

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 and previously issued FIRs are available on the NM Legislative Website (www.nmlegis.gov) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 1/26/17
 LAST UPDATED 2/15/17 HB 53/ec

SPONSOR Gentry

SHORT TITLE Allow Curfew Ordinances SB _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	See Narrative	See Narrative	See Narrative		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)
 Department of Public Safety (DPS)
 Municipal League (ML)
 Public Education Department (PED)

SUMMARY

Synopsis of Bill

House Bill 53 authorizes counties and municipalities to adopt youth curfew ordinances regulating and restricting the actions of children between midnight and 5 a.m., as well as during school hours on weekdays. A school day curfew ordinance may require children subject to the compulsory school attendance law to be present on public, private or home school program premises when that school or program is in session.

There are nine delineated exemptions that must be included in either type of youth curfew ordinance which excuse these children from its provisions:

- (1) a child 16 or older;
- (2) A lawfully emancipated minor;
- (3) a child accompanied by a parent, guardian or custodian;
- (4) a child accompanied by an adult authorized by the child’s parent, guardian or custodian to have custody of the child;
- (5) a child traveling interstate;

- (6) a child attending, going to or returning home from a school-sponsored function, a civic organization-sponsored function or a religious function;
- (7) a child at work, or going to work or returning home from work;
- (8) a child involved in a bona fide emergency; and
- (9) as to school time curfews:
 - a) a child enrolled in or receiving instruction in a private school or home school program that does not require the child to be in attendance at a particular time;
 - b) a child attending a high school with an open campus rule that applies at the time the child otherwise would be detained; and
 - c) a child concurrently enrolled at a high school and a post-secondary educational institution, a career enrichment center or the equivalent.

Upon detaining a child, the law enforcement officer or any other county or city employee designated by that public body to enforce an ordinance must:

- promptly attempt to contact the child’s parent, guardian or custodian;
- upon contact, deliver the child to the parent’s, guardian’s or custodian’s residence or request that the parent, guardian or custodian come and take custody of the child, unless returning the child to the custody of the child’s parent, guardian or custodian would endanger the health or safety of the child; and
- if unable to contact parent, guardian or custodian within a six-hour time period, follow the procedures for protective custody outlined in the Family in Need of Court-Ordered Services Act (FINCOS) (which authorizes placement in a licensed foster care home or other community-based shelter care facility or a relative’s home). HB 53 also amends FINCOS to include use of protective custody for curfew violations. Further, the bill prohibits placement in a “secured setting” for these violations.

This bill contains an emergency clause.

FISCAL IMPLICATIONS

AOC warns that the Court Appointed Attorney Fee Fund (CAAFF) likely will be impacted, since attorneys are appointed for children in Family In Need of Court Services (FINCOS) cases. Currently, attorneys on contract with AOC and paid through the CAAFF are required to handle FINCOS cases to which they are appointed. There continues to be a statewide increase in the abuse and neglect cases that significantly strains the CAAFF budget. In FY 15, AOC had to request two supplemental appropriations to cover costs of CAAFF attorneys. In FY 16 and FY 17, AOC requested a substantial supplemental appropriation for this same purpose. CAAFF has been unable to cap caseloads per attorney, with many handling over 80 cases. FINCOS cases under this bill could create a substantial strain on court recourses and the CAAFF.

Numerous agencies also indicate additional resources may be needed at the local level to care for curfew violators before they are released to a parent, guardian or custodian or taken into protective custody, as well as after being taken into protective custody, which need may result in additional operating budget impact to the state.

SIGNIFICANT ISSUES

In its analysis of a substantially similar bill introduced in the 2016 session (HB 29), PED provided these observations as to youth curfews generally:

The arguments for youth curfews are generally threefold: they reduce the number of crimes committed by juveniles; they protect children from becoming victims of crime and they reduce truancy. Although some local curfew ordinances in some states provide for civil penalties such as fines or community service for the juveniles and/or the parents, and some classify curfew violations as misdemeanor crimes, HB 29 contains a provision that prohibits criminal penalties for a violation of a curfew ordinance. Several states have passed laws similar to that which is being proposed by HB 29, and many municipalities have imposed youth curfews.

Youth curfews can be popular ways to stem public concern over crime rates, or as a reaction to a major event, because they are relatively inexpensive compared to other crime-fighting tools and have an easy-to-understand logic: If children are home, they won't commit crimes or be victims of crimes. However, there is little empirical evidence that curfews deter crime and/or reduce juvenile victimization. Curfews are also often challenged in court on constitutional grounds, with mixed outcomes, which can be time consuming and costly.

AOC echoes the concern as to litigation when it advises that a nighttime curfew enacted under HB 53 may be challenged on constitutional grounds as being in violation of the constitutional protections of due process and equal protection, as an infringement upon the rights of free speech and assembly, and even, perhaps, as a violation of the right to be protected from unreasonable searches and seizures. It points to the New Mexico Supreme Court's decision in *American Civil Liberties Union of New Mexico v. City of Albuquerque*, 1999-NMSC-044, where the Court ruled that the City's curfew was preempted by the Delinquency Act of the Children's Code because the ordinance designated previously lawful behavior of young people as criminal in nature and created a penal offense by authorizing incarceration and a fine for each occurrence of an individual under the age of 17 who remained in a public place or on the premises of any establishment within Albuquerque during curfew hours. Although, as AOC notes, the curfews authorized in HB 53 are much different than that rejected by the Court—they cannot create a penal offense nor impose criminal penalties—AOC calls attention to a concurring opinion which addressed the issue on constitutional grounds and found that the ordinance was overbroad in the encroachment on parental rights and vague in the attempt to define conduct by generalized reference to the First Amendment.

As to the school time curfew provisions of HB 53, AOC advises it is unclear whether such a curfew would face the same constitutional challenges as a nighttime juvenile curfew, but concludes that this type of curfew may be challenged as being preempted by existing state truancy laws, and as, perhaps, an unconstitutional violation of the right to be presumed innocent.

As to those laws, PED pointed out that the exemption for youth 16 and over contained in Section 1(C)(1) conflicts with the provision in the Compulsory School Attendance Act (which it specifically incorporates in Section 1(B)) that a school-age child must attend a public or private school or home school program until that child is at least 18, unless that child has graduated from high school or received a high school equivalency credential.

ML provides these comments:

The bill fails to articulate what circumstances will trigger a law enforcement officer's right to stop a child. Do they have to be in the act of committing a crime to establish reasonable suspicion, or is the mere fact that they are under 16 enough? How does a law enforcement officer decide if a child is under 16 or not? By looking at them? This could lead to children who are 17 or 18 or even young adults over 18 being stopped simply because they "look to be under 16". There is no reasonable standard established to make this determination.

If a child (defined as a person under 16) is picked up, law enforcement will contact the parents, guardian or custodian and return the child or have the parent, guardian or custodian pick up the child unless to do so would endanger the child. After 6 hours of "detention" the law enforcement officer or employee shall follow the procedures for protective custody outlined in the Family in Need of Court-Ordered Services Act. The bill does not outline what happens to the child during the period of detention which could be as long as 6 hours. The bill is silent as to the terms of and location of the detention but does state that the child shall not be placed in a secured setting.

Similarly, AOC anticipates that children will be treated differently and cared for differently, depending upon a variety of factors, including location, and this disparity in treatment is likely to spur legal claims. DPS expresses concern that its officers could be diverted from their primary duties and potentially from their ability to respond to an emergency incident while the child is in NMSP custody.

Further, while Section 1(D) (3) requires a six hour period for making contact with a parent or other guardian or custodian before a child picked up under either form of curfew is taken into protective custody, Section 2's amendment to the existing law governing protective custody does not require that that six hour contact period elapse prior to taking a curfew violator into protective custody. In analyzing changes to that law, AOC notes that the definition of "family in need of court-ordered services" is not amended to include curfew violators who now in Section 2 are authorized to be taken into protective custody under the law governing such families. See Section 32A-3B-2, NMSA 1978. Further, there is a disconnect between Section 1(D)'s language allowing a designated county or municipal employee to take a curfew violator into protective custody and the existing protective custody law which, even as amended in Section 2 of this bill, authorizes only law enforcement officers to take that child into protective custody.

More generally, allowing any county or municipal employee to detain a child for curfew violation may raise concerns regarding the safety and well-being of the child during such detention, if, for instance, that employee has not been subject to a background check. Liability issues may also arise in terms of actions by that employee, such as care that is or is not provided and vehicle transport.

PERFORMANCE IMPLICATIONS

PED suggested this bill may support Strategic Lever 3: Ready for Success by discouraging truancy and increasing attendance. CYFD has performance measures regarding the safety and permanency of children in its custody that may be impacted.

ADMINISTRATIVE IMPLICATIONS

Since communities may have differing curfew ordinances, given its state-wide coverage, DPS will need specific training on each ordinance adopted.

TECHNICAL ISSUES

The term “secured setting” in line 5 on page 4 is unclear: is it meant to describe secured juvenile facilities (where adjudicated delinquents may be transferred upon sentencing)? And is it meant to include local facilities in which children facing allegations of delinquency are held in custody pending adjudication and sentencing?

OTHER SUBSTANTIVE ISSUES

AOC also advises:

The U.S. Supreme Court has not weighed in on the juvenile curfew issue and circuits have been split on the constitutionality of such curfews over the years. In their 2015 Saint Louis University Journal of Health Law and Policy article, *Guidelines For Avoiding Pitfalls When Drafting Juvenile Curfew Laws: A Legal Analysis*, Vol. 8, p. 301, Elyse R. Grossman and Kathleen S. Hoke address the following:

- a specific Montgomery County, MD curfew law;
 - the history of curfew laws;
 - claims challenging curfew laws brought by minors and parents;
 - the history of cases involving curfew laws (they report that overall, as of the publishing of the article in 2015, there have been 41 cases reported examining the constitutionality of nighttime juvenile curfew laws, with 25 of them (or 60%) finding the laws to be unconstitutional (See p. 310 and footnotes 81 and 82)); and
 - recommendations for policy makers wishing to enact juvenile curfew ordinances.
- (See, www.law.slu.eu/sites/default/files/Journals/grosman-hoke_article.pdf)

PED provided this additional information:

At least 500 US cities have curfews on teenage youth, including 78 of the 92 cities with a population greater than 180,000. In most of these cities, curfews prohibit children under 18 from being on the streets after 11:00 pm during the week and after midnight on weekends. About 100 cities also have daytime curfews to keep children off the streets during school hours. (2009: <http://www.citymayors.com/society/usa-youth-curfews.html>)

One of several municipalities that have specific youth curfew laws of note is in Hennepin County, Minnesota (MN), which passed a youth curfew law initially as one part of a comprehensive safety net for youth. The City of Minneapolis’ curfew not only provides for punitive consequences to children, but connects them to counseling, social, and recreational programs. The City offers mentoring and positive adult role models and leadership in schools and neighborhoods and promotes good communication between police, parents, schools, social agencies, and youth. However, due to the huge influx of detainees under this ordinance, Minneapolis also had to establish a Curfew Center to serve as a holding area for youth in violation of the curfew statute, waiting for parents or guardians to retrieve them.

<http://www.hennepin.us/your-government/ordinances/ordinance-16>