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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/07/07  
 LAST UPDATED 3/12/07      HB 632/aHBIC/aSPAC

SPONSOR Garcia, M. P.

SHORT TITLE Child Care Provider Collective Bargaining      SB \_\_\_\_\_

ANALYST Lucero

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	None		General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		\$0.1*			Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

**\* Additional costs are significant but unquantifiable.**

Companion to SB 372  
 Relates to Appropriation in the General Appropriation Act

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Children, Youth and Families Department (CYFD)

Personnel Board Compensation Issues, Insurance, & Other State Employee Benefits

Attorney General's Office (AGO): *This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion letter. This is a staff analysis in response to the agency's, committee's or legislator's request.*

### SUMMARY

#### Synopsis of SPAC Amendment

Senate Public Affairs Committee Amendment to House Business and Industry Committee

amended House Bill 632 strikes on page 3, line 14, “and representation fees”.

Synopsis of HBIC Amendment

House Business and Industry Committee amendment to House Bill 632 makes the following changes:

1. On page 3, line 19, strikes "benefits,"
2. On page 3, line 24, after the period inserts: "The labor organization and the state agency shall work together to explore systems for family child care providers to access affordable, comprehensive health insurance coverage."
3. On page 4, between lines 3 and 4, inserts the following new subsection to read:  
"H. In order to ensure that the children, youth and families department's mandate for quality measures continues for all licensed providers of child care services, the department shall ensure the adequate allocation of appropriated funds to those providing the highest-quality care, including licensed centers and licensed family child care providers."
4. Reletters succeeding subsections accordingly.
5. On page 6, strikes lines 4 through 17 in their entirety and insert in lieu thereof:  
"(2) "family child care provider" means a person who provides care services and supervision for children in the provider's own home under regulations established by the children, youth and families department and who is:  
    (a) licensed by the state; or  
    (b) registered with the state to participate in the child and adult care food program and is a vendor in the state and federal child care assistance program; and".

Synopsis of Original Bill

House Bill 632 enacts new sections of state law which would allow family child care providers to form, join or assist a labor organization for the purpose of collective bargaining with the Children, Youth and Families Department through union representatives. The bill provides for mail ballot election ballot procedures in order to decide the issue of whether those providers want union representation.

The bill provides that a labor organization that has been certified through the process as representing the family child care providers shall be the exclusive representative for all family child care providers for the purposes of negotiating a collective bargaining agreement with the children, youth and families department.

A family child care provider is defined as a person who provides regularly scheduled care for a child or children in the home of the provider for periods of less than twenty-four hours or, if necessary due to the nature of the parent's work, for periods equal to or greater than twenty-four hours; receives child care subsidies; is licensed by the state to care for no more than twelve children; or is registered with the state to participate in the child and adult care food program and is a vendor in the state and federal child care assistance program to care for no more than six children.

The bill requires the Children, Youth and Families Department to meet with the family child care providers and their exclusive union representative with the purpose of entering into a written collective agreement that shall be binding upon both the state and the exclusive union representative. The written collective bargaining agreement shall include a binding arbitration procedure, grievance process, the creation of a labor-management committee that will meet regularly to discuss concerns and issues as they arise and mechanisms for dues and representation fees collection. Should the parties be unable to reach an agreement, they must follow the impasse resolution procedure as outlined in the Public Employee Bargaining Act.

The bill would prohibit the Children, Youth and Families Department from discriminating against child care providers or taking negative action against them because of their membership in a labor organization. It also requires the Department to bargain in good faith and to comply with the collective bargaining agreement provided by the bill.

The bill provides that the state intends to provide “state action immunity” under federal and state antitrust laws for the activities of family child care providers and their exclusive bargaining representative to the extent such activities are authorized by its provisions.

### **FISCAL IMPLICATIONS**

The SPAC amendment strikes “and representation fees” from the section which address mechanisms to collect union dues. Representation fees are typically paid by employees who are covered under a collective bargaining agreement but choose not to be members of the union. Non-members generally benefit from collective bargaining so the fee represents the employee’s pro rata share of the Union’s cost of negotiating and administering a collective bargaining agreement.

The HBIC amendment although not quantified, makes further general commitments to funding increases by acknowledging the importance of “adequate allocation of appropriated funds to those providing the highest-quality care...”

There is no appropriation included in this bill, neither direct nor as a contingency.

Child care providers are not public employees as defined in the Public Employees Bargaining Act (PEBA). Furthermore, as a state agency, CYFD does not qualify as an employer under this bill in reference to the PEBA definition of an employer. This bill is authorizing collective bargaining, but does not include a plan to form a collective bargaining agreement.

Section 1.E of the bill addresses dues and representation fees collection. In other states where a union has organized home child care providers, there has been an effort to deduct the dues from child care subsidy payments to providers. This capacity would have to be added to CYFD’s payment system and so result in an unknown expenditure to upgrade information systems.

Implementation of this bill would have significant, albeit presently unquantifiable implications and ramifications for CYFD. CYFD receives a fixed sum of money from state general fund and federal sources to provide child care subsidies to low income families, including and especially TANF recipients. Depending upon the amount of money received in each legislative session, a specific poverty level is determined for eligibility. At present, that level is 155% of poverty. The Executive Budget for 08 would bring that level to 165% of poverty. An un-quantified increase in

expenses negotiated through this agreement would have the effect of drastically lowering that poverty level in order to fund it and/or drastically lowering the rates for licensed child care centers.

## **SIGNIFICANT ISSUES**

The amendment seeks to clarify certain aspects of the bill and to acknowledge the importance of those child care providers, in particular licensed child care providers, in the efforts to raise quality in child care. The amendment seeks to further clarify that these providers are not state employees by striking the word "benefits" from the list of items to be negotiated. Finally the amendment further refines the definitions of those providers covered under this bill. The amendment is consistent with that introduced and adopted on the companion bill in the Senate.

Collective bargaining generally covers a worker's right to bargain with management over the terms of their employment relationship, most often their wages, hours and working conditions. Child care providers are not employees of the State; therefore, it is unclear how collective bargaining by providers will protect and empower child care workers and not solely benefit self-employed business owners.

The relationship between providers and the State is a contractual or quasi-contractual relationship and has traditionally been addressed through the public rule-making process, the contract negotiation process, and public policy advocacy process.

It is unclear if there would be complications with those general funds which are used as maintenance of effort (MOE) in the TANF program. It is also unclear if other federally funded Head Start programs and or Native American programs would be affected.

The bill does not make a distinction between providers who care for subsidized children and receive a subsidy reimbursement payment from the state for all or part of a low income child's tuition and those who are just regulated providers (those who do not receive state subsidy) who operate their businesses in compliance with state regulations.

There are more than 6,700 registered home child care providers and 329 licensed child care homes in New Mexico.

At present, the terms and conditions under which family child care providers supply child care in their homes is regulated by in the New Mexico Administrative Code (NMAC). These rules are subject to public rule-making which provides for public input and, under SB372, certain sections would be subject to negotiation with the labor organization.

Section 1.K of this bill stipulates that CYFD "will not interfere with rates of payment paid through parents' private money to family child care providers." This would appear to conflict with at least two sections of existing rules. Currently, most families receiving child care subsidy are required to make a co-payment to their provider and section 8.15.2.15.B NMAC requires that "child care providers collect required co-payments from clients." This could be seen, under section 1.K of SB372, as interfering with payments of parents' private money. There is also the stipulation in 8.15.2.15.E NMAC that child care providers accept the rate the department pays for child care and are not allowed to charge families receiving subsidy above the department rate.

This also could be seen as interfering with payments of parents' private money.

### **PERFORMANCE IMPLICATIONS**

Collective bargaining could impede the quality initiatives the department has initiated. The department has a performance measure related to increasing providers' quality level in the AIM High rating system.

### **ADMINISTRATIVE IMPLICATIONS**

None directly for SPO. However, SPO would provide labor relations expertise to CYFD where appropriate.

This bill places significant, albeit presently unquantifiable implications and ramifications administrative burden on CYFD requiring it to bargain directly with child care providers through an exclusive representative. If this bill is enacted, it is likely to result in a costly reconfiguration to CYFD's child care information system that the bill does not address.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Companion to SB 372.

### **TECHNICAL ISSUES**

The amendment addresses some of the technical issues noted in the original bill.

Section 1.F of the bill refers to "benefits." It is not clear if these benefits might include health care, unemployment compensation, workers compensation or other benefits. The scope and magnitude of these benefits would negatively impact the CYFD budget or alternatively decrease the poverty level for eligibility and/or the rates paid to licensed centers (the major group of providers not covered in this proposed legislation). As there isn't a direct employer/employee relationship it is unclear how CYFD could mandate private provider to pay benefits not to mention at a specific level.

Section 1(M)(2) defining "family child care provider" is somewhat inconsistent with current regulatory structure and usage. Subsection (a) includes providers who are not currently regulated by CYFD. Under the current regulatory structure, persons who provide child care in their homes for up to 4 children, and who do not participate in the federal food program and do not serve child care assistance clients, are not required to be licensed or registered. It is unclear whether the legislation actually intends to require CYFD to negotiate with child care providers who are not otherwise regulated by CYFD.

Subsection 1(M)(2)(d) misstates the maximum number of children who may be in the care of registered child care providers. Registered providers may care for up to 4 children, not 6 as stated in the proposed legislation. This must be corrected.

Section 1.M.2.a of the bill defines "family child care provider" as a person providing care "for periods of less than twenty-four hours or, if necessary due to the nature of the parent's work, for periods equal to or greater than twenty-four hours." It is not clear as to the time frame to which

the twenty-four hours refers. For periods of less than twenty-four hours in a week, substantially fewer providers would be affected.

Section 1.M.2.d of the bill also defines “family child care provider” as a person that “is registered with the state to participate in the child and adult care food program and is a vendor in the state and federal child care assistance program to care for no more than six children.” The current rules governing the child care assistance program stipulate that a registered home provider can care for no more than four children. It appears that to meet the definition in Section 1.M.2.d, a provider must be registered and able to care for up to six children; although under current rules no provider meets that definition.

The existence of a collective bargaining could eventually lead to tort judgments holding CYFD (State of NM) liable for the actions of collective bargaining members. Section 1(L) addresses this issue but must be clearer. The current phrasing “to the extent such activities are authorized by this section” is somewhat ambiguous.

Child care workers in other states have become organized through a variety of mechanisms.

In August of this year, Governor Jon Corzine of New Jersey signed an executive order recognizing the recently formed Child Care Workers Union and directing the head of their Department of Children and Families to meet in good faith with the union “as the recognized exclusive majority representative of all registered and approved family child care providers, for the purpose of entering into a written agreement regarding reimbursement rates, payment procedures, benefits, health and safety conditions and any other matters that would improve recruitment and retention of qualified family child care providers and the quality of the programs they provide...” Governor Tom Vilsack of Iowa signed a similar executive order in January 2006.

In 2005, the State of Illinois agreed to a union contract that covers 49,000 in-home child care providers. The providers will receive a 35 percent average increase in their daily rates over the life of a 39-month contract. Workers will have access to health care coverage in the final year of the contract. One report estimates that the contract will cost the State of Illinois \$250 million.

HB 632 could result in higher subsidy reimbursements to home child care providers and therefore increase the CYFD child care expenditure level. As stated above, client eligibility in recent years has fluctuated between 150% and 200% of federal poverty level. If rates increase without additional funding, the eligibility level would have to be lowered.

## **OTHER SUBSTANTIVE ISSUES**

One of the concerns expressed by licensed child care centers is that a negotiated, albeit appropriated by the legislature, amount of money to fund the increases for licensed and registered homes is that this would not leave adequate monies for centers. Center-based providers are generally acknowledged to be the leaders of development of quality in child care and center providers do not feel that this has been adequately funded. This amendment seeks to recognize these centers and to make a strong statement that they should also be funded by CYFD.

This bill would require the Children Youth and Families Department to enter into a collective bargaining agreement with a labor organization representing child care providers who receive reimbursements or subsidies from the Department for providing child care facilities to Department clients. By stating that an elected labor organization is the representative for *all* child care providers, it is unclear whether the bill appears to contemplate a “closed shop”, which would require child care providers to agree to union representation in order to receive reimbursement or subsidies from the department for their services. By implication the bill appears intended to prevent the Department from contracting with non-union child care providers.

The Children, Youth, and Families Department licenses child care facilities pursuant to NMSA Section 24-1-2A, 24-1-2D, and 24-1-3I. It also provides for reimbursement for child care services provided to eligible clients by child care facilities. NMSA Section 9-2A-7, 9-2A-8G. Eligibility is based upon income and the need for special supervision of certain children under court supervision or with medical conditions. The bill would apply to any licensed child care home or facility receiving reimbursement or subsidies from the Department.

The Department has adopted rules governing client eligibility for child care services, provider qualifications, rates of payment by the Department and client; and responsibilities of clients, the Department, and child care providers. The Department pays child care providers on a monthly basis. Payment is based upon the child’s enrollment with the provider as reflected in the child care placement agreement. Those rules provide for sanctions against and due process procedures for providers aggrieved by decisions of the Department. The definition of “family child care provider” contained in this bill appears to incorporate definitions contained in that rule. A major portion of those rules will be negated or severely impacted by the requirement of collective bargaining, and any resulting agreement between the Department and a labor organization. It is likely that rates paid will change, requiring additional appropriations, if this bill is enacted. See NMAC 8.15.2.

The bill does not prohibit activities by the exclusive labor organization with regard to strikes, slow-downs, or work refusal. The provision of child care services to eligible clients is an essential social service which should not be impacted by any failure of the Department and the union to reach accord. The bill does not protect clients from the consequences of disputes between the Department and the union, or during impasse resolution proceedings.

The effect of this bill and any collective bargaining agreement on federal funds received by the Department is uncertain. It is unclear as to how this bill might impact the receipt of Federal Child Care Development Fund (CCDF) money in accordance with New Mexico’s state plan. CCDF helps low-income families obtain child care subsidies that enable them to work, attend training or enroll in education programs. CCDF funding also supports delivery of early care and education services to more than 1.7 million children each month.

See <http://www.nccic.org/pubs/stateplan2006-07/execsum.html>.

15 U.S.C. 1 of the Sherman Antitrust Act states that “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is hereby declared to be illegal”. The “state action immunity” referred to in the bill is commonly known as the “state action doctrine” under which the United States Supreme Court has permitted state governments and certain private economic actors to show that the operation of a state regulatory scheme precludes the imposition of antitrust liability. The doctrine primarily comes into play when

conduct by state or private actors undertaken pursuant to a state regulatory program is challenged under the federal antitrust laws. There are two elements for establishing the state action defense: (1) the challenged restraint must be clearly articulated and affirmatively expressed as state policy, and (2) the policy must be actively supervised by the State itself. Courts continue to define the meaning of "clear articulation" and "active supervision." See, ABA Exemptions and Immunity Committee discussion at <http://www.abanet.org/dch/committee.cfm?com=AT302300>.

Presumably the bill refers to that doctrine because of the possibility that its implied prohibition against the Department contracting with or reimbursing non-union child care providers might be deemed a violation of federal antitrust laws. Although labor organizations are generally exempt from antitrust laws when they represent *employees* providing labor, the restrictions of this act may not immunize the child care provider labor organization because those providers are not "employees" of the Department, and because they provide non-labor services. Merely stating that the state intends to provide such immunity may not be sufficient to bring the exclusivity required by this bill within that exception.

## **AMENDMENTS**

The sponsor might consider an amendment to Section 1(K) which provides that CYFD "will not interfere with rates of payment paid through parents' private money to family child care providers." This is inconsistent with CYFD's child care assistance program, which routinely sets co-payment amounts for assistance clients. The legislation presumably does not intend to eliminate the child care assistance co-pay provisions.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

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