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SENATE BILL 372

52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015

INTRODUCED BY

Jacob R. Candelaria

AN ACT

RELATING TO PUBLIC SAFETY; AMENDING A SECTION OF THE CHILDREN'S
CODE TO PROVIDE FOR A PRIVATE RIGHT OF ACTION AND DAMAGES
RECOVERABLE FROM STATE AGENCIES THAT FAIL TO INVESTIGATE OR
INTERVENE IN, AND FROM MANDATORY REPORTERS WHO FAIL TO REPORT,
ABUSE OR NEGLECT; AMENDING A SECTION OF THE ADULT PROTECTIVE
SERVICES ACT TO PROVIDE A PRIVATE RIGHT OF ACTION AND DAMAGES
RECOVERABLE FROM STATE AGENCIES THAT FAIL TO INVESTIGATE OR
INTERVENE IN, AND FROM PERSONS THAT FAIL TO REPORT ABUSE,
NEGLECT OR EXPLOITATION; AMENDING A SECTION OF THE TORT CLAIMS
ACT TO PROVIDE A WAIVER OF GOVERNMENT IMMUNITY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 32A-4-3 NMSA 1978 (being Laws 1993,
Chapter 77, Section 97, as amended) is amended to read:

"32A-4-3. DUTY TO REPORT CHILD ABUSE AND CHILD

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1 NEGLECT--RESPONSIBILITY TO INVESTIGATE CHILD ABUSE OR NEGLECT--
2 PENALTY--PRIVATE RIGHT OF ACTION--DAMAGES.--

3 A. Every person, including a licensed physician; a
4 resident or an intern examining, attending or treating a child;
5 a law enforcement officer; a judge presiding during a
6 proceeding; a registered nurse; a visiting nurse; a
7 schoolteacher; a school official; a social worker acting in an
8 official capacity; or a member of the clergy who has
9 information that is not privileged as a matter of law, who
10 knows or has a reasonable suspicion that a child is an abused
11 or a neglected child shall report the matter immediately to:

12 (1) a local law enforcement agency;

13 (2) the department; or

14 (3) a tribal law enforcement or social
15 services agency for any Indian child residing in Indian
16 country.

17 B. A law enforcement agency receiving the report
18 shall immediately transmit the facts of the report and the
19 name, address and phone number of the reporter by telephone to
20 the department and shall transmit the same information in
21 writing within forty-eight hours. The department shall
22 immediately transmit the facts of the report and the name,
23 address and phone number of the reporter by telephone to a
24 local law enforcement agency and shall transmit the same
25 information in writing within forty-eight hours. The written

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1 report shall contain the names and addresses of the child and
2 the child's parents, guardian or custodian, the child's age,
3 the nature and extent of the child's injuries, including any
4 evidence of previous injuries, and other information that the
5 maker of the report believes might be helpful in establishing
6 the cause of the injuries and the identity of the person
7 responsible for the injuries. The written report shall be
8 submitted upon a standardized form agreed to by the law
9 enforcement agency and the department.

10 C. The recipient of a report under Subsection A of
11 this section shall take immediate steps to ensure prompt
12 investigation of the report. The investigation shall ensure
13 that immediate steps are taken to protect the health or welfare
14 of the alleged abused or neglected child, as well as that of
15 any other child under the same care who may be in danger of
16 abuse or neglect. A local law enforcement officer trained in
17 the investigation of child abuse and neglect is responsible for
18 investigating reports of alleged child abuse or neglect at
19 schools, daycare facilities or child care facilities.

20 D. If the child alleged to be abused or neglected
21 is in the care or control of or in a facility administratively
22 connected to the department, the report shall be investigated
23 by a local law enforcement officer trained in the investigation
24 of child abuse and neglect. The investigation shall ensure
25 that immediate steps are taken to protect the health or welfare

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1 of the alleged abused or neglected child, as well as that of
2 any other child under the same care who may be in danger of
3 abuse or neglect.

4 E. A law enforcement agency or the department
5 shall have access to any of the records pertaining to a child
6 abuse or neglect case maintained by any of the persons
7 enumerated in Subsection A of this section, except as otherwise
8 provided in the Abuse and Neglect Act.

9 F. A person who violates the provisions of
10 Subsection A of this section is guilty of a misdemeanor and
11 shall be sentenced pursuant to the provisions of Section
12 31-19-1 NMSA 1978.

13 G. A child who has suffered injury due to abuse or
14 neglect incurred as a result of a failure of the department or
15 a law enforcement agency to take steps to investigate or
16 intervene in a matter in which the department or law
17 enforcement agency had actual or constructive notice of abuse
18 or neglect to the child may assert that failure as a claim in a
19 judicial proceeding and obtain appropriate relief against the
20 department or law enforcement agency, including:

21 (1) injunctive or declaratory relief against
22 the department or law enforcement agency; and

23 (2) damages pursuant to the Tort Claims Act,
24 reasonable attorney fees and costs.

25 H. A child who has suffered injury due to abuse or

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1 neglect incurred as a result of the failure to report of a
2 person who has a duty to report abuse or neglect pursuant to
3 Subsection A of this section may recover actual and punitive
4 damages in a court of competent jurisdiction. Costs and
5 attorney fees may be awarded to the prevailing party."

6 SECTION 2. Section 27-7-30 NMSA 1978 (being Laws 1989,
7 Chapter 389, Section 17, as amended) is amended to read:

8 "27-7-30. DUTY TO REPORT--PENALTY--PRIVATE RIGHT OF
9 ACTION--DAMAGES.--

10 A. Any person, including financial institutions,
11 having reasonable cause to believe that an incapacitated adult
12 is being abused, neglected or exploited shall immediately
13 report that information to the department.

14 B. The report required in Subsection A of this
15 section may be made orally or in writing. The report shall
16 include the name, age and address of the adult, the name and
17 address of any other person responsible for the adult's care,
18 the nature and extent of the adult's condition, the basis of
19 the reporter's knowledge and other relevant information.

20 C. Any person failing or refusing to report, or
21 obstructing or impeding any investigation, as required by
22 Subsection A of this section is guilty of a misdemeanor.

23 D. The department may assess a civil penalty not to
24 exceed ten thousand dollars (\$10,000) per violation against a
25 person that violates the provisions of Subsection A of this

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1 section or obstructs or impedes any investigation as required
2 pursuant to Subsection A of this section. The department may
3 assess and collect the penalty, after notice and an opportunity
4 for hearing before a hearing officer designated by the
5 department to hear the matter, upon a determination that a
6 person violated the provisions of Subsection A of this section
7 or obstructed or impeded any investigation as required pursuant
8 to this section. The hearing officer has the power to
9 administer oaths on request of any party and issue subpoenas
10 and subpoenas duces tecum. Additionally, if the violation is
11 against a person covered by the Personnel Act, the department
12 shall refer the matter to the agency employing the person for
13 disciplinary action. Any party may appeal a final decision by
14 the department to the court pursuant to the provisions of
15 Section 39-3-1.1 NMSA 1978.

16 E. A person who has suffered injury due to abuse,
17 neglect or exploitation incurred as a result of a failure of
18 the department or a law enforcement agency to investigate or
19 intervene in a matter in which the department or law
20 enforcement agency had actual or constructive notice of abuse,
21 neglect or exploitation to the person may assert that failure
22 as a claim in a judicial proceeding and obtain appropriate
23 relief against the department or law enforcement agency,
24 including:

25 (1) injunctive or declaratory relief against

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1 the department or law enforcement agency; and

2 (2) damages pursuant to the Tort Claims Act,
3 reasonable attorney fees and costs.

4 F. An individual who has suffered injury due to
5 abuse, neglect or exploitation incurred as a result of the
6 failure to report of a person who has a duty to report abuse,
7 neglect or exploitation pursuant to Subsection A of this
8 section may recover actual and punitive damages in a court of
9 competent jurisdiction. Costs and attorney fees may be awarded
10 to the prevailing party."

11 SECTION 3. Section 41-4-4 NMSA 1978 (being Laws 1976,
12 Chapter 58, Section 4, as amended) is amended to read:

13 "41-4-4. GRANTING IMMUNITY FROM TORT LIABILITY--
14 AUTHORIZING EXCEPTIONS.--

15 A. A governmental entity and any public employee
16 while acting within the scope of duty are granted immunity from
17 liability for any tort except as waived by the New Mexico
18 Religious Freedom Restoration Act and by Sections 32A-4-3,
19 27-7-30 and 41-4-5 through 41-4-12 NMSA 1978. Waiver of this
20 immunity shall be limited to and governed by the provisions of
21 Sections 41-4-13 through 41-4-25 NMSA 1978, but the waiver of
22 immunity provided in those sections does not waive immunity
23 granted pursuant to the Governmental Immunity Act.

24 B. Unless an insurance carrier provides a defense,
25 a governmental entity shall provide a defense, including costs

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1 and attorney fees, for any public employee when liability is
2 sought for:

3 (1) any tort alleged to have been committed by
4 the public employee while acting within the scope of [~~his~~]
5 duty; or

6 (2) any violation of property rights or any
7 rights, privileges or immunities secured by the constitution
8 and laws of the United States or the constitution and laws of
9 New Mexico when alleged to have been committed by the public
10 employee while acting within the scope of [~~his~~] duty.

11 C. A governmental entity shall pay any award for
12 punitive or exemplary damages awarded against a public employee
13 under the substantive law of a jurisdiction other than New
14 Mexico, including other states, territories and possessions and
15 the United States of America, if the public employee was acting
16 within the scope of [~~his~~] duty.

17 D. A governmental entity shall pay any settlement
18 or any final judgment entered against a public employee for:

19 (1) any tort that was committed by the public
20 employee while acting within the scope of [~~his~~] duty; or

21 (2) a violation of property rights or any
22 rights, privileges or immunities secured by the constitution
23 and laws of the United States or the constitution and laws of
24 New Mexico that occurred while the public employee was acting
25 within the scope of [~~his~~] duty.

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1 E. A governmental entity shall have the right to
2 recover from a public employee the amount expended by the
3 public entity to provide a defense and pay a settlement agreed
4 to by the public employee or to pay a final judgment if it is
5 shown that, while acting within the scope of [~~his~~] duty, the
6 public employee acted fraudulently or with actual intentional
7 malice causing the bodily injury, wrongful death or property
8 damage resulting in the settlement or final judgment.

9 F. Nothing in Subsections B, C and D of this
10 section shall be construed as a waiver of the immunity from
11 liability granted by Subsection A of this section or as a
12 waiver of the state's immunity from suit in federal court under
13 the eleventh amendment to the United States constitution.

14 G. The duty to defend as provided in Subsection B
15 of this section shall continue after employment with the
16 governmental entity has been terminated if the occurrence for
17 which damages are sought happened while the public employee was
18 acting within the scope of duty while the public employee was
19 in the employ of the governmental entity.

20 H. The duty to pay any settlement or any final
21 judgment entered against a public employee as provided in this
22 section shall continue after employment with the governmental
23 entity has terminated if the occurrence for which liability has
24 been imposed happened while the public employee was acting
25 within the scope of [~~his~~] duty while in the employ of the

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1 governmental entity.

2 I. A jointly operated public school, community
3 center or athletic facility that is used or maintained pursuant
4 to a joint powers agreement shall be deemed to be used or
5 maintained by a single governmental entity for the purposes of
6 and subject to the maximum liability provisions of Section
7 41-4-19 NMSA 1978.

8 J. For purposes of this section, a "jointly
9 operated public school, community center or athletic facility"
10 includes a school, school yard, school ground, school building,
11 gymnasium, athletic field, building, community center or sports
12 complex that is owned or leased by a governmental entity and
13 operated or used jointly or in conjunction with another
14 governmental entity for operations, events or programs that
15 include sports or athletic events or activities, child care or
16 youth programs, after-school or before-school activities or
17 summer or vacation programs at the facility.

18 K. A fire station that is used for community
19 activities pursuant to a joint powers agreement between the
20 fire department or volunteer fire department and another
21 governmental entity shall be deemed to be operated or
22 maintained by a single governmental entity for the purposes of
23 and subject to the maximum liability provisions of Section
24 41-4-19 NMSA 1978. As used in this subsection, "community
25 activities" means operations, events or programs that include

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1 sports or athletic events or activities, child care or youth
2 programs, after-school or before-school activities, summer or
3 vacation programs, health or education programs and activities
4 or community events."

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