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## FISCAL IMPACT REPORT

<b>SPONSOR</b>	Candelaria	<b>ORIGINAL DATE</b>	03/01/21	<b>SB</b>	395/aSHPAC
		<b>LAST UPDATED</b>	03/18/21		
<b>SHORT TITLE</b>	CYFD Administrative Hearings			<b>SB</b>	
		<b>ANALYST</b>			Bachechi

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

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

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates House Bill 284

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 SHPAC Amendment

The Senate Health and Public Affairs Committee amendment to Senate Bill 395 strikes paragraph 2, “the removal of a child from a foster home” from the list of enumerated matters that can be challenged through the bill’s administrative hearing process. It also adds “the administrative hearings office and its employees and contractors” to the list of parties to whom confidential records can be disclosed in Section 32A-4-33 (B). The amendment further strikes "and the Administrative Procedures Act" in Section 3 at Page 6, Line 20. As AHO hearings are not subject to the provisions of the Administrative Procedures Act, the amendment resolves the inaccuracy in the original bill.

#### Synopsis of Original Bill

Senate Bill 395 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, 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 Hearing 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. SB395 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**

SB395 does not include an appropriation request but is likely to have significant fiscal impact on the operating budgets of both AHO and CYFD.

AHO anticipates a significant fiscal impact including the need for two additional FTEs (an additional hearing officer and a support staff position) totaling \$211,153.62 per fiscal year, or approximately a 20% increase on AHO's recurring operating budget. AHO is fully staffed for its current mission consistent with the Administrative Hearings Office Act, but the acquisition of the additional hearing prescribe in this bill will likely require additional resources in the form of FTE, office space, travel, training, and other associated costs. AHO reports, in a brief consultation with CYFD, it estimates the expansion of individuals and entities entitled to request hearings could result in a surge of hearings requiring as many as five additional hearing officers and two additional support staff. 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 member. AHO already employs 10 experienced hearing officers; however, only one, at the present time, has the experience required by the bill in Section 4, Page 7, Lines 22-23. The estimated annual cost is detailed in the spreadsheet provided below. To the extent AHO is underestimating its need for additional personnel, or if it needs to expand its pool of qualified hearing officers, referring again to the minimum requirements proposed in Section 4, SB 395 permits AHO to contract for the services of a contract hearing officer to be reimbursed by CYFD. In this circumstance, the fiscal impact of contracting would be born primarily by CYFD and could be significant.

Currently, CYFD employs one attorney to handle appeals of substantiations, revocations, and removals of children. NMAC 8.8.2.13(B) provides for administrative hearings in a limited number of instances, including when a foster parent, child placement agency, or parent or guardian custodian has standing to appeal an administrative decision against them. This bill expands the categories of parties with standing from three parties directly affected to 15 different parties who may appeal “any dispute” against the department, regardless of whether the dispute directly impacts them. Broadening both legal standing and appealable actions will require a significant expansion of staff working on administrative hearings. CYFD estimates at least 5 new FTE attorneys and 2 to 3 new FTE paralegals will be needed to handle the expanded workload. CYFD estimates the additional costs of these attorneys and paralegals to be \$750 thousand per year. In addition, CYFD estimates the expansion of standing provided for in this bill will result in AHO needing five or more additional contract hearing officers at any time, and the bill requires CYFD to reimburse AHO for the cost of contract hearing officers. CYFD estimates it will need an additional \$200 thousand a year to cover the cost of contract hearing officers.

In addition to the need for additional FTE, AHO also contemplates the necessity for expanding office space to provide workspace for the additional FTE, maintain confidential records related to the proceeding in a secure space, and accommodate confidential hearings across the state. The venue for the hearings will depend on various factors, such as the county of residence of a licensee in a foster license action, or other factors specific to the matter in dispute. 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 SB395, including Santa Fe, Albuquerque, and Las Cruces. However, AHO has no hearing spaces outside of these locations that can accommodate CYFD hearings. Accordingly, unless local CYFD facilities may be used to conduct hearings, AHO will need to rent other spaces across the state as needed to conduct hearings. Conducting hearings in areas outside of the locations where AHO presently maintains offices may result in an increase in travel costs for AHO. This additional travel may also require obtaining an additional state vehicle because it is likely the hearing officers will be simultaneously traveling to different areas of the state for different hearing types.

CYFD also emphasizes the fiscal impact of the bill is not limited to salaries and benefits or to general fund revenue and asserts that, allowing an agency not vested with responsibility for the federally required Title IV-E state plan to make binding decisions concerning foster care children, New Mexico risks losing federal Title IV-E funding.

Additional Hearing Officer FTE			
Gross Salary	90,509.15	<u>PS and PB Calculator</u>	
Medical	4,144.40		
FICA	6,923.95	<b>43.51</b>	<i>Rate of pay</i>
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	<b>Total Salary and Benefits</b>
DOIT HCM	415.00		
Car/Gas	2,700.00	<i>Please Note: Only the "Rate of Pay" field (highlighted in green) should be changed</i>	
Insurance	18.75		
State Bar Dues	500.00		
Mandatory Training	500.00		
Indirect (office space etc)	6,800.00		
Travel	1,500.00		
<b>Recurring Expenses</b>	<b>133,790.49</b>		
Initial Office set-up	2,600.00		
<b>(Nonrecurring Expense)</b>	<b>2,600.00</b>		
<b>Total fiscal requirements for hiring one Attorney at Competitive Range employee IG's Level</b>	<b>136,390.49</b>		
1 FTE / XX Approx. CYFD Hearings Annually			
Additional Support Staff			
Gross Salary	44,971.11	<u>PS and PB Calculator</u>	
Medical	4,905.16		
FICA	3,440.29	<b>21.62</b>	<i>Rate of pay</i>
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	<b>Total Salary and Benefits</b>
DOIT HCM	415.00		
Car/Gas	0.00	<i>Please Note: Only the "Rate of Pay" field (highlighted in green) should be changed</i>	
Insurance	0.00		
State Bar Dues	0.00		
Mandatory Training	500.00		
Indirect (office space etc)	6,800.00		
Travel	0.00		
<b>Recurring Expenses</b>	<b>72,163.13</b>		
Initial Office set-up	2,600.00		
<b>(Nonrecurring Expense)</b>	<b>2,600.00</b>		
<b>Total fiscal requirements for hiring one Support Staff at Competitive Range of SR's level</b>	<b>74,763.13</b>		

## SIGNIFICANT ISSUES

CYFD emphasizes SB395 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.

### **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 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. SB395 does not address the current statutory and case law on this issue. SB395 allows a nonparty to challenge the placement of a child, 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 hearing officer greater authority over placement of a child in CYFD custody than provided to any other entity throughout the law, including the district court. Moreover, CYFD contends it is nonsensical to give AHO authority in child welfare cases because this is an area patently outside its jurisdiction. AHO is administratively attached to the Department of Finance and Administration and its stated mission is to adjudicate tax, property, and motor vehicle-related administrative hearings.

In addition, CYFD emphasizes that transferring authority to make binding foster care placement decisions will have significant repercussions for CYFD funding streams. Federal law requires that placement decisions be vested with the agency responsible for Title IV-E state plan. 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) [R]esponsibility for placement and care vested with the title IV-E or other public agency per section 472(a)(2)(B) of the Act.

Because AHO is not responsible for the Title IV-E state plan, allowing DFA to make binding placement decisions would bring the New Mexico out of compliance with federal law and jeopardize CYFD's Title IV-E funding. Currently Title IV-E funding covers more than 50 percent of state's foster care placement costs.

### **Parties to an Administrative Hearing and Expanding Standing**

SB395 is extremely broad and provides standing to a significant number of individuals on the periphery of the Children’s Code to bring an administrative action 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. SB395 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. SB395 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.

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. By providing for any relative, fictive kin, school staff, or mental health provider to request an administrative hearing regarding any CYFD decision that they allege violates law, policy, or rule, the opportunity arises to allow any of those people to gain access to confidential information they generally would otherwise not be entitled to and would give countless people the ability to challenge CYFD’s decision-making.

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 SB395, including court-appointed special advocates, 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. SB395 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)**

SB395 does not reference ICWA, other than to state those allowed to inspect records under ICWA can also inspect records under the laws created by SB395. 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.

AHO notes, depending on the volume of new hearings actually received, the bill could impact AHO’s ability to meet its essential performance measure of timely conducting tax protest hearings because the only current attorney meeting the qualifications to serve as hearing officer under this bill also serves as one of the agency’s main tax hearing officers.

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Senate Bill 395 is a duplicate of House Bill 284.

SB395 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**

AHO highlights SB395 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 SB395 (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