

LEGISLATURE OF NEBRASKA  
NINETY-NINTH LEGISLATURE  
FIRST SESSION  
**LEGISLATIVE BILL 206**  
FINAL READING

Introduced by Byars, 30; Combs, 32; Cunningham, 40; Erdman, 47;  
Hudkins, 21; Jensen, 20; Price, 26; Raikes, 25;  
Schimek, 27; Burling, 33

Read first time January 7, 2005

Committee: Judiciary

A BILL

1 FOR AN ACT relating to developmental disabilities; to amend section  
2 83-1212.01, Reissue Revised Statutes of Nebraska; to  
3 adopt the Developmental Disabilities Court-Ordered  
4 Custody Act; to change provisions relating to an advisory  
5 committee; to repeal the original section; and to declare  
6 an emergency.  
7 Be it enacted by the people of the State of Nebraska,

1           Section 1. Sections 1 to 34 of this act shall be known  
2 and may be cited as the Developmental Disabilities Court-Ordered  
3 Custody Act.

4           Sec. 2. The Legislature recognizes the right of all  
5 persons, including individuals with developmental disabilities, to  
6 enjoy personal liberty and freedom. It is the public policy of the  
7 State of Nebraska to encourage persons with developmental  
8 disabilities to voluntarily choose their own services. It is also  
9 the public policy of the State of Nebraska to use guardians,  
10 preferably family members, to make and support service and  
11 placement decisions when a person with developmental disabilities  
12 is determined by a court to be incompetent, but there are instances  
13 in which the threat of harm to other persons in society is  
14 sufficient that a court should balance the rights of such person  
15 with the interests of society and place care and custody of such  
16 person with the State of Nebraska for appropriate treatment and  
17 services.

18           Sec. 3. The purpose of the Developmental Disabilities  
19 Court-Ordered Custody Act is to provide a procedure for  
20 court-ordered custody and treatment for a person with developmental  
21 disabilities when he or she poses a threat of harm to others.

22           Sec. 4. For purposes of the Developmental Disabilities  
23 Court-Ordered Custody Act, the definitions in sections 5 to 16 of  
24 this act apply.

25           Sec. 5. Court means the district court in which a  
26 petition is filed pursuant to the Developmental Disabilities  
27 Court-Ordered Custody Act.

28           Sec. 6. Department means the Department of Health and

1 Human Services.

2           Sec. 7.       Developmental disability means mental  
3 retardation or a severe chronic cognitive impairment, other than  
4 mental illness, that is manifested before the age of twenty-two  
5 years and is likely to continue indefinitely.

6           Sec. 8.       Independent mental health professional means a  
7 psychiatrist or psychologist with expertise in treating persons  
8 with developmental disabilities who has not previously been  
9 involved in the treatment of the subject in a significant way.

10          Sec. 9.       Least restrictive alternative means a placement  
11 and services provided in a manner no more restrictive of a  
12 subject's liberty and no more intrusive than necessary to provide  
13 appropriate treatment and protect society.

14          Sec. 10.      Mental retardation means a state of  
15 significantly subaverage general intellectual functioning existing  
16 concurrently with deficits in adaptive behavior which originates in  
17 the developmental period.

18          Sec. 11.      Petitioner means the Attorney General or the  
19 county attorney who files a petition under section 17 of this act.

20          Sec. 12.      Risk analysis means a comprehensive evaluation  
21 of a person's potential for future dangerous behavior towards  
22 others, including recommendations to minimize the likelihood of  
23 harm to others in the least restrictive alternative.

24          Sec. 13.      Severe chronic cognitive impairment means  
25 clinically significant difficulties in the ability to remember,  
26 think, perceive, apply sound judgment, and adequately use deductive  
27 reasoning not attributable to a mental illness.

28          Sec. 14.      Subject means a person who is named in a

1 petition filed under the Developmental Disabilities Court-Ordered  
2 Custody Act.

3           Sec. 15. Threat of harm to others means a significant  
4 likelihood of substantial harm to others as evidenced by one or  
5 more of the following: Having inflicted or attempted to inflict  
6 serious bodily injury on another; having committed an act that  
7 would constitute a sexual assault or attempted sexual assault;  
8 having committed lewd and lascivious conduct toward a child; having  
9 set or attempted to set fire to another person or to any property  
10 of another without the owner's consent; or, by the use of an  
11 explosive, having damaged or destroyed property, put another person  
12 at risk of harm, or injured another person.

13           Sec. 16. Treatment means the support and services which  
14 will assist a subject to acquire the skills and behaviors needed to  
15 function in society so that the subject does not pose a threat of  
16 harm to others and is able to cope with his or her personal needs  
17 and the demands of his or her environment.

18           Sec. 17. The Attorney General or county attorney may  
19 file a petition in the district court of the county in which a  
20 subject resides or the county in which an alleged act constituting  
21 a threat of harm to others occurs. The petition shall allege that  
22 the subject is a person in need of court-ordered custody and  
23 treatment and shall contain the following:

24                   (1) The name and address of the subject, if known;

25                   (2) A statement that the subject is believed to be  
26 eighteen years of age or older or that the subject is a juvenile  
27 who will become eighteen years of age within ninety days after the  
28 date of filing the petition;

1           (3) The name and address of the subject's guardian or  
2 closest relative, if known;

3           (4) The name and address of any other person having  
4 custody and control of the subject, if known;

5           (5) A statement that the subject has a developmental  
6 disability and poses a threat of harm to others;

7           (6) The factual basis to support the allegation that the  
8 subject has a developmental disability; and

9           (7) The factual basis to support the allegation that the  
10 subject poses a threat of harm to others.

11           The Nebraska Evidence Rules shall apply to proceedings  
12 under the Developmental Disabilities Court-Ordered Custody Act  
13 unless otherwise specified.

14           Sec. 18. A subject has the following rights pursuant to  
15 the Developmental Disabilities Court-Ordered Custody Act:

16           (1) The right to be represented by legal counsel and to  
17 have counsel appointed if the subject cannot afford to pay the cost  
18 of counsel;

19           (2) The right to have a guardian ad litem appointed to  
20 act on the subject's behalf if the court determines that he or she  
21 is unable to assist in his or her own defense;

22           (3) The right to have a timely hearing on the merits of  
23 the petition before a district court judge;

24           (4) The right to have reasonable continuances, for good  
25 cause shown, in order to properly prepare for a hearing on the  
26 petition;

27           (5) The right to testify, subpoena witnesses, require  
28 testimony before the court, and offer evidence;

1           (6) The right to confront and cross-examine witnesses;

2           (7) The right to have an expert witness of the subject's  
3 own choice evaluate the subject, testify, and provide  
4 recommendations to the court and to have such expert paid for by  
5 the county if the subject cannot afford the costs of such expert;  
6 and

7           (8) The right to have a transcript prepared for the  
8 purpose of an appeal, to appeal a final decision of the court, and  
9 to have the costs of such transcript and appeal paid by the county  
10 if the subject cannot afford such costs.

11           Sec. 19. (1) The petitioner may apply to the court to  
12 have the subject taken into emergency custody and held pending a  
13 hearing on the petition and disposition pursuant to sections 22 to  
14 26 of this act. The application for emergency custody shall be  
15 supported by affidavit or sworn testimony which establishes  
16 probable cause to believe that (a) the subject is eighteen years of  
17 age or older or will become eighteen years of age within ninety  
18 days after the date of filing the application, (b) the subject is a  
19 person with a developmental disability, (c) the subject poses a  
20 threat of harm to others, and (d) if the application is not  
21 granted, substantial harm to others is likely to occur before a  
22 trial and disposition of the matter can be completed.

23           (2) If the court concludes that there is probable cause  
24 to grant the application pursuant to subsection (1) of this  
25 section, the court may issue an ex parte order granting the  
26 application. The department shall provide a recommendation of an  
27 appropriate treatment program for the subject which has available  
28 space and is willing to hold the subject in emergency custody. The

1 court shall direct the sheriff or any other peace officer to take  
2 the subject into emergency custody and deliver him or her to the  
3 program ordered by the court to be held pending further hearing and  
4 order of the court. The order shall establish terms and conditions  
5 of the emergency placement as appropriate under the Developmental  
6 Disabilities Court-Ordered Custody Act. The department shall  
7 evaluate the subject within seven days after the date the  
8 application is granted to determine if the subject is a person with  
9 one or more developmental disabilities and poses a threat of harm  
10 to others. The results of the evaluation shall be provided to the  
11 court and all parties.

12           Sec. 20. If an emergency custody order is issued by the  
13 court under section 19 of this act, the subject has a right to an  
14 expedited hearing to challenge the order. At such hearing, the  
15 petitioner has the burden of showing that there is probable cause  
16 to continue the emergency custody order. Such hearing shall be  
17 held within ten days after the date the subject is taken into  
18 emergency custody unless such requirement is waived by the subject  
19 or the subject is granted a continuance based upon his or her  
20 request. The Nebraska Evidence Rules do not apply at a hearing  
21 under this section. Upon conclusion of such hearing, the court may  
22 continue, modify, or vacate the emergency custody order.

23           Sec. 21. The petitioner shall cause notice of the  
24 petition and summons to be served on the subject, the subject's  
25 attorney, if any, the subject's guardian, if any, the subject's  
26 closest relative, if known, any other person having custody and  
27 control of the subject, if known, and the department.

28           Sec. 22. When a petition is filed under the

1 Developmental Disabilities Court-Ordered Custody Act, the court  
2 shall ensure that the subject is represented by legal counsel and  
3 shall set a time and date for a hearing on the petition. The clerk  
4 of the court shall provide notice of the date and time of such  
5 hearing to the subject, the subject's legal counsel, the subject's  
6 guardian, if any, the subject's closest relative, if known, any  
7 other person having custody and control of the subject, if known,  
8 the petitioner, and the department. The notice of hearing on the  
9 petition shall state the date, time, and location of the hearing  
10 and shall contain a list of the subject's rights under section 18  
11 of this act. The court may order an examination and evaluation of  
12 the subject to be completed by the department prior to the hearing,  
13 and the results shall be provided to all parties. The hearing on  
14 the petition shall be held within ninety days after the date of  
15 filing the petition or, if the subject is in emergency custody  
16 pursuant to section 19 of this act, as soon as practicable but not  
17 later than forty-five days from the date when the subject was taken  
18 into emergency custody unless continuances are granted by the court  
19 upon the subject's motion.

20           Sec. 23. The subject may admit or deny the allegations  
21 of the petition or choose to not answer. If the subject denies the  
22 allegations of the petition, the court shall proceed to conduct a  
23 hearing on the petition. If the subject is unable to understand  
24 the nature and possible consequences of the proceedings or chooses  
25 to not answer, the court shall enter a denial of the allegations of  
26 the petition on the subject's behalf and shall proceed to conduct a  
27 hearing on the petition. If the subject admits to the allegations  
28 of the petition, the court shall determine whether the admission is

1 free and voluntary and, if the court finds a factual basis to  
2 support the admission, may find the subject to be a person in need  
3 of court-ordered custody and treatment.

4           Sec. 24. The petitioner has the burden to prove by clear  
5 and convincing evidence that the subject is a person in need of  
6 court-ordered custody and treatment. The court shall make specific  
7 findings of fact and state its conclusions of law.

8           If after the hearing is complete the court finds that the  
9 subject is not a person in need of court-ordered custody and  
10 treatment, it shall dismiss the petition and immediately release  
11 the subject from any emergency custody order.

12           If after the hearing is complete the court finds that the  
13 subject is a person in need of court-ordered custody and treatment,  
14 the court shall order the department to evaluate the subject and  
15 submit a plan for custody and treatment of the subject in the least  
16 restrictive alternative within thirty days and provide a copy to  
17 all parties in interest. The court shall set the matter for  
18 dispositional hearing within fifteen days after receipt of the  
19 department's plan, unless continued for good cause shown.

20           Sec. 25. The plan submitted by the department pursuant  
21 to section 24 of this act shall include the evaluation and  
22 recommendations of an independent mental health professional. The  
23 independent mental health professional may have been previously  
24 involved in evaluating the subject and advising the court pursuant  
25 to the Developmental Disabilities Court-Ordered Custody Act and may  
26 also be an employee of or a contractor with the department. The  
27 plan shall include: A history of the subject's past treatment, if  
28 any; a comprehensive evaluation of the subject's developmental

1 disabilities; a risk analysis; the treatment and staffing  
2 requirements of the subject; appropriate terms and conditions to  
3 provide custody and treatment of the subject in the least  
4 restrictive alternative; and an appropriate treatment program that  
5 is capable of providing and willing to provide treatment in  
6 accordance with the plan.

7           Sec. 26. At the dispositional hearing, the court shall  
8 consider the plan submitted pursuant to section 25 of this act, the  
9 arguments of the parties, and any other relevant evidence. The  
10 Nebraska Evidence Rules shall not apply at the dispositional  
11 hearing. The plan shall be approved by the court unless it is  
12 shown by a preponderance of the evidence that the plan is not the  
13 least restrictive alternative for the subject. After the hearing  
14 is completed, the court shall issue an order of disposition placing  
15 custody of the subject with the department and setting forth the  
16 treatment plan for the subject. The court shall establish the  
17 duration of the court-ordered custody and treatment of the subject,  
18 but such duration under the initial order shall not be longer than  
19 one year.

20           Sec. 27. The court shall hold annual review hearings of  
21 each order of disposition issued under section 26 of this act prior  
22 to the expiration date of such order. Prior to the annual review  
23 hearing, the department shall submit an updated plan for custody  
24 and treatment of the subject. It shall be the burden of the state  
25 to show by clear and convincing evidence that court-ordered custody  
26 and treatment continues to be necessary. The court shall determine  
27 whether the evidence supports continuing the court-ordered custody  
28 and treatment of the subject. At the review hearing, the court

1 shall consider the evidence received at the original and any  
2 subsequent hearings, the plan and updates submitted by the  
3 department, progress reports and recommendations from the treatment  
4 program, and any other relevant evidence. Following the review  
5 hearing, the court may continue or modify the court-ordered custody  
6 and treatment or may vacate such custody and treatment and dismiss  
7 the matter.

8           Sec. 28. (1) If at any time it appears that the subject  
9 no longer poses a threat of harm to others, any party may file a  
10 motion for a review hearing to be held as soon as practicable. The  
11 party filing the motion under this subsection shall have the burden  
12 of showing by a preponderance of the evidence that the subject no  
13 longer poses a threat of harm to others. If it is shown that the  
14 subject no longer poses a threat of harm to others, the court shall  
15 enter an order dismissing the case and immediately release the  
16 subject.

17           (2) If at any time it appears that (a) the plan submitted  
18 under section 24 or 27 of this act is not sufficient to protect  
19 society or the subject or (b) the circumstances upon which the plan  
20 was based have changed significantly, any party may file a motion,  
21 to be granted for good cause shown, for a review hearing to be held  
22 as soon as practicable. The party filing the motion under this  
23 subsection shall have the burden of showing by clear and convincing  
24 evidence that the court-ordered custody and treatment of the  
25 subject should be modified or vacated.

26           Sec. 29. A court which finds a subject to be in need of  
27 court-ordered custody and treatment shall have concurrent  
28 jurisdiction to hear and decide issues regarding appointment or

1 replacement of a guardian for as long as the subject is in  
2 court-ordered custody and treatment.

3           Sec. 30.       No findings under the Developmental  
4 Disabilities Court-Ordered Custody Act, including a finding that a  
5 person is in need of court-ordered custody and treatment, shall  
6 lead to a presumption that such person is incompetent to stand  
7 trial.

8           Sec. 31. If the subject cannot afford to pay, the county  
9 shall pay court costs, costs of emergency custody, and related  
10 expenses for a petition filed pursuant to the Developmental  
11 Disabilities Court-Ordered Custody Act, including the costs of  
12 legal counsel appointed to represent the subject and any expert  
13 hired to evaluate and testify on behalf of the subject. In  
14 counties having a public defender, the court may appoint the public  
15 defender as legal counsel for the subject. The county shall be  
16 responsible for the cost of transporting the subject to and from  
17 court hearings under the act and to any emergency custody or other  
18 custody ordered under the act. The department shall pay the costs  
19 of the department's evaluations of the subject, the costs of the  
20 plans completed by the department and the independent mental health  
21 professional, and the costs of the court-ordered custody and  
22 treatment of the subject following an order of disposition, except  
23 as provided by sections 83-363 to 83-380.

24           Sec. 32.       Jurisdiction of the court under the  
25 Developmental Disabilities Court-Ordered Custody Act does not  
26 prohibit a subject or a subject's guardian from consenting to  
27 medical care or to a more restrictive setting, on a temporary  
28 basis, than that ordered by the court to satisfy the treatment

1 needs of the subject.

2           Sec. 33. In the case of a juvenile in need of  
3 court-ordered custody and treatment, a petitioner may file a  
4 petition and begin proceedings under the Developmental Disabilities  
5 Court-Ordered Custody Act within ninety days before the juvenile's  
6 eighteenth birthday. No order under the act shall be effective  
7 until the subject reaches his or her eighteenth birthday.

8           Sec. 34. The department in collaboration with the  
9 Advisory Committee on Developmental Disabilities established under  
10 section 83-1212.01 shall submit quarterly reports to the court, all  
11 parties of record, and the guardian of any subject in court-ordered  
12 custody.

13           The department shall submit an annual report to the  
14 Legislature regarding the implementation of the Developmental  
15 Disabilities Court-Ordered Custody Act. Such reports shall not  
16 contain any name, address, or other identifying factors or other  
17 confidential information regarding any subject.

18           Sec. 35. Section 83-1212.01, Reissue Revised Statutes of  
19 Nebraska, is amended to read:

20           83-1212.01. (1) There is hereby created the Advisory  
21 Committee on Developmental Disabilities. The advisory committee  
22 shall consist of a representative of a statewide advocacy  
23 organization for persons with developmental disabilities and their  
24 families and not more than fifteen additional members, at ~~+~~ At  
25 least one-third of ~~the membership~~ whom shall be persons with  
26 developmental disabilities, at least one-third of ~~the membership~~  
27 whom shall be families of persons with developmental disabilities,  
28 and no more than one-third of ~~the membership~~ whom shall be elected

1 officials or interested community persons.

2 (2) The members shall be appointed by the Governor for  
3 staggered terms of three years. Any vacancy shall be filled by the  
4 Governor for the remainder of the term. One of the members shall  
5 be designated as chairperson by the Governor. Members shall be  
6 reimbursed for their actual and necessary expenses as provided in  
7 sections 81-1174 to 81-1177.

8 (3) The advisory committee shall advise the department  
9 regarding all aspects of the funding and delivery of services to  
10 persons with developmental disabilities.

11 (4) The advisory committee shall provide sufficient  
12 oversight to ensure that persons placed in the custody of the  
13 department under the Developmental Disabilities Court-Ordered  
14 Custody Act are receiving the least restrictive treatment and  
15 services necessary.

16 Sec. 36. Original section 83-1212.01, Reissue Revised  
17 Statutes of Nebraska, is repealed.

18 Sec. 37. Since an emergency exists, this act takes  
19 effect when passed and approved according to law.