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FISCAL IMPACT REPORT

SPONSOR Candelaria **ORIGINAL DATE** 03/05/15 **LAST UPDATED** 03/17/15 **HB** _____

SHORT TITLE Damages for Failure to Report Abuse & Neglect **SB** 372

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY15 | FY16 | FY17 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|-------------|-------------|-------------------|---------------------------|------------------------------------|
| Total | | Substantial | Substantial | Substantial | Recurring | General Fund/Public Liability Fund |

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 29.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Public Safety (DPS)
 Aging and Long-Term Services Department (ALTSD)
 Attorney General's Office (AGO)
 Children, Youth & Families Department (CYFD)
 Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 General Services Department (GSD)

SUMMARY

Synopsis of Bill

Senate Bill 372 creates a private cause of action for children and incapacitated adults who suffer injury from abuse or neglect as a result of CYFD's, ALTSD's or a law enforcement agency's failure to take steps to investigate or intervene when the department or agency had actual or constructive notice of abuse or neglect. A prevailing plaintiff is entitled to injunctive or declaratory judgment relief, damages under the Tort Claims Act (TCA), reasonable attorney fees and costs.

The bill creates a second private cause of action against a mandatory reporter for failure to report abuse or neglect of a child or an incapacitated adult. Remedies under this cause of action include actual and punitive damages, and costs and attorney fees may be awarded to the prevailing party.

SB 372 also amends the TCA to add waivers of immunity for these new causes of action.

FISCAL IMPLICATIONS

AGO, DPS, CYFD, ALTSD and GSD all report that the fiscal impact of this bill is substantial, since it creates new causes of action and waivers of immunity. DPS comments that law enforcement agencies and officers may be liable for injury to children and incapacitated adults in a wide array of circumstances, and expresses concern that the attorney fee provisions and ambiguous statutory language will likely result in greater litigation. GSD raises similar concerns, and points out the provision allowing the recovery of plaintiff's defense fees and costs greatly widens the financial risks associated with pursuing a defense to these new complaints. It believes the decision to settle cases, no matter how defensible, brought about by the enactment of SB 372 will be considerably impacted by the looming possibility of having to pay substantial plaintiff's attorney fees and costs upon a jury award of even minor damages.

Additionally, increased premiums paid by these departments and agencies to the Risk Management Division of GSD may be anticipated, as well as increased caseloads in the courts.

SIGNIFICANT ISSUES

Responding agencies who investigate allegations of abuse and neglect of children and incapacitated adults all express concern that the provisions are overbroad and potentially include activity that is reasonable and non-negligent. Both ALTSD and CYFD believe this bill is not consistent with public policy in terms of the duties and responsibilities of each department and law enforcement. DPS comments that generally law enforcement cannot be held liable when a victim believes that a particular investigation was inadequate, and it is not uncommon for a victim to believe that something else could or should have been done by investigating officers. It anticipates that this legislation will open the door to liability against police agencies and potentially individual officers who have acted in good faith. Similarly, AGO expresses concern that an agency could have actual or constructive notice of the abuse or neglect, follow all reasonable procedures, and yet if the child or incapacitated adult is injured, the agency becomes subject to suit. It also notes that the federal grant that funds its unit that investigates abuse and neglect does not authorize the investigation of every single allegation of abuse and neglect.

CYFD points out the causal connection between an injury to a child and an alleged failure on the part of CYFD or law enforcement to investigate or intervene may be difficult to establish, and asserts that in most cases, it is purely speculative to believe that intervention or investigation by either agency would prevent injury to a child. It concludes this bill gives unclear and confusing direction to courts and litigants under this prospective cause of action.

DPS calls particular attention to the failure to define the term "injury" and the vagueness of the phrase "failure to take steps to investigate or intervene", both of which may be so broad as to encompass conditions that may not be intended, and give raise to differing interpretations and debate. It also objects to imputing liability on the basis of constructive notice: what an officer or other person charged with responsibility should have known. DPS comments that that term is not used in the TCA, which instead addresses intentional misconduct of an officer in its law enforcement waivers. See Section 41-4-12, NMSA 1978.

Both CYFD and ALTSD point out that each already has a duty to investigate. See Section 32A-

4-3(C) and Section 27-7-19, NMSA 1978. ALTSD advises that the Adult Protective Services Act (APSA) authorizes only the least possible restriction on the exercise of civil rights and religious beliefs consistent with the adult's need for protective services. Further, it reports that good faith discharge of this least restrictive duty may be a lesser duty than is imposed by general negligence law, and that the bill may have the unintended consequence of altering the carefully balanced and restrained mandate of APSA.

As to the cause of action for failure to report, which allows the award of punitive damages for failure to report abuse or neglect, DPS notes that the TCA specifically prohibits that type of award against the State. See Section 41-4-19(D), NMSA 1978. Further, ALTSD calls attention to another provision in the section creating that cause of action that allows a court to award the prevailing party its costs and attorney fees, and suggests that when the prevailing party is the state, there may be public policy reasons against imposing such costs against an unsuccessful plaintiff. Additionally, if HB 29—which expands and clarifies the duty to report to every person with knowledge or a reasonable suspicion of child abuse or neglect—the pool of potential defendants under this cause of action will be significantly increased.

Similar to other agency comments, GSD advises:

The lack of definition in what is meant by a “failure...to take steps to investigate or intervene” presents a low barrier to claimants wishing to bring one of these new causes of action against CYFD, ALTSD, or an investigating law enforcement agency. The subjective nature of this language in SB 372 will permit individuals to file a complaint simply because they disagree with how the State agency is handling an investigation into abuse or neglect despite the agency's compliance with applicable law. Additionally, SB 372's failure to outline a clear causal link between an unspecified injury and a nebulous failure on the part of the State agency further complicates the capacity of the agency to defend against a complaint filed under the provisions of SB 372. Additionally, punitive damages are allowed without providing any clear standard for the basis of such damages. Moreover, punitive damages are not permitted for other torts under the Tort Claims Act, see Section 41-14-19(D), NMSA 1978, and thus an equal protection argument is raised which could essentially waive immunity for all punitive claims.

PERFORMANCE IMPLICATIONS

CYFD reports it has performance measures concerning the safety and well-being of children which it believes will not be positively affected by this bill. Similarly, ALTSD notes its performance measures for adult protective services, which are focused on addressing and preventing adult abuse, neglect and exploitation, would be negatively impacted by the significant demands placed on its staff and resources by this bill. DPS fears that officers trying to fulfill their professional obligations and act in good faith to investigate and report claims will still be subject to suit.

RELATIONSHIP

This bill relates to HB 29, Duty to Report Child Abuse or Neglect, which expands the duty to report to include every person with knowledge or a reasonable suspicion of child abuse or neglect.