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FISCAL IMPACT REPORT

ORIGINAL DATE 02/08/14
LAST UPDATED 02/19/14 **HB** 333/aHCJ

SPONSOR Martinez, K.

SHORT TITLE CYFD Custody of Abused Children **SB** _____

ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$ 609,041.5	\$609,041.5	\$609,041.5	\$1,827,124.5	Recurring	General Fund
	\$240.0	\$240.0	\$240.0	\$720.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Children, Youth and Families Department (CYFD)

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

SUMMARY

Synopsis HJC Amendment

The House Judiciary Committee amendment to House Bill 333 corrects a typo or punctuation error. It also includes two new subsections, D and E, which include references to the Indian Child Welfare Act (ICWA) requiring the department to make efforts to identify a child as an Indian child, if applicable and to provide notice pursuant to the Act:

D. When a child is taken into custody, the department shall make active efforts to determine whether the child is an Indian child as defined by the federal Indian Child Welfare Act of 1978.

E. If a child taken into custody is an Indian child and is alleged to be neglected or abused, the department shall give notice to the agent of the Indian child's tribe in accordance with the federal Indian Child Welfare Act of 1978 and Section 32A-4-6 NMSA 1978.

Synopsis of Original Bill

House Bill 333 requires CYFD to “immediately” take custody of a child “upon receipt of report” of certain enumerated injuries evidencing child abuse. After assuming custody of a child under this section, a court hearing must be held within 48 hours to consider the evidence of abuse. Following a finding of abuse by the court, the child shall remain in the custody of the Department if two “substantiated claims of abuse or neglect” have been made against the child’s parent, guardian, or custodian. In that event, the child will not be returned until the parent, guardian or custodian receives “professional counseling.”

The bill has an emergency clause.

FISCAL IMPLICATIONS

There is no appropriation attached to this bill and CYFD reports that the agency will be unable to absorb the increase in work through existing resources.

The bill proposes CYFD immediately take custody when physical injuries are present. In FY13, CYFD had more than 21,000 reports alleging physical abuse by a parent, guardian, or custodian. If only half of these allegations included the type of injuries noted in the bill, there would be more than 10,000 children in CYFD custody, which the agency reports would be five-fold increase in the number of children in custody at any given time. This does not include the allegations that are investigated for emotional abuse, child neglect, or sexual abuse. The agency states this would have tremendous fiscal impact on the courts, the Department, caseworkers, attorneys, behavioral health service providers, community agencies, and other stakeholders and partners involved in the child welfare system. The fiscal projections provided are preliminary numbers based on a limited analysis of this bill.

According to the preliminary analysis referenced above, CYFD Protective Services will need five times the resources currently available which would include an additional \$609 million and an estimated 4,000 additional FTE. The agency believes the actual recurring cost could be much greater and would need to be determined based on a more in-depth analysis.

Additionally, the bill has fiscal implications for CYFD Children’s Court Attorneys (CCAs), Respondent’s attorneys, guardians ad litem, Judges, and all those necessary to hold hearings. Given the forty-eight hour hearing requirement it is likely to mean that in some instances hearings would be held on weekends thus increasing workload, overtime compensation, and a worse judicial economy.

AOC reports that there will be a need for additional court-appointed attorneys to handle the 48-hour evidentiary hearing. It is difficult to estimate the cost because the number of new hearings is unknown. The \$240 thousand is estimated by the agency based on hiring a number of part-time attorneys to handle the hearing.

AOC believes the fiscal impact would be substantial due to the increased number of appointed attorneys and attorney time needed to contact a client and prepare for a forty-eight hour evidentiary hearing in addition to a ten-day custody hearing and adjudicatory hearing on the merits within sixty days of service. When caseloads increase additional court resources are needed to handle additional proceedings.

SIGNIFICANT ISSUES

HJC Amendment Significant Issues

The AOC reports it will likely to be difficult to have tribes participate on a 48 hour notice; especially for tribes outside the State of New Mexico. It is also unlikely that the identification of a child as an Indian child will occur in this time-frame; especially for tribes outside of New Mexico.

The CYFD analysis of the amendment to HB 333 maintains the bill does not address any of the significant issues raised in the analysis of the original bill provided by the agency, including administrative implications of an additional 4,000 FTE and an additional operating budget to be estimated at \$609 million per year. Additionally, the CYFD provided the below real case scenario:

“The director of a licensed child care facility reported that a five-year old child was running out to the playground. The child slipped and hit his forehead on the rail leading up to the slide. The child's mother was volunteering at the facility at the time, and playing with her child on the playground at the time of accident. The child had a bump on the left side of forehead and his mother decided to take him to urgent care to get him checked.

Under this legislation, when the physician reports this injury to CYFD as required by the reporting statute, the child will *have* to be removed from the family. The child will experience severe trauma as a result of an accident where the mother made *all* the right decisions.” (CYFD amendment analysis, February 19, 2014)

HB 333 Significant Issues

CYFD reports this bill is problematic for the agency in following respects: 1) The taking of a child into custody can be a very volatile, dangerous and potentially violent situation, and under our current Children's Code is reserved to law enforcement, which has “police power” granted by the State. Department case workers do not have police power, and are not trained or authorized to “take” a child into custody over the objection of a parent. 2) The automatic “taking” contemplated by this bill, triggered by the mere existence of an injury with no finding that it was caused by the action or inaction of a parent, or that there are emergency circumstances in which the child is at risk, would likely be considered an unconstitutional infringement on a parent's constitutionally protected liberty interest in raising their children without government interference. 3) The bill does not reference the filing of a petition or the initiation of a legal proceeding, but calls for a “hearing” within forty-eight (48) hours. CYFD reports that this may be an unrealistically short period of time for observing the normal requirements of procedural due process, and could not take place without the formalities of petition and issuance of process, which also could not be accomplished within this time frame. 4) The absolute limitation on the ability of the court and/or the department to return the child to the parent, guardian or custodian absent specified counseling, with no reference to findings regarding the best interests of the child or the circumstances of the particular case, would likely be considered by our courts as arbitrary, and a violation of parents' constitutional right to custody of their children. This likelihood is increased by the fact that the specified counseling is vague. 5) Removing children from their homes without substantiating the allegations that were made, prior to making any determination

about the safety of said children, a problematic clinical decision according to CYFD. The removal process is traumatic for children and families, and to do so without making reasonable efforts required by federal and current state law, would be inappropriate. 6) At this time CYFD has approximately 1000 foster families. To manage this number of children in custody could require upwards of 5000 foster families. The agency reports that this would be a massive statewide initiative that would require immense resources and response by the citizens of the state that is to date unprecedented.

CYFD states this bill does not consider in some instances a child may experience an injury for reasons other than abuse. As examples, a child who falls off of a bicycle or a child involved in sports activities. Automatic taking of a child with injury without investigation as to the cause or any action or inaction on the parent's part impedes the parents constitutionally protected interests.

The bill indicates CYFD would take children into custody. This is contrary to the law in that the only methods for CYFD custody of children, absent this bill, are through law enforcement removal or court order. This bill broadens CYFD's authority to include direct removal of children by CYFD.

The Children's Code requires a custody hearing ten days after removal of a child from the home followed by a mandatory pre-trial hearing and an adjudicatory hearing within sixty days of service. According to the AOC, often service must be achieved by publication which would most certainly take more than forty-eight hours. Moreover, best practice is for a guardian ad litem or youth attorney to meet with the child or youth prior to the custody hearing to make a best interests determination. The agency reports that it is unlikely, given current caseloads, that this would be achievable without contracting with additional attorneys. Additionally, it is not certain whether a pre-trial meeting would be required prior to the forty-eight hour hearing. This would impact the court services fund which pays for mediators.

Finally, CYFD has the ability to remove a child immediately from the home with forty-eight hours to determine if a petition for abuse/neglect should be filed. Some petition or other form of pleading would need to be filed to initiate the hearing and provide parties with notice. This may cause additional strain on court resources such as court clerks, monitors, trial court administrative assistants and judges.

The bill requires also that a "hearing on the evidence of abuse" be held within forty-eight hours. This is not practical. For example, if a child is removed at 2:00 a.m. on Saturday a hearing on the merits would be required to be held by 2:00 a.m. Monday. This will require the resources for a significant increase in overtime compensation for CYFD employees, contract attorneys, and judicial employees. Additionally, the ability of those involved to sufficiently prepare for a hearing on the merits within forty-eight hours is negligible. It would preclude parties from exchanging exhibits, witness lists, and ability to reach a solution without the need for full hearing. This would create potential violations of a party's due process rights.

The bill requires counseling in situations where there are two or more substantiations. CYFD states this requirement could be seen by as arbitrary and capricious.

PERFORMANCE IMPLICATIONS

CYFD has performance measures related to the safety and well-being of children, and stability of placement. This bill has the potential to significantly negatively affect these performance measures.

ADMINISTRATIVE IMPLICATIONS

As stated above, the authority of CYFD is changed by this bill because it provides CYFD authority to remove. This requires (1) the creation of policies and procedures related to removal pursuant to this bill; (2) the resources necessary to handle the increased workload for CSAs, placement workers, and permanency positions. There is no appropriation attached to this bill and CYFD states that the agency is unable to absorb the increase in work through existing resources.

CONFLICT

CYFD reports that this bill conflicts with the following:

- Section 32A-4-2(B) and (F) NMSA 1978 which define abuse and physical abuse.
- Section 32A-4-4(D) NMSA 1978 which allows CYFD two days within which to file a petition for custody.
- Section 32A-4-7(D) NMSA 1978 which requires CYFD make reasonable efforts before removal of a child. The bill conflicts with NMSA §32A-4-6 which describes the method for taking children into custody.
- Section 32A-4-18 NMSA 1978 which sets forth the timeframes for initial hearing in the case (ten days). Under NMSA 32A-4-18 a decision on the merits does not occur at the ten (10) day custody hearing. The purpose of the hearing is to determine who will maintain physical custody of the child pending the adjudicatory hearing.
- Section 32A-4-19 NMSA 1978 which sets forth a sixty (60) day timeframe for the hearing on the merits (adjudicatory hearing) occurs.

OTHER SUBSTANTIVE ISSUES

This bill confers new authority on CYFD to independently take custody of an apparently abused child. Under the Children's Code, NMSA 1978, Chapter 32A, the authority to take abused (or neglected) children into state custody now lies with law enforcement, NMSA 1978, Section 32A-4-6, and with medical personnel under certain circumstances. The proposed legislation would supplement this existing authority by mandating that CYFD take custody where physical abuse appears evident.

As with any measure that impacts the rights of parents vis-a-vis their children, important constitutional rights are implicated. Our state courts have joined the federal judiciary in recognizing the fundamental right of parents with respect to the "care, custody, and management of their child." State ex rel. Children, Youth and Families Dept. v. Ruth Anne E., 1999-NMCA-035, ¶ 10, 126 N.M. 670, 974 P.2d 164. In New Mexico, our courts have recognized a "parental privilege" to discipline, whereunder a parent is entitled "to use moderate or reasonable physical force, without criminal liability, when engaged in the discipline of his or her child." State v. Lefevre, 2005-NMCA-101, ¶ 16, 138 N.M. 174, 117 P.3d 980.

Any proceedings impacting the rights of parents must be conducted in conformity with due process standards, although “procedural due process is a flexible right and the amount of process due depends on the particular circumstances of each case.” 1999-NMCA-035, ¶ 17. Of course, the state also has an established offsetting interest in protecting the welfare of the child. See NMSA 1978, § 32A-4-10(A); Martinez v. Mafchir, 35 F.3d 1486, 1490 (10th Cir. 1994) (“the state itself has a compelling interest in the health, education and welfare of children”).

According to AGO this bill does employ measures to protect the due process interests of parents, namely, by requiring a court hearing within 48 hours. Additionally, existing provisions in the Children’s Code extending legal representation to parents are presumably applicable to the implementation of this legislation. See NMSA 1978, § 32A-4-10(B).

AMENDMENTS

The Attorney General’s Office (AGO) suggests the following amendments:

The bill appears to leave some gaps in the administration of the new authority proposed to be assigned to CYFD. By permitting such gaps, the legislation, if enacted, is vulnerable to judicial attack. First, the bases for removal enumerated in Section 1(A) of the Bill may benefit from greater clarity, and it may be prudent to ensure that the Section conforms to the “parental privilege” to discipline doctrine. Second, under Section 1(C), it is not readily apparent what procedure will be employed in the event the parent, guardian or custodian has more or less than “two substantiated claims of abuse or neglect.”

KK/svb:jl