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## FISCAL IMPACT REPORT

SPONSOR: Ogle DATE TYPED: 2/28/03 HB 811  
 SHORT TITLE: Amend Abuse and Neglect Act SB \_\_\_\_\_  
 ANALYST: Maloy

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
	NFI		See Narrative	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

Responses Received From  
 Children, Youth and Families Department  
 Department of Health  
 Office of Indian Affairs  
 Administrative Offices of the Courts  
 Office of the Attorney General

### SUMMARY

#### Synopsis of Bill

House Bill 811 adds a new provision to the neglect and abuse law relating to the termination of parental rights in those instances where the parent is incarcerated, or otherwise unavailable, for a period of 18 months or longer. The new provision outlines the factors a court is to take into consideration in determining whether the parental rights should be terminated and the child permanently placed with another. The factors include:

1. the age of the child;
2. the extent to which the parent – child relationship had been developed;
3. the suitability of the parent’s nominees for guardianship or adoption;
4. the developmental and permanency needs of the child; and
5. the period of time the parent needs after parole or probation to establish a stable home for the child.

The bill also specifically allows the parent to nominate relatives, or other persons, as guardians

or adoptive parents. The bill requires the nomination be submitted within 30 days of the filing of the termination of parental rights motion.

Finally, the bill deletes current language stating that CYFD shall not file or join a motion filed to terminate parental rights on the sole basis that the parent is incarcerated.

### Significant Issues

It is the understanding of LFC that funding has been granted to New Mexico for the development of a comprehensive study of the state's juvenile justice system and Children's Code. This study is underway, but has not yet been completed. Information regarding this funding and the study is available through the New Mexico Council on Crime and Delinquency / Children's Code Revision Committee.

There are numerous bills coming before the Legislature for consideration this session that change the Children's Code. Given the complexity of issues contributing to, and arising from, juvenile crime, and the many effects that changes to the system and code may have, the Legislature may find it helpful to wait on any significant Children's Code legislation until the Council has completed its study and recommendations.

### **FISCAL IMPLICATIONS**

There are no direct fiscal implications for the state. However, secondary costs will be associated with the CYFD and the court's handling of nominations, and the investigations and hearings regarding adequacy of the nominee(s). These costs will be recurring. It is anticipated that such costs can be absorbed into existing staff and budget resources. However, CYFD has noted that the investigations required under this law will be extensive, complex and time consuming.

### **OTHER SUBSTANTIVE ISSUES**

The CYFD analysis sets forth the following substantive issues:

- The goals of the Abuse and Neglect Act would **not** be assisted by the addition of the proposed language. This bill is inconsistent with existing statutes and case law on the issues of parent incarceration, termination of parental rights, guardianship and adoption. There are potential constitutional issues, as discussed below.
- The bill states that CYFD must investigate the suitability of parent-nominated guardians or adoptive parent within 60 days of a probable cause finding. This proposed investigation is premature if there has not yet been an adjudication of the abuse and/or neglect charges. A probable cause finding is not an adjudication. It simply begins the process that may lead to final adjudication. And, at all times prior to final adjudication of the abuse and neglect issues, CYFD is still evaluating whether a child should be returned to his home. The proposed processes are out of order.

Also, a full home study is necessary for CYFD to reach an appropriate conclusion about the suitability of nominated guardian(s) or adoptive parent candidate. Such home studies presently take more than 60 days, and are **not** automatically conducted on **any** person named by a parent who has abused and/or neglected their child. If

such parents had the best interests of their child at heart, the child would not have been abused or neglected and the parent would not be facing termination or his or her parental rights.

- The bill refers to a child who "has been abused or neglected" but proposes to eliminate the phrase "as defined in the Abuse and Neglect Act". This gives the court the ability to create its own definition of abuse and neglect on a case- by-case basis, which has considerable risk for inconsistency in application and constitutional challenges.
- The bill refers to a parent who is "otherwise unavailable" without defining the specific meaning of this term. It is unclear if this may include parents with a mental illness, and raises potential issues regarding the need for revised standards for Termination of Parental Rights (TPR) actions. This is the subject of existing case law.
- Section B (4) of the bill requires the court to consider *the suitability of nominated guardians or adoptive parents as a factor in whether to terminate parental rights*. This is contrary to existing law and contrary to Children's Code provisions. ***Termination of parental rights is ordered when it is in the children's best interest***. The suitability of nominated guardians or adoptive parents should not impact whether the termination of parental rights is in the child's best interest.

## TECHNICAL ISSUES

- The bill proposes to eliminate current section 32A-4-28(D) and substitute a provision that incarceration is an independent grounds for termination of parental rights (TPR). This is contrary to well-developed case law in New Mexico, and is potentially unconstitutional. Parental rights cannot be terminated unless there is proof that the parent is unable or unwilling to provide proper parental care for the child. In addition to incarceration, the court must consider numerous other factors in TPR cases.

## POSSIBLE QUESTIONS

- Should the Legislature wait for a comprehensive study and revision of the Children's Code (see Significant Issues) in order that a thorough understanding of the juvenile justice system and Children's Code is developed, and the cause and effect of pursued changes are contemplated?
- Will a piecemeal approach to the code do greater damage than good?
- What is the New Mexico Council on Crime and Delinquency's position regarding the numerous Children's Code bills being presented during this session?