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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/17/09

SPONSOR Chasey LAST UPDATED 2/18/09 HB 750

SHORT TITLE Foster Parents as Public Employees SB \_\_\_\_\_

ANALYST Archuleta

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		Potentially significant, but unable to quantify	Potentially significant, but unable to quantify	Potentially significant, but unable to quantify*		

(Parenthesis ( ) Indicate Expenditure Decreases)

\*Information according to GSD – exact estimate is not available.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General’s Office (AGO)  
 General Services Department (GSD)  
 Department of Health (DOH)

#### No Response Received From

Administrative Office of the Courts (AOC)  
 Administrative Office of the District Attorneys (AODA)

### SUMMARY

#### Synopsis of Bill

House Bill 750 amends the Tort Claims Act to include child placement agency’s licensed treatment foster parents and foster parents as public employees. The bill requires GSD’s, Risk Management Division (RMD) to provide liability coverage against civil rights claims against nonprofit corporations, members of its board of directors, employees, licensed foster care parents or licensed foster care parents where the claim is based on a contract between the nonprofit and state agency to provide treatment foster care or foster care services to children in the state’s custody.

## FISCAL IMPLICATIONS

The cost of obtaining an insurance policy for such coverage (if available) may be significant. This policy or claim activity arising from the extension of liability coverage to the groups and individuals identified in the bill may cause insurance costs to increase for all state agencies as they all share in the same risk pool. However, data to quantify the costs is not available.

## SIGNIFICANT ISSUES

DOH reported that according to CYFD, the Child Placement Agency Licensing Act and CYFD's implementing regulations gives them the authority to license foster parents and treatment foster parents. CYFD does not regulate or control the actions of the agency-licensed foster parents. The Tort Claims Act, as it currently stands, excludes foster parents certified by licensed child placement agencies from the definition of public employee because the state lacks authority to direct or control the actions of foster parents who are licensed and certified by private agencies rather than the state. Under current law, the state is obligated to defend and pay certain judgments against foster parents licensed by the state (over whom the state has meaningful authority), but the state is not obligated to defend and pay judgments for torts committed by foster parents licensed and certified by private agencies. The distinction makes sense because the state, through CYFD does exercise meaningful supervision and control over state-licensed foster parents, but it does not have the authority or the resources to monitor and supervise the actions of agency-licensed foster parents. Under the current law, foster parents licensed by private agencies are monitored and supervised by the private agencies, and insurance coverage, is provided by the agencies' insurance carriers.

House Bill 750 would make the state liable for the actions of foster parents licensed by private agencies, even though CYFD does not have the regulatory tools or FTE resources to monitor, supervise and discipline agency-licensed foster parents. This would create an anomalous situation where the state, which does not and cannot supervise and discipline agency-licensed foster parents would be liable for their wrongdoing which the private agencies that do license, supervise and discipline the foster parents they license would have no liability for their wrongdoing and thus no incentive to monitor, supervise and discipline them.

A likely effect of the bill is an increase in foster parent liability and an increase in CYFD's and RMD's exposure for the actions of individuals that are not under state supervision or control. The amendment is limited in scope only to foster parents that non-profit agencies license. It is unclear how many of the agencies are for profit, and how many are non-profit.

The amendment also will increase tort liability for treatment foster parents under a "medical provider" theory. This occurs in the provision that includes treatment foster parents in the definition of "public employees licensed to provide health care services." Significantly, this provision is not limited to treatment foster parents of non-profits. Again, this will expand the state's liability for the actions of persons not under its supervision or control, with whom the state has no contractual agreements, and who have no real financial incentive to even cooperate in the defense of suits against them.

There are several reasons to maintain the limitations on state liability for private actors who are licensed foster parents but who do not act under color of state law, particularly those who are not paid, supervised or licensed directly by the state or any state agency.

1. Even foster parents who are licensed directly by the state (CYFD) and who are supervised in their ongoing activities are not necessarily acting under color of state law for tort claims purposes. See *Rayburn v. Hogue* 241 F.3d 1341 (C.A.11 (Ga.),2001)
2. Foster parents who are not licensed directly by the state are not under the control or supervision of the state or of any public state agency. Privately licensed foster parents (such as treatment foster care parents) are licensed, paid and supervised by private agencies. The licensing and supervision of these parents is outside the control and supervision of the state. None of the usual indicia of being an “employee” are present for these individuals vis a vis the state or any state agency.
3. The state compensates private agencies, which do the licensing and supervision of treatment foster care and other privately licensed foster parents. The state is already paying these agencies to license and supervise these foster parents, which includes remuneration to the agency for any necessary insurance coverage. To include these privately licensed foster parents as state employees under the tort claims act would make the state the primary insurer for persons whose insurance is already being paid for by the state via contracts with the private agencies.
4. The term “pursuant to contract” on p. 4 and p. 8 of the bill would appear to imply that even indirect third party contractors would become the responsibility of the state under the tort claims act. For example, if a treatment foster care parent arranges through a private placement agency for a child to be moved to another foster home, with no notice to or involvement of any public state agency, the use of the term “pursuant to contract” in this bill might be interpreted as extending tort liability to the state for such entirely private actors.
5. Inclusion of licensed foster parents under the definitions section (10) (pp. 7-8) of the bill could expand tort liability for foster parents under “medical provider” theories not properly applicable to foster parents, who are not medical providers. Section (10) of the definitions section (41-4-3(F)) relates to medical practitioners.

The AGO notes that amending NMSA §15-7-3; §41-4-3; and §41-4-9 would make the state assume the liability of treatment care foster parents when it has no control over them and adds that there will be some additional tort cases that RMD will be required to defend. Cases of negligence and/or abuse by treatment foster care agencies and/or treatment foster care parents can involve potential high liability exposure, and in cases where civil rights are violated, the Tort Claims Act caps do not apply. Therefore, the potential additional liabilities could be significant.

#### **ADMINISTRATIVE IMPLICATIONS**

As the non-profit corporation licenses the treatment care foster parents and supervises them, the State (CYFD) would be taking on the liability for the actions of treatment care foster parents but the State would not be able to monitor the actions of these treatment care foster parents.

## TECHNICAL ISSUES

GSD notes the following:

(1) Some minor inconsistencies. The amendment of subsection 15-7-3(B)(3) provides RMD coverage to nonprofit corporations providing treatment foster care services under contract to DOH or to CYFD. DOH is nowhere else mentioned in the amendments. For example, in the amendment to subsection 15-7-3(F)(10), public employees will include licensed foster parents providing services pursuant to contract with CYFD, but not providing services under contract with DOH.

(2) This point is not directly related to the purpose of this bill. This bill amends subsection 15-7-3(F)(4) by deleting the exception to the exception for licensed foster parents certified by a licensed child placement agency. It does not change language already in subsection 15-7-3(F)(4) that refers to “licensed foster parents providing care for children in the custody of the human services department, corrections department or department of health.” CYFD was formed in the early 1990s by combining the children’s services portions of HSD, DOC and DOH, so technically the reference should now read: “children in the custody of the children, youth and families department.” This would make the overall text more consistent and less confusing, even though the intent is understandable from a historical perspective.

(3) Related to point (2), CYFD currently licenses all its regular (non-treatment) foster parents. Subsection 15-7-3(F)(4) does not specify that only foster parents licensed by CYFD are “public employees.” This means that, at least theoretically, if CYFD were to allow outside agencies to license foster parents as well as treatment foster parents, those foster parents would still be public employees.

## OTHER SUBSTANTIVE ISSUES

The treatment foster care nonprofit corporations could be required to purchase their own liability insurance coverage, if available. However, it should be noted that these nonprofits have not reliably acquired insurance in the past, although contractually obligated to do so. Treatment foster parents be required to purchase insurance coverage, if available. Likewise, there is some question whether they can be relied upon to purchase the insurance, even though contractually required to do so.

## POSSIBLE QUESTIONS

If treatment foster care agencies provide treatment foster care for children who are not in state custody, as well as children who are in state custody, would RMD coverage extend to claims relating to care for children who are not in state custody? If so, would this be an anti-donation violation?

How much additional liability exposure will be created for the public liability fund, and how will the additional liability exposure be funded?

Whether RMD will be able to purchase liability insurance to cover this additional exposure, and how much will it cost?