



2. A child may be taken into protective custody without a court order when the enforcement officer has reasonable grounds to believe that the child is in violation of a county or municipal curfew ordinance.
3. Enactment of a new section (Section 3) of the Children's Code wherein counties and municipalities are granted the authority to:
  - a. Enact curfew ordinances for children under age eighteen;
  - b. Provide for penalties, which may include community service, suspension of a driver's license, or monetary fines;
  - c. Enter into joint powers agreements with a children's court and CYFD for purposes of supervision, probation, and intervention; and
  - d. A child may be taken into protective custody without a court order when the enforcement officer has reasonable grounds to believe that the child is in violation of a county or municipal curfew ordinance.
4. The bill enacts another new section (Section 4) of the Children's Code providing the following protective custody options for violation of curfew:
  - a. Community center
  - b. Shelter-care, or
  - c. Other non-secured facility.

Additionally, if a child has not been released to the custody of a parent or guardian by 11:00 the morning after being placed into protective custody, the county or municipality shall contact CYFD and follow appropriate provisions of Article 3B, Families in Need of Court-Ordered Services (FINS).

#### Significant Issues

1. This bill promotes the protection of children, and will also likely benefit property owners with less vandalism and crime.
2. Does the mere amendment to the Children's Code result in municipalities having the legal authority to enact curfew ordinances? If the answer to this question is yes, do the curfew ordinances meet the constitutionality tests enunciated by the New Mexico Supreme Court in ACLU v. CITY OF ALBUQUERQUE?
3. Will the language characterizing the "penalties" imposed against both the child or the child's parents as "civil" in nature be regarded by the New Mexico Supreme Court as nevertheless "criminalizing" the prohibited conduct?
4. Will the language characterizing the taking of a child into "Protective Custody" be regarded by the New Mexico Supreme Court as nevertheless "arresting" the child? i.e., will the New Mexico Supreme Court regard the new provisions as nothing more than a subterfuge for arresting children since the new bill provides for community service, limitation of use of a mo-

tor vehicle license, and a monetary fine, all of which are traditional criminal penalties?

5. Upon the adoption of curfew ordinances by counties or municipalities, local police departments will have an additional burden of enforcement. This bill does not address duties for juvenile probation and parole officers, implying that enforcement is strictly a function of local government unless a joint powers agreement is developed with a specific role or function for juvenile probation and parole officers.
6. There may be possible constitutional issues relating to freedom of association.
7. Existing law at 32A-3B-4.1(A)(1) – (3) prohibits the child from being held in a detention facility or jail, and from being held in a police station, sheriff's office, or state police office.

### **FISCAL IMPLICATIONS**

Existing law at 32A-3B-4.1 prohibits the child from being held in a detention facility or jail, and from being held in a police station, sheriff's office, or state police office. Therefore permissible facilities such as community centers or other buildings owned by a county or municipality, shelter-care homes or centers, or other non-secured facilities will have to be found, or built, and staffed on a continuous basis. These costs will be the responsibility of the local governing bodies.

Local governing bodies will also be required to dedicate the staff and budget resources necessary for enforcement. However, monetary civil fines associated with charges of violating a curfew ordinance will go to the local governing body's general fund.

Finally, there will likely be an increase in the workload of the Children's Courts throughout New Mexico.

### **CONFLICT**

New Mexico Supreme Court's unanimous decision in ACLU v. CITY OF ALBUQUERQUE (S.Ct. 1999) 1999-NMSC-044, 128 N.M. 315, 992 P.2d. 866, which struck down the City of Albuquerque curfew ordinance on a number of grounds, must be of paramount importance in the analysis, drafting, and consideration of this bill.

### **TECHNICAL ISSUES**

32A-3B-3(A)(5) adds an additional reason a child may be taken into protective custody, as follows:

(5) the child is in violation of a county or municipal curfew ordinance.

In ACLU v. CITY OF ALBUQUERQUE, the Court stated:

“{22} In order to take children into protective custody, the Family in Need of Services article requires, among other circumstances, that the officer has reasonable grounds to believe that "the child is endangered by his [of her] surroundings and removal from those surroundings is necessary to ensure the child's safety." Section 32A-3B-3(A)(4). As Plaintiffs observe, the police officers who took the children into custody under the STOP

program did not note any particularized finding that these children were in danger. The City argues that the lateness of the hour is inherently dangerous to children. We disagree. {23} We conclude that the City cannot take children into protective custody without a fact-specific showing that one or more of the specific statutory conditions within Section 32A-3B-3 are met. *We reject the City's attempt to create a bright-line rule which automatically defines a child in violation of the Curfew as a child endangered by his or her surroundings.* Such a rule is clearly over-inclusive, penalizes innocent conduct, and presents too great a danger that the police or municipalities will use "protective custody" as a subterfuge to avoid constitutional protections that would otherwise apply to warrantless arrests. *(Emphasis added)*

There is a significant technical hurdle to clear since the Supreme Court may apply the same rule to the legislature's attempt to add curfew violation as a reason for protective custody under 32A-3B-3.

SJM/yr/lr