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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/31/13

SPONSOR Lewis LAST UPDATED \_\_\_\_\_ HB 142

SHORT TITLE Children’s Code Delinquency Act Changes SB \_\_\_\_\_

ANALYST Daly

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

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		TBD*	TBD*	Possibly Substantial	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

\*See Fiscal Implications

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Administrative Office of the District Attorneys (AODA)  
 Attorney General’s Office (AGO)  
 Public Defender Department (PDD)  
 Children, Youth & Families Department (CYFD)  
 New Mexico Corrections Department (NMCD)  
 New Mexico Council on Crime and Delinquency (NMCCD)

### SUMMARY

#### Synopsis of Bill

House Bill 142 makes extensive changes to the Delinquency Act of the Children’s Code (the Act) and related statutes, both by amending existing provisions and adding new provisions.

Significant substantive changes include:

- Providing that a serious youthful offender shall not be sentenced to life without the possibility of release or parole. See Section 6 of HB 142.
- Adding the elimination or reduction of disproportionate minority contact as a purpose of the Act. See Section 8 of HB 142.
- Reducing the number of prior felony adjudications required for “youthful offender” status from three offenses to two offenses within a three-year period. See Section 9 of HB 142.

- Allowing a child detained for violating conditions of release to be held temporarily in an adult jail or lockup. See Section 11 of HB 142.
- Clarifying where alleged delinquent children or youthful offenders may be detained. See Section 19 of HB 142.
- Deleting language requiring the appointment of counsel. See Section 21 of HB 142.
- Clarifying the roles and responsibilities of parents, legal guardians and custodians. See Sections 14, 23 and 32 of HB 142.
- Prohibiting credit for time spent in detention while awaiting adjudication. See Section 24 of HB 142.
- Prohibiting consecutive commitments for adjudicated delinquents. See Section 24 of HB 142.
- Changing the disposition provisions, including creating a new “dual disposition” that combines a juvenile disposition with a suspended adult sentence. See Section 25, 26 and 27 of HB 142.

HB 142 also makes numerous changes to terminology and otherwise updates and clarifies a number of existing statutes.

Further explanation of some of the significant changes listed above, as well as other changes made in HB 142, is set out below:

Section 11 amends NMSA 1978, Section 32A-2-4.1, to allow a child arrested and detained for a violation of conditions of release (which could be not going to school) be held temporarily in an adult jail or lockup. (Existing statute only allows this form of detention for a child detained for an alleged delinquent act.)

Section 17 amends NMSA 1978, Section 32A-2-10, regarding release or delivery from custody. “If available” is removed from Subsections A(4) and A(5), clarifying that a child must be delivered to a medical or evaluation facility in specified situations.

Section 19 amends NMSA 1978 Section 32A-2-12 regarding the place of detention for a child under certain circumstances. Existing Subsection C allows a child adjudicated as a youthful offender who is violent toward staff or other residents in a detention facility to be detained in a county jail, pending hearing. HB 142 deletes that provision in its entirety, and replaces it with a new Subsection C addressing the place of detention of a child alleged to be a delinquent child or a youthful offender who, at the time of the allegation, is in the custody of the department pursuant to a previous disposition pending hearing or final disposition. The possible places of detention are (1) a detention facility, licensed by the department, for children alleged to be delinquent children; or (2) any other suitable place designated by the court that meets the standards for detention facilities pursuant to the Children's Code and federal law other than a facility for the long-term care and rehabilitation of delinquent children to which children adjudicated as delinquent children may be confined. A county jail is no longer an option. (The existing Subsection D, which allows a child who has previously been incarcerated as an adult or a person who is 18 years old or older to be detained in a county jail, remains in effect.)

Section 23 amends NMSA 1978, Section 32A-2-17, regarding predisposition studies and reports. HB 142 clarifies the requirement that the Adult Probation and Parole Division of the Corrections Department prepare a subsequent predisposition report is not applicable to any adult sentence

sought pursuant to NMSA 1978, Section 32A-2-20.1 (a new section addressing dual sentencing proposed under Section 27 of HB 142). It also adds “legal guardian” to the list of persons who may be examined if the person is a party to the case and that party’s ability to care for or supervise a child is at issue. Subsection D now requires pre-dispositional evaluations be performed in the child’s community unless the court makes a finding that the child meets the detention requirements in Section 32A-2-11 NMSA 1978. Subsection E is amended to extend the time to complete an evaluation from fifteen to thirty days if a child is detained for pre-disposition evaluation and meets the detention standards in Section 32A-2-11.

Section 24 makes changes to NMSA 1978, Section 32A-2-18. It adds an exception to the existing Subsection B regarding admissibility of records of a youthful offender or serious youthful offender in other proceedings involving the child. If the sentence was imposed pursuant to the new dual sentencing provision (Section 32A-2-20.1(G)) and the offender successfully completed adult probation then the records are not admissible. Subsection D is amended to provide that a child adjudicated delinquent and transferred to the department for commitment receives no credit for time served in detention while awaiting adjudication. Subsection E is amended to provide that all commitments on a child adjudicated delinquent are to be served concurrently, not consecutively.

Section 25 amends NMSA 1978, Section 32A-2-19, regarding disposition of an adjudicated delinquent child. Currently, Subsections B(1)(a) and B(1)(2) describe short-term and long-term commitments. Both short-term and long-term commitments include no less than 90 days of supervised release, unless certain events occur. HB 142 amends both Subsections to add an additional provision allowing the supervised release panel to increase the time served at a facility (and lessen the time served on supervised release) if, after hearing, the panel determines that the child is not ready for supervised release for reasons that are outside of the department’s control, and prepares a proper transition plan that includes a summary of those reasons. HB 142 also strikes the provision that a youthful offender can be committed to age 21, unless sooner discharged.

Section 26 amends NMSA 1978, Section 32-A-2-20, regarding the disposition of youthful offenders to recognize the new “dual disposition” provision added by HB 142. (See Section 27).

Section 27 adds a new statute, codified as NMSA 1978, Section 32A-2-20.1, providing for “dual disposition” of a youthful offender amenable to treatment. If the offender committed one of the serious felony offenses listed in Section 32A-2-3(J) and is amenable to treatment, the court may impose the following: 1) a fine; 2) a juvenile disposition; and 3) an adult criminal sentence that will be stayed on condition that the offender not violate the provisions of the disposition order and does not commit a new offense. Successful completion of the juvenile disposition is a condition of the suspension.

Section 28 also adds a new statute, codified as NMSA 1978, Section 32A-2-20.2, addressing imposition of an adult sentence on a youthful offender. When there is probable cause to believe a youthful offender sentenced under the “dual disposition” provision has violated a condition of the stayed adult sentence, or is alleged to have committed a new offense, Subsection A authorizes the court to direct that the offender be taken into custody, the children’s court attorney may petition for revocation of stay, and the offender is entitled to a hearing. If the court finds a violation, it may order execution of the previously imposed sentence, and the offender will be placed under the custody of adult corrections and the jurisdiction of adult courts.

Subsection F requires a hearing to be held before a youthful offender who has received a suspended adult sentence turns 21. After hearing, the court must determine whether to: 1) revoke the suspension and give custody of the offender to the corrections department; 2) order execution of the adult sentence and place the offender on probation; or 3) release the offender. Subsection G directs that if the offender who was placed on probation at the Subsection F hearing successfully completes that probation, the adjudication shall not become a conviction for purposes of the Criminal Code and the court shall enter a conditional discharge. Subsection H grants credit toward any adult criminal sentence imposed at the Subsection F hearing for all time served under a juvenile disposition.

Section 30 updates NMSA 1978, Section 32A-2-25, replacing “Parole” with “Supervised Release” to reflect the new terminology. It also adds a new Subsection C, which provides that if a child on supervised release absconds or is otherwise “absent from supervision,” the supervised release period is tolled, and any time remaining may be added to the child’s commitment period.

Section 32 amends NMSA 1978, Section 32A-2-28, to recognize the responsibilities of legal guardians and custodian; currently this section describes only parental responsibilities. It provides that a legal guardian or custodian (as well as a parent) may be made party to a delinquency petition, and a party may be ordered to submit to counseling, participate in programs, etc. It also provides that legal guardians (as well as parents) shall be ordered to support a child committed for institutionalization. Like parents currently, legal guardians and custodians are not liable to pay any fine imposed on a child.

Section 33 amends NMSA 1978, Section 32A-2-32, the confidentiality provision of the Act to include educational records in Subsection A. Subsection C removes the restriction that any record released to law enforcement officials must relate to the investigation of a crime. It also allows disclosure to those who are on contract with the department or in accord with state and federal law.

The effective date of HB 142 is July 1, 2013.

## **FISCAL IMPLICATIONS**

Although the CYFD reports that since all of its clients are or will be already committed to its custody, costs are already covered under existing and future budgets, LFC staff is concerned that additional costs have not been identified in the CYFD analysis. For example, the new provision extending the time for completing a predispositional evaluation if a child is detained from 15 to 30 days could cost the State \$4,305 per child for those additional fifteen days, given the CYFD’s average cost per client per day for FY 12 of \$287.03. Similar or greater increases in costs could result from the new provision prohibiting credit for time spent in detention while awaiting adjudication, as well as the new provision allowing the supervised release panel to extend the time served at a facility upon a determination that a child is not ready for supervised release for reasons outside the department’s control. Allowing a child detained for violating conditions of release to be temporarily detained in an adult jail or lockup (physically segregated by sight and sound from adult offenders) also may lead to increased costs.

Further cost increases could arise outside the context of CYFD budgetary needs. The AOC believes the provisions in HB 142 which result in youthful offenders receiving suspended adult sentences may result in additional administration for both juvenile and adult courts. Additionally,

because a youth may oppose a petition to revoke the stay of an adult sentence, it is likely that more hearings will result using more court time and resources. Moreover, the youth must be represented by counsel, which would then also increase costs to the State in that category.

Similarly, the AOC anticipates that the bill's provision reducing the number of prior felonies for youthful offender status may also increase the number of court hearings since the child will now, under dual sentencing, possibly be facing an adult sentence concurrent with his juvenile disposition. Since the consequences of violating conditions of the disposition or committing a new offense carry more stringent penalties, it is likely that more cases will go to trial both to avoid the felony charge and to prevent that last adjudication from triggering youthful offender status. This would result in more court time and resources if there are fewer pleas. There would also be a similar increase in workloads for prosecutors and defenders. However, the AOC points out there may also be a rise in consent decrees as a result of this measure in an effort to avoid youthful offender status.

The PDD comments that there may also be an increase in litigation against the State to test the legality of some of the new provisions of HB 142, which could result in costs to the State to defend such litigation.

Lastly, the NMCD reports minimal fiscal impact, since it anticipates that at most only a minimal number of youthful offenders will be sentenced to serve an incarceration period in NMCD custody as a result of this bill. Any youthful offenders sentenced to the care of NMCD may more likely be placed on adult probation with that department.

## **SIGNIFICANT ISSUES**

### Overview

The AOC provides this overview of the significant provisions of HB 142 and some of the issues that arise in light of its changes to the Act:

The current Children's Code provides a structure which allows a judge the discretion to impose either a juvenile or adult sentence on a youthful offender. The children's court attorney must file a petition to seek an adult sentence for the offender and must make a showing that the child is not amenable to treatment. Youthful offenders who are amenable to treatment, following an evaluation, receive juvenile sanctions. New material in proposed section 32A-2-20.1 adds dual sentencing to the code. Dual sentencing removes the requirement that the youth not be amenable to treatment before adult sentencing. Under 20.1, a judge may sentence a child to fines, and a combination of a juvenile disposition and an adult sentence. If the court chooses this option, the adult sentence is stayed provided that the youth does not violate the juvenile disposition or commit a new offense. The adult sentence is suspended for a youth who completes the juvenile disposition without committing a new offense.

For youth who fail to meet these provisions, the child may be taken into immediate custody and the Department may file a petition to revoke the stay of adult sentencing. The youth may oppose the petition resulting in a hearing where the youth is represented by counsel. The court may make findings that the stay

should remain in place; however, if the stay is revoked, the youth's status as a youthful offender is terminated and the court's jurisdiction over the delinquent act is terminated. Adult sanctions, other than commitment to the corrections department, are with the adult court.

The AOC ultimately concludes:

It is possible that children who are found amenable to treatment will ultimately have adult sentences whereas they currently do not. Section 32A-2-20.2.

#### Prohibiting Life Without Parole for Serious Youthful Offenders

The AODA explains that under current law a serious youthful offender convicted of first degree murder with aggravating circumstances could receive a sentence of life without the possibility of release or parole. As the AOC notes above, HB 142 prohibits such a sentence. The AODA provides this legal analysis of current case law regarding this issue:

In recent years the United States Supreme Court has considered whether the Eighth Amendment's prohibition against cruel and unusual punishment prohibits sentencing a juvenile to life without parole. Just months ago, a divided Supreme Court held in Miller v. Alabama, No. 10-9646, that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders. In 2010, the Supreme Court held that the Eighth Amendment bars a sentence of life without parole for juvenile in non-homicide cases. Graham v. Florida, 560 U.S. \_\_\_, 130 S. Ct. 2011 (2010). New Mexico's current law does not fall exactly under either case. New Mexico would only apply life without parole to juveniles in homicide cases, and New Mexico does not mandate life without parole in those cases. However, the question of whether the Supreme Court will allow sentences of life without parole in juvenile homicide cases, and what procedures will be required if such sentences are allowed, has not been answered. Section 6 of HB 142, by prohibiting a life without parole sentence, would decide the issue by legislative action.

#### Dual Disposition/Sentencing

Section 27 adds a new Section 32A-2-20.1 under which a youthful offender who has committed a serious felony but is amenable to treatment may be subject to a fine, a juvenile disposition and an adult criminal sentence that is stayed on condition that the offender not violate the provisions of the disposition order and not commit a new offense. This process is referred to both as "dual disposition" and "dual sentencing". The CYFD advises that dual sentencing is a component of Cambiar New Mexico. It allows CYFD the opportunity to more fully assess an offender's response to treatment programming over time, instead of having to predict rehabilitative amenability at the disposition phase of the juvenile justice process. The CYFD believes this new option will not only promote public safety but will also offer the best opportunity for rehabilitation of young offenders. It advises that dual sentencing is a sentencing method adopted by multiple jurisdictions across the United States, and is considered a more therapeutic alternative than, for example, some states' ability to transfer children as young as ten years old to adult courts.

The AODA asserts:

Combining the more lenient juvenile disposition with the threat of a possible adult criminal sentence should create a strong incentive for the offender to follow the disposition order and not commit a new offense, and will reward those who successfully complete the juvenile disposition.

However, the AODA calls attention to the impact of new provisions in HB 142 which result in the anomalous situation where a juvenile offender who is not amenable to treatment receives more rights, and may receive a lower sentence, than a juvenile offender found amenable to treatment:

It is important to note that Section 32A-2-20.1 does not contain the procedural rights that apply when the children's court attorney seeks an adult sentence for a child not amenable to treatment, such as notice of intent to seek an adult sentence and a hearing for probable cause. And the court is not required to consider the list of relevant factors set out in Section 32A-2-20(C), such as the seriousness of the offense and the maturity of the child, before imposing an adult sentence on a juvenile offender who fails to complete his disposition order or commits a new offense.

The PDD provides this critique of the dual disposition/sentencing process:

The creation of this blended sentencing scheme goes against the unique scheme New Mexico devised to deal with serious offenses committed by children. It reverses the default position of New Mexico law to date that is supported by science that recognizing the differences between youth and adults compel a different, and often more protective, treatment for youth. It also is contrary to the current trend in law that recognizes the unique vulnerabilities of children. See e.g. *Miller v. Alabama*, 132 S.Ct. 2455 (2012); *Graham v. Florida*, 130 S.Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

The PDD also specifically challenges the new standard of reasonable certainty set out in Section 28's new Section 32A-2-20.2(B):

This new standard of reasonable certainty is contrary to Section 32A-2-24 that requires any probation violation be proven beyond a reasonable doubt. Using the reasonable certainty standard for any condition increases the overall risk that juvenile-age offenders will be sanctioned as adults. While the current scheme has passed constitutional scrutiny, this new scheme will require additional litigation to determine if it is constitutional. See *State v. Rudy B.*, 2010 -NMSC- 045.

In assessing the impact of HB 142, the NMCD advises the number of juvenile offenders in NMCD custody has historically been very low (an average of one to four such offenders in NMCD custody/incarceration most of the time), and juvenile judges have historically been very reluctant to send juveniles to NMCD prisons. The NMCD predicts judges will be more likely under the new provisions of the bill to place youthful offenders on adult probation in lieu of NMCD incarceration.

Other Significant Issues

The PDD advises that the reduction in the number of prior felony adjudications that expose a child to adult sanctions runs counter to a recent trend in U.S. Supreme Court recognizing the differences between youth and adults compel a different, and often protective, treatment for youth under the U.S. Constitution.

Further, the PDD warns that to the extent that Section 21’s amendment of Section 32A-12-14(H) that removes language directing that counsel be appointed for a child if counsel is not retained may be read to suggest that children are not entitled to appointed counsel, such a conclusion is contrary to federal constitutional law. See In re Gault, 387 U.S. 1 (1967).

And as to the expansion contained in Section 11’s amendment of Section 32A-2-4.1 permitting the use of adult jails and lockups as temporary holding facilities for a child arrested and detained for violations of conditions of release, the PDD advises that conditions of release usually include custody arrangements, school attendance and other similar matters. Running away can be a violation of a condition of release. Allowing a child to be held in adult jail for running away may create a conflict with NMSA 1978 Section 32A-3B-6, which directs that when a child is placed in protective custody for running away they may not be held in adult detention or jail.

**PERFORMANCE IMPLICATIONS**

The CYFD reports it has performance measures related to juvenile recidivism, and believes dual sentencing may assist in meeting those measures. The NMCD anticipates little or no performance impact, as prison staff already has gained experience and expertise over the years in working with youthful offenders sentenced as adults and sentenced to prison time in NMCD custody.

**ADMINISTRATIVE IMPLICATIONS**

The AODA notes that the Children’s Court Rules should be reviewed to ensure consistency with both the terminology and the more substantive changes made by HB 142.

**TECHNICAL ISSUES**

1. Page 27, line 23: the reference to “Section 32A-2-20 NMSA 1978” should be changed to “Section 32A-2-20.1 NMSA 1978”.
2. Page 56, line 9: the reference to “Paragraph (2) of Subsection F of Section 32A-2-2” should be changed to the appropriate sentencing provision.
3. Page 59, line 4: the term “facility release panel” should be changed to “supervised release panel”.

**OTHER SUBSTANTIVE ISSUES**

The AODA also raises a question as to the provision in Section 19 which adds a new Subsection C to Section 32A-2-12 barring a child who was alleged to be delinquent or a youthful offender who is already in custody on a previous disposition from being detained in a facility for the long-term care and rehabilitation of delinquent children, since such a child has already been adjudicated delinquent.

**OTHER COMMENTS**

The NMCCD comments that HB 142's reduction in the number of prior felony adjudications required in defining a child as a youthful offender and its creation of a dual disposition/sentencing scheme each will expose more children to possible adult sanctions. It also reports that the limited empirical evidence available on dual sentencing reflects that juveniles who would otherwise have received juvenile dispositions end up receiving dual sentences that eventually result in the imposition of the adult prison sentences, often for minor misbehavior that would not otherwise be subject to adult criminal court sanctions. Dual sentencing options in other states have resulted in racial and geographic biases as to the sanctions imposed. The NMCCD also reports these studies indicate that suspended adult sentences do not improve the behavior of youthful offenders in juvenile facilities, and the prospect of adult sanctions is not a deterrent to juvenile crime: psychosocial immaturity reduces the likelihood that young people will accurately estimate the risks of their conduct.

**POSSIBLE QUESTIONS**

- 1) Since additional costs to implement the provisions of this bill are anticipated, can CYFD and the courts comply with this bill without additional funding for FY14?
- 2) Does CYFD have sufficient space in its juvenile facilities for temporary detentions?
- 3) What method will be used to notify parents, legal guardians and custodians of the roles and responsibilities required by this bill?
- 4) Can this bill be implemented by June 14, 2013?

MD/svb