F I S C A L I M P A C T R E P O R T

SPONSOR HHHC **ORIGINAL DATE** 03/04/21 **LAST UPDATED** **HB** 202/HHHC

SHORT TITLE Foster Care Requirements & Changes **SB**

ANALYST Bachechi

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	Indeterminate				Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to Senate Bills 97 and 127 and an appropriation in the General Appropriation Act.

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Aging and Long-Term Services Department (ALTSD)
Children, Youth and Families Department
Early Childhood Education and Care Department (ECECD)
Governor's Commission on Disability (GCD)
Human Services Department (HSD)
Indian Affairs Department (IAD)
Law Office of the Public Defender (LOPD)
Office of the Attorney General (NMAG)

SUMMARY

Synopsis of Bill

The House Health and Human Services Committee substitute for House Bill 202 amends multiple sections in the Department of Health Act (DOH Act) and the Children's Code, Abuse and Neglect Act, and Children's Mental Health and Developmental Disabilities Act. The bill requires additional behavioral health services and trauma responsive services for children in the custody of the Children, Youth and Families Department. The bill largely mirror provisions of the *Kevin S.* settlement agreement regarding the creation of a trauma-responsive system of care, least restrictive and appropriate placements for children, culturally responsive interventions, and

behavioral health services. (See *Kevin S., et al. v. Blalock* et al., No. 1:18-cv-00896, https://kevinssettlement.com/)

1) Section 1 of the bill amends provisions in the DOH Act (Section 9-7-6.4 NMSA 1978) to expand the scope of the services provided by the Interagency Behavioral Health Purchasing Collaborative and requires CYFD to set up a process to provide trauma-responsive services, including "individualized" service plans, to address the unique needs of infants, children, and adolescents in the legal custody of CYFD.

2) Section 2 of the bill amends the Abuse and Neglect Act's change of placement provisions (Section 32A-4-14 NMSA 1978) to prohibit placement of a child in a hotel, motel, or office setting unless there are extraordinary circumstances "necessary to protect the safety and security of the child as documented in the child's record" and approved by the CYFD secretary. The bill further requires CYFD to provide notice to the child's guardian ad litem or attorney within 24 hours after placement and to the court within three business days of the placement. When a child is placed with an out-of-state provider, notice to both the child's attorney and the court is required prior to the placement. HB202/HHHC, however, does not include a definition for "extraordinary circumstances" and there is no definition found in § 32A-4-2 of the act.

   Section 2 of the bill further amends the change of placement provisions in the Abuse and Neglect Act, prohibiting more than three moves of a child in 1,000 calendar days. When the department initiates the third change of placement, the bill requires notice 10 days prior to the placement change to the child's guardian ad litem or attorney and the court specifying this will be the third placement change. The notice must specify what interventions, behavioral supports, and services are in place to support the child, and CYFD is required to initiate a written "education plan to ensure continuity in the child's education, including a plan for transportation and educational supports to minimize the transition." HB202/HHHC includes the following additional requirements regarding change in placement:

   - CYFD is required to have a procedure in place for a change in placement specific to emergency circumstances that includes appropriate placement locations, approval by the secretary of CYFD or the director of the Protective Services Division when extraordinary circumstances necessitate alternative placement, and appropriate notice to the child's guardian ad litem or attorney.
   - Consent consistent with the Children's Mental Health and Developmental Disabilities Act is required for out-of-state placement in the case of a child 14 years or older.
   - CYFD is required to have a procedure in place for out-of-home care that includes a reasonable rate of move from placement settings while ensuring continuity in the child's education.

   HB202/HHHC includes an exception to the rate of moves allowed per 1,000 calendar days when there are extraordinary circumstances that warrant a fourth move. Such action requires notice is provided to the guardian ad litem, attorney, and the court within 24-hours of a move.

3) Section 3 of HB 202/HHHC adds the following to the definition of "least restrictive means principle" in the Children's Mental Health Act (Section 32A-6A-4 NMSA 1978):

take into consideration the goal of keeping the child at home, in a family setting or in the most home-like setting appropriate to the child's needs and circumstances."

Section 3 of the HB 202/HHHC adds the following definition to the Children's Mental Health Act (Section 32A-6A-4 NMSA 1978): "trauma-responsive" means an approach to providing care that recognizes and addresses the behavioral, social, medical and neurodevelopmental impacts of trauma, promotes resiliency and recovery and is specifically designed to avoid re-traumatizing those receiving services."

4) Section 4 of the bill amends the Children's Mental Health Act's provisions on individualized treatment plans (Section 32A-6A-7 NMSA 1978 (being Laws 2007, Chapter 162, Section 7). HB202/HHHC provides: "A child receiving mental health or habilitation services shall have the right to prompt treatment and habilitation based on the professional judgment of a qualified clinician pursuant to an individualized treatment plan that is culturally and linguistically competent and consistent with the least restrictive means principle."

There is no effective date of this bill. It is assumed the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

The *Kevin S.* settlement agreement allows for the requirements of the lawsuit to be achieved over a three-year period. HB202/HHHC provides a phased timeframe to bring the department practices into alignment with the requirements of the bill. If CYFD is required to implement all of the prescribed changes in less than three years, there will be a significant fiscal and operational impact that cannot be absorbed by existing resources.

HB202/HHHC could result in an increase in Medicaid utilization and operating cost. The bill requires CYFD to offer trauma-responsive services and supports, including screening, assessing, referring, treating, and providing transition services. The bill also requires individualized treatment plans that are culturally and linguistically competent and consistent.

AOC notes, new laws, amendments to existing laws, and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. AOC projects minimal administrative cost for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to additional hearings necessitated by these statutory changes.

SIGNIFICANT ISSUES

The *Kevin S., et al. v. Blalock* case, filed in 2018 with the previous administration on behalf of 14 foster youth and two advocacy organizations alleged that trauma-impacted children and youth in New Mexico foster care lacked safe, appropriate, and stable placements and behavioral health services to meet their needs. CYFD and HSD entered into a settlement agreement with the plaintiffs on March 6, 2020. The settlement agreement details commitments to be implemented over a three-year period. These commitments include reports, new and revised policies and procedures, and data documenting progress and specific goals.

HB202/HHHC codifies in law sections of the negotiated *Kevin S.* settlement agreement, while deviating from the actual terms of the settlement agreement in significant ways. The agencies involved in the legislation, HSD and CYFD, emphasize this bill will alter changes to services for children in custody that are part of the settlement agreement, effectively undoing certain portions of the settlement agreement and frustrating the state's efforts to meet the requirements of the settlement agreement. Significantly, HB202/HHHC does not provide the same three-year timeframe for the implementation of the system reforms contained in the settlement agreement. It does not appear the sponsors of this bill have allowed for input by the *Kevin S.* co-neutrals, who oversee the state's compliance with the settlement agreement. The legislation could be improved by the sponsors working with both the state and the co-neutrals to ensure alignment.

The legislation expands the notification requirement for placement changes to include developing (1) a plan that specifies interventions, behavioral supports, and services are in place to support the child, and (2) a written education plan, including a plan for transportation and educational supports. For instances of a planned placement change, these requirements may be feasible. But in the case of emergency placement change, as requested by a resource family or residential provider, the notice provided to guardians ad litem, youth attorneys, and the courts is unlikely to be accompanied with a behavioral intervention and support plan or an educational plan until the emergency requiring the placement change has been resolved. Such a requirement will either delay an emergency placement – at potentially dire adverse consequences for the child – or result in CYFD being out of compliance as it serves the best interest of the child. This is not in accordance with the *Kevin S.* settlement agreement.

Under the *Kevin S.* settlement, the class of children covered are children under CYFD custody. Language in this bill, namely "including those in the legal custody of children, youth and families department" could significantly expands that class to all children because the language seems to create children in custody as a subset of a larger population the bill also includes.

The *Kevin S.* settlement includes an agreed-on data validation plan that sets clear timelines for taking any intermediary steps necessary to validate progress toward the outcomes of the settlement and assign responsibility for the supplying information necessary to fulfill the Data Validation Plan. This bill by codifying portions of the settlement disrupts the plan and will likely require extensive changes and re-drafting of the cata validation plan, which will undermine the state's current efforts to meet existing timelines and will increase costs significantly.

The Governor's Commission on Disability reports HB202/HHHC could prevent children with disabilities from getting the services they need with the addition of subsection (G) to section 32A-4-14 NMSA 1978. While HB202/HHHC does contain an exception to the limit on child placements moves, the bill does not center the needs of the child in the placement decision. The legal standard for placement decisions under existing state and federal law is not based on extraordinary circumstances but based on the child's best interest, least restrictive setting, and most family-like setting.

HB202/HHHC amends §32A-4-14 of the Children's Code to requiring notification and the application of extraordinary circumstances for children placed in offices, hotels, motels, or out-of-state placement. This requirement was included in the CYFD procedures (PR 10.9.1), effective December 1, 2020, to bring CFYD practice into compliance with the *Kevin S.* settlement agreement.

PERFORMANCE IMPLICATIONS

CYFD has performance measures established through both federal and LFC direction. Enshrining additional performance measures within state statute runs the risk of conflict. Performance measures related to this group are defined in federal statute and are subject to change as best practice and policy emerges. The current system related to the delivery of placement services depends on the flexibility afforded by regulations, not statutory mandates. Changes in the federal government's comprehensive research on the best practices for children in the foster care system, as well as state preferences, drive the delivery model for placement services. Enshrining performance measures in statute, where they are difficult to change, does not allow CYFD the flexibility to adapt to best practices and meet children's best interests.

Attempts to adhere to state statutory performance while at the same time working to meet the more dynamic federal performance measures will have performance implications that cannot be absorbed by existing resources.

ADMINISTRATIVE IMPLICATIONS

As noted above, the *Kevin S.* settlement agreement allows for the requirements of the lawsuit to be achieved over a three-year period. HB202/HHHC does provide a phased timeframe to bring the department practices into alignment with the requirements of the bill. If CYFD is required to implement all changes in less than the agreed-on three years, there will be a significant administrative impact that cannot be absorbed by existing resources.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB202/HHHC relates to SB97, Guardianship Changes, SB127, Family Representation and Advocacy Act, and an appropriation in the General Appropriation Act.

The bill interferes with the process and potentially inhibits the reform efforts that HSD and CYFD are pursing through the *Kevin S.* settlement agreement.

TECHNICAL ISSUES

NMAG notes HB202/HHHC includes the term "extraordinary circumstances" but does not define it. The term also is used in the Kinship Guardianship Act (Chapter 40, Article 10b) but not defined. In the absence of a statutory definition, the state Court of Appeals has construed the term as follows:

> Even when applying the extraordinary circumstances test, only "grave reasons" approaching, but not necessarily reaching, those required for termination of parental rights should overcome the presumption that children are better raised by their own parents. A finding of extraordinary circumstances must be based on proof of a substantial likelihood of serious physical or psychological harm, or "serious detriment to the child." (*Stanley J. v. Cliff L.*, 2014-NMCA-029, ¶ 14, 319 P.3d 662, 666, *citing In re Guardianship of Ashleigh R.*, 2002-NMCA-103, ¶ 25, 132 N.M. 772, 781, 55 P.3d 984, 993.)

If the Legislature understands the term to mean something other than as defined by the court, it should include a definition for use of the term "extraordinary circumstances" in HB202/HHHC.

ALTERNATIVES

HSD and CYFD report progress on the deliverables for the *Kevin S.* settlement agreement through a public scorecard that uses other executive departments involved with the care and support of children – Public Education, Early Childhood Education and Care, Health, and Indian Affairs – to create metrics regarding mental health identification, referral and treatment of children with mental health, and co-occurring diagnosis. Following identification or implementation of *Kevin S.* deliverables, the collaborative could continue to evaluate behavioral health services for children through a discreet set of metrics, including screens and assessments (identification); referral to treatment (output of assessment); behavioral health interventions (based on needs of individual child and family); and success in permanency, education, relationship development, and core developmental benchmarks.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Some of the changes called for by this bill will occur over the course of the next three years due to the settlement agreement within the *Kevin S.* lawsuit. That settlement agreement, negotiated between plaintiffs and the state, avoids the risks with the legislation outlined above.

CLB/al/sb/rl