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FISCAL IMPACT REPORT

SPONSOR Dow/Candelaria/Lane/ ORIGINAL DATE 02/28/21
Dixon/Sweetser LAST UPDATED 03/08/21 **HB** 284

SHORT TITLE Admin Hearings for Some CYFD Actions **SB** _____

ANALYST Bachechi

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY21	FY22	FY23		
	(\$750.0 - \$30,000.0)	(\$750.0 - \$30,000.0)	Recurring	Loss of Title IV-E funding and Penalties

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$1,161.2	\$1,161.2	\$2,322.4	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicates Senate Bill 395

Relates to HB202, HB209, SB97, SB257, SB278, and SB324.

Relates to Appropriations in the General Appropriation Act of 2021

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Children, Youth and Families (CYFD)

Administrative Hearings Office (AHO)

SUMMARY

Synopsis of Bill

House Bill 284 amends the Children's Code (Chapter 32A of New Mexico statutes) creating a

new section granting a list of individuals and entities standing to challenge decisions made by CYFD in a number of specified matters, currently within the exclusive jurisdiction of CYFD, including the revocation or suspension of a foster home license, the removal of a child from a foster home, a dispute relating to the reimbursement of expenses, or any dispute that alleges an action of the department conflicts with an existing law or department policy or rule. Section 1 of the bill defines the types of parties who have standing to request an administrative hearing, including the court-appointed special advocate (CASA), child, child's attorney, custodian, foster parent, guardian, guardian ad litem, Indian tribe, parent, pre-adoptive parent, relative, fictive kin, mental health provider, school staff, or protective services division worker of a child in department custody.

Significantly, the bill transfers the jurisdiction of those matters from CYFD to the Administrative Hearings Office by amending the Administrative Hearings Office Act (§§ 7-1B-1 through 7-1B-9 NMSA 1978) to create a new process for adjudicating these challenges. Section 2 of the bill directs the Administrative Hearings Office, administratively attached to the Department of Finance and Administration, to conduct all administrative hearings requested pursuant to the bill. These hearings will not be heard in the district courts that hear the primary Children's Code case.

The hearing officer's findings of fact and conclusions of law will be binding on CYFD and constitute a final agency decision. HB284 also gives any of the many enumerated potential participants to an administrative hearing access to confidential case information they would have no right or access to in the district court case. The bill does, however, provide evidence that would otherwise be considered confidential shall remain confidential if introduced at the hearing.

There is no effective date of this bill. It is assumed the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

HB284 does not include an appropriation request but is likely to have significant fiscal impact on the operating budgets of both AHO and CYFD.

CYFD emphasizes that transferring authority to make binding foster care placement decisions to the AOH will have significant repercussions for CYFD funding streams. The impact is not limited to salaries and benefits, or the general fund. By allowing an agency which is *not* vested with responsibility for the Title IV-E state plan to make binding decisions concerning foster care children, New Mexico risks losing Title IV-E funding.¹ Federal law requires that placement decisions be vested with the agency responsible for Title IV-E state plan. Because AHO is not responsible for the Title IV-E state plan, allowing AHO hearings officers to make binding placement decisions would bring the New Mexico out of compliance with federal law and jeopardize CYFD's Title IV-E funding.

CYFD currently estimates a loss of between \$750 thousand and \$1.5 million annually in Title

¹ See 45 CFR § 1356.71(d) "Requirements subject to review. Title IV-E agencies will be reviewed against the requirements of title IV-E of the Act regarding: (1) The eligibility of the children on whose behalf the foster care maintenance payments are made (section 472(a)(1)-(4) of the Act) to include: (iii) Responsibility for placement and care vested with the title IV-E or other public agency per section 472(a)(2)(B) of the Act;"

IV-E penalties. If found completely out of compliance due to violating the single state agency requirement, CYFD could lose upwards of \$30 million per year until the issue was addressed through legislative repeal.

Additionally, the Child Abuse Prevention and Treatment Act (CAPTA) requires the state preserve the confidentiality of all child abuse and neglect reports and records in order to protect the rights of the child and the child's parents or guardians. States may only share confidential reports and records with individuals who are the subject of a report, a grand jury or court, or other entities or classes of individuals who are authorized by statute to receive information to carry out their duty and all other authorized recipients are bound by the same confidentiality restrictions as the CPS agency. (Section 106(b)(2)(B)(viii) of CAPTA) This bill does not provide adequate protections for the dissemination of confidential information in accordance with CAPTA and the confidentiality statute in the Abuse and Neglect Act, 32A-4-33 which could lead to violations of CAPTA. Violations of CAPTA confidentiality laws would jeopardize an additional \$280-500 thousand per year in CAPTA funding

This bill expands the categories of parties with standing from three parties who are directly affected to 15 different parties who may file a protest regarding "any dispute" (page 2, line 8) against the department regardless of whether that dispute directly impacts them or not. Broadening both legal standing and actions reviewable by the Administrative Hearings Office to this extreme will require a significant expansion of staff working with administrative hearings, by at least five (5) FTE attorneys with the CYFD Office of General Counsel, and two to three FTE paralegals. CYFD cannot absorb the costs of these attorneys and paralegals with existing resources and estimate additional operating costs of approximately \$750 thousand per year. In addition, the bill requires CYFD to reimburse AHO the cost of any contract hearing officers that would be required to manage the expanded caseload of the AHO. CYFD will not be able to absorb the costs of these additional contract hearing officers with existing resources and estimates a fiscal impact of \$200 thousand per year.

The Administrative Hearings Office is fully staffed for its current mission consistent with the Administrative Hearings Office Act. Acquisition of additional hearing types would require additional resources in the form of FTE, office space, travel, training, and other associated costs. AHO estimates the expansion of individuals and entities entitled to request hearings could result in a surge of hearings requiring additional hearing officers and support staff. AHO already employs 10 experienced hearing officers. However, only one currently has the experience required by the bill (see Section 4.) Although AHO does not have concrete data on which to estimate any increase in hearings, AHO contemplates it could absorb any surge in hearings with one additional hearing officer and one additional support staff with an estimated annual cost of \$211.2 thousand per year. A spreadsheet detailing the calculations is provided below. To the extent AHO is underestimating its need for additional personnel, HB284 permits AHO to contract for the services of contract hearings officer to be reimbursed by CYFD. In this circumstance, the fiscal impact of contracting would be born primarily by CYFD.

In addition, AHO will also need additional office space to accommodate the required additional FTE, maintain confidential records related to the proceeding in a secure space, and accommodate confidential hearings across the state. Some, but not all, hearings would be expected to occur in locations where AHO already maintains offices capable of conducting the confidential hearings contemplated by HB284, including Santa Fe, Albuquerque, and Las Cruces. However, AHO has no hearing spaces outside of these locations that can accommodate CYFD hearings. Accordingly,

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unless local CYFD facilities can be used to conduct hearings, AHO will need to rent space as needed across the state. Additionally, conducting hearings in locations where AHO does not maintain an offices will result in increased in travel costs and may require additional state vehicles.

Additional Hearing Officer FTE			
Gross Salary	90,509.15	PS and PB Calculator	
Medical	4,144.40		
FICA	6,923.95	43.51	Rate of pay
PERA	15,377.51	2,080.00	Annual # hours
RHCA	1,810.18	90,509.15	Gross Pay
WKRS Comp Assessment	9.20		
GSD WKRS Comp Premium	11.76	43,281.34	Benefits and recurring expense
Unemployment Comp. Pre.	0.00	2,600.00	non-recurring expense
Employee Liability Ins. Pre.	111.76		
DOIT Technology	2,458.82	136,390.49	Total Salary and Benefits
DOIT HCM	415.00		
Car/Gas	2,700.00	Please Note: Only the "Rate of Pay" field (highlighted in green) should be changed	
Insurance	18.75		
State Bar Dues	500.00		
Mandatory Training	500.00		
Indirect (office space etc)	6,800.00		
Travel	1,500.00		
Recurring Expenses	133,790.49		
Initial Office set-up	2,600.00		
(Nonrecurring Expense)	2,600.00		
Total fiscal requirements for hiring one Attorney at Competitive Range employee IG's Level	136,390.49		
1 FTE / XX Approx. CYFD Hearings Annually			
Additional Support Staff			
Gross Salary	44,971.11	PS and PB Calculator	
Medical	4,905.16		
FICA	3,440.29	21.62	Rate of pay
PERA	7,640.59	2,080.00	Annual # hours
RHCA	899.42	44,971.11	Gross Pay
WKRS Comp Assessment	9.20		
GSD WKRS Comp Premium	11.76	27,192.02	Benefits and recurring expense
Unemployment Comp. Pre.	0.00	2,600.00	non-recurring expense
Employee Liability Ins. Pre.	111.76		
DOIT Technology	2,458.82	74,763.13	Total Salary and Benefits
DOIT HCM	415.00		
Car/Gas	0.00	Please Note: Only the "Rate of Pay" field (highlighted in green) should be changed	
Insurance	0.00		
State Bar Dues	0.00		
Mandatory Training	500.00		
Indirect (office space etc)	6,800.00		
Travel	0.00		
Recurring Expenses	72,163.13		
Initial Office set-up	2,600.00		
(Nonrecurring Expense)	2,600.00		
Total fiscal requirements for hiring one Support Staff at Competitive Range of SR's level	74,763.13		

SIGNIFICANT ISSUES

CYFD emphasizes HB284 expands the universe of parties who may seek satisfaction to include those who may not be affected by CYFD decisions, through a mechanism not intended for use with CYFD cases and, by so doing, jeopardizes both the best interest of the children and the funding stream on which the state relies to provide services to those children. While accountability is a priority of CYFD, the departments notes the following issues:

- It risks costing CYFD significant federal funding for violation of the single state agency requirement under Title IV-E of the Social Security Act, as well as, potential violations of CAPTA confidentiality provisions (full explanation provided in fiscal impact section);
- It creates a binding administrative process that would circumvent important legal protections and processes in the children's court, including creating a means to circumvent the Indian Child Welfare Act (ICWA);
- It lacks provisions permitting the sharing of confidential information related to a child welfare case making it unclear how the administrative hearings division will be able to review all of the information pertinent to a protest;
- It lacks provisions ensuring the confidentiality of protected information that may come up in the administrative hearing process, potentially placing youth, domestic violence survivors, and others at risk;
- Any remedy through the administrative hearing process would likely take much longer than existing remedies available through the children's court, grievance processes, or review by the Substitute Care Advisory Council (SCAC).
- It significantly expands who can request an administrative hearing to individuals outside of those impacted by the CYFD case or those who would normally have standing. This expansion of the usual concept of standing creates the real potential for the fundamental rights of parents and children, including to be placed with relatives and otherwise maintain cultural and familial connections, to be subordinated to those individuals.

Authority to Make Binding Decisions Concerning the Placement of Foster Care Children

When CYFD has legal custody of a child through an abuse and neglect case, CYFD has the right to determine placement and has other specified rights and duties to the child, including medical and mental healthcare and education. CYFD exercises its authority and responsibilities in the context of a legal system that provides due process protections for parents and is governed by both state and federal requirements that require CYFD to make efforts to place children with relatives and with the child's siblings in custody; maintain a child's connections with the child's relatives and siblings; maintain a child's educational setting; work to reunify a child with the child's parents; and meet safety, permanency, and well-being measures for children. CYFD must also ensure compliance with federal laws, including the Indian Child Welfare Act, which mandates placement of Indian children with their relatives, a tribally-licensed home, or another Native American family home setting. CYFD makes countless decisions regarding a child's care on a daily, weekly, and monthly basis with input from parents, children, attorneys representing parties in abuse and neglect cases, service providers, school personnel, court-appointed special advocates (CASAs), and others. Some of CYFD's decisions, such as a change in the child's placement are governed by statute and subject to review by the Children's Court.

The current law gives CYFD sole discretion for placement of a child as the child's legal custodian. CYFD's decision on placement of a child may be overruled by the court only on a showing of abuse of that discretion. HB284 does not address the current statutory and case law on this issue. HB284 allows a nonparty to challenge the placement of a child (or removal of a child from a specific foster home), and if the administrative hearing officer rules against CYFD, that ruling will be binding on CYFD as a final agency decision. This removes the placement discretion from CYFD and gives the administrative hearings officer greater authority over placement of a child in CYFD custody than provided to any other entity throughout the law, including the district court, and usurps the oversight authority of the Children's Court.

CYFD emphasizes, by providing for any relative, fictive kin, school staff, or mental health provider to right to request an administrative hearing regarding any CYFD decision that they allege violates law, policy or rule, HB284 give countless people the ability to challenge CYFD's decision-making, many of whom may otherwise have no, or a very limited, role in the abuse and neglect case and little understanding of the decision-making process.

Parties to an Administrative Hearing and Expanding Standing

HB284 is extremely broad and provides standing to a significant number of individuals, on the periphery of the Children's Code, to bring administrative actions challenging daily decisions made by CYFD. Children's Code cases can involve highly volatile and emotional family issues. Allowing a relative to initiate an administrative hearing opens this process up to a vast group of people who are not parties to a Children's Code case and are legally prohibited from access to records. HB284 also opens this process up to fictive kin (individuals who are not biologically related but have a close relationship with the child), an even a wider net of nonparty participants. HB284 allows challenges by school staff and mental health providers. None of these participants, other than a child, respondent, CYFD, or intervener, have standing in any Children's Code action.

Moreover, the bill does not specify whether the person bringing the appeal has to be currently involved with the child or the child's case as a CASA, foster parent, protective services worker, or other category of newly eligible party; whether they can bring an action based on their former standing; or whether the person bringing the petition has to be connected to the case at all. Legal standing in New Mexico is limited to those who have suffered direct injury due to an agency decision. Following this definition, only the parent, child, foster parent, or their attorneys would have standing to bring actions against CYFD for revocation, removal, or reimbursement decisions. The other parties enumerated in HB284, including CASAs, pre-adoptive parents, relative, fictive kin, school staff, and protective services workers, all have other avenues to voice complaints; allowing these persons to bring claims on behalf of others when they do not have direct legal standing and may not have any actual involvement with the child or the child's case is starkly contrary to the theory of legal standing.

Confidentiality

Most Children's Code hearings, records, and case information are confidential and sequestered, with criminal consequences if the requirements of confidentiality are breached. HB284 allows for nonparty participants to initiate an administrative action and gain access to records strictly protected from the disclosure. Allowing anyone who falls under the definition of relative, fictive kin, or school staff (or many of the other persons allowed to initiate an administrative hearing)

access to protected records, to potentially include psychological, medical, and psychiatric record, for the purpose of challenging a decision by CYFD, goes against current protective laws designed specifically to prohibit this disclosure. These protections are in place, at least in part, to encourage parents and children to engage in psychological, psychiatric, medical, and other services, knowing their records and disclosures will not be available to their relatives, fictive kin, children's foster parents, children's school staff, etc.

Indian Child Welfare Act (ICWA)

HB284 does not reference ICWA, other than to state those allowed to inspect records under ICWA can also inspect records under the laws created by HB284. The interrelationship of ICWA (and potentially SICWA HB209/SB278) and the Children's Code is critical in protecting the rights of Native American children, their families, and Indian tribes.

Duplicative

The New Mexico Administrative Code provides for an administrative appeals process for certain disputes and includes definitions, pre-hearing requirements, conduct of hearings, and a process for judicial review (8.8.4 NMAC). CYFD reports, except for "any dispute" as a broad category, the contents of this bill are accounted for in CYFD's current administrative regulations and they may be appealed to the district court, thus making this bill unnecessary.

- Foster parents can appeal revocation, suspension or nonrenewal of their license pursuant to NMAC 8.8.2.13(B)(1). These hearings take place in accordance with NMAC 8.8.4
- Reimbursement decisions may be appealed pursuant to NMAC 8.26.2.25(H). These hearings take place in accordance with NMAC 8.8.4
- NMSA 32A-4-14 already addresses a child's change of placement and the ability to dispute that decision.
- Appeals from final agency decisions can be taken to the district court pursuant to NMRA 1-075.

PERFORMANCE IMPLICATIONS

CYFD has performance measures concerning the best interests of children that will be adversely affected by this bill.

ADMINISTRATIVE IMPLICATIONS ADMINISTRATIVE IMPLICATIONS

AHO and CYFD agree, the significant administrative implications of this bill cannot be absorbed by existing resources. The bill would potentially result in hundreds of administrative hearings a year that CYFD placement workers, permanency planning workers, supervisors, county office managers, and other program staff, children's court attorneys and other department attorneys might have to participate in in addition to their work in the underlying abuse and neglect case and other administrative hearings, such as regarding resource parent licensure and administrative reviews of abuse and neglect substantiations.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Senate Bill 395 is a duplicate.

HB284 also relates to:

HB202 – Foster Care Requirements and Changes

HB209 – State Indian Child Welfare Act

SB97 – Guardianship Changes

SB257 – Delinquency Placements

SB278 – State Indian Child Welfare Act

SB324 – Protective Custody of Children

TECHNICAL ISSUES

Section 3 at Page 6, Line 20 *suggests* the hearing should be conducted in accordance with the Administrative Procedures Act. However, the Administrative Procedures Act does not govern hearings under the Administrative Hearings Office Act or any other acts over which AHO has jurisdiction. If the Legislation intends to make these hearings subject to the Administrative Procedures Act, the language ought to be more express to make that requirement clear.

NMSA 1978, Section 12-8-23 of the Administrative Procedures Act states, “The provisions of the Administrative Procedures Act apply to agencies made subject to its coverage by law, or by agency rule or regulation if permitted by law.” AHO has not expressly been made subject to its coverage by law, rule, or regulation, and the same applies to CYFD to the best of the author’s knowledge. Accordingly, reference to the Administrative Procedures Act may be erroneous or superfluous.

While HB284 contains language regarding the sealed and confidential nature of the proceedings, it does not actually add any exception allowing for release of documents to the DFA Hearing Officers. As such, the simple matter of filing a petition for a hearing – where three of the five required elements for the petition consist of confidential information – would be a violation of NMSA 32A-4-33(A) and a criminal offense. AHO contends it would be preferable the bill explicitly authorize the disclosure of records to AHO, its employees, and contractors so the individual, presumably CYFD employees, making such disclosures can do so under a clear and unambiguous understanding they will not be subject to criminal or civil sanctions. In addition, AHO highlights HB284 requires the “return all records produced during the proceeding to the producing party.” This language conflicts with the existing requirement that AHO “make and preserve a complete record of all proceedings[.]” See Section 7-1B-6 (C) (6) (renumbered to (7) in HB284 (Page 5, Lines 16 – 17)).

With respect to the 30-day timeline to file a petition, currently, CYFD administrative hearing process allows for the hearing to occur within 180 days of the request for hearing. Given that parents and foster parents are not allowed the entirety of their files absent a court order (See NMSA 32A-4-33(C) and NMAC 8.26.4.22(C)(1)), it takes a minimum of 30 days to obtain a court order to begin the exchange of exhibit process. It is impossible to lawfully provide the file for discovery purposes and hold the hearing within 30 days.

ALTERNATIVES

CYFD contends this bill appears to be attempting to solve a problem that does not currently exist and, by so doing, creates many more problems. There is already an established appeal process for foster care licensure, allowing parties directly affect by CYFD’s decision concerning licensure to

seek satisfaction. CYFD has established a foster parent grievance process, again allowing parties who are directly affect by CYFD's decision concerning reimbursements to seek satisfaction.

CLB /al/rl