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FISCAL IMPACT REPORT

ORIGINAL DATE 1/28/19

SPONSOR Salazar LAST UPDATED _____ HB 96

SHORT TITLE Blind Parents' Rights Act SB _____

ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate	Indeterminate	See Fiscal Implications		CYFD, AOC

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Children, Youth and Families Department (CYFD)

SUMMARY

House Bill 96 provides that a parent's blindness cannot be the basis for denied or restriction of a parental right.

Section 2 defines the types of visual impairments that constitute a "blind parent." "Child" is defined to be an individual under eighteen who, "by reason of minority, is legally subject to parental control, guardianship, foster care or similar control." Similarly, this section goes on to define "foster parent," "guardian," and "parent." "Parental right" is defined as "a right to:

- (1) adopt a child, through a state agency or through a private adoption service;
- (2) custody of a child;
- (3) visitation of a child;
- (4) serve as guardian of a child; or
- (5) serve as a foster parent."

Section 3 states that: "A blind parent's blindness shall not serve as a basis for denial or restriction of a parental right." This section goes on to require that:

- Allegations that the blindness has a detrimental impact on the physical, mental or emotional welfare of a child have the burden of proof by *clear and convincing evidence*.
- If the burden is met, the blind parent may rebut the allegation by demonstrating how

supportive parenting services can alleviate or mitigate any detrimental impact.

- If a court, state agency or other entity limits or denies a blind parent's parental right, it shall make specific written findings setting forth the clear and convincing evidence for the determination and why supportive parenting services is not a reasonable accommodation.
- Also required to make a finding of fact as to the prospects for supportive parenting services.

Finally, this section provides that a blind parent who has been subject to a violation of this act has the right to seek and recover reasonable attorney fees and costs, including fees and costs arising in a domestic relations matter in which a spouse or parent has alleged that a blind parent should be denied any parental right on the basis of the blind parent's blindness."

FISCAL IMPLICATIONS

According to the Children, Youth and Families Department (CYFD), "Subsequent to the licensure of a foster parent with a visual impairment, a foster child was injured, and, following a lawsuit, CYFD's liability insurance made payment to the injured foster child. The injury was due solely and specifically to the visual impairment of the foster parent. Further, the establishment of a higher burden of proof specifically and solely for administrative appeals made by individuals with visual impairments will have an additional fiscal implication for the protective services division and general counsel of CYFD." In addition, the agency also reported additional administrative resources will be necessary to address the dual-track appeals process necessarily created to address the increased burden of proof established for a single portion of the population.

The Administrative Office of the Courts (AOC) reported this bill will require a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the additional litigation generated by enforcement of this new definition of "parental right" across several different areas of the law related to children.

AOC also reported HB 96 applies to both court and administrative proceedings that are ultimately appealed to court ("If a court, state agency or other entity limits or denies a blind parent's parental right, it shall make specific written findings setting forth the clear and convincing evidence...") These specific findings are not currently required, and not all cases impacting parental rights as they are defined here require a burden of clear and convincing evidence (e.g. denial of a foster care license). These new requirements would increase the cost of each case in terms of judicial time spent on appeals from administrative proceedings and in creating the necessary record in each case.

Finally, AOC reported HB 96 also provides for attorneys' fees and costs when a blind parent's rights are violated as provided in the new act. Additional penalties tend to increase the length of litigation and the motives to appeal. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional personnel and resources to handle the increase.

SIGNIFICANT ISSUES

AOC reported, “The definitions and apparent scope of HB 96 includes domestic relations, abuse and neglect, kinship guardianship, adoption, and foster care licensing proceedings, so HB 96 would impact a number of different types of proceedings.

Biological parents have a constitutional right to parent their children unless the parents are proven to be unfit. Unfitness must be proven by clear and convincing evidence. While the overall physical condition of the parent can be considered as one factor of many in child custody decisions, the AOC is not aware of any case where an individual was denied the right to parent solely because the parent was blind or physically disabled. Any such case would likely violate the federal constitution and might violate other federal law such as the Americans with Disabilities Act or Section 504 of the Rehabilitation Act. There is no evidence or case law that suggests our current statutes and case law are insufficient to protect the rights of parents who are blind.

HB 96 includes several different new standards, such as the “ability to parent” as well as the effect of “supportive parenting services,” which is not further defined. In addition, Section 3(D) requires that “the court, state agency or other entity with jurisdiction shall also make a written finding of fact as to the prospects for supportive parenting services to allow the blind parent to adequately parent the child in the future.”

HB 96 appears to change the standard of proof and judicial decision making process required for domestic relations matters when one parent is blind and their blindness is alleged to impact their parenting. Current law in domestic relations cases requires the decision maker to consider the best interests of the children and the ability of each parent to meet the physical, emotional, and educational needs of the child.

Additionally, HB 96 defines “parental right” to include taking guardianship of a child or acting as a foster parent. This is an expansion of the definition of parental right as it is understood under the federal constitution and under New Mexico law that relates to children.

This bill could increase the amount of time a judge would have to spend on each case involving a blind parent by requiring additional findings of fact and an increased burden of proof. The bill may also have an impact on the measures of the district courts in cases disposed of as a percentage of cases filed and percentage change in case filings by type.”

CYFD reported, “This bill establishes five (5) parental rights, of which two – the right to custody of a child, and the right to visitation with the child – fall within the usual parental liberty interests. The remaining three – defined in this bill as the right to adopt a child, the right to serve as guardian of a child, and the right to serve as a foster parent to a child – are not currently established as rights or entitlements anywhere else in law. Indeed, all three activities – adoption, guardianship, foster care licensure – require that assessments and determinations be made by entities statutorily endowed with authority over those three areas.

With respect to foster care licensure, CYFD has guidelines in place for assessing a person’s suitability for foster care licensure. These guidelines include a mechanism for assessing the mental and physical health of the applicants (NMAC 8.26.4.12(F)(1)). For an individual with a visual impairment to become licensed as a foster parent, under regulation, a physician is required to address whether an applicant’s blindness will have an impact on their ability to care for a foster child. This same process is used for applicants with any other type of physical health

issues or mental health issues, and there is no justification for treating a potential foster parent with blindness different from other potential foster parents with other potentially limiting health issues.

In addition to the guidelines for assessing a prospective foster care parent's fitness, the existing foster application guidelines establish mechanisms for appealing a CYFD decision on licensure (NMAC 8.26.4.19(A)(3)). However, this bill requires the use of a higher standard, that of clear and convincing, when a negative licensure decision affects an individual with a visual impairment when that impairment is in any way a factor for that licensing decision. Foster care licensing denials, revocations, and terminations are not presently held to this higher burden of proof. As with the requirement for assessing physical and mental health of a licensure applicant, the appeals process is standard for any denial, regardless of the reason for that denial, and there is no justification for treating a potential foster parent with a visual impairment different from any other potential foster parent.

With respect to adoption, while *any* child may be adopted, the individuals who *may* adopt are limited to those who have been approved by the court as a suitable adoptive parent pursuant to the provisions of the Adoption Act (NMSA 1978 §32A-5-11(B)).

The Abuse and Neglect Act of the Children's Code provides a mechanism by which the State can interfere with the rights of a parent in order to protect the safety and well-being of a child. The Abuse and Neglect Act has detailed provisions to protect the due process rights of a parent when a child has been removed from the parent's care. As examples, the parent has a right to an attorney appointed at the inception of the case, the Department must prove by clear and convincing evidence that the child is abused or neglected due to the actions or inactions of the parent, the court must, in all but very limited circumstances, order a case plan to assist the parent in changing the conditions and causes that brought the child into substitute care, and, if parental rights are terminated, the Department must prove the allegations by clear and convincing evidence. New Mexico case law has further defined the parameters of what process is due a parent when the State seeks to interfere with their parental rights.”

TECHNICAL ISSUES

The definition of “blind parent” differs from the definition of “blind person” in Section 22-14-25 NMSA 1978.

CYFD stated this bill appears to conflict with the Adoption Act's limitation on who may adopt, and may conflict with the Probate Code's requirements for guardianship. It also conflicts with the Children's Code definitions for child, foster parent, and parent. The agency also requested the following amendment “Remove Section 2(F)(1), (4), and (5) to eliminate conflicts with existing statutory and regulatory requirements concerning foster care licensure and appeals, adoption, and guardianship.”

KK/sb