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FISCAL IMPACT REPORT

ORIGINAL DATE 01/26/09
 LAST UPDATED 03/13/09 HB 245/aHHGAC

SPONSOR Garcia, M.P.

SHORT TITLE Child Care Provider Collective Bargaining SB _____

ANALYST Moser

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		Indeterminate to Substantial see narrative	Indeterminate to Substantial see narrative	Indeterminate to Substantial see narrative	Recurring	General fund, federal funds

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Children Youth and Families Department (CYFD)

Office of the Attorney General (AGO)

Workforce Solutions Department (WSD)

American Federation of State, County and Municipal Employees (AFSCME)

SUMMARY

Synopsis of Amendment

House Health and Government Affairs Committee amendment to House Bill 245 adds:

- a new subsection (P) that a clarifies that a family child care provider or an employee of the family child care provider is not a public employee for purposes of the Tort Claims Act; and,
- additionally, clarifies that a family child care provider includes an entity that is licensed by the state and is a participating vendor in the state and federal child care assistance program.

Synopsis of Original Bill

House Bill 245 enacts a new section of Chapter 50 NMSA 1978 allowing family child care providers, defined as those who are licensed by the state to provide child care services within their own home, or registered to participate in the child and adult food are program and a vendor in the state and federal child care assistance program, to engage in collective bargaining and representation.

This bill provides for election of exclusive representation and binding arbitration proceedings; requires CYFD to negotiate an agreement that includes reimbursement rates, payment procedures, health and safety conditions, monitoring and evaluation of family child care homes, licensing and other fees, quality rating standards, training and certifications requirements, areas to improve recruitment and retention of qualified providers; and requires CYFD and the exclusive representative to work out access to health insurance for family child care providers.

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

House bill 245 contains no appropriation either direct or as a contingency.

However, CYFD indicates that significant fiscal impact could be realized. CYFD provides child care subsidies to low income families, including TANF beneficiaries, from a fixed sum of money from state general funds and federal sources. The department indicates that an increase in expenses negotiated through a collective bargaining agreement may make it necessary to lower the poverty eligibility level (currently 200% of federal poverty level) in order to make up the difference, or require reduced reimbursement rates to child care providers in order to maintain a 200% FPL eligibility.

Fiscal implications include potential costs and expenses incurred in performing the obligations laid out in this bill, such as compiling information lists of eligible family child care providers or participating in mandatory arbitration or grievance proceedings. However the larger fiscal implication would be the cost of any “benefits” negotiated through the collective bargaining. Although the level of benefits and their costs are not defined in the bill, CYFD points out that

they have, in other states, resulted in substantive increases in the amounts of funds allocated to child care that must be used for this purpose. AFSCME indicates that "...any extra funding or expenditures pursuant to any contract must be both specifically appropriated and available." And further emphasizes that "The Legislature clearly maintains control of all fiscal expenditures."

SIGNIFICANT ISSUES

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. AFSCME argues that the bill does include a plan as subjects of negotiation are outlined. In Oregon, the exclusive negotiator for collective bargaining for child care providers is AFSCME.

If PEBA does not apply to childcare providers, then an issue of major importance is that HB 245 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 CYFD and the union to reach accord. The bill does not protect clients from the consequences of disputes between CYFD and the union, or during impasse resolution proceedings. The effect of this bill and any collective bargaining agreement on federal funds received by CYFD 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 the 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 help 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.

The AGO points out that HB 245 presumably applies to persons who are contractors of CYFD, rather than to employees of CYFD. Therefore, the Public Employee Bargaining Act (PEBA), Sections 10-7E-1 to -26, does not apply. The AGO also indicates that HB 245 is unclear whether it is intended that the Public Employee Labor Relations Board (PELRB) conduct the representation election.

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. AFSCME points out that "...in the fourteen (14) other states where providers have the right to organize."

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.

In other states where a union has organized home child care providers, union dues are deducted directly from child care subsidy payments to providers. This capacity does not exist in CYFD's payment system; the cost of the upgrade necessary for this deduction is unknown.

Based on figures compiled for December of 2008, CYFD had 5,237 registered homes, 692 licensed child care centers, 178 licensed child care group homes, and 162 licensed child care homes (1,032 licensed facilities in total).

CYFD expresses concerns with regard for the rules which presently govern child care providers; it is unclear to what extent HB 245 would provide for a collective bargaining agreement to supersede existing rules. Such rules are promulgated in accordance with the State Rules Act and CYFD's enabling statute which provide for notice and public comment. As an example, HB 245 provides that the terms of the agreement must address health and safety conditions. However, CYFD has promulgated detailed rules addressing health and safety conditions for child care provider homes and facilities. See, for example, 8.16.2 and 8.17.2 NMAC. These requirements demonstrate the minimum standards for assuring the health and safety of children receiving child care services. CYFD argues that HB 245 may have the effect of superseding existing regulations with the terms and conditions of the collective bargaining agreement. The same is true for other promulgated rules to which HB 245 provides mandatory terms and conditions, and therefore, the agreement may have the effect of superseding existing rules promulgated to address reimbursement rates, monitoring and evaluation of family child care homes, rating quality standards, training and certification standards.

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.

This bill does not discuss the significant potential impact on parents that pay for their child's care, including the co-payments that parents receiving child care subsidy must pay in addition to the subsidy payments made by the state.

ADMINISTRATIVE IMPLICATIONS

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.

OTHER SUBSTANTIVE ISSUES

CYFD argues that this bill may also adversely affect the department's ability to directly address with child care providers concerns and/or deficiencies relating to health and safety standards, or other deficiencies, by requiring adherence an unknown, yet-to-be-negotiated procedure. The result could be unreasonable delay in addressing health and safety concerns as they arise.

The AGO expresses concern as to why HB 245 intends to provide “state action immunity” from the federal and state antitrust laws? Section 57-1-4 exempts labor organizations and their members from antitrust laws as provided therein. 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 Section 1(O) of 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.” AFSCME also questions “..the invocation of the state immunity doctrine to anti-trust.”

HB 245 refers to that doctrine because of the possibility that its implied prohibition against CYFD 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 CYFD, 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.

GM/svb:mc