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FISCAL IMPACT REPORT

SPONSOR: HJC DATE TYPED: 03/11/01 HB CS/124 et. al/aHAFC/aSPAC
 SHORT TITLE: Private Correctional Facilities Oversight Act SB _____
 ANALYST: Trujillo

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
		See Narrative		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to appropriation in the General Appropriation Act, HB124, SB316 and HB881

SOURCES OF INFORMATION

LFC Files
 Corrections Department
 U.S. Department of Justice Information Brief
 Administrative Office of the District Attorneys (AODA)
 Children, Youth and Families Department (CYFD)
 Attorney General (AG)
 NM Public Defender (NMPD)
 Administrative office of the courts (AOC)
 Criminal Juvenile Justice Coordinating Council

SUMMARY

Synopsis of Senate Public Affairs Committee Amendments

Senate Public Affairs Committee Amendments to HBCS/124et. al/aHAFC are as follows:

- Replaces “supervision” in the title with “a classification review”;
- Replaces “fees” with “a fee” in different sections of the bill;
- Strikes the language which allowed the secretary to adopt, implement and enforce standard rules regarding privately operated correctional facilities that house or propose to house ten or more out-of-state inmates;
- Directs the secretary to prepare and submit to the county a written report summarizing his review of each contract;
- Directs the secretary to notify the county of the deficiencies and recommend corrective action;

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- Changes the title in Section 4 from the “SECRETARY’S AUTHORITY TO SUPERVISE THE INCARCERATION” to “CLASSIFICATION REVIEW”; and
- Strikes the language which provided the secretary with the authority to approve out-of-state inmates in privately operated correctional facilities.

Synopsis of HAFC Amendments

House Appropriations and Finance Committee amendments to CS/HB124et.al include:

1. On page 4, lines 4 and 5, striking “as deemed appropriate by the secretary”;
2. On page 5, lines 2 and 3, striking “The contract shall be subject to advance review by the secretary”; and
3. On page 7, lines 6 and 7, striking “the county sheriff’s department of”.

The amendment removes some of the authority from the Secretary of Corrections.

Synopsis of Original Bill

HB 124et al/HJCs creates the “Privately Operated Correctional Facilities Oversight Act.”

The bill defines “out-of-state inmate” as an inmate who is being incarcerated on behalf of a state other than New Mexico or a governmental entity whose jurisdiction is outside of New Mexico. The term “out-of-state inmate” does not include federal inmates or inmates being incarcerated on behalf of Indian tribes or pueblos whose lands are located wholly or partially in New Mexico.

The bill provides that privately owned correctional facilities which house ten or more out of state inmates are required to:

- have all their prospective correctional officers successfully complete a screening, background check and training course approved by the Secretary of Corrections;
- immediately notify the Secretary of Corrections, the Secretary of Public Safety, the local county sheriff and the chief of police of the municipality, or the nearest municipality when a firearm or chemical agent is discharged at the facility, when a hostage situation occurs, when a death of an inmate, staff member, visitor or other person occurs, a disturbance involving five or more inmates occurs at the facility, when any inmate escapes from the facility, or the commission of a felony offense occurs at the facility;
- maintain accreditation with the American Correctional Association;
- subject to final approval by the secretary of corrections, prepare and submit a written emergency response plan for the correctional facility. Copies of the plan are to be provided to the Secretary of Corrections, the Secretary of Public Safety, the County Sheriff and chief of police of the municipality where the facility is located or the chief of police of the nearest municipality;
- assure that an out of state inmate released from a private correctional facility is released back to his state of origin; and
- enter into a written contract with the out-of-state jurisdiction; with said contract containing the minimal contract standards as outlined by the bill as well as contract oversight by the Secretary of Corrections.

Next, the bill gives the Secretary of Corrections the power to adopt, implement and enforce standards and rules regarding privately operated correctional facilities which would house ten or more out of state inmates. It mandates that the Secretary review all contracts and proposed contracts between the owner or operator of a privately operated correctional facility and the entity that proposes to house ten or more out of state inmates in the facility. It also mandates the secretary to inspect and monitor privately operated correctional facilities that houses or proposes to house ten or more out of state inmates to ensure compliance with minimum standards set forth in the bill, and other rules and standards subsequently adopted by the Secretary. It provides that the Secretary be provided with classification and other relevant records pertaining to prospective out of state inmates to be housed at the facility. The Secretary is granted subpoena power over persons and records for the purposes of investigation to assure the enforcement of rules and standards. Subsequent to any inspection, the Secretary will submit a report with findings and recommendations to the private facility, the board of county commissioners and county sheriff of the county where the facility is located as well as the legislative Corrections Oversight Committee. The Secretary shall allow the facility a reasonable amount of time to remediate deficiencies, if any, found during the inspection, and may conduct additional inspections if necessary. If a privately-operated facility fails to comport with promulgated standards or rules, the Secretary may prohibit the privately owned facility from housing out of state inmates.

Finally, this bill prohibits any out-of-state inmates from being housed in a privately operated correctional facility or privately operated jail in New Mexico:

1. unless the facility is designed to meet or exceed the appropriate classification level for the inmate housed; and
2. without the express approval of the Secretary of Corrections, which shall not be unreasonably withheld.

The bill also provides for a fee, payable on a quarterly basis by the private prison, of seventy-five cents per day for each out of state inmate housed at the private prison. This fee would be payable to the sheriff of the county in which the private correctional facility is located. The bill also provides for a fee that would be paid to CD on a quarterly basis to reimburse CD for actual costs of supervising, inspecting and monitoring the private correctional facility.

Significant Issues

CD reports the bill imposes significant additional fiscal and administrative burdens upon the Secretary and the Department. CD should be able to recover most of the additional monetary costs by way of the quarterly fee collected for the costs of inspection and monitoring. However, the CD will probably be unable to absorb the additional administrative burden.

CD indicates granting the Secretary oversight authority for the housing of out-of-state inmates in private facilities in New Mexico will likely result in liability claims against the Secretary when out-of-state inmates in private facilities engage in serious misconduct that results in injury to other persons.

PERFORMANCE IMPLICATIONS

According to CD, the department may be unable to fully implement a program to administer the bill unless the department is given sufficient resources to accomplish these additional duties.

FISCAL IMPLICATIONS

There is no appropriation to cover the prospective costs associated with this legislation. Although there is a fee reimbursement provision, it is unknown at this time whether the reimbursement will be enough to cover the costs to CD (See Technical Issues). In addition to the need for additional F.T.E., there will be additional in-state travel costs, perhaps out-of-state travel costs, postage, supplies and materials. These increased costs will be recurring and CD may be unable to absorb them.

DPS reports if more calls are received by law enforcement because of mandated notifications, there could be a budget impact to operations, and over time, to the New Mexico State Police (from \$10K to \$100K). It is unknown whether passage of the proposed legislation will affect any federal appropriation or any other local, state or federal matching funds.

Staff is unable to determine how many out-of-state inmates are currently housed in New Mexico in order to determine an estimated revenue. All monies collected shall go to the general fund (See Technical Issues).

ADMINISTRATIVE IMPLICATIONS

CD reports there will be a substantially increase the administrative burden upon the Secretary and/or CD employees who will be required to inspect the private jails and correctional facilities and also review the classification and history of every out-of-state inmate who is proposed for housing in such a facility. Although there is a fee reimbursement provision (See Technical Issues), CD may be unable to absorb this additional burden and additional F.T.E. may be required to perform these new duties.

There is possible administrative impact from passage of the proposed legislation to DPS, as the legislation requires that a contractor notify the Secretary of Public Safety of certain information specified in the proposed legislation. From a reading of the proposed legislation, it appears this language transmittal to the Secretary of Public Safety is purely informational in nature.

CONFLICT/DUPLICATION/COMPANIONSHIP/RELATIONSHIP

This bill may overlap and conflict with NMSA 1978, § 33-3-27(C). Section 2 of the bill requires correctional officers employed at county and privately operated correctional facilities to complete a training program with the same standards as the training program required for officers employed at state-operated facilities. Section 33-3-27(C) now requires jailers at county jail facilities operated by private independent contractors to receive training as specified in the contract between the county and independent contractor.

In the consultants January 14, 2000 report to the Legislature, AG and the Secretary of Corrections, it was reported that requiring “the private contractor to do so many things according to State and County dictates that the liability reduction is minimal. For example:

- all basic training for correctional officers must be provided by the New Mexico Corrections Department’s Training Academy.”

The report goes on to state such intrusiveness seriously compromises the State’s right to indemnification because the private entity is not responsible for any losses resulting in the negligence by employees, agents or servants of the County or the State, Therefore if an inmate were injured through employee negligence it would be easy for the private entity to take the position that this is not the

private entities fault, but rather the fault of the department's training academy of because of poorly written department policy.

TECHNICAL ISSUES

CD suggests providing the Secretary of Corrections with immunity from claims based upon alleged improper oversight.

Section 6-4-2 NMSA 1978 states "There is created a fund to be known as the "general fund" to which the state treasurer shall credit all revenues not otherwise allocated by law. Expenditures from this fund shall be made only in accordance with appropriations authorized by the legislature."

Sections B and C of this bill provides for County's CD to collect fees on a quarterly basis. However it does not provide for the County's or CD to expend the fees collected.

The term "appropriate classification level" is not defined.

OTHER SUBSTANTIVE ISSUES

One area of concerned raised by the panel of experts in the January 14, 2000 report provided to the New Mexico Legislature, Secretary of Corrections and Attorney General was "Although not in the scope of this study, it is clear that other private facilities are being operated in New Mexico without sufficient oversight. This should be addressed as well."

In an information brief provided by the U.S. Department of Justice based on a forum of correctional experts, legislators and others with an interest in correctional policy the following discussion occurred: "There was a consensus among forum participants that regulation of some form was both constitutional and appropriate. The most compelling reason is to assure that the operation of the private prisons does not threaten public safety. The issue of public safety is particularly sensitive when the facility is housing inmates from out-of-state. In these cases, the host-state and the local jurisdiction in which the facility is located need to be concerned about public safety issues (escapes, inmate disturbances, fires, natural disasters, work stoppages, or other labor disputes that may threaten the prison). *Attachment A* includes an excerpt of this discussion.

Another area of concern raised by the panel of experts in the January 14, 2000 report included a liability issue as it relates to the training of correctional officers of privately operated facilities and the utilization of state standards.

The bill may not be entirely consistent with the existing statutory scheme governing state and local correctional facilities. Currently, the state is authorized to enter into contracts with private entities for certain specified state corrections facilities. § 33-1-17. The CD is also generally authorized to enter into contracts with public or private detention facilities for housing state inmates. § 30-20-2(G). Alternatively (and more typically), the state has entered into contracts with counties to house state inmates in those counties' jails. The counties' jails may be provided and operated by private independent contractors, as authorized by § 33-3-27. Nothing in state law authorizes a private company to operate a corrections facility or jail in New Mexico absent an agreement with the state, a county or other local governmental body.

The bill seems to cover (1) state corrections facilities operated by private entities under § 33-1-17, more and (2) county or privately-operated jails with which the state does not have a contract for the incarceration of state inmates. This effectively creates a loophole for counties with which the state

contracts for the incarceration of state inmates in the counties' jails. Since, as discussed above, this is the usual arrangement for housing state prisoners in privately-operated county jails, the loophole may affect a significant number of correctional facilities.

The AG reports:

1. The legislature generally cannot pass a bill that impairs the obligations of contracts. See N.M. Const. art. II, § 19. HB 124 may affect current state and county contracts with private operators. However, if a bill relies on a legitimate exercise of a State's police power, the bill can impair the obligations of contracts. See Temple Baptist Church v. Albuquerque, 98 NM 138, 147 (1982).
2. The Secretary of Corrections does not have jurisdiction over county jails. The county sheriff should likely be a participant in the approval process for county jail matters.
3. The bill also does not state who shall make the determination of what constitutes "appropriate classification."

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