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FISCAL IMPACT REPORT

SPONSOR <u>Lord/Mirabel/Moya</u>	LAST UPDATED <u>02/27/2023</u>	ORIGINAL DATE <u>02/09/2023</u>
SHORT TITLE <u>Placement of Temporary Custody Children</u>	BILL NUMBER <u>House Bill 196</u>	ANALYST <u>Chilton</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
		Indeterminate but substantial	Indeterminate but substantial	Indeterminate but substantial	Recurring	General Fund

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent version of this legislation.

Sources of Information

LFC Files

Responses Received From

Children, Youth and Families Department (CYFD)
 Office of the Attorney General (NMAG)
 Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of House Bill 196

House Bill 196 amends Section 32A-4-8 NMSA 1978 to change the order of preference for placement of children removed from parental care. Previously, if a relative was not available, children would be placed first in a licensed foster home and second in a licensed child welfare service facility. Now the child would be placed in the following, in descending order of preference:

- 1) Fictive kin,
- 2) Licensed family foster care,
- 3) Therapeutic foster care,
- 4) A group home,
- 5) A residential treatment facility.

A court must presume that a child’s current placement is the best alternative, unless there is evidence that that is not so. A foster parent or a fictive kin with whom a child has been living is assumed to have a significant relationship with the child.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

There is no appropriation in House Bill 196. CYFD believes that the fiscal impact of the bill on the department to be “significant,” but does not estimate that cost. CYFD states “The administrative implications of requiring CYFD to place children via checklist cannot be absorbed by existing resources.”

SIGNIFICANT ISSUES

CYFD has the following concerns relative to House Bill 196:

The bill declares that the “child’s preferred order of placement is”, but it is unclear whether the bill means “the preferred order of placement *for* the child” or “the order of placement preferred *by* the child”. If the latter, and the child’s wishes are to be considered paramount over their best interests, this could cause significant issues with CYFD ensuring appropriate placement of the child. If the former, the bill conflicts with CYFD’s authority to “determine where and with whom a child shall live” (§32A-1-4(T)).

Having legal custody of the child, and the duty to protect and meet the child’s needs, CYFD must retain the discretion to assess the complex array of factors involved and make placement decisions that meet the best interests and needs of the child. The exercise of that discretion currently includes following the requirements and placement preferences established by the Indian Child Welfare Act and the Indian Family Protective Act. CYFD supports and prioritizes placement with relatives as the first and best option whenever such placement is possible and meets the child’s needs.

Relative placement should always be the first priority placement for any child; and in the Indian Child Welfare Act and New Mexico’s Indian Family Protection Act, relative placement has been identified as such. Both the Indian Child Welfare Act and the Indian Family Protective Act, call for active efforts to identify family, extended family, and fictive kin (as established by the Nation/Pueblo/Tribe’s law, custom, or tradition) for placement for Indian children.

The proposed amendment further restricts CYFD’s ability to determine the placement that is in a child’s best interest when placement with a relative is not possible. The list does not account for all placement types, and the order of preference does not take into account:

- Child-specific needs,
- The voice and input of youth age 14 and over,
- The input of parents and importance of maintaining connections,
- Other case specific needs and circumstances.

The child’s needs and circumstances of the case change over time and CYFD’s work with the family progresses. Other placement considerations pursuant to CYFD policy include close proximity to the child’s home of origin, placement in the least restrictive setting, and educational continuity. Addressing the complex factors involved in placement decisions through policy and procedure allows CYFD to continually assess and improve

those criteria. This bill strips CYFD of that discretion.

The provision that “a foster parent or fictive kin caregiver with whom the child has resided for six months or more is a person who has a significant relationship with the child” is contrary to the definition of fictive kin in the Indian Family Protection Act. That definition provides that the significant relationship with the child or family must pre-exist the child coming into custody (with some exception for fictive kin identified by youth 14 and over). This provision attempts to establish that fictive kin relationships may be created through placements with resource parents who may have no pre-existing relationship with the child.

Updating the current language of 32A-4-8B would be appropriate in the following respect (current language being inconsistent with licensing standards and placement options):

(1) a licensed foster home ~~or any home authorized under the law for the provision of foster care or group care or use as a protective residence;~~

The remainder of the changes identifying placement options remove approval and licensing references that should remain.

TECHNICAL ISSUES

According to CYFD, “It is unclear whether the ‘child’s preferred order of placement’ means ‘the preferred order of placement FOR the child’ or the ‘order of placement preferred BY the child.’”

AOC raises a number of concerns with this legislation:

There is argument that fictive kin should be treated the same as relatives. Julia Eger, in a recent American Bar Association article, writes that “States that have not already done so should amend their laws to treat fictive kin the same as relatives in the contexts of kinship foster care, placement resources.

Subsection C of HB196 creates the presumption that continuation of the child’s placement with the current caregivers is in the best interest of the child, absent evidence to the contrary. This is problematic, as it fails to recognize the federal requirements that state agencies must give preference to an adult relative over a nonrelated caregiver.

HB126 New Subsection D creates an automatic significant relationship finding when a foster parent or fictive kin caregiver has had the child residing in their home for six months or more. The term “significant relationship” is used in the children’s code only when defining fictive kin. Thus, Subsection D would essentially make foster parents fictive kin, as foster parents would then meet the definition of fictive kin found in Section 32A-4-2(E) NMSA 1978 when the child is in their home for six months or more.

Federal requirements around placement includes CYFD maintaining documentation in the child’s case file which demonstrates that the prospective guardian meets the “fictive kin” definition...Yet this federal definition requires a “significant emotional tie that existed prior to the agency’s involvement.” Foster parents are defined in the Children’s Code as, “...a person, including a relative of the child, licensed or certified by the

department or a child placement agency to provide care for children in the custody of the department or agency,” *See* Section 32A-1-4(I) NMSA 1978. Thus by definition, foster parents who are not relatives typically do not have a relationship with a child *prior* to the agency’s involvement. If that relationship did exist prior to agency involvement, then that foster parent would instead fall under the original fictive kin definition in New Mexico.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

As noted by AOC, “Without this legislation, fictive kin are not a preferred temporary placement option for a child when a relative is not available to provide foster care.”

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