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FISCAL IMPACT REPORT

SPONSOR Padilla **ORIGINAL DATE** 02/08/21
LAST UPDATED _____ **HB** _____
SHORT TITLE Delinquency Placements **SB** 257
ANALYST Glenn

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB209, SB97, SB242, SB278

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Office of the Attorney General (NMAG)
Law Offices of the Public Defender (LOPD)

No Response Received

Children, Youth & Families Department (CYFD)

SUMMARY

Synopsis of Bill

Senate Bill 257 amends the Delinquency Act to expand the appropriate placements for a child alleged or adjudicated to be a delinquent child to include an approved home of a relative or fictive kin. “Fictive kin” is defined to include a non-relative who has a significant and familial relationship with a child that existed prior to the child entering foster care and a non-relative who developed a significant and familial relationship with a child after the child entered foster care and who has been identified by CYFD as the child’s permanent connection. Fictive kin also refers to a person chosen by a child who is at least age 14 when it is in the best interest of the child to identify that person as fictive kin. For an Indian child, fictive kin may be a person defined according to tribal or pueblo law, custom, or tradition. When placing an Indian child, the bill requires CYFD to consider the Indian child’s cultural needs, and the placement must provide the Indian child with reasonable access to cultural practices and traditional treatment.

The Delinquency Act's provisions governing placement currently apply to placements of children alleged to be delinquent. SB257 adds a child adjudicated to be a delinquent child. The bill provides that if a child's initial placement with a parent or guardian is disrupted, CYFD may temporarily remove the child to an alternative placement. CYFD must petition the court for an order authorizing the child's removal from the parent or guardian's custody within three days of the change in placement. In addition, the bill provides that at any stage in the placement proceeding, CYFD or the child may petition the court for an order authorizing the child's removal from the parent or guardian's custody or otherwise modifying a previous placement order and authorizing an alternative placement. When a court authorizes a child's removal from a parent or legal guardian's custody the court must specify in writing that the continuance of the child in the home of the parent or guardian is contrary to the welfare of the child and that reasonable efforts were made by CYFD to prevent the need for removal of the child. Responsibility for temporary placement is with juvenile probation services.

In the Delinquency Act's provisions that apply specifically to a child who has been adjudicated delinquent and placed on probation, the bill permits a court to place the child in the custody of a parent or guardian under conditions and limitations that are appropriate for the welfare and rehabilitation of the child. If the court does not place the child with a parent or guardian, the court again must specify in writing that the continuance of the child in the home of the parent or guardian is contrary to the welfare of the child and that reasonable efforts were made by CYFD to prevent the need for removal of the child, and responsibility for the temporary placement is with juvenile probation services.

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

FISCAL IMPLICATIONS

No fiscal implications for SB257 were reported.

SIGNIFICANT ISSUES

AOC states that SB257 expands the Delinquency Act to allow CYFD to take custody of a youth adjudicated as delinquent. AOC explains that the purpose of allowing CYFD custody is to find a way for youth adjudicated in the juvenile justice system to have equal access to federal Title IV-E funding as children and youth adjudicated as abused and neglected under the Abuse and Neglect Act. AOC has the following concerns regarding the changes made by the bill:

- SB257 proposes a definition for fictive kin. In the current Children's Code, the term "fictive kin" is defined under the Abuse and Neglect Act. The definition proposed by SB257 significantly differs from the Abuse and Neglect definition. Having two different definitions for one term under the same code is confusing and should be avoided. When there is lack of uniformity in definitions throughout the same statute, it can lead to lack of uniformity in practice, argument, and enforcement. This issue is amplified by the fact that there are two additional definitions for fictive kin presented in SB97 (Guardianship Changes) and HB209/SB278 (State Indian Child Welfare Act), both currently before this legislature. That results in four possible different definitions for "fictive kin" throughout the Children's Code. It should also be noted that

fictive kin (as demonstrated by the four potential definitions) is a bit of an ambiguous or vague term, so a single, clear and uniform definition is needed.

- The changes proposed Section 2, paragraph A, which allow CYFD to place a child alleged or adjudicated to be a delinquent child, can be read to remove the judicial authority and discretion for placement or detention of a delinquent child from the court, and place that authority directly in the hands of CYFD. This is would be a significant shift in jurisdictional authority from the judiciary to the executive.

- SB 257 proposes a means within the Delinquency Act for removing a child from their parents' custody and placing that legal custody with CYFD. Under existing law, the only situation in which legal custody of a child can be transferred to CYFD is in NMSA 1978, § 32A-2-19, for the purposes of commitment to a facility for the care and rehabilitation of the child. The legal implication is the infringement on a parent's constitutional right to parent their child. SB257 creates a mechanism for a child's removal from their parents' legal custody and granting of legal custody to CYFD without providing the parents an attorney or a legal avenue to challenge that custody transfer. There are no developed evidentiary elements that must be met to remove and transfer custody of a child, no burden of proof the parents can contest, and no allowance for a parent to rectify the circumstances or concerns that led to the loss of custody of their child. This also raises concerns that a juvenile probation officer (JPO) does not have the training or knowledge to create and implement a reunification plan with parent and child.

- Indian Child Welfare Act (ICWA) implications from the bill stem from the above-stated constitutional right to parent one's child and due process concerns. ICWA requires heightened efforts by CYFD to prevent removal of an Indian child from their family, a heightened standard of proof to transfer custody to CYFD, a heightened level of active efforts to reunite the family, the testimony of a qualified expert witness, and a large array of heightened notice efforts, collaboration efforts, cultural considerations and responsibilities, and judicial findings. The federal protections provided by ICWA (which are proposed to be codified and expanded in New Mexico law through duplicate State Indian Child Welfare Act bills HB 209/SB 278) cannot be circumvented without due process and judicial oversight.

- SB257, Section 2, paragraph C, proposes to add language allowing CYFD, via a JPO, to remove a child from their parents' home for up to 72 hours before requiring court intervention. This is 24 hours longer than the state may assume emergency custody of a child when law enforcement has reasonable grounds to believe the child is abused or neglected and there is an immediate threat to the child's safety (NMSA 1978 32A-4-6 (A)(1)). This provision gives a CYFD employed JPO authority for removal under the Delinquency Act that only law enforcement has under the Abuse and Neglect Act, and it allows for that removal to last 50percent longer than in emergency abuse and neglect situations before the court reviews the decision.

- "Cross-over youth" is a term the Children's Court community uses to describe children involved in more than one state system: abuse and neglect, juvenile justice, and/or behavioral health. SB257 creates the potential that cross-over youth would be caught up in probation holds and placed as a part of their probation, rather than placed in the least-restrictive and most family-

like setting as required by the Abuse and Neglect Act, and with the assistance of a permanency planning worker working with the entire family on a goal of reunification.

Like AOC, LOPD notes that SB257 gives significant authority to CYFD to remove children from their parents, apparently without the protections generally present in abuse and neglect removal cases. *See State of N.M. ex rel. CYFD v. Amanda M.*, 2006-NMCA-133, ¶ 20 (“right to counsel exists from “the inception of an abuse or neglect proceeding.”); *State ex rel. Children, Youth & Families Dep’t v. Maria C.*, 2004-NMCA-083, ¶¶ 24–28 (noting that, because “[a] parent’s fundamental liberty interest in the care, custody, and management of their children is well established,” “a parent, like a criminal defendant, has a constitutional right to ... an opportunity to participate in all critical stages of abuse and neglect proceedings”). Additionally, it does not appear the child is appointed a guardian ad litem like in abuse and neglect proceedings. This could result in a due process violation for the parents and also presents a risk of significant trauma to children in being removed from their homes absent adequate procedural protections.

NMAG notes that the term “fictive kin” includes “a non-relative who developed a significant and familial relationship with a child after the child entered foster care” if that person has “been identified by the department as the child’s permanent connection.” NMAG points out that the section does not define “permanent connection” or provide any criteria, leaving substantial discretion to CYFD, which may cause confusion and a lack of consistency in determining whether the requirement is met.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The following bills also define and employ the term “fictive kin.”

- HB 209 State Indian Child Welfare Act
- SB 97 Guardianship Changes
- SB 242 Citizen Substitute Care Review
- SB 278 State Indian Child Welfare Act

TECHNICAL ISSUES

The bill’s amendments that make Section 32A-2-12 of Delinquency Act, which current applies only to children alleged to be delinquent, applicable to a child adjudicated to be a delinquent child are somewhat confusing. The bill adds Subsections (C)-(E) to Section 32A-2-12. Each of those subsections reference Section 32A-2-19, which currently applies to the disposition of adjudicated delinquent offenders. As a result, it is unclear whether the amendments to Section 32A-2-12 are intended to apply to a child alleged to be a delinquent child or only to a child who has been adjudicated a delinquent child under Section 32A-2-19.

SB257’s amendments to Sections 32A-2-12 and 32A-2-19 refer to the juvenile probation services office’s responsibility for temporary placement “in accordance with the provisions of Section 32A-2-12 NMSA 1978.” This may be an error, as the current provisions of Section 32A-2-12 do not appear to address the responsibility of juvenile probation services for temporary placements.

BG/al