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## FISCAL IMPACT REPORT

<b>SPONSOR</b> <u>SJC</u>	<b>LAST UPDATED</b> _____
	<b>ORIGINAL DATE</b> <u>3/8/23</u>
<b>SHORT TITLE</b> <u>Office of Child Advocate Act</u>	<b>BILL</b> <u>CS/Senate Bill</u>
	<b>NUMBER</b> <u>373/SJCS</u>
	<b>ANALYST</b> <u>Chenier</u>

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

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
			\$515.0	\$515.0	Recurring	General Fund (Office operating costs)
			\$84.1 – \$252.2	\$84.1 – \$252.2	Recurring	General Fund (CYFD)
<b>Total</b>			<b>\$599.1-\$767.2</b>	<b>\$599.1-\$767.2</b>		

Parentheses ( ) indicate expenditure decreases.

\*Amounts reflect most recent analysis of this legislation.

Similar to House Bill 11- Office of Child Advocate Act  
 Possible Relationship to House Bill 187- CYFD Policies & State Rules Act  
 Possible Relationship to House Bill 326- CYFD Abuse & Neglect Support Services  
 Possible Relationship to Senate Bill 150- CYFD Plan of Care Failure Assessments  
 Possible Relationship to House Bill 434- Child Rights, Dept. collaboration & Newborns

### Sources of Information

LFC Files

#### Responses Received From

Children, Youth and Families Department (CYFD)  
 Attorney General’s Office (NMAG)

#### No Response Received From

Department of Finance and Administration (DFA)

## SUMMARY

### Synopsis of SJC Substitute for Senate Bill 373

The Judiciary Committee Substitute for Senate Bill 373 creates the Office of Child Advocate, administratively attached to NMAG, and creates the position of State Child Advocate who will oversee the office and may be removed by the governor. The bill also creates the State Child Advocate Selection Committee consisting of nine members. The Committee is tasked with filling the position of State Child Advocate.

The duties of the office include reviewing systemic issues involving services received by children and families, receive complaints, review current systems to determine how those systems protect and enhance children’s dignity, privacy, healthcare, and education, promulgate rules to carry out the responsibilities of the Office, and submit an annual report to the Legislature and the governor on or before December 1 of each year.

The State Child Advocate is to provide staff with federal, state, local, and tribal law training regarding child protection and juvenile justice services in the state, investigative techniques, the Federal Indian Child Welfare Act, and other matters that the office deems appropriate.

The department would be required to provide the office with reports regarding children who have been physically injured or where there is a significant risk to injury in the department’s custody. The department is also required to provide a report regarding any fatalities or restraints and seclusions of any children in the custody of the department. Law enforcement is also required to provide any law enforcement reports regarding any children in the custody of the department. Any records received by the office are deemed confidential pursuant to the bill unless disclosure is required by court order or is deemed necessary because of imminent harm. Moreover, the department is required to notify the office of all children placed in its custody, receive services, or who are referred to the department.

Finally, the bill amends Section 32A-2-32 NMSA 1978 and Section 32A-4-33 NMSA 1978 to include provisions allowing the office to receive most records provided for under paragraph A of that section.

The effective date of this bill is July 1, 2023.

## **FISCAL IMPLICATIONS**

CYFD said it is estimated the department will require a minimum of 2 additional FTE to field the records requests associated with the office. This will be in addition to the staff time related to participation in the investigations themselves. The current anticipated impact to CYFD is between \$84.1 thousand and \$252.2 thousand annually.

This bill does not include an appropriation to establish the office. DFA did not provide an analysis of the expected costs of establishing the office.

It is assumed that the office would require at least 5 FTE including the chief advocate, an administrator, and three personnel to conduct the investigations. Assuming an average FTE cost of \$98 thousand including benefits and \$25 thousand for computer equipment and other supplies, the minimum cost of the office would be \$515 thousand.

## **SIGNIFICANT ISSUES**

NMAG said that Section 6 makes several references to “department”. However, the bill does not contain a definition for “department” or provide an explanation for who “department” refers to in this section or in other sections throughout the bill.

CYFD provided the following:

The bill authorizes an office outside of CYFD with making recommendations or decisions on child and family welfare, which could potentially violate the single state agency requirement for certain federal funding, such as Title IV-E funding. If New Mexico is out of compliance with federal law, this could jeopardize the state's Title IV-E funding, with estimated losses between \$750 thousand and \$1.5 million annually in Title IV-E penalties. 42 USCA §672 and 45 CFR 1356.71. If found out of complete compliance, due to violating the single state agency requirement, CYFD could lose upwards of \$30 million a year. CYFD cannot absorb even the most minimal impact of lack of compliance with existing resources.

This bill duplicates services and programs already provided at CYFD by the Office of Children's Rights (OCR), which administers the CYFD grievances process for children and youth. The OCR supports the promotion of the New Mexico Child and Youth Bill of Rights and grievance process; investigates cases, advocates for children and youth, and provides CYFD with final determinations and recommendations; offers recommendations for systemic reform; provides numerous training and presentations to the public and a required course for all CYFD protective services staff; and promotes the rights of children and families in New Mexico by supporting social justice advocacy through inclusion, equity, LGBTQ rights, access to reproductive health services and trauma-responsive behavioral health services, and a family-centered approach by identifying innovative and transformative approaches to child welfare reform.

If the complaint relates to personnel matters, the State Personnel guidelines for investigation and due process must be followed and all matters related to personnel investigations are confidential. The bill's requirement to notify the complainant of the outcome of the investigation would violate any CYFD employee's right to confidentiality in their personnel matters.

There is ambiguity regarding the extent of the bill's confidentiality provisions.

- The bill prohibits the disclosure of identifiable information for a child, but does not prohibit it for a parent, guardian, or custodian. The bill also allows for disclosure of identifiable information for a child if the information is already known to the public. These provisions do not adequately protect the privacy and rights of the parents and children involved. Parents, guardians, and custodians are unprotected. Children could have their identifiable information disclosed when publicly known, but the disclosure by the child advocate could tie that identifiable information to other disclosures, making connections that were previously private and confidential. Additionally, the allowance for disclosure of information already known to the public is in direct conflict with NMSA 1978 §32A-2-26(E) and §32A-4-33(D), which make the unauthorized disclosure of confidential juvenile justice and protective services records or information a criminal offense.
- The bill also does not discuss or address federal confidentiality requirements such as HIPAA, FERPA, or the Violence Against Women Act. 42 U.S.C. 5106a. Title IV-E of the Social Security Act, 42 U.S.C. 671(a)(8), and related federal rules at 45 CFR 1355.30 and 45 CFR 205.50, require that states restrict use and disclosure of information regarding children receiving title IV-E assistance, such as those

receiving placements or sex trafficking victims, to receive federal funding.

While this newly created office is charged with either investigating or referring complaints, there is no indication what will be done with investigation outcomes outside of them being communicated to the complainant. It is likely that these outcomes of the office will be disputed on occasion. It is unclear if the outcomes would be appealable in those situations, and what entity would handle such an appeal. It is also unclear whether the office's investigation outcomes will have binding requirements, or merely be considered advisory.

Consistent with the Kevin S. litigation settlement, CYFD has improved its grievance processes available to children, resource parents, and parents involved in the child welfare system. This work was conducted with Casey Family Programs and other stakeholders in a thoughtful and inclusive manner. This is consistent with child advocate offices in multiple other states, including California and Texas, as found at the website for the National Conference of State Legislatures, which have child advocate offices within the state child welfare agency.

CYFD has implemented a Data Validation Plan to validate progress toward the outcomes of the Kevin S. settlement. This bill adds metrics (such as the condition of placements for New Mexico's children, the number of out-of-state placements, assessments of active congregate facilities, and the number of children who have run away) which will likely require extensive changes and a possible redrafting of the Data Validation Plan, including a re-approval process. Not only will such changes affect the state's ability to meet existing timelines, but it could also increase costs significantly.

The language emphasizing the reporting of systemic issues duplicates the role and function of the Substitute Care Advisory Council (SCAC), which is authorized by both state and federal law NMSA 1978, §§32A-8-1 et seq., and the federal Child Abuse Prevention & Treatment Act (CAPTA), 42 U.S.C. §5101 et seq). The SCAC provides independent monitoring of children placed in CYFD custody and evaluates the extent to which CYFD is effectively discharging its child protection responsibilities. These evaluations also include reporting of systemic issues and concerns. It is unclear how this office would interact with the SCAC, or indeed any of the other existing entities that perform similar review processes, including the New Mexico Children's Court Improvement Commission, the New Mexico Child Fatality Review Board, Juvenile Justice Advisory Committee and Boards, and the Governor's Children's Cabinet.

It is unclear how this bill interacts with either the Indian Family Protection Act, which codifies the federal Indian Child Welfare Act and expands protections and procedures for Native children, or the Office of Family Representation and Advocacy Act, an independent office for the representation of children and families in abuse and neglect matters.