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## FISCAL IMPACT REPORT

SPONSOR Egolf ORIGINAL DATE 1/27/15  
LAST UPDATED 2/3/15 HB 29

SHORT TITLE Duty to Report Child Abuse or Neglect SB \_\_\_\_\_

ANALYST Klundt

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

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Unknown				

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Children, Youth and Families Department (CYFD)

Administrative Office of the Courts (AOC)

Department of Public Safety (DPS)

Attorney General's Office (AGO)

Law Offices of the Public Defender (LOPD)

### SUMMARY

#### Synopsis of HJC Amendment

The House Judiciary Committee amendment removes a list of enumerated professionals specifically described as mandatory reporters, thereby clarifying that every person is required to report knowledge or reasonable suspicion of child abuse and/or neglect.

#### **Original**

House Bill 29 amends Section 32A-4-3 NMSA 1978, to clarify language regarding the duty to report child abuse and neglect. Specifically, the change simplifies and expands the class of persons having a legal duty to report child abuse and neglect to include "every person" who "has information that is not privileged as a matter of law and who knows or has a reasonable suspicion that a child is an abused or neglected child."

The bill also amends Section 32A-4-3 (E) so that law enforcement agencies or the Children, Youth, and Families Department shall have access to any of the records pertaining to a child abuse or neglect case maintained by "a person who makes a report pursuant" to Subsection A.

## FISCAL IMPLICATIONS

There is no appropriation included in this bill however; the Administrative Office of the Courts (AOC) reported that fiscal implications will be minimal as related to the printing and distribution of the amended statute.

However, the Law Offices of the Public Defender (LOPD) stated some additional cases could be absorbed with existing resources but that significant increases in the number of prosecutions brought about by the cumulative effect of this change could bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

## SIGNIFICANT ISSUES

CYFD reported that this bill attempts to reassert, after the *Strauch* case, the legislature's intention that *all* citizens of New Mexico have a duty to report reasonable suspicions of child abuse or neglect. *See State v. Strauch*, 2014-NMCA-020, 317 P.3d 878, *cert. granted* 321 P.3d 936. CYFD analysis raises the concern that, as drafted, the exception for privileged information contained in the statute could be used by physicians, psychotherapists and other professionals to claim that they do not have a duty to report in certain circumstances. In contrast, CYFD reads the privilege exception in the existing statute applies only to clergy. The agency believes that broadening this exception creates limitation or qualification on the duty to report which would shrink the pool of reporters, including many of those who come into contact with children in circumstances where abuse may be evident. The agency states the exception for privilege is not in the current Children's Code, and since the Department prefers, as a matter of policy, that every reasonable suspicion of abuse or neglect be reported, the CYFD argues this bill should not be passed in its current form.

In support, CYFD states 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, CYFD asserts 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. The narrowing of the reporting law is contrary to the position of CYFD as being contrary to the safety and welfare of children.

Further, CYFD believes there is a societal benefit in allowing for open, honest, and candid communication of a person with professionals, and 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 voices for the child. To restrict reporting based on privilege may not serve the best interests of the children of New Mexico according to CYFD.

CYFD also indicates that the individuals listed in the existing law are included 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.

Privilege held by clients of those currently 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.

However, contrary to the analysis provided by CYFD, the Attorney General’s Office (AGO) indicated that privilege, as in the existing version of the statute, would apply to any potential reporters only as set forth in the Rules of Evidence, other Supreme Court Rules, or the constitution. Thus, the proposed changes would not expand the privileges that would exempt information from mandatory disclosure.

The AOC reports that in the *Strauch* opinion, the Court of Appeals read the reporting requirement in Section 32A-4-3 narrowly to include only those parties specifically listed in the statute, such as physicians, teachers, etc. The list also includes any “social worker acting in an official capacity....” The court read this phrase to mean only social workers employed by or contracting with a government entity. House Bill 29 would legislatively overrule the opinion by deleting the list of people expressly included in the current language of Section 32A-4-3, so that is simply applies to “all persons.”

It should be noted that the New Mexico Supreme Court is reviewing the *Strauch* opinion on petition for certiorari. The LOPD reports the possibility remains that the New Mexico Supreme Court may adopt a more expansive interpretation of the statute and find that it applies to “every person” notwithstanding the list of carefully selected professionals expressly included in the statute.

LOPD analysis indicates the change in statute would resolve ambiguity as to the persons covered by the statute by creating a 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. The agency also indicates that the increase in reporting may result in a significant increase in the number of reports made by lay persons, and states there may be some ambiguity what constitutes a “reasonable suspicion” that could be viewed as subjective by persons reading the law. Currently, any person can report suspected abuse, and failing to do so could result in a misdemeanor. However, the agency analysis indicated that persons currently delineated in the statute are better equipped to assess abuse and recognize when abuse is occurring.

The LOPD also indicates the deletion of the list could significantly increase prosecutions since child abuse cases often involve several witnesses who suspected child abuse at one point or another, or could effect a witnesses’ candor since testifying honestly to their suspicions or observations could subject them to liability for failure to report. However, the agency notes that insofar as that would be the case, witnesses may also have grounds to invoke their 5<sup>th</sup> Amendment rights against self-incrimination. Finally, the LOPD indicated that the bill may be interpreted to include minors or those witnesses who may not have reported as results of fear of recrimination, such as a battered person.

**PERFORMANCE IMPLICATIONS**

CYFD has performance measures concerning the safety and well-being of children which the agency believes may be negatively affected if the requirement for mandatory reporting is narrowed by expanding privilege to all professions and persons.

Service and lead to objections to getting the full suggested phrase included in the bill.

**AMENDMENTS**

The LOPD recommended amendment should be considered that specifies that the duty to report applies to adults and is limited it to an actual knowledge standard, and create an affirmative defense for battered persons with justifiable fears of recrimination; Alternatively, the LOPD suggests a careful expansion of 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**

Limiting mandatory reporters to those enumerated in §32A-4-3(A) based on the recent Court of Appeals (*State v. Strauch*, Ct. App. No. 32,425) decision which ruling is being challenged pursuant to a Writ of Certiorari was granted by the Supreme Court on January 10, 2014 and which oral arguments were heard in September of 2014 back to what CYFD believes to be its original intent which is that every person is a mandatory reporter regardless of professional affiliation. However, it will narrow the statute based on privileges that may be asserted.

ANA/bb/aml