

- Establishes a rebuttable presumption that a parent, guardian or other person charged with care of a child knows if the child has a disability; and
- Adds a definition of “disability” for purposes of Section 30-6-1. The definition provides that a medical diagnosis is not necessary to establish the existence of a child’s disability.

This bill does not contain an effective date. It is assumed the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

LOPD states that SB69’s broad definition of “disability,” which does not require a medical diagnosis, makes it likely that the issue of whether a particular child has a disability will be raised more frequently in child abandonment and abuse cases. This would increase LOPD’s need for investigators and experts. In addition, the higher penalties proposed by the bill would make plea agreements less likely, which would increase the number of cases going to trial. An increase in trials would require LOPD to hire or contract with additional attorneys with sufficient experience to handle the cases. These cases would likely require a greater number of expert witnesses for both the prosecution and defense to litigate the issue of whether a child meets the definition of disability. Although an accurate prediction of the fiscal impact is not possible, any increase in the demand or need for expert witnesses, experienced attorneys and other personnel would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

Like LOPD, AOC states SB69 may increase litigation in criminal child abuse cases where a child is believed to have a disability because of the increased penalties imposed by the bill and the presumption regarding a defendant’s knowledge of a child’s disability. According to AOC, hearings about disability and knowledge of disability have the potential to be lengthy and complex as they would most likely require the testimony of experts and possible examinations of the child. This would result in increased court time, including a possible need for more judges or court staff to manage the increase in litigation.

CYFD states that, if criminal prosecutions under SB69 lead to an increase in custodial proceedings before the Children’s Court, there may be a fiscal impact on CYFD not easily absorbed with existing resources.

SIGNIFICANT ISSUES

LOPD notes that children with disabilities are already protected by the existing abandonment and abuse penalties under Section 30-6-1. The increased punishment imposed by SB69 for a person who abuses a disabled child is based entirely on the child’s status, rather than on the egregiousness of the person’s conduct. Crimes based on the victim’s status raise equal protection and due process concerns because they can lead to disparate punishment for similarly-situated persons or increased punishment for arguably less severe or harmful conduct. For instance, LOPD states that in a case where a child abuse allegation stems from a child being nearby when spousal abuse occurs, a parent or guardian of a child with even a mild disability would face harsher punishment than a parent or guardian of a child without a disability, even if the latter case involved greater violence or riskier conduct by the defendant.

LOPD states that the bill’s broad definition of “disability” may include disorders such as Attention-Deficit/Hyperactivity Disorder (ADHD) and dyslexia. LOPD explains that, at the very least, the broad definition of “disability” would likely result in increased litigation over whether a particular child had a disability and whether the defendant knew the child had a disability. A similarly broad definition in the Americans with Disabilities Act (ADA) has resulted in litigation and confusion about whether ADHD and other conditions fall within the ADA’s definition. *See* <https://hrdailyadvisor.blr.com/2015/09/14/wait-adhd-is-a-disability> (discussing human resources concerns related to whether ADHD is a disability covered by the ADA).

LOPD notes that although the state is required to prove that a child has a “disability,” as broadly defined in the bill, SB69 does not require a formal medical diagnosis or expert testimony to establish the existence of a disability. Also, the bill establishes a rebuttable presumption that a parent, guardian or other caretaker knows if the child has a disability. This presumption means that the state does not have the initial burden of showing the defendant knew the child had a disability. Instead, that burden is put on the defense, who must prove that the parent, guardian or other caretaker did not know the child had a disability, as well as counter the state’s proof on the existence of the disability.

LOPD points out that the bill does not affirmatively require knowledge of the disability as an element of the crime; it merely implies that knowledge in the presumption created by the bill. Additionally, the bill does not specify that the disability must exist at the time the alleged abuse or abandonment occurred.

AOC notes that the presumption created by the bill assumes that caretakers or others charged the care of a child should and would know about a child’s disability. The category of potential defendants includes a wide range of individuals, including teachers or babysitters who may not recognize that a child has a disability, especially since the bill does not require a medical diagnosis to establish the existence of a disability.

CYFD points out that numerous studies have shown that children with disabilities (when compared with their non-disabled peers) are statistically more likely to be subject to abandonment and abuse. DDPC adds children with disabilities are less likely to self-report abuse. However, according to CYFD, it remains unclear whether increased criminal penalties, like those imposed under SB69, will ultimately reduce child abandonment and abuse. Historically, according to CYFD, increasing criminal penalties has not necessarily led to reductions in crime and in many cases caused more harm. Children with disabilities are more likely to live in communities of color and to be economically disadvantaged, with less access to resources and criminal justice services. Additionally, CYFD notes that many children with disabilities also have parents with disabilities who are also less able to access resources and are more susceptible to criminal prosecution and contact with the child welfare system.

TECHNICAL ISSUES

The language in the bill creating a presumption that a parent or other person charged with the care of a child knows that the “child suffers from a disability” might be changed to “child has a disability.” (Section 1, pp. 4-5 (adding subsection (L) to Section 30-6-1)).

OTHER SUBSTANTIVE ISSUES

LOPD suggests that the bill be amended (1) to require expert testimony to establish that a child had a disability at the time the abuse was inflicted; and (2) remove the presumption of knowledge for parents, guardians, and caretakers and instead require the state to establish that a defendant knew the child was disabled at the time of the alleged abuse or abandonment.

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