSAULTIVE, DISORDERLY, OR HARASSING BEHAVIOR OF A PERSON WITH A DEVELOPMENTAL DISABILITY, NOR SHALL ANY SUCH PROVIDER BE HELD CIVILLY LIABLE FOR FAILURE TO PREDICT OR PREVENT SUCH BEHAVIOR, EXCEPT THERE SHALL BE A DUTY TO WARN WHERE THE PERSON WITH THE DEVELOPMENTAL DISABILITY HAS COMMUNICATED TO

THE PROVIDER A SERIOUS AND CREDIBLE THREAT OF IMMINENT PHYSICAL VIOLENCE AND SERIOUS BODILY INJURY AGAINST A SPECIFIC PERSON OR PERSONS. IF THERE IS A DUTY TO WARN AS SPECIFIED IN THIS SUBSECTION (6), THE DUTY SHALL BE DISCHARGED BY THE PROVIDER MAKING REASONABLE AND TIMELY EFFORTS TO NOTIFY ANY PERSON OR PERSONS SPECIFICALLY THREATENED, EXCEPT THAT IF THE PERSON OR PERSONS THREATENED WITH IMMINENT PHYSICAL VIOLENCE AND SERIOUS BODILY INJURY IS A PERSON WITH A DEVELOPMENTAL DISABILITY UNDER THE CARE OF A PROVIDER, THE PROVIDER SHALL TAKE REASONABLE ACTION TO PROTECT SUCH PERSON FROM SERIOUS BODILY INJURY UNTIL THE THREAT CAN REASONABLY BE DEEMED TO HAVE ABATED. A PROVIDER SHALL NOT BE LIABLE FOR DAMAGES IN ANY CIVIL ACTION FOR WARNING A PERSON AGAINST OR PREDICTING VIOLENT, ASSAULTIVE, DISORDERLY, OR HARASSING BEHAVIOR OF A PERSON WITH A DEVELOPMENTAL DISABILITY, NOR SHALL A PROVIDER BE SUBJECT TO PROFESSIONAL DISCIPLINE FOR SUCH WARNING OR PREDICTION.

(7) IN ANY CIVIL ACTION BROUGHT AGAINST A PROVIDER, A PERSON WITH A DEVELOPMENTAL DISABILITY WHO IS SERVED IN A RESIDENTIAL SETTING OWNED OR LEASED BY A PROVIDER SHALL NOT BE CONSIDERED A TENANT OF THE PROVIDER AND STATUTES REGARDING LANDLORD-TENANT RELATIONSHIPS SHALL NOT APPLY. THE OWNER OF A PROPERTY LEASED BY A PROVIDER FOR THE PURPOSE OF PROVIDING SERVICES PURSUANT TO ARTICLE 10.5 OF TITLE 27, C.R.S., SHALL NOT BE RESPONSIBLE FOR THE PROVISION OR MONITORING OF SUCH SERVICES. NO REAL PROPERTY RIGHTS SHALL ACCRUE TO A PERSON WITH A DEVELOPMENTAL DISABILITY BY VIRTUE OF PLACEMENT IN A RESIDENTIAL SETTING.

(8) IF A PERSON WITH A DEVELOPMENTAL DISABILITY RESIDING IN A RESIDENTIAL PROGRAM OPERATED BY THE DEPARTMENT IS REFERRED BY THE DEPARTMENT FOR COMMUNITY PLACEMENT, THE PROVIDER SHALL NOT BE SUBJECT TO CIVIL LIABILITY FOR ACCEPTING THAT PERSON FOR COMMUNITY PLACEMENT.

(9) CLAIMS PREDICATED ON AN ALLEGED DECEPTIVE TRADE PRACTICE PURSUANT TO ARTICLE 1 OF TITLE 6, C.R.S., SHALL NOT APPLY TO PROVIDERS ENGAGED IN THE PROVISION OF SERVICES PURSUANT ARTICLE 10.5 OF TITLE 27, C.R.S.

(10) COMMUNITY CENTERED BOARDS AND SERVICE AGENCIES SHALL HAVE THE AUTHORITY TO REMOVE A PERSON WITH A DEVELOPMENTAL DISABILITY FROM ANY RESIDENTIAL SETTING THAT THEY OPERATE OR FOR WHICH THEY CONTRACT, DIRECTLY OR INDIRECTLY, IF THE COMMUNITY CENTERED BOARD OR SERVICE AGENCY BELIEVES THAT THE PERSON WITH A DEVELOPMENTAL DISABILITY MAY BE AT RISK OF ABUSE, NEGLECT, MISTREATMENT, EXPLOITATION, OR OTHER HARM IN SUCH SETTING. IN THE ABSENCE OF WILLFUL AND WANTON ACTS OR OMISSIONS, COMMUNITY CENTERED BOARDS AND SERVICE AGENCIES SHALL HAVE NO CIVIL LIABILITY FOR EXERCISING SUCH AUTHORITY OR FOR TERMINATION OF ANY RELATED CONTRACTS IF SUCH RISK IS SUBSTANTIATED BY INVESTIGATION PURSUANT TO THE RULES OF THE DEPARTMENT.

(11) IN THE ABSENCE OF WILLFUL AND WANTON ACTS OR OMISSIONS, A PROVIDER SHALL NOT HAVE CIVIL LIABILITY FOR INJURIOUS CONSEQUENCES TO A PERSON WITH A DEVELOPMENTAL DISABILITY IN THE PROVIDER'S CARE WHEN THAT PERSON HAVING THE LEGAL CAPACITY FOR SUCH DECISIONS AT THE TIME SUCH DECISIONS WERE MADE, OR THE PERSON'S GUARDIAN OR OTHER PERSON OR ENTITY DULY AUTHORIZED TO MAKE MEDICATION OR TREATMENT DECISIONS FOR THE PERSON, DECLINES OR

OBSTRUCTS THE ADMINISTRATION OF PRESCRIBED MEDICATION OR OTHER TREATMENT RECOMMENDED BY A LICENSED PHYSICIAN, LICENSED PSYCHOLOGIST, OR CERTIFIED THERAPIST.

(12) WHEN A PERSON WITH A DEVELOPMENTAL DISABILITY WHO HAS THE LEGAL CAPACITY TO MAKE DECISIONS, OR THAT PERSON'S GUARDIAN, REFUSES TO COMPLY WITH RESTRICTIONS ESTABLISHED PURSUANT TO AN INTERDISCIPLINARY TEAM PROCESS THAT ARE DESIGNED TO SAFEGUARD THE HEALTH AND SAFETY OF THE PERSON OR OTHERS, AND IT CAN BE SHOWN THAT A PROVIDER HAS MADE REASONABLE EFFORTS TO SECURE SUCH COMPLIANCE FROM THE PERSON OR HAS TAKEN OTHER REASONABLE ACTIONS TO SAFEGUARD THE PERSON OR OTHERS, A PROVIDER OF SERVICES SHALL NOT HAVE CIVIL LIABILITY FOR INJURIES OR DAMAGES TO THE PERSON WITH A DEVELOPMENTAL DISABILITY THAT MAY ARISE FROM THE REFUSAL BY THE PERSON WITH A DEVELOPMENTAL DISABILITY, OR THAT PERSON'S GUARDIAN, TO COMPLY WITH SUCH RESTRICTIONS.

SECTION 2. Applicability. This act shall apply to acts or omissions occurring on or after the effective date of this act.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 22, 2003