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FISCAL IMPACT REPORT

ORIGINAL DATE 2/11/22

SPONSOR HJC LAST UPDATED 2/14/22 HB 145/HJCS

SHORT TITLE Child Welfare Ombudsman Act SB _____

ANALYST Chenier/Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY22	FY23	FY24	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
CYFD costs		\$84.1- \$252.3	\$84.1- \$252.3	\$168.2- \$504.5	Recurring	CYFD General Fund
Initial DFA costs	\$1,000.0				Nonrecurring	Ombudsman/DFA General Fund
Annual DFA costs		\$850.0	\$850.0	\$2,700.0	Recurring	Ombudsman/DFA General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to House Bill 135, Indian Family Protection Act, and House Bill 46, Family Protection and Advocacy Act

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC; response to original bill)

Attorney General’s Office (NMAG; issued response to original bill and to committee substitute)

Children, Youth and Families Department (CYFD; issued response to original bill and to committee substitute)

Department of Finance and Administration (DFA; response to original bill)

SUMMARY

Synopsis of Bill

This bill creates a new section of the Children’s Code establishing a child welfare ombudsman office administratively attached to the Department of Finance and Administration. The office is headed by a chief child welfare ombudsman, appointed for six years by a committee with membership selected by the governor and legislative council.

The following is a summary of the contents of the bill’s 16 sections:

Section 1 specifies the name of this section of the Children’s Code as “Child Welfare Ombudsman Act.”

Section 2 establishes definitions used in the act.

Section 3 creates the child welfare ombudsman office within DFA.

Section 4 declares the head of the office to be the “chief child welfare ombudsman”.

Section 5 describes the makeup and duty of the chief child welfare ombudsman selection committee and its method of selection by the governor and by leaders in the Legislature. The committee’s sole purpose is to nominate a qualified person for the position; the governor may respond by asking the committee to select additional candidates or will fill the vacancy with the committee’s choice. One of the governor’s appointees must be expert in the Indian Child Welfare Act and, if it passes, the state Indian Family Protection Act.

Section 6 specifies the powers and duties of the office:

- 1) To review current functioning of CYFD and receive complaints about its procedures.
- 2) To assess current systems for their ability to meet children’s needs with dignity, a right to privacy, appropriate health and education.
- 3) To make rules to carry out this act.
- 4) To operate a toll-free hotline and electronic reporting to receive complaints.
- 5) To investigate and respond to complaints by or on behalf of children receiving CYFD services.
- 6) To decide whether to investigate a complaint or to refer it to another agency for investigation.
- 7) To notify a person complaining of its decision to investigate or not to do so.
- 8) To modify complainants of the progress and resolution of an investigation.
- 9) To work to improve CYFD’s procedures.
- 10) To monitor applicable state, federal, and local law as it applies to the department.
- 11) To provide information about CYFD services and service recipients’ rights.
- 12) To inform state decision makers of child and family welfare issues.
- 13) To submit an annual report on its findings in these areas to the Legislature and the governor.
- 14) To address challenges to receiving appropriate records for these investigations.
- 15) To request and receive records necessary to investigate these complains.

In addition, the department may establish a budget and hire consultants as needed and communicate with children in CYFD custody.

Section 7 specifies the knowledge needed by the chief child welfare ombudsman and staff, to include applicable law, specifically including provisions of the Indian Child Welfare Act and requires training in relevant matters, including the Indian Child Welfare Act.

Section 8 specifies what would constitute conflict of interest for office staff and contractors.

Section 9 requires CYFD to report to the office of the ombudsman any fatalities or physical injuries occurring in department custody, notifying the office of fatalities or restraint or seclusion of children in custody within 72 hours.

Section 10 requires law enforcement agencies to share relevant materials with the office of the ombudsman.

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Section 11 requires the office of the ombudsman to maintain confidentiality, but allows it to identify patterns of adverse conduct within CYFD, maintaining individuals' privacy.

Section 12 allows other remedies even when using the ombudsman's offices.

Section 13 requires CYFD to notify children and families it is serving of the availability of the ombudsman's office's services.

Section 14 modifies Section 32A-2-32 NMSA 1978 (on Confidentiality of Records) to allow release of information to the office of the child welfare ombudsman.

Section 15 modifies Section 32A-4-33 NMSA 1978 (on Confidentiality of Records and Penalties) absolves office of the ombudsman of penalties for receiving needed records.

Section 16 establishes the effective date of this bill as July 1, 2022.

FISCAL IMPLICATIONS

There is no appropriation in the committee substitute for House Bill 145.

DFA states that "Recurring operating costs of personnel which may be affected by work volume. Estimate that beginning FTE will be 5.0 with GovEx Ombudsman, 2 investigators, administrative assistant, and paralegal.

Initial startup costs for office space, furnishings, computers/software, professional training and certifications, departmental vehicles, database development, and intergovernmental agreements." It estimates its costs as \$1 million in the first year, including the one-time charges referred to above, and then \$650 thousand annually as a recurrent cost.

CYFD provided the following:

An increase in records requests will result in creating a new process for responding to those requests and hiring staff, as the bill requires CYFD to "provide the office with a copy of all reports related to actual physical injury to children in the custody of the department or a significant risk of such an injury[,]" as well as written reports within 48 hours of "a fatality of a child in CYFD custody or referred or receiving services under the supervision of the department; and the restraint or seclusion of a child" in CYFD custody.

Responding to requests for all reports will require Statewide Central Intake to establish a new secure transmission process capable of ensuring the confidentiality of families and reporting sources, and to hire additional staff to develop and implement a robust screening process capable of ensuring that all reports mandated by this bill are forwarded without false positives or negatives. Resource parents and child placement agencies are required by statute to submit a broad range of incident reports, of which physical injury or risk of injury are only a small subset.

The investigation process will also generate records requests that will need to be responded to by CYFD program staff and records custodians, with oversight by Children's Court Attorneys or the Office of General Counsel. Processes for response will require additional staff, as the current records staff are working at capacity.

It is estimated CYFD would have to hire 1 to 3 FTE to meet the needs of providing records to the Ombudsman's office. CYFD's average FTE cost, all in, is \$84.1 thousand per year. The estimated cost of implementing this bill for CYFD is \$84.1 thousand to \$252.3 thousand.

SIGNIFICANT ISSUES

There is a national trend to develop child welfare ombudsman offices; a list of the twenty-three such offices can be found at the website for the National Council of State Legislators. See <https://www.ncsl.org/research/human-services/childrens-ombudsman-offices.aspx> (accessed January 26, 2022). According to NCSL,

Children's Ombudsman Offices, also known in some jurisdictions as Office of the Child Advocate, have been established at the state level in order to assist in providing oversight of children's services. Currently, approximately twenty-three states have established a Children's Ombudsman/ Office of the Child Advocate with duties and purposes specifically related to children's services. Another five states have a statewide Ombudsman program that addresses the concerns of all governmental agencies, including children's services. Nine states have related Ombudsman services, program-specific services, or county-run programs.

The purpose, responsibilities and duties of the Children's Ombudsman Office vary by state. In general, these offices exist to:

- Handle and investigate complaints from citizens and families related to government services for children and families - this may include child protective services, foster care, adoption and juvenile justice services.
- Provide a system accountability mechanism by recommending system-wide improvements to benefit children and families - often in the form of annual reports to the Legislature, Governor and public.
- Protect the interests and rights of children and families - both individually and system-wide.
- Monitor programs, placements and departments responsible for providing children's services

This bill does not indicate what type of remedies the ombudsman's office can pursue or what steps it can take to address the complaints it investigates outside of the ability to "make appropriate referrals). HB145 only allows complaints by or on behalf of children or substitute caregivers and does not specifically state whether it will accept complaints from the biological parents. Additionally, the bill mentions juvenile justice but does not clearly state how a child or parents of a child in the juvenile justice system can seek relief from the office.

CYFD provided the following concerns about confidentiality:

If the complaint relates to personnel matters, the State Personnel guidelines for investigation and due process must be followed and all matters related to personnel investigations are confidential. The committee substitute's requirement to notify the complainant of the outcome of the investigation would violate any CYFD employee's right to confidentiality in their personnel matters.

There is still ambiguity regarding the extent of the bill’s confidentiality provisions.

- The bill provides for disclosure of confidential records and information when “disclosure is necessary to prevent imminent harm”. The exception provides no standard or definition for imminent harm, and no identification of, or limitation on, who can receive such disclosure under the exception.
- The bill prohibits the disclosure of identifiable information for a child, but does not prohibit it for a parent, guardian, or custodian. The bill also allows for disclosure of identifiable information for a child if the information is already known the public. These provisions do not adequately protect the privacy and rights of the parents and children involved. Parents, guardians, and custodians are unprotected. Children could have their identifiable information disclosed when publicly known, but the disclosure by the ombudsman could tie that identifiable information to other disclosures, making connections that were previously private and confidential. And the allowance for disclosure of information already known to the public is in direct conflict with NMSA 1978 §32A-2-26(E) and §32A-4-33(D), which make the unauthorized disclosure of confidential juvenile justice and protective services records or information a criminal offense.
- It is unclear whether certain documents would be confidential under the bill, such as complaints filed with the office and any office recommendations or decisions would be confidential, as whether any hearings or meetings of the office, which is a public agency, would be open to the public.
- The bill also does not discuss or address federal confidentiality requirements.

The bill contains no substantive discussion of the juvenile justice services division or its clients, nor does it amend the juvenile justice confidentiality statutes to permit the release of records or information to the office. Consequently, the exact impact of this bill on the juvenile justice system is unclear, especially as, without an appropriate amendment to the confidentiality statutes, the release of records to the office will be limited by existing statute to the extent that the office is unable to discharge the duties assigned it.

CYFD has committed, through the Kevin S. litigation, to improving its grievance processes available to children, resource parents, and parents involved in the child welfare system and has been working diligently with Casey Family Programs and other stakeholders to do so in a thoughtful and inclusive manner. Over the last two years, CYFD has embarked on several changes to promote greater transparency and accountability that this bill undermines. Consequently, this bill duplicates current CYFD policies and procedures related to complaints and grievance from the public and CYFD-involved children, youth and families.

For example, the bill would give the Ombudsman the authority to conduct investigations on behalf of substitute caregivers or children in custody. However, in compliance with the Kevin S. Settlement (see. Kevin S., et al. v. Blalock, et al., No. 1:18-cv-00896), CYFD developed and implemented a Resource Family Bill of Rights and Grievance

Procedure, which was reviewed and approved by the Co-Neutrals who oversee the state’s compliance with the settlement. Under this procedure, resource families who file a formal grievance with the CYFD Office of Constituent Affairs will receive a finding within 15 days, with the CYFD Regional Manager responsible for ensuring implementation of the resolution. Resource families who feel their grievance has not been resolved may file a request for review by the Office of the Inspector General (OIG), with a finding within 30 business days. As with the first review, where OIG recommends specific actions, the Regional Manager is responsible for ensuring these are completed and must provide a written response to the parties involved.

Similarly, the bill creates a process for investigations related to child and youth in CYFD custody parallel to what already exists. Pursuant to the Kevin S. Settlement, CYFD developed the Foster Child and Youth Bill of Rights and grievance procedure, which was approved by and is monitored by the Co-Neutrals. The procedures provide a process by which a child or youth can request a review of a resource families’ decisions in applying the prudent parenting standard, or to report a violation of their rights under the Foster Child and Youth Bill of Rights. Any youth aged 14 and older who disagrees with a resource family’s decision on the youth’s involvement in certain activities can contact the Director of CYFD’s Office of Children’s Rights (OCR) and request a review of the foster care providers’ decision within 15 days after the decision was made. The OCR is responsible for investigating the grievance, developing a file for the grievance within the OCR and determining if the grievance can be addressed by informal resolution, or should be assigned to a three-person panel.

Under the existing complaints and grievances process, for the period FY2020, 883 complaints were processed; for the period FY2021, 773 complaints were processed. At this time, the complaints and grievances process, which seeks to resolve complaints where a child or youth may be at significant risk within 24 to 48 hours; complaints where there is no immediate risk to a child within 5 business days; and inquiries concerning program information or policy clarification within one to seven business days. These tasks take significantly fewer than nine people and requires no support staff.

As the bill limits complaints and investigations to “complaints made by or on behalf of substitute caregivers or children placed in the custody of the department or who are receiving services under the supervision of the department,” Section 6A(4), pp. 5-6, ll. 23-25 & 1, other constituents would not have the opportunity to benefit from the Ombudsman Office through the complaint process, such as parents (biological and adoptive), guardians, service providers, and Nations, Tribes, and Pueblos.

Currently, the following processes are used in juvenile justice to measure compliance with expectations:

- A grievance procedure, wherein clients, parents/guardians/custodians, and client advocates can submit grievances for consideration, investigation, and resolution;
- Performance Based Standards, a data-driven continuous improvement process for juvenile justice facilities to provide safety, monitor program effectiveness, and help youth achieve positive outcomes to prevent reoffending;
- The Office of Quality Assurance, which objectively assesses compliance with JJS procedures, provides trend analysis, and makes recommendations to improve

- services and to inform CYFD employees and administration; and
- Adherence to the required standards of the Prison Rape Elimination Act to prevent, detect and respond to sexual abuse in confinement facilities.

Additionally, many of the reporting components of the substitute bill will complicate CYFD's current work to develop greater reporting and data accountability. The Kevin S. settlement agreement requires CYFD to implement a Data Validation Plan to validate progress toward the outcomes of the settlement and to assign responsibility for supplying information required by the Data Validation Plan. This substitute adds more metrics (such as the condition of placements for New Mexico's children, the number of out-of-state placements, assessments of active congregate facilities, and the number of children who have runaway), which will likely require extensive changes and a possible re-drafting of the Data Validation Plan. Not only will such changes complicate the state's current efforts to meet existing timelines, it will potentially increase costs significantly.

Further, it is unclear how this substitute would interact with both the Indian Family Protection Act, which codifies the federal Indian Child Welfare Act (ICWA) and expands protections and procedures for Native children, and the Office of Family Representation and Advocacy Act, which creates an independent office for the representation of children and families in abuse and neglect matters.

While the substitute includes language concerning the federal ICWA, it is unclear if any Native American communities and their leaders have been consulted, even though federal ICWA applies to Native American children and their families impacted by the bill. Although the New Mexico Tribal Collaboration Act does require such consultation, it appears that the substitute's development and drafting did not take that Act into consideration.

TECHNICAL ISSUES

In addition to two suggestions incorporated into the committee substitute (as were NMAG's suggestions), the following CYFD recommendations remain:

Section 7A(1), p. 9, ll.16-18 would benefit from the addition of "including CYFD policies and procedures with respect to abuse and neglect, out of home placement, and safety and risk assessments" or from a broader approach that includes training on all CYFD policies and procedures.

Section 6A(4), p. 5, ll. 23-25, could be clarified to identify the mechanisms the Ombudsman Office will utilize to resolve complaints after investigation.

NMAG finds that "The Substitute at Section 6(A)(15) states that the office shall have authority to request, access and review information, records or documents, including records of third parties 'so long as the department would be entitled to access or receive such information, records or documents.' It is unclear what 'would be entitled to' means here, and there is no external reference to determine how the office 'would be entitled to' such information, records or documents. The provision should be revised to delete 'would be entitled to' and add an external reference or qualifier allowing the office to obtain such information, records or documents, e.g. a reference to obtaining such information, records or documents through subpoena according to the rules of court, and subject to other provisions of law."

CYFD points out that “This bill introduces ‘substitute caregiver’, defined as ‘person, including a relative of the child, licensed or certified by the department or a child placement agency to provide care for children in the custody of the department or agency.’ This definition is already in place in NMSA 32A-1-4(I) for ‘foster parent’ – ‘a person, including a relative of the child, licensed or certified by the department or a child placement agency to provide care for children in the custody of the department or agency.’ The alternate terminology is not necessary.”

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