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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/28/10

SPONSOR Adair LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Use of CYFD Funds for Attorney Fees SB 175

ANALYST Peery-Galon

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

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		Unknown	Unknown	Unknown	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Department of Health (DOH)  
 Children, Youth and Families Department (CYFD)  
 Public Education Department (PED)  
 Developmental Disabilities Planning Council (DDPC)  
 Human Services Department (HSD)

#### No Response Received From

Administrative Office of the Courts  
 Attorney General's Office  
 Governor's Commission on Disability  
 New Mexico Corrections Department

### SUMMARY

#### Synopsis of Bill

Senate Bill 175 prohibits expenditure of funds for attorney fees, expert witness fees, or any other expenses related to the ACLU v. CYFD lawsuit (D-0101-CV-2007-02921) and settlement, or related cases. The prohibition is also extended to other agencies, including the Corrections Department, Human Services Department, Public Education Department, Vocational Rehabilitation Division of the Public Education Department, and other involved departments. The proposed legislation directs that any funds saved by this measure shall be appropriated to reduce the developmental disability waiver waiting list. The proposed legislation includes an emergency clause.

## FISCAL IMPLICATIONS

Funds saved by the enactment of this measure are to be appropriated to reduce the developmental disabilities waiver waiting list and are authorized for transfer to the Department of Health for that purpose.

CYFD reported that the fiscal implication of the proposed legislation is unclear. The ACLU v. CYFD lawsuit has been dismissed and all claims for plaintiffs' attorney fees and costs in that case have been resolved and paid. However, since the bill also applies to related cases, the bill could affect future cases that might be brought by the ACLU in a way that results in additional and potentially costly litigation related to the issue of attorney fees.

PED stated the reduction of the developmental disability (DD) waiver waiting list could result in increased referrals for the Division of Vocational Rehabilitation Supported Employment Program, requiring increased program costs in order to provide comprehensive services to eligible clients with significant disabilities.

## SIGNIFICANT ISSUES

CYFD reported the ACLU v. CYFD case has been dismissed and all claims for attorney fees in the case have been resolved and paid. However, to the extent that the bill prohibits CYFD and other departments from paying attorney fees in undefined related causes, the bill is legally problematic for the following reasons:

1. It is unclear what is meant by the term "related cases". Does this refer to cases involving the settlement reached in ACLU v. CYFD? Does it refer to other case brought by the ACLU concerning conditions in juvenile correctional facilities? Does it, since the bill covers the Corrections Department, include actions brought by the ACLU concerning conditions in adult correctional facilities? Does the bill also apply to actions that the ACLU might bring against HSD and PED, neither agency was involved in ACLU v. CYFD? These questions would generate additional litigation costs in the event the ACLU filed an action against any of the departments named in the bill at some future date.
2. The use of the term "any other involved department" would appear to also preclude the Risk Management Division from paying attorney fee awards in "related cases". It is unclear whether this is an intended consequence, since it seems clear that if a court orders a department to pay a fee award authorized by federal law, the award will ultimately have to be paid.
3. All claims for attorney fees and costs in ACLU v. CYFD have already been resolved and paid. In essence, the bill seeks to prevent something from occurring that has already happened.
4. To the extent that claims for attorney fees might be made by the ACLU in future "related cases," the claims for fees would necessarily be predicated on either a statute or a contract authorizing such fees. Although it is impossible to anticipate which statute(s) such a claim might be based on, among the most obvious possibilities are 42 U.S.C.A Sections 1983 and 1988, and the Prison Litigation Reform Act. These are federal laws that expressly authorize the recovery of attorney fees by plaintiffs in civil rights and certain prison reform cases. To the extent the federal laws authorize the recovery of attorney fees, the bill would directly conflict with the federal enactments and the courts would likely hold that the bill was pre-empted by federal law under the supremacy clause

of the United States Constitution which states that the "Constitution and the laws of the United States...shall be the supreme law of the land...anything in the constitutions or laws of any State to the contrary notwithstanding." This means that federal laws that provide for attorney fee awards for prevailing plaintiffs would trump conflicting state laws, such as the bill if it were to be enacted into law.

5. The settlement agreement in *ACLU v. CYFD* provides that it is an enforceable contract but the ACLU's right to recover damages is limited to attorney fees and costs. To the extent the bill seeks to invalidate provisions of the contractual settlement in *ACLU v. CYFD* that may obligate the state to pay attorney fees under certain circumstances, the bill appears to run afoul of Article II, Section 19 of the New Mexico Constitution which provides that "[n]o ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature."
6. To the extent that the bill seeks to retroactively alter and invalidate an agreement lawfully entered into by the executive, it could be argued the bill violates the separation of powers enshrined in Article III of the New Mexico Constitution.
7. If enacted into law, the bill would inject the issue of the bill's validity into what is already complex and expensive litigation. Litigating this additional issue would cost the state even more money and employee time to litigate and might potentially result in even larger fee awards for plaintiffs' counsel to pay them for the time and expense of litigating one more issue.
8. Despite the bill's intention, to reduce the state's exposure to attorney fees in certain types of cases, the reality is that so-called "system reform" cases are a fixture of the legal landscape. Such cases are expensive and time-consuming for the state to defend, and federal law authorizes awards of attorney fees to prevailing plaintiffs in at least some of these kinds of cases.
9. Although the bill provides the money saved as a result of its enactment will be appropriated to reduce the developmental disabilities waiting list, there almost certainly will be no money saved as a result of the bill's enactment, both because the *ACLU v. CYFD* case is over and the fees in the case have already been paid, and because the bill's likely effect will be to increase the cost of litigating any "related cases."

DOH reported if the proposed legislation passed, it would prohibit the department from paying attorneys' and expert witness fees as part of settlement of the *Jackson* case. However, the bill could *not* prohibit the federal court from requiring payment by DOH of plaintiffs' attorney fees or costs, because the case is in federal court, rather than state court. The state cannot limit the jurisdiction of a federal court, nor can it generally limit the ability of a federal court to impose a judgment, monetary or otherwise. The federal government is an independent sovereign, and laws that are created within the federal government's lawful jurisdiction are considered supreme to those of the states, due to the "supremacy clause" at Article VI, clause 2 of the U.S. Constitution.

DDPC noted that although the intent of the bill is noble, the agency poses a question of the role of the legislature on judicial rulings.

PED stated the spirit of the proposal is consistent with the current economic crisis of the State, although, it remains unclear whether such a proposal impedes on judicial control and whether the legislative branch has the authority to supersede federal court mandates.

## PERFORMANCE IMPLICATIONS

DOH reported the proposed legislation relates to the department's performance measure which states "percent of Jackson requirements from the Plan of Action and Appendix A to the Joint Stipulation completed" with a target of 80 percent for FY10. As of the second quarter of FY10, DOH achieved 76 percent completion rate.

## CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Senate Bill 175 has a relationship with Senate Bill 173 and Senate Bill 174 which contain similar restrictions on attorney fees in other cases involving other executive departments.

## TECHNICAL ISSUES

CYFD noted that the term "related cases" is not defined in the bill.

DOH noted that the proposed legislation refers to the *Jackson* case by a case citation, 757 F.Supp. 1243 (D. N.M. 1990). That citation refers to a published opinion in the *Jackson* lawsuit, and is not the case number for the litigation itself. The correct case number is USDC No. CIV 87-0839.

## OTHER SUBSTANTIVE ISSUES

DDPC reported serving more New Mexicans with developmental disabilities through the DD waiver will enable those individuals to contribute to the community through employment and other meaningful activities.

DOH reported the *Jackson v. Ft. Stanton Hospital and Training School, et al.*, is a class action lawsuit originally filed in July of 1987. There are numerous parties to the lawsuit. The plaintiff class members are former residents of the Los Lunas Hospital and Training School (LLHTS) and Fort Stanton Hospital and Training School (FSHTS) who sought community placement and closure of LLHTS and FSHTS. Interveners are those who opposed the closure of the institutions and sought to upgrade those institutions. Defendant agencies are the DOH, HSD, and Division of Vocational Rehabilitation (DVR). In 1990, the court found constitutional and statutory violations in the defendants' operation of LLHTS, FSHTS and their community system for persons with developmental disabilities in New Mexico. The court ordered that defendants correct the violations.

DOH noted that a Joint Stipulation on Disengagement (JSD) was agreed to by the parties in 1997, which called for the closure of both training schools, transition of residents to the community, strengthening the community service system infrastructure, and the development of additional services and supports for class members. A Plan of Action (POA) was also agreed to, which was designed to achieve the desired outcomes and implement the activities required by the JSD. The POA required defendants to comply with 53 desired outcomes. To date, 38 desired outcomes have been disengaged.

DOH reported that in 2004, plaintiffs and interveners filed contempt motions and plaintiffs filed a motion to re-engage case management. In response to those motions, the parties negotiated an agreement to resolve the issues known as Appendix A for the JSD. All actions contained within

Appendix A were to have been completed within 18 months. The agreed actions in Appendix A address the following areas: case management, incident management, crisis services, supported employment, day services, quality enhancement, behavior services, sexuality services, Division of Vocational Rehabilitations. At this point in time, the parties have not reached agreement as to whether the state has sufficiently completed all actions in Appendix A.

DOH noted that in 2007, the Court appointed an expert to assist the court in determination of compliance with orders of the court including the JSD, POA, 1998 audit recommendations and Appendix A. Secretary Vigil has identified compliance with the JSD, including the POA, 1998 audit recommendations and Appendix A as a high priority of this administration. Accordingly, high ranking staff members have been directed to aggressively and collaboratively address compliance with all requirements. DOH reported the fundamental principle for department is to provide quality services to class members in accordance with these established requirements.

### **ALTERNATIVES**

HSD noted that in order to accomplish the goal of cost savings for money paid by an executive agency in a lawsuit, the legislature could enact legislation that limits the amount of attorney's fees and costs that can be awarded when the State of New Mexico is a defendant in a lawsuit.

RPG/svb