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FISCAL IMPACT REPORT

SPONSOR Park DATE TYPED 2/28/2005 HB 471/aHGUAC
 SHORT TITLE Curfew Enforcement Act SB _____
 ANALYST Dunbar

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
	NFI				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General (AG)
 NM Public Education Department (NMPED)
 Administrative Office of the District Attorneys (AODA)
 Administrative Office of the Courts (AOC)
 NM Department of Corrections (NMDC)

SUMMARY

Synopsis of Amendment

The House Government and Urban Affairs Committee amendment to House Bill 471 provides for:

- A definition of a family education program,
- Procedures for a law enforcement officer to follow in questioning a child for a curfew violation. The questions are limited to determination of identity, age, address, phone number, the name address of the child's parents and or guardians. The officer must also determine if the child qualifies for one of the exceptions of the Act.
- Clarifying language when a child has permission to be outside the home and away from the direct supervision of the child parents or guardians.
- Citations to be issued to the parent or guardians for curfew violations (child will also be cited),
- Data that is collected to include information on race, age, and sex of child and shall not include any personal information such as photographs, tattoos, name or home address by which a child or family could be identified.

- A delayed repealed of July 1, 2009.

Synopsis of Original Bill

House Bill 471 enacts the Curfew Enforcement Act within the Children's Code to protect children from dangerous circumstances. The Curfew Enforcement Act ("Act") provides that a municipality or county may enact a curfew ordinance applicable to children under 16 years of age during the time period between 12:00 a.m. and 5:00 a.m., if the municipality or county establishes a family education program that provides information about the curfew and the availability of community services.

The bill contains four exceptions that an ordinance would have to include: (1) activities authorized by a school, religious organization or community organization; (2) verified employment/work-related errand; (3) parental permission; and (4) an emergency.

The Act provides for enforcement through issuance of a warning to the child for the first violation and issuance of a citation to the child for the second violation, which requires that the family attend a family education program. Upon issuance of a second citation (third violation) the officer shall also call the CYFD juvenile justice call center and attempt to contact the parents or legal guardian. Citations are subject to appeal to a hearing officer appointed by CYFD. If the family does not attend the family education program or in the event of a third or subsequent violation, the child shall be referred to CYFD for assessment of whether the child is an abused or neglected child. The Act provides that CYFD shall adopt rules for collection of data on curfew ordinances and report annually to the legislature.

The Act contains definitions for an "abused child" and "neglected child."

Significant Issues

Because the law has so many exceptions, PED expresses concern that law enforcement will be put in the difficult position of determining whether a child has a proper note from his parent, church or school. Not clear is how law enforcement can or must verify if a child is excused from being issued a citation for violating the act without taking the child into custody. Also, if a parent or guardian at a violation hearing can simply say he/she gave his/her child permission to be out after midnight, the express purpose of the act would be defeated.

PED also raises issues about a municipality's exposure to civil liability if law enforcement issues a citation to a minor who is later injured or killed because the child was not taken into custody. The bill does not permit the taking of minors into custody, which has its own risks. See, *ACLU v. City of Albuquerque*, 1999-NMSC-044, (Invalidating a curfew ordinance geared toward minors that permitted taking them into custody because the ordinance was preempted by the Delinquency Act of the Children's Code.)

PED believes that the legislation will inevitably lead to confrontations between law enforcement and minors that will implicate the search and seizure guarantees of the Fourth Amendment to the U.S. Constitution and Article II, Section 10 of the New Mexico Constitution. Lawsuits will follow when minors are taken into custody after being stopped by law enforcement ostensibly to enforce the act. See, *State v. Jason L.*, 2000-NMSC-018, (Suppressing the search and seizure of a handgun from a 15-year-old walking with a friend at night about whom the Court concluded

there was not sufficient individualized suspicion regarding criminal behavior.); *Eli L.*, 1997-NMCA-109, (Officers must possess "at the time the Child was stopped . . . reasonable individualized suspicion that the Child had committed or was about to commit a crime."); *United States v. Little*, 60 F.3d 708, 712 (10th Cir. 1995) (Questions asked in an accusatory, persistent, and intrusive manner can make an otherwise voluntary encounter . . . coercive.); *United States v. Sanchez*, 89 F.3d 715, 718 (10th Cir. 1996) (Stating that the "threatening presence of several officers" and the "absence of other members of the public" are factors that could indicate that a reasonable person would not feel free to ignore an encounter with the police). *United States v. Little*, 18 F.3d 1499, 1505, n. 6 (10th Cir. 1994) ("Characteristics such as whether the person being questioned is a child or an adult . . . are objective and relevant" to the question of whether a reasonable person would feel free to leave.); *State v. Paul T.*, 1999-NMSC-037, (The full-blown search by a police officer of the pockets of a 15-year-old for violation of a curfew exceeded the lawful and limited protective search under the Fourth Amendment.)

The New Mexico Supreme Court in *ACLU v. City of Albuquerque*, Id. at ¶19, noted that Section 32A-3B-3(A)(4) of the Children's Code authorizes law enforcement to take children into protective custody who are endangered by their surroundings.

FISCAL IMPLICATIONS

The bill would require municipalities who passed curfew ordinances to establish a Family Education Program. Additionally, the CYFD would have to have sufficient hearing officers to hear appeals of the issuance of citations to curfew violators. The cost for CYFD to establish these programs or increase FTE cannot be determined by the Public Education Department (PED).

ADMINISTRATIVE IMPLICATIONS

The bill requires the CYFD to adopt rules regarding *ACLU v. City of Albuquerque* during the collection of curfew data and report this data annually to the Legislature.

Because HB 471 is unclear as to whether a court will be asked to resolve issues regarding exceptions to the ordinance that will be claimed, it is unknown if enactment of this bill would impact various judicial resources. AOC, however, is expecting that challenges to the constitutionality of curfew ordinances will occur, requiring the involvement of court personnel and requiring the allocation of judicial resources.

TECHNICAL ISSUES

The AG suggest deleting the definitions "abused child" and "neglected child" in Section 2 of HB 471 and add a new Section 2 that states that, unless otherwise provided, terms used in the Curfew Enforcement Act shall be defined under the "Children's Code General Provisions Act" or the "Abuse and Neglect Act."

HB 471 uses the term department without a definition. Presumably, the term means CYFD as defined in the "Children's Code General Provisions Act."

Even though the bill ostensibly does not authorize taking children into custody, the bill's requirement of having law enforcement issue a warning or citations for a "first violation" or "second violation" respectively, make it appear that acts of delinquency are involved.

As discussed above, PED notes that section 5 contains so many general exceptions to a child's "violation" of the bill's curfew requirement as to create confusion for law enforcement who would be required to determine the veracity of these exceptions in their determination to warn or cite a minor. As discussed above, taking or not taking a child into custody while verifying the child's authority to be outside of his home could expose the municipality to liability.

Given that an officer "shall issue a warning to the child," It is not clear that how another officer would know if a child has previously violated a curfew ordinance and should be issued a citation for a second violation. (Line 22, Page 4) The officer may not have information regarding prior offenses and without that information it may be difficult to meet the conditions.

OTHER SUBSTANTIVE ISSUES

According to the AG's office, in 1999, the New Mexico Supreme Court struck down an Albuquerque curfew ordinance that criminalized juvenile activity that is not unlawful when committed by adults. The Supreme Court held that the Delinquency Act of Children's Code preempts the City from enacting and enforcing the curfew ordinance because the ordinance authorizes criminal punishment of children for acts that would not be a crime under the law if committed by adults. Moreover, the Supreme Court rejected the argument that the lateness of the hour was inherently dangerous to children and held that the City cannot take children into protective custody without (1) a fact-specific showing allowing protective custody under Families in Need of Court Ordered Services Act, § 32A-3B-3 and (2) compliance with the safeguards and placement requirements of the Children's Code. See American Civil Liberties Union of New Mexico v. City of Albuquerque, 1999-NMSC-044. HB 471 allows municipalities and counties to enact non-criminal curfew laws that divert the children and families to the provisions under the Children's Code.

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