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FISCAL IMPACT REPORT

SPONSOR Gentry ORIGINAL DATE 02/07/14
 LAST UPDATED _____ HB 324

SHORT TITLE Reporting Child Abuse SB _____

ANALYST Klundt

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY14	FY15		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Children, Youth and Families Department (CYFD)

Administrative Office of the Courts (AOC)

Public Defender Department (PDD)

SUMMARY

Synopsis of Bill

House Bill 324 amends Section 32A-4-3 NMSA 1978, to clarify language regarding the duty to report child abuse and neglect expanding the class of persons having a legal duty to report child abuse and neglect to include “every person” who “knows or has a reasonable suspicion that a child is an abused or neglected child” excluding disclosure of information that is privileged as a matter of law. Every such person shall report the matter immediately to: a local law enforcement agency; the Children, Youth and Families Department (CYFD); or a tribal law enforcement or social services agency for any Indian child residing in Indian country.

FISCAL IMPLICATIONS

There is no appropriation included in this bill, but according to the Public Defender Department (PDD) it is difficult to ascertain how many new prosecutions would result from such a change in the law requiring reporting of child abuse. If stringently enforced, this could result in a significant increase in prosecutions which would require a corresponding increase in indigent defense funding.

The Administrative Office of the Courts (AOC) stated that fiscal implications will be minimal as related to the printing and distribution of the amended statute. There may be some initial fiscal impact resulting from litigation due to the intersection of this statute with NMRA 11-504(D)(4).

SIGNIFICANT ISSUES

The Child Abuse Prevention and Treatment Act (CAPTA; 42 U.S.C. §5101), as amended by the CAPTA Reauthorization Act of 2010, retained the existing definition of child abuse and neglect as, at a minimum: “Any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation; or an act or failure to act, which presents an imminent risk of serious harm” (Administration for Children, Youth and Families, Child Maltreatment 2012).

The New Mexico Abuse and Neglect Act Section 32A-4-2 NMSA 1978 broadly defines what is meant by abuse and neglect. Abuse and neglect may be physical, sexual or emotional.

Physical abuse includes:

1. Cases in which a child exhibits evidence of a skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of a bone, subdural hematoma, tissue swelling or death, AND
2. There is not a justifiable explanation for the condition or death.

Sexual abuse includes:

1. Criminal sexual contact; or
2. Incest or criminal sexual penetration; or
3. Sexual exploitation (acts such as allowing, permitting or encouraging a child to engage in prostitution or obscene or pornographic photographing, or filming a child for obscene or pornographic commercial purposes)

Neglect includes:

1. The abandonment of a child by a parent, guardian or custodian; or
2. The failure of a parent, guardian or custodian to provide a child with proper parental care and control or subsistence, education, medical or other care or control necessary for the child’s well-being; or
3. When a child is physically or sexually abused and the child’s parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm; or
4. Parental inability to discharge their responsibilities to and for the child because of parental incarceration, hospitalization, or physical or mental disorder or incapacity.

According to the federal Administration on Children, Youth and Families, New Mexico had 32,515 referrals for investigation of child abuse in 2012, of which 16,279 resulted in official reports. The rate of total referrals for New Mexico is 63.2 reports per 1,000 children, compared with a national rate of 46.1 reports per 1,000 children.

The Court of Appeals recently interpreted that "mandated reporter" did not mean "everyone" but rather only the specific list of categories of people listed in Section 32A-4-3(A). According to

CYFD, this new interpretation of the statute significantly narrows the list of individuals responsible for reporting abuse and neglect. Of the 1,557 reports of suspected abuse or neglect received by CYFD during December 2013, 16.9 percent of the reports came from individuals who according to CYFD, under this ruling, would no longer be mandated reports, and therefore absolved of any community responsibility to these children.

CYFD states that After the recent court of appeals decision that narrowed the duty to report to the so-called "laundry list" of professions listed in the statute, this bill attempts to reassert the legislature's intention that *all* citizens of New Mexico have a duty to report reasonable suspicions of child abuse or neglect. However, its simultaneous inclusion of a privilege exception limits this duty, and could be used by physicians, psychotherapists and other professions to claim that they do not have a duty to report in certain circumstances. This is a limitation or qualification on the duty to report which would tend to shrink the pool of reporters, including many of those who come into contact with children in circumstances where abuse may be evident. This exception for privilege is not in the current Children's Code, and since the Department would prefer, as a matter of policy, that every reasonable suspicion of abuse/neglect be reported, this bill should not be passed in its current form.

CYFD believes that this bill does not promote the primary purpose of the Children's Code which is to "*first* provide for the care, protection and wholesome mental and physical development of children..." (§32A-1-3(A) (emphasis added). Rather, this bill narrows the duty to report significantly by applying privilege laws to *every* person, rather than *solely* to clergy as the law previously stated. To narrow the reporting law is contrary to the position of CYFD and contrary to the safety and welfare of children.

CYFD states that there is a societal benefit in allowing for open, honest, and candid communication of a person with professionals. There is also a societal interest in the protection of children. When those interests conflict, the protection of children takes precedence. Often, those persons that a child comes in contact with outside of an abusive or neglectful situation are the only voice for the child. To restrict reporting based on privilege does not serve the best interests of the children of New Mexico.

The agency reported that it may be problematic to import the complicated issue of privilege into the laws regarding a citizen's mandatory duty to report suspected child abuse and/or neglect. Those individuals listed in the law are included there because, by basis of practicing a specific profession, they come into contact with children on a more frequent basis, not because citizens not of those professions are somehow exempt from mandatory reporting.

The agency states that there may be significant problems by the complicated issue of privilege into the laws regarding mandatory duties to report child abuse and/or neglect. Privilege held by clients of those enumerated is an issue more appropriately determined by a court. Those who do enjoy a legally protected privilege of confidentiality, due to the increased contact with children, should not be excluded from reporting based on any privilege. Even if professionals hold a privilege, they should still have a duty to report and indeed can do so anonymously. Should the reporter later be identified, not as the reporter, but as a potential witness, it will be for the Court to determine whether or not the privilege applies when the client claims the privilege. Whether privilege applies in court proceeding or not is a complicated issue for the courts to decide. To import notion of privilege creates ambiguity for professionals which in turn places children at risk.

On the other hand, the amendments may be read to exempt only that information that is previously as a matter of law existing.

PDD stated that creating a clear legal duty for “every person” who “knows or has a reasonable suspicion that a child is an abused or neglected child” to report their suspicions to an appropriate agency could result in a significant increase in the number of accusations made by lay persons. What constitutes a “reasonable suspicion” is a vague concept that could easily be viewed as subjective by persons reading the law. Thus, a person may believe they have “reasonable suspicion” when they objectively do not, or they may have difficulty identifying what constitutes a “reasonable suspicion.” While lay people are currently free to report suspected abuse, because failing to report would be a misdemeanor, such persons could feel compelled to report any suspicion, founded or unfounded, out of an abundance of caution. Police and CYFD workloads would be likely to increase. The persons currently delineated in the statute are better equipped to assess abuse and recognize when abuse is occurring.

PDD also states that expansion could also significantly increase prosecutions since child abuse cases often involve several witnesses who suspected child abuse at one point or another. It could also have a chilling effect on these witnesses’ candor since testifying honestly to their suspicions or observations could subject them to liability. Insofar as that would be the case, it would also give them grounds to invoke their 5th Amendment rights against self-incrimination. This bill could also increase prosecutions to include people who report their suspicions but do not do so “immediately.” Additionally, according to the PDD the bill may also be problematic insofar as it ostensibly applies to “every person” with knowledge or a reasonable suspicion; this presumably includes minors. The bill creates no exceptions for minors or for battered persons who might remain silent out of justifiable fears of recrimination.

PERFORMANCE IMPLICATIONS

CYFD has performance measures related to the safety and security of children.

This bill relates to DOH FY15 Result 1: Improve Health Outcomes for the people of New Mexico.

CONFLICT, RELATIONSHIP

Related to HB 265 – While the bills are worded differently they both ultimately limit reporting by adding language with regard to privilege.

Conflicts with HB 334 – This bill also amends the language of §32A-4-3. HB 334 does not have similar language with regard to privilege, but still includes the enumerated list that this bill eliminates.

TECHNICAL ISSUES

The bill appears to attempt to broaden the scope of those required to report by removing the enumerated list. However according to CYFD, by including language with regard to privilege results in a narrowed scope of the law which may mislead those in professions with privileges to believe they are not required to report knowledge or suspicion of child abuse.

OTHER SUBSTANTIVE ISSUES

This bill amends Section 32A-4-3 NMSA 1978, The New Mexico Abuse and Neglect Act, to clarify that any person knowing of or suspecting that a child is being abused or neglected has a duty to report that information to the proper authorities.

ALTERNATIVES

The PDD requests to specify that the duty to report applies to adults and limit the standard to an actual knowledge standard; create affirmative defenses for battered persons with justifiable fears of recrimination; and/or carefully expand the class of persons to include an easily identifiable subset of persons more likely to accurately assess abuse.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo based on the recent Court of Appeals (*State v. Strauch*, Ct. App. No. 32,425) decision which limits mandatory reporters to those classes enumerated in §32A-4-3(A). A writ of Certiorari was granted by the Supreme Court on January 10, 2014.

KK/ds:jl