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## FISCAL IMPACT REPORT

ORIGINAL DATE 03/07/11

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

SHORT TITLE Use of CYFD Funds for Lawsuit Plaintiffs SB 531

ANALYST Esquibel

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
	Minimal	Recurring	GF/DD Medicaid Waiver waiting list

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Human Services Department (HSD)  
 Division of Vocational Rehabilitation (DVR)  
 Department of Health (DOH)  
 Children, Youth and Families Department (CYFD)  
 Corrections Department (CD)

### SUMMARY

#### Synopsis of Bill

Senate Bill 531 prohibits the Children, Youth and Families Department, and other uninvolved state agencies, from using any agency funds for attorney fees, expert witness fees or other expenses claimed by the plaintiffs in *ACLU v. CYFD*, D-0101-CV-2007-02921, or related cases. The bill appropriates any funds saved to reduce the developmental disabilities waiver waiting list. This bill declares an emergency.

### FISCAL IMPLICATIONS

SB531 appropriates to the developmental disabilities Medicaid waiver waiting list at the Department of Health any funds saved by not paying attorney or witness fees or other expenses that may be claimed by plaintiffs' attorneys in the *ACLU v. CYFD* lawsuit and settlement.

CYFD indicates all existing fiscal obligations under the referenced lawsuit have been paid. There have been no additional negotiations resulting in required or ordered payments as of this date.

DOH indicates the provisions of SB531 may compel department(s) to take funding from other areas to pay attorney fees that accrue and are due and payable.

### **SIGNIFICANT ISSUES**

CYFD writes, “as of the present time, CYFD has satisfied all fiscal obligations specifically arising from the ACLU v. CYFD, D-0101-CV-2007-02921. The terms and conditions of those obligations were established by the settlement agreement which concluded the litigation in the referenced case. Although the ACLU has filed a new lawsuit against CYFD, the matter is still in its infancy and CYFD has not assumed through any negotiated settlement any obligation to pay attorneys fees or expert witness fees claimed by the Plaintiff, nor has the Court made any determination, finding, or order with regard to the distribution of any fees of any kind. Other issues which may deserve some consideration, to which CYFD offers no position, is whether or not this bill implicates the prohibitions of Article II, Section 19 of the New Mexico Constitution which prohibits ex post facto laws, bills of attainder, or laws impairing the obligations of contracts, or whether the this bill is a local or special law prohibited by Article IV, Section 24 of the New Mexico Constitution.”

DOH writes “SB 531 would prohibit the use of agency funds to pay for plaintiff’s attorneys from the ACLU V. CYFD Lawsuit in FY12. This bill may put a state agency in a situation to violate a standing court order.

Agency personnel may be compelled to participate in additional court proceedings and sanctions for contempt charges. Program funding and operations may be affected by proceedings and orders arising from agency failure(s) to pay attorney fees wherein immunity has already been waived expressly. More funds could be required to pay for legal counsel to defend affected agencies and personnel and also for additional attorney fees accrued by plaintiff attorneys pursuing contempt motions and proceedings.”

HSD writes “it appears from the court docket that the court case ACLU v. CYFD, D-101-CV-2007-02921 has been settled by the parties and is considered resolved. This legislation cannot alter the terms of the final settlement accepted by the court. Once a court case is resolved it is not subject to further litigation of the same issues pursuant to the doctrine of res judicata.”

### **PERFORMANCE IMPLICATIONS**

CYFD indicates SB531 could deter future litigation if plaintiffs have no incentive for seeking fees. However, the scope of this bill is so narrow that its application beyond the referenced lawsuit is unclear.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

DOH indicates SB531 potentially conflicts with NM Tort Claims Act 41-1-1, et seq (1978) and also constitutional separation of executive, judicial, and legislative branches.

Court orders require attorney fees in both cases so failure to do so necessarily challenges state (ACLU v. CYFD) and federal (Jackson v. DOH) court orders.

**TECHNICAL ISSUES**

The Corrections Department indicates it was and is not a party in the designated lawsuit, and appears to have no liability or exposure in that lawsuit. Thus, the bill has no fiscal or other impact on NMCD. Therefore, the CD suggests an amendment to remove the department from the list of agencies in SB531.

The New Mexico Division of Vocational Rehabilitation (NMDVR) is not a party to the ACLU v. CYFD lawsuit.

HSD indicates SB531 as drafted is not likely to accomplish the stated goal of realized a cost savings for the executive agencies mentioned. The bill applies to one particular class of cases that has already been resolved by the court and is not subject to an alteration of the terms of the settlement unless agreed to by the parties and the court.

**ALTERNATIVES**

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.

RAE/bym