

LFC Requester:	Kelly Klundt
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**AGENCY BILL ANALYSIS
2014 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

And

DFA@STATE.NM.US

{Include the Bill no. in the email subject line, e.g., HB2, and only attach one Bill analysis and related documentation per email message}

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 X **Amendment**
Correction **Substitute**

Date Feb. 6, 2014
Bill No: HB333-305Feb 7

Sponsor: Rep. W. Ken Martinez **Reviewing** Attorney General's Office
Short CYFD Custody of Abused **Person Writing** Sean Cunniff, AAG
Title: Children **Phone:** 827-6469 **Email** scunniff@nmag.gov

SECTION II: FISCAL IMPACT **FOR LFC OFFICIAL PURPOSES******
AGO STAFF SHOULD LEAVE SHADED AREAS BLANK

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY14	FY15		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

Duplicates/Relates to Appropriation in the General Appropriation Act

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY14	FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates, Relates to, Conflicts with, Companion to

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Opinion Letter. This is a staff analysis in response to the agency’s, committee’s or legislator’s request.

BILL SUMMARY

HB 333 requires the Children, Youth and Families Department (the “**Department**”) to “immediately” take custody of a child “upon receipt of report” of certain enumerated injuries evidencing child abuse. After assuming custody of a child under this section, a court hearing must be held within 48 hours to consider the evidence of abuse. Following a finding of abuse by the court, the child shall remain in the custody of the Department if two “substantiated claims of abuse or neglect” have been made against the child’s parent, guardian, or custodian. In that event, the child will not be returned until the parent, guardian or custodian receives “professional counseling.”

The Bill includes an emergency provision finding that it is “necessary for the public peace, health and safety that this act take effect immediately.”

FISCAL IMPLICATIONS WITH ENACTING THIS BILL

SIGNIFICANT LEGAL ISSUES

This legislation confers new authority on the Department to independently take custody of an apparently abused child. Under the Children’s Code, NMSA 1978, Chapter 32A, the authority to take abused (or neglected) children into state custody now lies with law enforcement, NMSA 1978, Section 32A-4-6, and with medical personnel under certain circumstances. *Id.* The proposed legislation would supplement this existing authority by mandating that CYFD take custody where physical abuse appears evident.

As with any measure that impacts the rights of parents vis a vis their children, important constitutional rights are implicated. Our state courts have joined the federal judiciary in recognizing the fundamental right of parents with respect to the “care, custody, and management of their child.” *State ex rel. Children, Youth and Families Dept. v. Ruth Anne E.*, 1999-NMCA-035, ¶ 10, 126 N.M. 670, 974 P.2d 164. In New Mexico, our courts have recognized a “parental privilege” to discipline, whereunder a parent is entitled “to use moderate or reasonable physical force, without criminal liability, when engaged in the discipline of his or her child.” *State v. Lefevre*, 2005–NMCA–101, ¶ 16, 138 N.M. 174, 117 P.3d 980.

Any proceedings impacting the rights of parents must be conducted in conformity with due process standards, although “procedural due process is a flexible right and the amount of process

due depends on the particular circumstances of each case.” 1999-NMCA-035, ¶ 17. Of course, the state also has an established offsetting interest in protecting the welfare of the child. See NMSA 1978, § 32A-4-10(A); Martinez v. Mafchir, 35 F.3d 1486, 1490 (10th Cir. 1994) (“the state itself has a compelling interest in the health, education and welfare of children”).

The proposed legislation does employ measures to protect the due process interests of parents, namely, by requiring a court hearing within 48 hours. Additionally, existing provisions in the Children’s Code extending legal representation to parents are presumably applicable to the implementation of this legislation. See NMSA 1978, § 32A-4-10(B).

PERFORMANCE IMPLICATIONS WITH ENACTING THIS BILL

ADMINISTRATIVE IMPLICATIONS WITH ENACTING THIS BILL

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP WITH BILLS INTRODUCED THIS SESSION

TECHNICAL ISSUES OR DRAFTING ERROR

OTHER SUBSTANTIVE LEGAL ISSUES

ALTERNATIVES TO ENACTING THIS BILL

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The status quo will remain intact, precluding CYFD from taking custody of children who have apparently been abused.

AMENDMENTS NEEDED TO IMPROVE THIS BILL

The Bill appears to leave some gaps in the administration of the new authority proposed to be assigned to CYFD. By permitting such gaps, the legislation, if enacted, is vulnerable to judicial attack. First, the bases for removal enumerated in Section 1(A) of the Bill may benefit from greater clarity, and it may be prudent to ensure that the Section conforms to the “parental privilege” to discipline doctrine. Second, under Section 1(C), it is not readily apparent what procedure will be employed in the event the parent, guardian or custodian has more or less than “two substantiated claims of abuse or neglect.”