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## FISCAL IMPACT REPORT

SPONSOR Fajardo ORIGINAL DATE 2/7/18  
LAST UPDATED \_\_\_\_\_ HB 309  
SHORT TITLE Sexual Offenses Against Children SB \_\_\_\_\_  
ANALYST Chilton

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

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	NFI	>\$21,337.0	>\$21,337.0	>\$42,674.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to and partially conflicts with House Bill 299

Related to House Bill 18, House Bill 28, House Bill 281, House Bill 300, House Bill 308 and Senate Bill 96

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

New Mexico Attorney General (NMAG)  
Administrative Office of the District Attorneys (AODA)  
Administrative Office of the Courts (AOC)  
Children, Youth, and Families Department (CYFD)  
Public Defender Department (PDD)  
New Mexico Sentencing Commission (NMSC)

### SUMMARY

#### Synopsis of Bill

House Bill 309 makes changes to the definitions and classifications of child sexual penetration and child sexual contact, and establishes new, increased penalties for these acts. It makes changes in Sections 30-9-11, 30-9-13, and 31-18-25 NMSA 1978, as follows:

- 1) Adds a category of first-degree sexual penetration for victim-children between 13 and 18 years of age, if force or coercion were used, if the perpetrator is armed with a deadly weapon, or if the perpetrator is in a position of authority over the victim.
- 2) Establishes a minimum imprisonment of 18 years for first-degree sexual penetration.
- 3) Defines all other sexual penetration of a victim between 13 and 18 not meeting criteria in

- (1) above as second-degree sexual penetration.
- 4) Establishes a minimum imprisonment of 15 years for second-degree sexual penetration.
- 5) Moves sexual penetration upon a child 13 to 16 year old by a perpetrator at least 18 years old and four years older than the victim to be third degree rather than fourth degree sexual penetration.
- 6) Establishes a minimum imprisonment of six years for third-degree sexual penetration.
- 7) Leaves the definition of the term “criminal sexual contact of a minor” untouched: “unlawful and intentional touching of or applying force to the intimate parts [defined as breast, genital area, groin, buttocks, or anus] of the unlawful and intentional causing of a minor to touch one’s intimate parts.”
- 8) Makes criminal sexual contact with a minor aged less than 13, or aged 13-18 if force is used that causes injury to the child, the perpetrator uses force or coercion or is armed with a deadly weapon a first-degree felony, rather than a second-degree felony.
- 9) Establishes a minimum imprisonment of 18 years for first degree criminal sexual contact
- 10) Makes criminal sexual contact of a minor less than 13 years of age not subject to (8) above a second degree felony rather than a third degree felony
- 11) Establishes a minimum imprisonment of 6 years for third degree sexual contact with a minor.
- 12) Adds “criminal sexual penetration in the second degree when the victim is a child 13 to 18” to the definition of “violent sexual offense” for which a second conviction would be considered as a mandate for life imprisonment.

## **FISCAL IMPLICATIONS**

Major increases in penalties for child sexual penetration and child sexual contact are made (e.g., from minimum imprisonment 3 years to a minimum imprisonment of 15 years for criminal sexual penetration in the second degree and from 3 years to 18 years for criminal sexual contact of a minor, now to be made a first degree felony like criminal sexual penetration). The costs of incarceration average \$37,492.80 per person per year in New Mexico, according to the Department of Corrections. Thus, in the example given, the 12-year addition to the minimum sentence would result in an additional cost of \$449,914 per offender.

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The New Mexico Sentencing Commission has provided the following table regarding the number of offenders sentenced for criminal sexual penetration and criminal sexual contact under current law (note that the degree of offense would generally increase under House Bill 309).

Below are the admissions in the New Mexico Corrections Department for which criminal sexual penetration is the highest charge:

<b>Fiscal year</b>	<b>1st degree</b>	<b>2nd Degree</b>	<b>3rd Degree</b>	<b>4th Degree</b>
2012	10	23	7	9
2013	15	18	4	13
2014	20	22	13	12
2015	18	23	6	10
2016	23	30	6	9
2017	18	21	5	5
<b>Average</b>	<b>18.5</b>	<b>22.8</b>	<b>8.8</b>	<b>9.8</b>

Below are the admissions in the New Mexico Corrections Department for which criminal sexual contact of a minor is the highest charge:

<b>Fiscal year</b>	<b>2nd degree</b>	<b>3rd degree</b>	<b>4th degree</b>
2012	17	14	6
2013	11	18	2
2014	33	11	1
2015	19	19	5
2016	24	23	2
2017	14	23	4
<b>Average</b>	<b>19.7</b>	<b>18.0</b>	<b>3.3</b>

Using the examples given above only, the additional cost of sentencing each offender according to the mandates given in Senate Bill 309 would total to the following for each year's average number of offenders, using the Department of Corrections figure of \$37,492.80/year/person incarcerated:

Offense	Increase in mandatory minimum sentence	Number of offenders sentenced per year	Total cost of additional incarceration per year
Criminal sexual penetration of a minor, second degree	12 years	22.8	\$10,258,000
Criminal sexual contact of a minor, second degree now; first degree under House Bill 309	15 years	19.7	\$11,079,000
<b>Total for these two offenses</b>		<b>42.5</b>	<b>\$21,337,000</b>

Other penalties are also increased, so that incarceration costs of enacting this legislation would be considerably higher than the above in total.

As noted by AODA, “Higher potential penalties, and mandatory minimum sentences, may result in more cases going to trial, or may result in more plea agreements.” PDD makes the same point, that “enactment of any higher penalty is likely to result in more trials, as more defendants will prefer to risk a trial than take a plea to the greater penalty... [and] since a mandatory life sentence is at issue upon a second conviction, a person charged with a second degree criminal sexual penetration of a minor would be much more likely to demand to confront his accuser in a full trial...”

Further, PDD makes the point that first- and second-degree penalties are usually handled by senior-level public defender attorneys, who command higher salaries than those who defend prisoners being tried for lesser crimes. PDD estimates an additional cost to its office of \$77,000 if the bill were to pass...

There is often no physical evidence demonstrating criminal activity in Criminal Sexual Contact of a Minor cases, and defendants frequently allege the charges are false. Such allegations arise in discipline and in the context of divorce and child-custody battles. *See* Michael Robin, *Assessing Child Maltreatment Reports: The Problem of False Allegations*, 21-24, Haworth Press (1991). Trials for such cases generally require the use of expert witnesses and often take large amounts of court time. If cases charging such behavior will carry a mandatory eighteen-year sentence, defendants will be more likely to go to trial, resulting in diminished resources for the LOPD, DAs and courts in an already stretched-to-the-limit justice system.

## SIGNIFICANT ISSUES

AODA notes inconsistencies in the proposed legislation, which may lead to confusion for the district attorneys:

### Criminal Sexual Penetration

Section 1 of HB299 makes it a first-degree felony to commit the crime of CSP of a child thirteen to eighteen years of age in certain defined circumstances: when the perpetrator uses force or coercion, is in a position of authority over the child or when the perpetrator is armed with a deadly weapon. A first-degree felony carries a potential sentence of eighteen years. (Committing CSP on a child thirteen to eighteen years of age by the use of force or coercion is a first-degree felony under the existing statute only if the force or coercion results in great bodily harm or great mental anguish to the victim; otherwise, it is a second-degree felony.)

HB309 leaves in place another provision of the statute, to be renumbered as Subsection F(2), which defines a separate crime of CSP on a child thirteen to eighteen “when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.” Under the current statute, the crime is a fourth degree felony, but HB309 raises it to a third degree felony. This separate provision can lead to interpretation issues, and create problems for prosecutors determining which crime(s) to charge. Consider a middle-school teacher who commits CSP on a child in his or her class. Is that a first degree CSP by a person “in a position of authority over a child,” punishable by a sentence of eighteen years, or is it only a third degree felony, punishable by six years, under the more specific provisions of Subsection F(2)? Why is there such an extreme gap in potential sentences between the two crimes?

Increasing the confusion is the change made by HB309 to subparagraph E(1) of the statute. Currently, it defines CSP in the second degree as all CSP perpetrated by the use of force or coercion on a child thirteen to eighteen years of age. (If the force or coercion resulted in great bodily harm or great mental anguish, the crime would be a first-degree felony.) HB309 changes the provision, removing the language regarding force and coercion, and stating that CSP in the second degree is all CSP perpetrated “on a child thirteen to eighteen years of age not otherwise specified in this section.” (Emphasis added.) Subsection D defines first degree CSP. This suggests that CSP on a child 13 to 18 is either a first-degree felony or a second-degree felony. But Subsection F(2), described above, sets out fourth degree CSP crimes against children 13 to 18. So, is CSP by a middle-school teacher a first degree felony under Subsection D (perpetrated by a person in a position of authority over the child), a second degree felony (if the proof on “position of authority” is not sufficient, because Subsection E covers all CSP on 13-18 year olds not otherwise specified in the section), or does it fall to a fourth degree felony under the more specific provisions of Subsection F(2)?

### Criminal Sexual Contact of a Minor

Section 2 of HB309 raises the level of each offense described in the Criminal Sexual Contact of a Minor statute. Unlike Section 1, it does not change the definition of what will now be first degree Criminal Sexual Contact of a Minor (CSCM) by removing the requirement that force or coercion result in personal injury, or proof that a perpetrator in a position of authority over the child uses that authority to coerce the child to submit.

It corrects a gap in the current statute. As currently written, the crime only applies to criminal sexual contact of the unclothed intimate parts of a minor perpetrated on a child under thirteen years of age, or perpetrated on a child thirteen to eighteen years under certain circumstances, such as with the use of force or coercion, or when the perpetrator is in a position of authority or is armed with a deadly weapon. If the child is under thirteen, those special circumstances would not raise the crime to the highest degree. HB309 changes that, making all CSCM committed when the perpetrator is in a position of authority, uses force or coercion, or is armed with a deadly weapon a first-degree felony, regardless of whether the child is under 13, or between 13 and 18.

#### Amendments to the Two Violent Sexual Offense Convictions Statute

Section 3 of HB309 adds “criminal sexual penetration in the second degree when the victim is a child who is thirteen to eighteen years of age” to the list of offenses defined as a “violent sexual offense.” A conviction for a second “violent sexual offense” is punishable by a sentence of life imprisonment. If the victim of each offense was less than thirteen at the time of the offense, the defendant shall be punished by a sentence of life imprisonment without the possibility of parole.

The statute also includes criminal sexual penetration in the first degree as a “violent sexual offense,” and since HB309 expands the scope of first degree CSP, it increases the number of offenders who will be subject to increased punishment.

CYFD states that HB 309 “changes penalties in a way that will make the laws stronger for the protection of children.”

#### **PERFORMANCE IMPLICATIONS**

AODA notes that changes brought about by HB 309 would make it easier for a prosecutor to prove first degree criminal sexual penetration (but not first degree criminal sexual contact with a minor) when the victim is an adolescent between 13 and 18 years of age.

**RELATIONSHIP and CONFLICT** with House Bill 299, much of which is the same, although the definitions and penalties of violations differ.

**RELATIONSHIP** with the following bills, which deal with crimes against children and/or sexual offenses:

House Bill 18 Three strikes – additional crimes to violent felonies

House Bill 28 Additional crimes to violent felonies

House Bill 281 Sex offense permanent no contact order, prosecution timeline for child sex offenses

House Bill 300 Sex offense no contact

House Bill 308 Sex offender court review notice

Senate Bill 96 Penalties for crimes against children

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

As noted by PDD, “All of the listed crimes would remain felonies, and judges would be able to continue to use their discretion in sentencing cases in relation to the offenders’ culpability. A greater number of charges would continue to plead without in-court confrontation of the accusers,” and the cost to the PDD, to the courts, to the district attorneys, and to the Department of Corrections would be markedly decreased compared to what would occur if the bill were passed.

LAC/jle