

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (www.nmlegis.gov). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 02/10/13

SPONSOR Griego LAST UPDATED _____ HB _____

SHORT TITLE Children’s Code Abuse & Neglect Changes SB 252

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	TBD*	TBD*	TBD*	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Implications.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney General’s Office (AGO)
 Public Defender Department (PDD)
 Department of Health (DOH)
 Children, Youth & Families Department (CYFD)
 New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

Senate Bill 252 makes extensive changes to the Abuse and Neglect Act of the Children’s Code (the Act) and related statutes, both amending existing and adding new provisions.

Significant substantive changes:

- Expand the definition of aggravated circumstances, in which instance the CYFD does not have to make reasonable efforts to reunify a family (Section 5);
- Remove automatic release from custody requirement if a petition is not filed within two days (Section 7);
- Remove the requirement of service of an ex parte custody order (Section 9);

- Allow a child 14 or older to choose not to attend a hearing unless the court compels the child’s attendance (Section 15);
- Delete the requirement that a child’s educational needs be included in the case plan (Section 16);
- Remove certain matters that must be included as findings in the court’s dispositional judgment and convert them to factors to be considered in determining the appropriate disposition (Section 17); and
- Expand exceptions to general confidentiality of records provision while restricting access by a parent, guardian or custodian (Section 29).

SB 252 also makes numerous changes to terminology and otherwise updates and clarifies the Act and related statutes.

Further explanation of some of the significant changes listed above, as well as other changes made to the Act and related statutes, is set out below:

Section 2 amends section 32A-1-4, NMSA 1978 to allow a children’s court to appoint a party or employee or representative of a party as a guardian ad litem.

Section 5 amends section 32A-4-2, NMSA 1978 to expand the definition of “aggravated circumstances” to include circumstances in which a parent, guardian or custodian 1) has attempted to, conspired to subject or has subjected another child to torture, chronic abuse or sexual abuse; or 2) has been required to register with a sex offender registry under state or federal law.

Section 6 amends section 32A-4-3, NMSA 1978 regarding reporting child abuse. Subsection B is modified to no longer requires cross-reporting law enforcement and the department by phone and by submission of a written report within 48 hours of receiving a referral; it still requires each agency to report to the other “immediately”. A written report still must be submitted, but not within 48 hours of the referral and not on a standardized form. Subsection C makes the CYFD as well as law enforcement responsible for investigating reports of child abuse at schools and child care facilities, and adds two new categories for those investigations: shelter care homes and residential facilities. Subsection D authorizes the CYFD, as well as the police, to investigate reports of abuse or neglect at facilities that are administratively connected to that department.

Section 7 amends section 32A-4-4, NMSA 1978 regarding complaints, referrals and investigations. In subsection B, language allowing the CYFD to refer the investigation to another appropriate agency and to conduct conferences resulting in adjustments or agreements instead of filing a petition is removed. Subsection C, requiring the CYFD to make a recommendation at the end of its investigation on whether or not to file a petition is also removed. And the re-lettered subsection C removes language expressly requiring the return of the child to the child’s parent, guardian or custodian if a petition is not filed within 2 days of the child being taken into custody.

Section 8 amends Section 32A-4-5, NMSA 1978 to require a child to be interviewed privately at school or elsewhere when deemed appropriate by the interviewer who is investigating a report of abuse or neglect. Subsection F’s requirement that CYFD notify the parents of an alleged child victim prior to an interview unless such notice would adversely affect the safety of the child or compromise the investigation is expanded to include a child witness.

Section 9 amends section 32A-4-7, NMSA 1978 regarding release from custody. If the child is not delivered to the CYFD by law enforcement but instead is placed elsewhere (like a hospital), the CYFD must be notified immediately that the child is in the department's legal custody.

Section 10 amends Section 32A-4-8, NMSA 1978. The current law lists four possible community placements for a child. This bill deletes the specified placements--including with a relative who guarantees the child will not be returned to the alleged abusive parent, guardian or custodian without prior court approval--and instead directs that a child be placed in a licensed or approved home or facility.

Section 12 amends Section 32A-4-16, NMSA 1978 to remove the requirement that the ex-parte custody order be served on the respondent by a person authorized to serve arrest warrants (law enforcement), along with the requirement the officer take custody of and deliver the child as directed by the order.

Section 13 amends Section 32A-4-18, NMSA 1978 governing custody hearings when a child is in the custody of the CYFD or it has petitioned the court for temporary custody. Subsection E adds a new requirement that the department make reasonable efforts to identify and locate relatives that can take the child and to conduct home studies on appropriate relatives who express an interest in providing placement for the child.

Section 14 amends Section 32A-4-19, NMSA 1978 governing adjudicatory hearings. Subsection A clarifies that this hearing must start within 60 days of service of the petition (not an ex-parte custody order) on the respondents. Under existing law, if the hearing was not started within the 60 days or any extension of time that was granted, the court is required to dismiss the petition and return the child to the respondents. In Subsection D, that mandatory dismissal with prejudice is made permissive, and is now only one potential outcome, along with other sanctions as may be appropriate.

Section 15 amends Section 32A-4-20 governing hearings. Subsection D now allows a child to object to the presence of the media in the courtroom even if the child is not personally present (current law requires the child's presence). Currently Subsection E directs a child 14 and older be excluded from a hearing only if the court finds there is a compelling reason to exclude the child, but under SB 252, that child may be excused if the child chooses not to attend. SB 252 also allows the court to compel attendance of any child at any hearing.

Section 16 amends Section 32A-4-21, NMSA 1978 regarding predisposition studies reports. This Section is reorganized to require the report first address the harm the child may suffer by being removed from the child's parents, siblings and significant others and how the case plan will mitigate such harm, followed by what efforts the department has made to identify relatives where the child could be placed and whether or not the department is conducting home studies on appropriate relatives who have expressed an interest, and then information concerning the current placement to ensure that placement is the least restrictive placement possible and is in close proximity to the child's home consistent with the child's best interest and special needs. Currently, Subsection 21(B)(11) requires that for a child that is 16 or older, the CYFD must develop what SB 252 labels a transition plan for developing specific skills the child will require to transition into adulthood. For children 17 years of age, SB 252 adds a new Subsection (B)(12) which requires the department develop a transition plan that includes specific options for

meeting the child's needs once the child is 18, including housing, education, employment or income, physical and mental health, local opportunities for mentors and continuing support services.

Section 17 amends Section 32A-4-22, NMSA 1978 regarding disposition of adjudicated child. The amendments to this section reassign certain matters that currently are required to be findings included in the court's dispositional judgment (Subsection A) to be factors to be considered in determining an appropriate disposition (Subsection C).

Section 18 amends Section 32A-4-23, NMSA 1978 regarding disposition of a child with a mental disorder or a developmental disability to clarify that a child receiving treatment in a residential treatment program shall be entitled to (instead of enjoy) all the substantive and procedural rights set forth in the Children's Mental Health and Developmental Disabilities Act.

Section 19 amends Section 32A-4-23.1, NMSA 1978 governing disposition of an undocumented immigrant child. SB 252 clarifies the department reports to the court as to a child's immigration status at the dispositional hearing, and that the court's jurisdiction terminates upon the final decision of the federal authorities or upon the child's twenty-first birthday, whichever occurs first.

Section 20 amends Section 32A-4-24, NMSA 1978 setting timelines for judgments vesting legal custody to delete current Subsection B, which sets a two year limit on custody of a child by an individual other than a parent or permanent guardian.

Section 21 amends Section 32A-4-25, NMSA 1978 to clarify that the first periodic review of a case plan approved in a court's dispositional order shall occur 60 days after the dispositional hearing itself to prevent a delay in filing the order from also delaying that review. SB 252 also clarifies that the dispositions authorized Subsection H applies to neglect as well as abuse cases.

Section 23 amends Section 32A-4-25.2, NMSA 1978 governing transition services to require the CYFD review and further develop the transition plan prior to a child's 17th birthday, to clarify that the plan must address both the physical and mental health of the child, and to require the court approve and order a transition plan.

Section 24 amends Section 32A-4-25.3, NMSA 1978 regarding discharge hearings, which currently limits the court's exercise of continuing jurisdiction to 1 year after the child turns 18 only if the child consents to that continued jurisdiction. SB 252 allows a court to continue to exercise jurisdiction without the child's consent when a referral has been made for a guardianship or limited guardianship, but only until a final order regarding such a guardianship has been entered.

Section 27 amends Section 32A-4-29 regarding procedures for terminating parental rights. Subsection D is amended to permit any party involved in a termination action to request an adoption mediation. SB 252 also removes the provision requiring any open adoption agreement reached at any time before termination of parental rights be made part of the court record. Subsection G currently provides nine specific exceptions to the general requirement that if a child has been in foster care for 15 of the previous 22 months, the CYFD shall file a motion to terminate parental rights. SB 252 replaces all nine reasons with a more comprehensive exception preventing the filing of a motion to terminate when the department has documented in the case

plan--which shall be available for court review--a compelling reason for determining that filing such a motion would not be in the best interests of the child.

Section 29 amends Section 32A-4-33, NMSA 1978 which makes all records related to a neglect or abuse proceedings confidential except as provided for in that section. SB 252 adds a new subsection (B) allowing disclosure of all mental health and developmental disability records pursuant to the Children's Mental Health and Developmental Disabilities Act. Language is added to what becomes Subsection C prohibiting re-release of those records by those receiving them under Section 33 without 'proper consent or as otherwise provided by law'. SB 252 adds these additional entities to whom records may be released: 1) federal or tribal social services; 2) any person or entity if necessary for case planning, including persons or entities invited by the child to attend a transition plan meeting, persons attending a court-ordered pre-adjudicatory or pre-permanency meeting and any person attending a family-centered meeting or mediation, if the records directly concern the specific issues raised for purposes of case planning; and 3) a person or entity authorized by contract with the department, or by state or federal law, to review, inspect or otherwise have access to records or information in the department's possession. A new Subsection D provides that records may be disclosed to these persons or entities even if a petition has not been filed: department personnel, law enforcement, district attorneys, social service agencies, Indian tribes specifically authorized under applicable federal law or regulations, other persons or entities necessary for case planning, children's safehouses in certain circumstances, and any person or entity a) as ordered by the court or b) authorized by contract with the department or by state or federal law to review, inspect or otherwise have access to department records or information. SB 252 also removes in Subsection E the right of a parent, guardian or legal custodian when no petition has been filed to inspect medical reports, psychological evaluations, law enforcement reports or other investigative or diagnostic evaluations. Under SB 252, they only have the right to the results of the investigation, but the provisions under current law allowing them to petition the court for access to all of the department's records remain.

Section 32 repeals Sections 32A-1-13 and 32A-1-20, NMSA 1978, both general provisions of the Children's Code governing service of a summons and the purchase of care from a private agency by a public agency.

The effective date of this bill is July 1, 2013.

FISCAL IMPLICATIONS

The CYFD reports no fiscal impact, yet provisions such as expanding the department's responsibility to investigate shelter care homes and residential facilities will likely lead to increased caseloads and thus increased costs. Further, the AOC predicts additional court hearings due to changes in this bill. For example, the removal of language requiring automatic release of a child in custody if a petition is not filed within two days may well result in more hearings to determine the consequences of failing to file a petition within that two-day limit (which remains in the Act).

The CYFD describes another potential fiscal impact related to the requirement to initiate parental termination proceedings when a child has been in foster care for fifteen months or more out of the previous twenty-two months. Current law provides nine specific exceptions to the initiation of termination proceedings in those cases. SB 252 replaces those nine exceptions with this more general exception: if there is a compelling reason for determining that initiating

parental termination proceedings is not in the best interest of the child. (See Section 27 of SB 252.) According to the CYFD, this change is required by the federal government based upon its interpretation of federal law impacting child welfare and federal funding under Title IV-E of the Social Security Act. The CYFD uses funding under this Title, which governs adoption assistance and foster care programs, to provide necessary services for vulnerable families and children. As the department explains:

The compelling reason exception which the CYFD is proposing to add to the Children’s Code comes from the Adoptions and Safe Families Act and is directly related to Title IV-E. The department receives approximately \$40 million per year of Title IV-E reimbursement. Although the CYFD does not anticipate an immediate impact to any of this federal funding if the Act is not amended in this manner, the department’s alignment with federal policy is critical in claiming reimbursement on an ongoing basis, since the federal government audits department programs on a semi-regular basis to ensure compliance with its policies.

Because it is unclear when, or the full extent of any, such impact may occur, it has not been incorporated into any table above.

SIGNIFICANT ISSUES

In addition to the need to incorporate the compelling reason exception discussed above, the CYFD explains that the new confidentiality provisions (contained in Section 29 of SB 252) enable participants in children’s court to have access to pertinent information, while expressly limiting the re-release of confidential information. As to the many other changes in SB 252, the department provides only general comment that these changes “rationalize practice” in children’s court (including several “clean-up” provisions), and clarify provisions for placements of children, including the requirement of early efforts to place with relatives. These changes are intended to assist all participants in achieving the goals of safety, permanency, and well-being for children coming into foster care.

It appears that some of the changes to the Act could increase the number of children in CYFD custody. One example is the expansion of the definition of aggravated circumstances. (See Section 5 of SB 252.) Under the existing Children’s Code, after a determination that a child has been abused or neglected, the CYFD must make reasonable efforts to provide services to reunify the family unless an aggravated circumstance is present. If so, the department does not have to attempt reunification and the department can file for termination of parental rights sooner. See Section 32A-4-22(D)(2). Section 5 expands the definition of aggravated circumstances in two ways: first, to cover a situation where a parent, guardian or custodian has attempted to or subjected (or conspired to subject) any child other than the actor’s own child to torture, chronic abuse or sexual abuse; and second, to include any situation where a parent, guardian or custodian has been required to register as a sex offender under state or federal law. These changes would allow the CYFD to move to termination of parental rights sooner, which would increase the number of children who come into custody.

Increases in children in custody leads to increased caseloads, and may make an already difficult situation worse. As reported in the LFC’s January 2013 Policy and Performance Analysis:

The Children, Youth and Families Department (CYFD) struggles to recruit and maintain a sufficient case management workforce. In FY12, the average caseload for permanency planning workers was 17.3 children per worker. Permanency planning workers handle cases where investigations have determined a need for the department to file for ongoing custody of a child. These caseworkers' primary duty is to work with the children and parents toward reunification or another permanency goal, such as adoption or permanent guardianship.

For protective services caseworkers, national benchmarks indicate the caseload should average 12-15 children per worker. The average vacancy rate for protective services workers for FY12 was 16 percent. Turnover for basic and operational caseworkers in Protective Services is very high. The turnover rate for workers who work directly with abused children and state central intake workers, who receive the reports of child abuse and neglect, was 20 percent in FY12.

Without adequate staffing and other necessary support, increases in the number of children placed in the department's custody will further strain a struggling department.

The AOC and the AGO direct attention to another provision of SB 252 which deletes the express requirement that a child who has been taken into custody must be released to the child's parent, guardian or custodian if the CYFD does not file a petition within two days. (Section 7 of SB 252) Although the two-day deadline remains in the law, it is unclear what happens if that time period is breached. The AGO believes a constitutional due process issue may arise in the absence of a release requirement. The AOC points out that a parent, guardian, or custodian is without counsel until a petition is filed, and thus may be unlikely to seek the child's release by the court if a petition has not been timely filed, pointing out as well that any delay in proceeding with a court action also delays permanency for a child.

The DOH also raises a constitutional due process issue stemming from the deletion of language requiring service of an ex parte order on the child's parent, guardian or custodian that directs a child be taken into custody unless, as a practical matter, the order is served along with the petition (since the order cannot be issued until a petition is filed). (See Section 9, striking old subsection B on page 27.) The AOC notes this change may eliminate service of process for taking the child into custody all together.

In addition, the AOC questions the removal of six findings currently required to be included in the court's dispositional judgment (including interrelationship with the parent and siblings, adjustment to home and school, mental and physical health of everyone involved, wishes of the child as to placement, the parent's wishes as to custody, and whether a relative exists who is qualified to care for the child). (See Section 17 of SB 252.) Although these matters are included in a new subsection as factors to be considered in determining an appropriate disposition, they no longer are required to be expressly included in the judgment. If not so included, the AOC cautions that the ability to reconsider them at a later point in time likely would be lost.

The AOC also points to the deletion of a motion seeking permanent guardianship from the 6 month hearing requirement, since permanent guardianship is still a disposition that can be ordered at the conclusion of the hearing. (See Subsections B and H of Section 21 of SB 252.) If the case is dismissed at the same time guardianship is granted this is not a problem, but if the guardianship hearing is delayed for any reason or if the guardianship is in place but the order for

dismissal has not been entered (like the time period between termination and an adoption) then a problem could arise.

Both the AOC and the DOH comment on Section 29 of SB 252, which expands the exceptions to the general rule that all records in abuse and neglect cases are confidential to include eight additional categories of persons or entities entitled to receive records whether or not a petition has been filed, while at the same time it restricts the right of parents, guardians and custodians to access these same materials. A parent, guardian or custodian is no longer be able to inspect any medical report, psychological evaluation, law enforcement reports or other investigative or diagnostic evaluation, but can only access the results of the investigation without going to court. If no petition has been filed, they will not have counsel to assist them in this effort. Yet anyone within these eight new categories is entitled to those and all other records.

Additionally, the DOH specifically calls attention to the inclusion in Section 29 of language providing that disclosure of all mental health and developmental disability records shall be made pursuant to the Children’s Mental Health and Developmental Disabilities Act, which the DOH advises gives children age 14 and older certain rights of access, and control of others’ access, to their medical records and confidential information, yet it significantly broadens the specifically named persons or entities that may get access, without permission, to the child’s records in the case of suspected abuse or neglect.

The DOH also points out that the new provision in Section 15 of SB 252 that a child aged 14 or older can decide not to attend a neglect or abuse hearing is consistent with the age in which children are allowed to make treatment decisions under the Children’s Mental Health and Developmental Disabilities Act.

Finally, the AOC questions the deletion of the child’s educational needs from the case plan contained in Section 16 (B)(10) of SB 252. Currently, educational needs and status of the child are reported to the court in an effort to be sure those needs are met and to achieve educational stability for a child in foster care. Educational needs are addressed for older children (sixteen and older) in B (11) and (12), but there is no corresponding section for younger children with this removal.

PERFORMANCE IMPLICATIONS

The AOC advises that tracking the educational stability and progress of children is a federal measure for court performance. Removing educational needs from the case plan is likely to make this more difficult to track.

OTHER SUBSTANTIVE ISSUES

The DOH advises that child abuse and neglect is a significant problem in New Mexico, and provides this background information:

In 2010, the Child Protective Services conducted a total of 27,397 investigations of child maltreatment. One-fourth of these cases were substantiated cases. “Substantiated” in a child abuse and/or neglect investigation means the victim(s) is under the age of 18, a parent/caretaker has been identified as the perpetrator and/or identified as failing to protect, and credible evidence exists to support the

conclusion by the investigator that the child has been abused and/or neglected as defined by the New Mexico Children's Code.

Of the 6,534 substantiated cases, almost half of the victims of child maltreatment were children under the age of six. Physical neglect (73.3 percent) was the most common type of maltreatment, followed by physical abuse (24.5 percent), and sexual abuse (2.2 percent). According to the New Mexico Hospital Inpatient Discharge Database, in 2011, 63 children were hospitalized due to injuries from physical and/or sexual abuse.

The New Mexico Child Fatality Review studied 24 child homicide cases that occurred in 2009-2011 in which the death was due to maltreatment from the child's parent, a family member, or other supervisor.

Finally, it is not clear why the provision that applies to the Children's Code generally authorizing the transfer of physical custody of a child over whom a public agency has legal custody to a private agency and the purchase of care and treatment for that child from the private agency subject to certain conditions is being repealed in Section 32.

POSSIBLE QUESTIONS

Why in Section 17 is the component related to a child's educational needs being removed from a case plan?

What potential increase in investigations and caseloads are anticipated if SB 252 becomes law?
Is the department staffed sufficiently to handle those increases?

MD/blm