

LFC Requester:	
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## AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO  
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### SECTION I: GENERAL INFORMATION

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:

Original      Amendment X  
Correction      Substitute

Date Prepared: 2025-03-06  
Bill No: HB5

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### SECTION II: FISCAL IMPACT

#### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

#### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

**ESTIMATED ADDITIONAL OPERATION BUDGET (dollars in thousands)**

	<b>FY25</b>	<b>FY26</b>	<b>FY27</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

Duplicates/Conflicts with/Companion to/Relates to:

Duplicates/Relates to Appropriation in the General Appropriation Act:

**SECTION III: NARRATIVE**

**BILL SUMMARY**

House Bill 5 (HB 5) proposes the creation of the Office of Child Advocate (OCA) in New Mexico to provide oversight of child welfare services. The bill establishes a State Child Advocate and outlines its powers, duties, and the process for its selection.

If enacted, the bill proposes:

1. Creation of the Office of Child Advocate (OCA):

- \* The OCA will be independent but administratively attached to the New Mexico Department of Justice to ensure autonomy.

- \* The office will review child welfare services, investigate complaints, and

- monitor the Children, Youth and Families Department (CYFD).

2. State Child Advocate Appointment:

- \* A State Child Advocate Selection Committee will be formed to nominate candidates.

- \* The Governor will appoint the State Child Advocate for a six-year term based on qualifications in law, psychology, social work, or family therapy.

- \* The advocate can only be removed for malfeasance, misfeasance, or abuse of office.

3. Powers and Duties of the Office of Child Advocate:

- \* Investigate complaints about CYFD services and child welfare cases.

- \* Operate a toll-free hotline and electronic communication portal for reporting concerns.

- \* Review policies affecting children's welfare and recommend legislative or administrative changes.

- \* Monitor compliance with federal and state child protection laws, including

the Indian Child Welfare Act.

- \* Issue subpoenas and access records for investigations, particularly in cases of child fatalities or near fatalities.
- \* Collaborate with law enforcement, child welfare agencies, and courts to improve child protection services.

4. Annual Reporting & Transparency:

- \* The office must submit an annual report on the quality of services provided to children and families, including:
  - \* Child placement statistics (e.g., foster care, juvenile justice system, missing children).
  - \* Out-of-state placements and congregate care assessments.
  - \* Findings on systemic issues in child welfare services.
- \* The report must be publicly accessible and posted online.

5. Confidentiality & Information Access:

- \* The office will maintain confidentiality of records but can disclose findings to prevent imminent harm.
- \* CYFD must notify the office of child injuries, fatalities, and the use of restraints or seclusion within 72 hours.
- \* Law enforcement must share reports related to children in state custody upon request.

6. Legal Authority & Attorney General's Role:

- \* The Attorney General can take legal action against CYFD for violations of child welfare laws.
- \* The Advocate can refer cases to the Attorney General for further investigation or prosecution.

7. Conflict of Interest Provisions:

- \* Employees of the Office of Child Advocate cannot have ties to CYFD or any entity receiving funds from CYFD.

8. The State Child Advocate is responsible for ensuring that OCA staff are trained in:

- \* Federal, state, local, and tribal laws related to child protection and juvenile justice.
- \* Investigative techniques, including trauma-informed care and questioning.
- \* The Indian Child Welfare Act (ICWA), the Indian Family Protection Act, tribal culture, and tribal relations.
- \* CYFD policies and procedures, including those on abuse, neglect, out-of-home placements, and risk assessments.
- \* Other relevant areas deemed necessary by the office.

9. Only certified personnel can investigate complaints filed with the office.

- \* The State Child Advocate must develop procedures for the training and certification of appropriate staff.
- \* These requirements ensure that staff have the knowledge, skills, and cultural competency needed to effectively advocate for children and families, investigate complaints, and oversee child welfare services.

Analysis of HB 5 Amendments:

\* Removes: In section 4 "who shall be appointed for a term of six years, except that the initial term shall begin on July 1, 2025, and shall end on December 31, 2025."

\* In Section 5 paragraph B, adds "by September 1, 2025" and removes "a current or impending vacancy".

Analysis of HB5 House Floor Amendment:

\* Removes language on page 5 section C: "Immediately after receiving nominations for the state child advocate, the governor or the attorney general may make one request of the committee for submission of additional names. The committee shall promptly submit those additional names if a majority of the committee members find that additional persons would be qualified and recommends those persons for appointment as state child advocate."

## **FISCAL IMPLICATIONS**

This bill requires significant collaboration and action by CYFD to provide information, data, and reports. The investigation process will generate records requests, prompting additional efforts from CYFD program staff and records custodians, guided by Children's Court Attorneys, the Office of Child Advocacy and/or the Office of General Counsel. However, the absence of specific funding in this bill means that CYFD will need to address the fiscal impact, as existing resources are insufficient to absorb these costs.

The bill mentions that the Office shall maintain autonomy over its budget but does not specify funding sources or levels. Clearly outlining funding mechanisms and ensuring adequate resources are allocated will be crucial for the effective operation of the Office.

Analysis of HB 5 Amendments:

Amendments do not change analysis for this section.

Analysis of HB5 House Floor Amendment:

Amendment does not change analysis for this section.

## **SIGNIFICANT ISSUES**

### **House Floor Amendment**

CYFD continues to maintain that, with the amendment limiting the governor's role, this bill creates an unprecedented shift in the power dynamics between CYFD and the Attorney General. The AG's office is given an active enforcement role over CYFD, rather than just defending the agency in legal matters. This alters the traditional role of the AG, which normally defends executive agencies, rather than suing them. The AG could take an adversarial role against CYFD, leading to internal conflicts within the executive branch. If the AG and the Governor have differing views on child welfare policies, Section 15 could be politically charged.

Section 15 explicitly authorizes the AG to sue CYFD or its employees for (1) Violations of federal or state constitutional rights (e.g., due process violations, failure to provide adequate care to children in custody). (2) Reckless disregard for a child's health and safety (potentially encompassing systemic failures, negligence, or failure to protect children from harm). (3) A pattern of violations of laws and rules related to child welfare (suggesting the AG could step in if CYFD repeatedly ignores legal requirements). This creates an oversight mechanism that operates outside of CYFD itself, allowing the AG to act as an external watchdog. CYFD employees and leadership may be at increased risk of litigation from the AG's office, which could affect decision-making, hiring, and policy implementation.

The bill potentially violates the separation of powers by allowing both the Attorney General and the Supreme Court to appoint members to an oversight body with the power to sue an executive agency. This creates conflicts of interest and judicial entanglement in policy matters.

Lastly, if the Office of Child Advocacy is administratively attached to the Attorney General, an elected official, there is no guarantee that future Attorneys General will not defund or deprioritize the office if they politically believe it should not be housed within their office but rather within the executive branch, where it more appropriately belongs.

### **Section 3**

HB 5 establishes the Office of Child Advocate in accordance with Section 9-1-7. However, the act clearly states that the purpose of the Executive Reorganization

Act is to enable more efficient management of the executive branch by creating an executive cabinet composed of department secretaries. Therefore, under this provision, the Office of Child Advocate cannot be administratively linked to the

Attorney General.

Furthermore, while HB 5 establishes the Office of Child Advocate as administratively attached to the state Attorney General, it also specifies that the office shall maintain autonomy over its budget and decisions. This dual structure could lead to conflicts regarding oversight and control. The balance between administrative attachment and operational autonomy may require clearer delineation to prevent jurisdictional disputes and/or potential conflict of interests. It is not clear how this would occur, as this office cannot be connected to the Attorney General according to statutory requirements.

#### Section 4

The State Child Advocate is appointed for a six-year term by a nine-member selection committee and can only be removed by the governor for malfeasance, misfeasance, or abuse of office. The specified grounds for removal might be subject to interpretation, potentially leading to legal challenges if a removal is contested. Additionally, the composition and selection process of the committee could raise questions about impartiality and representation.

#### Section 5 (Amended Section)

The selection committee consists of nine members, five members appointed by the legislature, one member who is selected by the attorney general and two members who are selected by the chief justice of the Supreme Court.

Through this bill, this is essentially disguising a shift of power to the legislative branch. This potentially improperly delegates an executive function to the legislature, a potential violation of the nondelegation doctrine. (N.M. Const. art. §1)

This section does not specify the number of names that will be submitted to the Governor, so only one name may be sent for consideration. Additionally, the bill does not clarify whom the Supreme Court or the Attorney General is permitted to appoint. As a result, it is conceivable that the Attorney General could appoint a member from their own office to the committee, and similarly, the Supreme Court could appoint a judge or a member of their staff. This situation could lead to potential conflicts of interest.

If all three branches have direct appointments to a body that oversees CYFD, this potentially blurs the separation of powers between the branches of government. (N.M. Const. Art. III, §1) The Supreme Court should typically avoid making political or policy appointments, as it could create the appearance of judicial bias or entanglement in legislative or executive functions. State constitutions do not grant power to the legislative, executive, or judicial branches; rather, they serve as limitations on the powers of each branch. No

branch of the state may add to or detract from the clear mandates of the Constitution. State ex rel. Clark v. Johnson, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11

## Section 6

If there is a complaint related to personnel misconduct, State Personnel guidelines for investigation and due process must be followed and all matters related to personnel investigations are confidential. The bill's requirement to notify the complainant of the outcome of the investigation could potentially violate a CYFD employee's right to confidentiality in their personnel matters as it is unclear what information would be released.

## Section 15

This section allows the Attorney General to bring a civil cause of action for declaratory or injunctive relief against the department or a department employee.

The Attorney General's Office represents the state in litigation, including cases involving CYFD. If the Child Advocate investigates and finds systemic issues that lead to lawsuits against CYFD or the state, the AG's office could find itself in a conflicted role. It is unclear how or who would defend CYFD in court while having appointed part of the oversight body that identified the issues. Potentially the child advocate can be a name that is chosen by the attorney general. If the AG's appointee has strong opinions about CYFD's failures, it could create friction within the AG's office. This bill does not address how such conflict would be addressed by the Attorney General.

As long ago as 1961, the Attorney General determined that, "[it] is the representative of all state agencies, departments, etc. . ." 1961 Op. Att'y Gen. No. 61-61. Therefore, if the attorney general is the lawyer for all state agencies, and the DOJ is the successor to the Attorney General's Office, then this statute commands that the Attorney General investigate its own clients, a conflict of interest in the making. The statutory mandate of action that could be a legal conflict should not be allowed.

Analysis of HB 5 Amendments:

Amendments do not change the analysis for this section.

Analysis of HB5 House Floor Amendment:

Amendment does not change analysis for this section.

## **PERFORMANCE IMPLICATIONS**

CYFD has performance measures concerning the safety and wellbeing of children which may be affected by the diversion of resources necessary to fulfill the obligations placed on CYFD by this bill.

CYFD must provide the Office with a copy of all reports related to actual physical injury to children in CYFD custody or at significant risk of such an injury. CYFD must also provide the Office with written notice within seventy-two hours of a fatality of a child in its custody or referred or receiving services under CYFD supervision and the restraint or seclusion of a child in its custody.

The Kevin S. Settlement requires CYFD to have a grievance process and produce certain data metrics. CYFD has in place grievance processes for the Resource Family Bill of Rights and Foster Child and Youth Bill of Rights, as well as a procedure to address retaliation. The bill should consider the agency's current processes as it relates to Kevin S.

CYFD does report the data requested on the TogetherWeThriveNM.org dashboard. Additionally, due to CYFD's outdated data systems, the information is difficult to collect and verify. This bill would add another layer of data production on an agency that is in the process of upgrading to a new federally approved child welfare data system and should take this into consideration.

Analysis of HB 5 Amendments:

Amendments do not impact original analysis

Analysis of HB5 House Floor Amendment:

Amendment does not change analysis for this section.

## **ADMINISTRATIVE IMPLICATIONS**

The ambiguous nature of what, if any, remedies would be available on a case-by-case basis to those filing complaints through the Office proposed by this bill could complicate and/or interfere with the already existing administrative review/appeal process conducted by the CYFD Office of Advocacy and Office of the Inspector General.



There are currently administrative processes and 40 FTE in place at CYFD similar to what is described in this bill. In August 2023, the Office of Performance and Accountability was established to provide CYFD with quality assurance review and data collections processes to support continuous quality improvement and data driven decision making regarding practice, policy, training, and allocation of resources. The Office of Performance and Accountability is charged with providing CYFD and its stakeholders with:

1. An annual schedule of quality assurance reviews conducted to ensure compliance with federal child welfare regulations, compliance and progress toward Kevin S. Settlement Agreement target outcomes, and safety improvement practice.
2. Developing and implementing a continuous quality improvement model to correct deficiencies and develop plans to measure progress toward improving identified systemic issues.
3. Publishing reports and data related to quality assurance reviews and plans toward making improvements.
4. Writing and submitting annual federal reports on progress made in federally funded programs through Titles IV-B and IV-E, Title XX, and CAPTA.
5. Preparing for and responding to federal audits, including developing and implementing program improvement plans.
6. Conducting and involving child welfare stakeholders, including those with lived experience, in the continuous quality improvement process to obtain feedback and recommendations on systemic improvement.
7. Conduct critical incident reviews of harm to children and youth involved with CYFD.

Analysis of HB 5 Amendments:

Amendments do not impact original analysis.

Analysis of HB5 House Floor Amendment:

Amendment does not change analysis for this section.

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

Conflicts with SB 307 and HB 391, which both propose an office of the child Ombud, and with SB 363, which proposes the child protection authority. SB 363 provides for a more streamlined process of handling complaints and the creation thereof.

## **TECHNICAL ISSUES**

None.

## **OTHER SUBSTANTIVE ISSUES**

None.

## **ALTERNATIVES**

None.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

CYFD will continue to resolve grievances through its Office of Advocacy and the Office of the Inspector General. Cooperation with the Substitute Care Advisory Council and the data requirements of the Kevin S. Settlement will continue to be followed without duplication and possible impact on the compliance.

Analysis of HB 5 Amendments:  
Amendments do not impact original analysis.

Analysis of HB5 House Floor Amendment:  
Amendment does not change analysis for this section.

## **AMENDMENTS**

Proposed: TO HOUSE JUDICIARY COMMITTEE

1. On page 3, line 6, strike the comma, strike lines 7 and 8 and strike line 9 up to the period.
2. On page 5, line 2, after "meet", insert "by July 1, 2025".
3. On page 5, line 3, after "fill", strike the remainder of the line and on line 4, strike "vacancy in".

Adopted:

1. On page 3, line 6, strike the comma, strike lines 7 and 8 and strike line 9 up to the period.
2. On page 5, line 2, after "meet", insert "by September 1, 2025".
3. On page 5, line 3, after "fill", strike the remainder of the line and on line 4, strike "vacancy in"

#### HOUSE FLOOR AMENDMENT

The House Floor Amendment strikes language from Section 5(C) which granted the governor or attorney general to request additional names from the selection committee. This change would require the governor to have 30 days to appoint a child advocate from the committee's nominees and would not permit the governor or the attorney general to seek additional names.