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## FISCAL IMPACT REPORT

**SPONSOR** Harper/Hernandez      **ORIGINAL DATE** 03/01/21  
**LAST UPDATED** \_\_\_\_\_      **HB** 305  
**SHORT TITLE** Contract SVCS For Some Juvenile Offenders      **SB** \_\_\_\_\_  
**ANALYST** Bachechi

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Indeterminate					

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Children, Youth and Families Department (CYFD)  
 Human Services Department (HSD)  
 Law Office of the Public Defender (LOPD)  
 Office of the Attorney General (NMAG)

### SUMMARY

#### Synopsis of Bill

House Bill 305 requires the Human Services Department’s Behavioral Health Services Division to contract for services to assist juvenile offenders deemed incompetent to stand trial and allowing juvenile treatment in certain circumstances. HB305 provides that children with a mental disorder or developmental disability will remain in a residential treatment or habilitation facility until they reach the age of majority or attain competency to stand trial in a criminal case if: (1) the child has been charged with a felony offense; and (2) the child has been deemed incompetent to stand trial in a criminal case; or (3) there is evidence that the child poses a likelihood of serious harm to the child’s self or others. To achieve this, HB305 amends sections of both the Delinquency Act 32A-2-1 NMSA 1978 and the Children’s Mental Health and Developmental Disabilities Act 32A-6A-1 through 32A-6A-30 as follows:

- “Likelihood of serious harm to self or others” is defined “it is more likely than not that in the near future the child will inflict serious bodily harm on the child’s self or another person or commit a criminal sexual offense, as evidenced by behavior

causing, attempting or threatening such harm, which behavior gives rise to a reasonable fear of such harm.”

- Proceedings can be stayed for 1 year while a child is treated to competency. The child’s competency will be reviewed every 90 days or six months if they are receiving treatment as detailed in this bill. If it is determined the child cannot be treated to competency the petition will be dismissed.
- Amends the definition of “habilitation” to include, as a purpose of habilitation, assisting the child pursuant to Subsection E of Section 32A-2-21 (i.e., treating to competency to stand trial).
- Permits involuntarily placement of a child in a residential treatment or habilitation program upon a showing by clearing and convincing evidence that there is evidence that the child poses a likelihood of serious harm to the child’s self or others as a result of mental disorder or developmental disability. Section 5 of the bill provides the child retains all legal rights and will be represented by legal counsel. Involuntary treatment may not last longer than 60 days. At that time another hearing must be called to determine further action, inclusive of continuing involuntary residential treatment.

There is no effective date of this bill. It is assumed the effective date is 90 days following adjournment of the Legislature.

## **FISCAL IMPLICATIONS**

There is no appropriation contained within the bill and it is unclear who will be responsible for paying for the treatment for the youth when insurance or Medicaid will not cover it. While the bill charges HSD with these responsibilities, CYFD is the children’s behavioral health authority.

In the event that state funds are required to cover the costs, the state general fund cost is estimated to be \$400 per child, per day, or an estimated \$12 thousand per child per month. Regardless of the entity so burdened, whether state agency or private payer, the financial burden will be excessive with the increase in residential treatment, and cannot be absorbed by existing resources.

The LOPD notes that while extended treatment for juvenile offenders could reduce recidivism, the potentially prolonged period of time HB305 permits delinquency petitions to remain pending is likely to increase LOPD caseloads. Cases would remain active, with the regular six-month competency hearings, rather than reaching a point where the case would be resolved or dismissed. Any increase in the need for attorneys would require a corresponding increase in LOPD’s budget.

AOC notes, new laws, amendments to existing laws, and new procedural and hearing requirements can increase caseloads and require additional resources. Under HB305, the court may be required to hold additional proceedings and to entertain additional evidence to determine if a child poses a likelihood of serious harm to the child’s self or to others, and to determine competency of a child who remains in a residential treatment or habilitation facility as a result of a mental disorder or developmental disability to stand trial, thus requiring additional court resources to be expended.

## SIGNIFICANT ISSUES

### Involuntary Commitment Requirements

By requiring continued treatment in a residential treatment or habilitation facility until a child reaches the age of majority or is treated to competency, HB305 requires (instead of merely permitting) the prolonged and indefinite commitment of juveniles who have merely been charged with a crime – inherently a non-serious crime treated as a delinquency offense – based on a mere preponderance of the evidence that they pose a risk of serious harm to themselves or others. The preponderance standard is inconsistent with involuntary commitment requirements under the Children’s Mental Health and Developmental Disabilities Act (which requires a showing by clear and convincing evidence).

Under this provision, a twelve-year-old child could be involuntarily committed to a facility for six years – their entire adolescence –because they’ve been accused of a crime for which they are still presumed innocent, if they are either unable to understand the nature of the proceedings or assist in their defense (incompetent) or are likely to pose a risk of harm.

The bill adds residential treatment or habilitation facilities as a means of placement for youth deemed incompetent in a juvenile setting. However, there are issues related to youth who are not competent to stand trial and do not necessarily meet clinical criteria to be placed in residential treatment. Treatment of youth in overly-restrictive settings is not conducive to current efforts to utilize least-restrictive interventions.

This bill assumes that all competency cases can be treated to competency, which is not the case. This bill does not honor all of the various reasons a youth can be deemed not competent and does not take into consideration the child’s specific issues related to competency. Competency is a complex issue. Orders to “treat to competency” assume that the issue creating a lack of competency can be therapeutically addressed in a treatment setting. This does not take into consideration organic factors, learning deficits and intellectual disabilities that often contribute to a lack of competency. In addition, this bill does not take into account the dual diagnosis of mental health and developmental disabilities along with the impact trauma has on an individual’s ability to learn, grow or adjust to environments.

Limited evidence exists regarding the efficacy of “treatment to competency” for juveniles. Due to limited evidence, few models exist that specifically address interventions to treat to competency. Access to assessments that deem youth incompetent vary from county to county. Often, stakeholders are not allowed to access assessments that result in a youth being found not competent – limiting a provider’s ability to “treat to competency” as they are not allowed access to assessments that outline factors contributing to the lack of competency.

In addition, because there is no cap on how long such an individual could be detained without being adjudicated or having the petition dismissed, the child could end up being committed to a residential treatment or habilitation facility for a period longer than the child could be sentenced for the underlying crime. This is particularly likely to occur if the child is incompetent due to cognitive delays as such individuals are unlikely to ever be treated to competency. Even if

deemed competent after years of such commitment, they could still be adjudicated delinquent and committed pursuant to their delinquency sentence for even more of their childhood.

Beyond providing for prolonged and indefinite commitments, HB305 would simultaneously permit the prolonged pendency of criminal charges against such individuals. While HB305 would be doing so under the guise the individual was receiving treatment, the pendency of criminal charges or proceedings is widely recognized to have deleterious impact on individuals. *Cf. State v. Lujan*, 2015-NMCA-032, ¶ 20, 345 P.3d 1103 (recognizing that “some degree of ... anxiety is inherent for every defendant ... awaiting trial” and that a key purpose of the speedy trial right is to minimize the anxiety and concern experienced by defendants awaiting trial). In addition, delay is likely to adversely impact a child’s defense to the underlying crime as memories inevitably fade or change.

#### Residential Treatment Facilities in New Mexico

Currently, no facility exists in New Mexico to treat youth to competency and there is no infrastructure to support the amount of beds that may be needed. Facilities would have to contract specific therapeutic models to treat to competency including therapists trained in those specific areas. Additionally, New Mexico has a limited amount of residential treatment beds. The use of residential treatment beds to address competency issues would create an additional lack of bed space for youth meeting clinical criteria for placement in residential treatment to address mental health concerns. Based on the current (limited) number of RTC (Residential Treatment Center) beds in the state of New Mexico, this could create an increased number of youth being sent out of state for residential treatment to competency.

#### Funding for Residential Treatment Centers and Compliance with Federal and State Regulations

Residential treatment in New Mexico is primarily funded by Medicaid dollars. In order to secure Medicaid funding for residential treatment, youth need to meet clinical/medical criteria for placement in a residential treatment setting. A lack of competency does not guarantee that a youth meets criteria for residential treatment as determined by the Managed Care Organization that would pay for treatment.

This bill puts New Mexico CYFD and New Mexico Residential Treatment Centers (RTCs) at risk of non-compliance to federal mandates and state regulations:

- National Guidelines: CYFD licenses and certifies New Mexico child and adolescent residential treatment centers (RTCs) that provide medically necessary treatment (for Medicaid reimbursement). All licensed and certified RTCs are required to demonstrate compliance to New Mexico Children’s Code NMSA 32-A, which includes a definition for medically necessary services. NMSA 32-A-6A-4-T (3), defines medically necessary services as rehabilitative physical, mental or behavioral health services that are provided within professionally accepted standards of practice and national guidelines. National guidelines which CYFD is required to follow includes the federal Family First Prevention Services Act (FFPSA). New Mexico CYFD is currently working with the Building Bridges Initiative (BBI) to implement strategic planning towards meeting federal Family First Prevention Services Act (FFPSA) and Qualified Residential Treatment Program (QRTP) requirements. These efforts focus on increasing community-based services in order to maintain clients in the community and decrease reliance on residential treatment

facilities. This will include efforts to ensure facilities minimize length of stay in order to support best practices.

- Admissions: Certification Requirement NMAC 7.20.11.23.C(1) -(2) mandates that agencies establish and follow written criteria for admission to its program(s) and service(s), including exclusionary criteria. Agencies are also required to establish and follow written intake procedures to address clinical appropriateness for admission.
- Individualized Treatment and Discharge: Certification Requirement NMAC 7.20.11.23.E mandates that the treatment planning process is individualized and ongoing, and includes initial treatment planning, comprehensive treatment planning, discharge planning, and regular re-evaluation of treatment plans and discharge criteria.

#### Authority over Forensic and Behavioral Health Services for Juveniles

Although CYFD BHS oversees forensic evaluation contracts for juveniles, the length of services and the type of services received by incompetent juveniles is not of the purview of the BHS forensic evaluation oversight. The CYFD BHS Forensic Evaluation open fund pool is funded via state general funds, at approximately \$150 thousand per fiscal year. BHS is limited to overseeing the funding of the actual evaluations and is not involved in the implementation of interventions resulting from said evaluations.

CYFD has purview over both Juvenile Justice Services and Behavioral Health Services, which serves as the children's behavioral health authority for the State of New Mexico. However, this bill shifts responsibility for certain juvenile forensic and behavioral health services from CYFD to the HSD Behavioral Health Services Division (BHSD), the single state authority for mental health and substance abuse for adults, creating a division of oversight of these efforts for this population between departments. A Joint Powers Agreement between HSD and CYFD provides CYFD with the responsibility and authority over forensic and behavioral health services for juveniles:

Chapter 32A - Children's Code Article 13 - Juvenile Assistance Programs. (NM Stat § 32A-13-2 (2018)) outlines CYFD's responsibility related to juvenile forensic (competency and amenability) evaluations.

32A-13-2. Juvenile forensic evaluation program.

A. There is created within the children, youth and families department the "juvenile forensic evaluation program." The program shall be staffed by juvenile forensic evaluation teams and shall provide evaluation of children alleged or found to be in need of supervision and alleged delinquents upon request of the court, law enforcement agencies and juvenile probation officers.

B. The juvenile forensic evaluation teams shall recommend referral of children alleged or found to be in need of supervision or alleged delinquents to the children, youth and families department, department of health or human services department or recommend any other appropriate legal disposition based on the diagnostic evaluation. Juvenile forensic evaluation teams shall follow the juvenile in each stage of treatment, utilizing a data management system established by the children, youth and families department, and shall provide information upon request to state agencies, pursuant to applicable confidentiality provisions pertaining to children.

## **PERFORMANCE IMPLICATIONS**

CYFD has performance measures concerning appropriate placements and services for children which may be negatively affected by this bill. Current best practice is to keep the youth in the community, with community based resources, and family engagement. Removing youth who are deemed “not competent” from their natural supports and community contradicts the goal of least restrictive means in terms of placement and treatment.

By keeping criminal cases active for prolonged periods of time, HB305 could increase LOPD workloads overall. In addition, because of turnover in LOPD offices, juveniles who face prolonged commitments under HB305 are likely to be represented by multiple attorneys. Attorneys assigned to the case are unlikely to be as familiar with the underlying charges or issues as the attorney originally assigned, impairing the efficacy of the representation for children facing prolonged commitments.

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

## **ADMINISTRATIVE IMPLICATIONS**

As LOPD attorneys are not in a position to provide long-term monitoring of a client’s behavioral health treatment over the course of many years, additional oversight of these indefinite commitment cases may be necessary.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Conflicts with HB202 which seeks to amend Sections of the Children’s Code 32A-6A-4 NMSA 1978.

Conflicts with section 32A-4-9 NMSA 1978 of the Children’s Code dealing with Indian Child Placement Preferences and requires CYFD to follow tribal preferences in terms of culturally relevant placement options. Ordering a youth into a residential treatment facility may directly contradict this statute.

Conflicts with section 32A-4-9 NMSA 1978 of the Children’s Code which mandates the use of “least restrictive means”, specifically defined as “the conditions of habilitation or treatment for the child, separately and in combination that:

- (1) are no more harsh, hazardous or intrusive than necessary to achieve acceptable treatment objectives for the child;
- (2) involve no restrictions on physical movement and no requirement for residential care, except as reasonably necessary for the administration of treatment or for the protection of the child or others from physical injury; and
- (3) are conducted at the suitable available facility closest to the child's place of residence;

As mentioned above in “substantive issues” passage of this bill may increase the number of youth being sent to out of state facilities.

Conflicts with section 32A-4-9 NMSA 1978 of the Children’s Code which permits placement in a residential treatment or habilitation program only when the placement is medically necessary and requires, “(A)n involuntary placement hearing shall be held within seven days of the emergency admission of the child to a residential treatment or habilitation program under this section. An involuntary placement hearing shall be held within five days from a child’s declaration that the child desires to terminate the child’s voluntary admission to a residential treatment or habilitation program if the child’s clinician has assessed and documented that involuntary placement is necessary.”

Conflicts with the federal Families First Prevention Service Act and national research showing that stays in residential treatment facilities should not be longer than six months.

### **TECHNICAL ISSUES**

Page 2, Line 4 and Line 22 - Page 2, line 22 refer to a “criminal case.” However, the Children’s Code section referred to on line 23 is titled, “Disposition of a child with a mental disorder or developmental disability in a delinquency proceeding.” NMSA 32A-2-21. Accordingly, references to “criminal case” should be to a “delinquency proceeding.”

In addition, some ambiguity in the language of HB305 may need to be addressed. Critically, the amendment to Subsection E of Section 32A-2-21 using both an “and” and an “or” clause is somewhat unclear on whether it applies to all children shown to pose a likelihood of serious harm or only those that are charged with a felony.

Second, the definition of “likelihood of serious harm” gives rise to some potential confusion related to the requisite evidentiary showing. The definition of “likelihood of serious harm” only requires a showing by a preponderance of the evidence that a child presents a risk, but involuntary placement of a child in a treatment or habilitation program under the Children’s Mental Health and Developmental Disabilities Act requires a showing by clear and convincing evidence that a child poses a “likelihood of serious harm.”

CLB/al