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FISCAL IMPACT REPORT

SPONSOR Lopez **ORIGINAL DATE** 03/07/21 **LAST UPDATED** 03/09/21 **HB** _____
SHORT TITLE Protective Custody for Children **SB** 324
ANALYST Bachechi

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Indeterminate					

(Parenthesis () Indicate Expenditure Decreases)

Relates SB196 and HB209
 Relates to an appropriation in the General Appropriation Act of 2021

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Children, Youth and Families Department (CYFD)
 Department of Public Safety (DPS)
 Human Service Department (HSD)
 Office of the Attorney General (NMAG)

SUMMARY

Synopsis of Bill

Senate Bill 324 amends the Family in Need of Court Services Act¹ as well as the Abuse and Neglect Act,² revising procedures for placing children into protective custody. In particular, SB324 limits law enforcement involvement in decision-making and assumption of temporary custody with regard to the temporary removal of children under these sections of law while concurrently updating the timelines and responsibilities of the Children, Youth, and Families Department (CYFD) pursuant to these sections.

¹ Chapter 32A, Article 3B NMSA 1978 may be cited as the "Family in Need of Court-Ordered Services Act"

² Chapter 32A, Article 4 NMSA 1978 may be cited as the "Abuse and Neglect Act".

SB324 details a new process for removal; allowing CYFD rather than law enforcement to take a child into protective custody. The bill prescribes only two ways CYFD can remove a child: (1) by seeking a removal order from the court via a removal application accompanied by a sworn statement, or (2) absent a removal order, because of well-defined exigent circumstances. If a child is removed without a removal order due to exigent circumstances, CYFD is required to seek a removal order within 18 hours to maintain the child in their care. SB324 also extends the period after removal, for family evaluation and the filing of an abuse and neglect petition from two days to three days. However, it reduces the time from the filing of the petition to custody hearing from 10 days to seven days. Specific amendments include

- Section 1 of the bill amends Section 32A-3B-3 NMSA 1978 to grant the department, rather than law enforcement, responsibility and discretion in taking children into protective custody in given circumstances.
- Section 2 of the bill amends Section 32A-3B-4 NMSA 1978, which covers time restrictions for protective custody, to remove any references to law enforcement and squarely place responsibility on CYFD. Additionally, Section 2 amends Section 32-3B-4(D) NMSA 1978 to allow the department three days, rather than two, to involuntarily hold a child pending the filing of a petition and amends Section 32A-3B-4(F) NMSA 1978 to remove a directive to a law enforcement officer to take custody of a child and deliver them pursuant to a court order.
- Section 3 of the bill amends Section 32A-3B-7 NMSA 1978, which limits time for a protective custody hearing, to require a hearing within seven days of a petition filed to determine if a child should remain with family or be placed in the custody of the department pending adjudication and makes technical correction, including gender neutral language.
- Section 4 of the bill amends Section 32A-4-2, NMSA 1978, which provides definitions for the Abuse and Neglect Act, to include a new, comprehensive definition for exigent circumstances, which would allow for removal of a child without an ex parte order if certain criteria, including probable cause of imminent harm to the child, are present.
- Section 5 of the bill amends Section 32A-4-3 NMSA 1978, which governs the duty to report child abuse and neglect, to include a provision that a report that is “screened out” by the department “shall not” be transmitted to law enforcement.
- Section 6 of the bill amends Section 32A-4-4 NMSA 1978, which covers complaints and preliminary inquiries, to remove a provision requiring the department to either recommend or refuse to recommend the filing of a petition and, consistent with Section 2 of the bill, amends the language to grant the department three days, rather than two, to file a petition when a child is taken into temporary custody.
- Section 7 of the bill overhauls Section 32-4-6 NMSA 1978, which deals with taking a child into custody. The portion which allows for a law enforcement officer to take a child into temporary custody in situations where an officer suspected abuse and neglect or in the event the officer suspected an emergency would be eliminated. The amendment replaces this section with newly established limited circumstances in which a child may

be taken into temporary custody. These include a district court order or exigent circumstances pursuant to Section 4 of this act. Additionally, Section 7 outlines the procedure for temporarily removing a child pursuant to a court order or in the event of exigent circumstances, as well as addresses circumstances where siblings could be subject to temporary removal. Further, Section 7, subsection F, adds a provision for law enforcement or medical personnel to hold a child in the event of suspected abuse and neglect pending an on-site safety assessment. Section 7 also includes procedural responsibilities for the department in the event of temporary removal, including a requirement the department obtain an ex parte removal order from a judge within 18 hours of the department obtaining temporary custody pursuant to exigent circumstances. Finally, Section 7 includes provisions in the event the child is believed to be a Native American child.

- Section 8 of the bill amends Section 32A-4-17.1 NMSA 1978, which addresses notice to grandparents and relatives, to replace references to law enforcement with the department.
- Section 9 of the bill amends Section 32A-4-18 NMSA 1978, which governs procedure for custody hearings, to include a requirement for the court to uphold temporary custody in the event a parent or guardian “left the child without adequate supervision or a plan for support and care.” This language replaces existing language that the court find the parent or guardian is “unwilling or unable” to provide care. Additionally, Section 9 eliminates language that explicitly connects the petition to situations “when a child alleged to be neglected or abused has been placed in the legal custody of the department.” Finally, Section 9, subsection J, removes “Indian children” and replaces it with “parties and the Indian child’s tribe in a proceeding to which the Indian Child Welfare Act applies.”
- Section 10 of the bill establishes a new section of the Abuse and Neglect Act regarding post-petition removal hearings. Initially, Section 10 explains when a child may be removed by the department. This is followed by subsections detailing the procedures for removal hearings held before or after a child is adjudicated as abused or neglected, including considerations for the court and burdens of proof, and an appellate outline. Finally, Section 10, subsection I, explains rights pursuant to the Indian Child Welfare Act will not be abridged.
- Section 11 of the bill repeals Section 32A-4-7, which governs the release and delivery of a child from custody. Section 11 also repeals Section 32A-4-16 NMSA 1978, which currently controls ex parte custody orders.

The effective date of the bill is October 1, 2021

FISCAL IMPLICATIONS

No appropriations are requested in SB324. However, AOC notes there are fiscal implications for the judiciary. The requirement the court produce a removal order for every child removed from the home by CYFD, even if just for a very short period of time, is expected to be a new burden on the judiciary. This will manifest itself in additional hours worked by judges, training across all positions of the judiciary, and restructuring of docket management.

CYFD notes, the bill creates an extra step in the hearing process when it is determined that a child must be removed from the home to ensure the safety of a child. This is likely to have some fiscal impact upon the investigation staff and legal staff including attorneys, paralegals and legal administrators. However, as reported in the LFC evaluation short-term placements in foster care cost the state up to \$13.7 million a year and cost families \$16.5 million a year.” If the changes in the removal process contained in this bill are successful in reducing short-term placements, then any additional cost will be absorbed through savings.

SIGNIFICANT ISSUES

SB324 was drafted to address issues with short-term foster care placements and the current statutory framework for removing children from their family homes and placing them in the custody of CYFD, as detailed in the Legislative Finance Committee’s program evaluation on short-term foster care placements, published on May 18, 2020. Recommendations in the report include changing the Children’s Code to place removal authority with CYFD. While CYFD administers child welfare services in New Mexico, currently the Children’s Code stipulates law enforcement officers have the sole authority for removing a child from the home. New Mexico is one of only four states that grants law enforcement the sole authority to remove a child from the home based on suspected abuse or neglect and this policy likely adds to the state’s high rate of short-term placements.

States that grant removal authority to law enforcement generally have short-term foster care placement rates above the national average, and New Mexico has significantly higher rates than the other three states (Arkansas, Georgia, and Hawaii) that grant removal authority to law enforcement. Over at least the last six years, approximately 48 percent of children placed into foster care in New Mexico stayed in care for less than 30 days before being reunited with family, giving New Mexico one of the highest short-term placement rate in the nation. The national average is 8.7 percent.

The high rate of short-term placements has significant impact on both the children and families who experience unnecessary trauma. Research shows children removed from the home often have worse outcomes than those not removed, costing taxpayers and families tens of millions of dollars per year. These negative impacts are likely related to the trauma associated with parental separation and the child’s feelings of fear, uncertainty, and abandonment. Over 90 percent of the state’s short-term placements are in care for less than eight days. These short-term placements are less likely to be placed with relatives, a recognized best practice. Short-term placements also add to the workload of the department and divert essential resources and attention away from the children and families who are unsafe or at risk.

In line with the recommendations in the LFC evaluation, SB324 changes the current statutory framework to place removal authority with CYFD and aligns New Mexico with best practice in reducing the re-traumatization of children being taken into protective custody by giving the department the ability to take custody children and limiting law enforcements’ role. As a result, new definitions, proceedings and processes are delineated. SB324 makes room for law enforcement to remove children in collaboration with CYFD under the defined exigent circumstances. The bill also allows for law enforcement to be the affiant that accompanies the removal application to the court. SB324 eliminates law enforcement as the primary authority for removal but speaks directly to inevitable law enforcement involvement in abuse and neglect matters.

Change of Procedure

SB324 is proposing significant changes to the current procedures and processes in place. AOC notes these changes will require new procedures and protocols be developed, training for judges who are not familiar with abuse and neglect matters, and calendaring adjustments that all parties to abuse and neglect cases are accustomed. It will be an entirely new way of handling these matters, on new timelines, all of which will impact the judiciary.

Requirement for a Removal Application and Order

SB324 requires CYFD to present a removal application accompanied with a sworn statement to the court to receive a removal order and requires the court to consider whether the threat can be mitigated by less extreme measures and whether the harm from any imminent threat of abuse or neglect outweighs the harm to the child before issuing a removal order. The bill also requires each child be assessed individually and not remove solely because there is a threat of abuse or neglect to that child's sibling.

AOC notes this process is not currently in place for abuse neglect cases, and in many counties in New Mexico, courts are divisionalized, leaving many judges without the regular experience of assessing abuse and neglect matters. All courts will have to develop new procedures and protocols to accomplish what SB324 requires, and training will have to be provided for all judges across the state. The development of such protocols, procedures, and training takes significant time, effort, and coordination to put into place in a manner that is effective, efficient, and serves the spirit of the law, striking the balance between child safety requirements and trauma caused by removing a child from their home.

Unspecified Periods of Time

SB324 requires, once CYFD determines filing an application for removal is necessary, "it shall be filed without delay." Section 6, page 19, line 13-14. There is no specification or perimeters on what "without delay" means.

In the removal process, SB324 states, "Pending the department filing the application and the court's action on the application, the department may hold and transport the child." There is no definition for what it means to hold and transport a child, and there is no specified period of time that this "hold and transport" can last without a removal order.

Exigent Circumstances

SB324 makes allowances for situations that present exigent circumstances, allowing CYFD to place a child in protective custody if it is probable cause to believe that the child is likely to suffer serious imminent harm in the time it would take to obtain an ex-parte removal order, there is no less intrusive alternative to removing the child from the home that would reasonably and sufficiently protect the child's health or safety and probable cause exists to believe one of the following is true: (1) the child requires immediate care or diagnosis for sexual abuse or abuse involving serious physical injury; (2) the child is in need of immediate medical care for a serious medical condition; (3) the physical environment poses an immediate threat to the health or safety of the child that cannot be mitigated by any reasonable means other than immediate removal; or

(4) the child has been left by the parent, guardian or custodian without adequate supervision plan for support and care.

Heightened Requirement for Efforts to Eliminate or Prevent the Need for Removal

The goal of SB324 is to limit the removal of children to those who truly require removal to provide safety. SB324 requires CYFD to make active efforts to prevent or eliminate the need for removing the child from the child's home, with the paramount concern being the child's health and safety. Due to both the human and fiscal costs associated with the removal of children, the goal of SB324 is to limit the removal of children to those who truly require removal to provide safety. Nationally, child welfare systems are reflecting a growing recognition of the importance of prevention and early intervention to keep children safe, preserve and strengthen families, and keep children and families out of the system all together.

Extending the Timeline for Filing of a Petition

Currently, CYFD has 48 hours from the time in which law enforcement removes a child to evaluate a family and its supports, decide whether the filing of a petition is necessary, and actually file the required petition. SB324 would universally extend that timeline from two days to three days. This would allow CYFD more time to evaluate and plan with the family, while the child is out of the care of their parents. This tends to be a period of time marked by high emotions and distrust. This additional time may allow for more thoughtful, calmer decision-making by all parties and aligns with proposed timelines in SB97 (guardianship changes).

Provisions regarding Native American Children

The bill contains the following provisions regarding Native American children:

- CYFD will make reasonable efforts to determine whether the child is Native American and provide written notice to the child's tribe of its investigation;
- CYFD must make active efforts to prevent or eliminate the need for removing the child from the child's home, with the paramount concern being the child's health and safety;
- If CYFD knows or has reason to know that the child is a Native American child, CYFD shall also provide remedial services and rehabilitative programs designed to prevent the breakup of the Native American family; and,
- If a child taken into temporary custody is a Native American child or there is a reason to know the child is a Native American child, CYFD shall give notice to the agent of the child's tribe in accordance with the federal Indian Child Welfare Act of 1978.

Reducing the timeline for a custody hearing

SB324 reduces the time between the filing of a petition and a hearing before a court from 10 days to seven days. This reduces the amount of time a parent has to wait to be heard on the removal of their child and potentially have a court return the care of their child to them. However, it also reduces the amount of time a parent and their newly appointed attorney have to meet and develop a legal strategy for the custody hearing, as well as the time CYFD has to serve the parents or respondents in a case prior to the custody hearing.

Law Enforcement and Liability Concerns

SB324 allows for the department to screen out reports that “shall not” be transmitted to law enforcement. DPS contends CYFD may “screen out” a report if at the time the report is received the perpetrator is not currently in a position to inflict additional harm. DPS provides, as an example, a child who is in CYFD custody and placed with foster parents may report abuse by a parent that occurred in the past. CYFD may “screen out” this report, even if the child may return to the perpetrator because CYFD’s focus is on current safety, and not what happened yesterday or what may happen tomorrow. In contrast, DPS notes, law enforcement is concerned with whether a crime occurred in the past. Due to different roles of CYFD and law enforcement and the different lens through which each views reports, DPS argues all reports should always be cross-reported. The Attorney General (NMAG) also reports, if the purpose of transmitting these reports to law enforcement is to effectuate potential prosecution, it may be prudent the law enforcement agencies, rather than the department, screen cases to decide which allegations should be investigated.

DPS further notes, SB324’s required finding of “independent probable cause ... to believe temporary custody is necessary as to each child” means, if a parent inflicted serious physical injury or death on one child, separate grounds would need to be found to take other child into custody. This causes unnecessary risk of harm to other children in the custody of the accused parent or guardian. DPS asserts a parent or guardian who acts inappropriately with one child will act inappropriately with another and should not get opportunity to harm each child, before all are protected.

NMAG notes SB324 removes law enforcement from assuming custody of children and places the responsibility squarely on the department. Oftentimes, there are dangerous situations involved when the government takes custody of a child, and the updated language does not explicitly order law enforcement to stand by or assist in those situations, other than to order officers to “hold” a child pending a site visit. Specifically, the bill provides that a law enforcement officer or medical personnel who has a reasonable belief that a child has been injured as a result of abuse or neglect, or that the child may be at risk of harm if returned to the child's parent, guardian or custodian, shall hold the child until CYFD is available to conduct an on-site safety assessment to determine whether it is necessary to take the child into temporary custody.

HSD notes, Section 7 F, page 21, giving law enforcement and medical personnel the ability to temporarily detain a child when they believe there is a risk of harm if returned to parents, while an important protection, potentially places law enforcement and medical personnel at significant risk of civil rights liability. There is no standard in the proposed legislation for what constitutes “risk of harm.” This section should be modified to so medical personnel and law enforcement can make such a determination without risk of liability.

PERFORMANCE IMPLICATIONS

With the proposed changes in timelines, requirement of a removal order, and the required heightened efforts by CYFD, the removal of children from their families for short-term placements should drop. The aim of SB324 is to reduce the number of children removed from their families to those who only truly must be removed for safety reasons and provide more access to court oversight throughout the process.

ADMINISTRATIVE IMPLICATIONS

Compliance with the changes proposed in SB324 will require administrative adjustments and new protocols. These administrative adjustments will look different in each judicial district. Compliance with SB324 will take extensive planning, training, and coordination within the judiciary.

CYFD will need to develop policies and procedures to implement practice around removal petitions and the process for a removal based on exigent circumstances. CYFD will also need to provide training to its staff, particularly investigations and legal, to address the change in practice from law enforcement removal to CYFD-driven removals.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB324 relates to SB196, which aims to create a task force to study and make recommendations to change the Children’s Code, although it does not explicitly mention the Abuse and Neglect Act.

SB324 relates to HB209 State Indian Child Welfare Act, creating a new state statute that mirrors the federal IWCA statute.

TECHNICAL ISSUES

In section 5 A, page 13, the statute is left as is, which reads: (mandated reporters) report immediately to law enforcement, the department, and or tribal entity. It is not clear how reports from law enforcement will be reported back to the department prior to or after an investigation by law enforcement.

AMENDMENTS

CYFD notes, after participating in a discussion with the judiciary and other stakeholders and based on the assessment of implementation needs, including time for training, CYFD recommends extending the effective date of the legislation from October 1, 2021, to December 31, 2021, to ensure that the implementation is thorough and appropriate.

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