FISCAL IMPACT REPORT

SPONSOR HJC **LAST UPDATED**
ORIGINAL DATE 2/28/2023
BILL NUMBER CS/House Bill 173/HJCS
SHORT TITLE Child Forensic Interviews
ANALYST Dinces

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*
(dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
NMAG/AOC/CYFD	Indeterminate but minimal	Indeterminate but minimal	Indeterminate but minimal			
LOPD		Indeterminate but minimal	Indeterminate but minimal			

Parentheses ( ) indicate expenditure decreases.
*Amounts reflect most recent analysis of this legislation.

Sources of Information

LFC Files

Responses Received From
New Mexico Attorney General (NMAG)
Children, Youth and Families Department (CYFD) For original bill*
Administrative Office of the Courts (AOC) For original bill*
Law Offices of the Public Defender (LOPD)

*Because of the short timeframe between the introduction of this committee substitute and its first hearing, LFC has yet to receive analysis from state, education, or judicial agencies. This analysis could be updated if that analysis is received.

SUMMARY

Synopsis of HJC Substitute for House Bill 173

The House Judiciary Committee Substitute for House Bill 173 changes the name of the Uniform Child Witness Protective Measures Act to the Child Witness Protective Measures Act, allows a child victim the right to deny a pretrial statement or pretrial interview pursuant to the act, and provides for the admissibility of a child's forensic interview in certain circumstances. The committee substitute also removes the specific factors to consider in determining whether to permit a child witness to testify by an alternative method and changes shall to may within that section.

This bill does not contain an effective date, and as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

According to the Administrative Office of the Courts' original analysis of the bill:

> There will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, appeals from convictions, and an increase in court and parole hearings. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

According to the Law Offices of the Public Defender's original analysis of the bill:

> The fiscal impact of this proposal is difficult to quantify. As it applies to a wide range of crimes—ranging from aggravated assaults and batteries to negligent use of a firearm—and to all victims of those crime—including family members in some cases—CSHB173 would likely result in more pretrial litigation in cases involving one of these charges [that also includes a child]. This could increase the time cases are pending trial and significantly increase the complexity of pretrial investigations and litigation, decreasing the number of cases a given attorney or investigator could constitutionally handle. It also could prevent the factual inquiry that enables balanced plea bargaining and, in some cases, dismissal, resulting in more cases going to trial that are currently resolved more efficiently. This could result in a corresponding need for more attorneys, investigators, and support staff for LOPD.

SIGNIFICANT ISSUES

There are two significant issues, one with the right to confrontation and the other regarding appearance of conflict with Rule 5-503 and LR2-308 NMRA.

Confrontation

According to the office of the Attorney General's original analysis of the bill:

> Giving victims the option to refuse pretrial interviews as included in Section 3 and the introduction of additional types of out-of-court statements as included in Section 4 would probably not violate the confrontation rights of criminal defendants. Although interviewing witnesses may help prepare for cross-examination, the Confrontation Clause is a trial right that guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *State v. Montoya*, 2014-NMSC-032, ¶ 47, 333 P.3d 935 Most states do not have a mechanism for compulsory pretrial interviews at all. Section 3 would only apply to victims who have given testimony or participated in a forensic interview; the defendant would be able to prepare for cross-examination with that information. Provisions within the section, if followed, would address confrontation concerns. To admit a forensic interview, the victim would have to "testif[y] at a court proceeding" and be "subject to cross examination." These requirements would satisfy the Confrontation Clause even if the interview was testimonial; the defendant would have the opportunity to confront the witness and cross examine her about the interview.

According to the office of the Attorney General:

> Section 3 of the substitute would permit a court to order a second forensic interview under certain circumstances. This could lessen the appearance of a conflict with Rules

5-503 and LR2-308 NMRA, because it would allow a party to request another statement. A second interview conducted by a forensic examiner, however, would still be different from an ordinary pretrial statement under the rules, in which a party's attorney asks questions.

According to the Administrative Office of the Courts' original analysis of the bill:

While CS/HB173 grants child witnesses more rights in the criminal justice process when they are alleged to be victims of crime, it may have the unintended consequence of limiting the ability for a defendant to conduct a thorough investigation of the charges during the discovery phase of a criminal case.

CS/HB173 may conflict with New Mexico Constitution, Section 14, which provides for the accused's right to confront witnesses "in all criminal proceedings." The Supreme Court addressed whether the full constitutional right of confrontation in criminal prosecutions applies at a pretrial probable cause determination, see *State v. Lopez*, 2013- NMSC-047. . However, the Supreme Court has held that confrontation rights only apply at trial.

Although CS/HB173 allows for limitations to child victim interviews, it does provide that a victim may *only* refuse to give a pretrial interview or statement when they have previously given a recorded statement as part of a forensic interview or in-court testimony regarding a criminal or noncriminal offense. Often, the only statement made by a crime victim during the initial investigatory stage in a criminal case is a statement to law enforcement or conversations conducted during SANE exams. It is important to note these types of victim statements are not under oath, so the provisions of this legislation barring or restricting pre-trial interviews could have a significant impact on the defendant's ability to adequately prepare and execute a defense to the charges. When the statement previously given by the victim is during in-court testimony, then the question is whether the defendant's attorney had the opportunity to properly confront and cross examine the witness at that time. If the answer is no, then there may still be Confrontation Clause issues.

According to the Law Office of the Public Defender's original analysis of the bill:

Section 3: Right to Refuse Pretrial Interview

This bill appears to follow the approach of "Marsy's Law," legislation originating in California in 2008 designed to increase "victim's rights" in a variety of ways. *See* https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/12/marsys- law-protections-for-crime-victims-sound-great-but-could-cause-problems. As was recently found in Pennsylvania with respect to similar aspects of Marsy's Law, there are significant due process and confrontation issues in permitting victims the right to refuse interviews and in limiting defense access to critical discovery and impeachment material. *See* https://www.post-gazette.com/news/crime-courts/2021/01/07/marsys-law- pennsylvania-court-unconstitutional-ruling-amendment-votes-invalid-commonwealth/stories/202101070127. *cf. State v. Layne*, 2008-NMCA-103, ¶ 13, 144
N.M. 574 (recognizing limitation of discovery undermined defendant's rights because "[i]mpeachment is crucial to effective cross-examination because it gives a party the

> opportunity to discredit a witness, so the jury properly has a way to determine whether a witness is untruthful or inaccurate"). As *Layne* describes, the ability to test an accusing victim's memory and reliability, and other aspects of their credibility, requires getting a full version of their account before trial and comparing it to their trial testimony. In 1979, *State v. Orona*, held that a "trial court's order prohibiting defense counsel from interviewing the State's main witnesses" deprived him of a fair trial. It requires a showing of prejudice to establish the violation, and *Orona* recognized that certain witnesses may require protective measures. However, in the absence of some demonstrable good cause, a trial court **may not impose an absolute restriction on defense counsel's access to the State's prospective witnesses**." *Id.* ¶ 12. As CS/HB173 requires no individualized showing of necessity, provides for no individual case-by-case assessment of prejudice, and instead declares a *victim's* right of refusal without exception. This approach [may be] unconstitutional under *Orona*.
>
> Without access to a pretrial interview, an attorney in *most* cases [could be] deprived effective confrontation of their accuser, and deprived due process in the discovery and trial preparation process, much less the ability to then present their defense at trial. Additionally, assuming certain persons are victims at the outset of the case—before any determination of guilt has been made—and insulating such persons from the discovery process is inconsistent with the presumption of innocence and the State's burden of proof. The presumption of innocence and burden of proof hold that a person is innocent until proven guilty beyond a reasonable doubt. *See e.g., State v. Henderson*, 1970-NMCA-022,
> ¶ 12, 81 N.M. 270; UJI 14-5060 NMRA. These presumptions afford defendants who are facing incarceration, convictions carrying life-long consequences, and the entire resources and force of the State, certain protections and rights consistent with these presumptions. The provisions of HB173 would presume a particular individual is a victim, another individual is guilty, and would specifically limit the defendant's access to evidence and information based on such presumptions. Because defendants would be required to litigate any request for identification information as well as proposed interrogatories, the amount of litigation required for such cases would increase significantly. This, in turn, would create substantial delay in cases involving such charges and thereby endanger the right to a speedy trial guaranteed by the Sixth Amendment of the Federal Constitution and Article II, Section 14 of the New Mexico Constitution. *See e.g., State v. Serros*, 2016-NMSC-008, ¶¶ 71-73, 366 P.3d 1121.

According to the Law Offices of the Public Defender:

> The HJC-Substitute does nothing to restore or ensure the right to a defense pretrial interview.

Appearance of Conflict with Rule

According to the Office of the Attorney General's original analysis of the bill:

> Section 3 provides that children would not have to give a pretrial interview or statement if they had already testified or participated in a forensic interview. Pretrial interviews and statements exist in New Mexico by court rule.
>
> Rule 503(A) permits defendants to obtain compulsory pretrial statements from any

person with discoverable information – the person "shall" give a statement and a party may obtain a subpoena to secure the person's attendance. LR2-308, among other provisions, makes pretrial statements (called pretrial interviews) essentially mandatory upon request for criminal cases in the Second Judicial District. A criminal defendant might argue that Section 3 conflicts with these rules – the rules would say that the victim "shall" give another statement, while the statute would say that the victim could not be compelled to.

The Legislature may enact legislation that affects court practice and procedure, but the state Supreme Court will use its power of superintending control "to revoke or amend a statutory provision when the statutory provision conflicts with an existing court rule[.]" *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 5, 138 N.M. 398.

It is unclear how the Court would treat Section 3. The State could argue that, instead of creating a privilege, the Legislature was establishing a very limited form of "immunity from discovery." *Sw. Cmty. Health Services v. Smith*, 1988-NMSC-035, ¶ 9, 107 N.M.
196. In *Smith*, the Court evaluated a statute that made confidential all "data and information" acquired by a medical review organization. *Id.* ¶ 2. It ruled that the provision did not establish a privilege but instead made information immune from discovery. *Id.* ¶¶ 9-11. Because it did not violate any court rules, it generally upheld the statute. *Id.* ¶¶ 11, 17. But because this immunity impacted the litigation process, the Court limited the statute and injected its own burden-shifting analysis and allowed some litigants to access the information in question. If the Court followed this model, it might undermine the right as articulated in Section 3.

According to the Administrative Office of the Courts' original analysis of the bill:

Section 4 of CS/HB173 allows for previous statements made by child witnesses to be admitted under certain conditions and only when that child testifies in the hearing and is subject to cross-examination. The ability to cross examine the witness is essential to the Confrontation Clause including allowing the attorney to question the witness about any previous statements. Additionally, the attorney seeking the admission of the documents must provide notice of intent to introduce such items at least five days before a preliminary hearing and twenty-five days before a trial. This advance notice gives the defense attorney time to prepare their defense as long as the notice clearly states what is sought to be introduced.

According to the Children, Youth and Families Department's original analysis of the bill:

Children in CYFD custody are often involved in multiple court proceedings. The amendments allowing for the admission of forensic interviews and other prior statements, and the ability to decline pretrial statements and interviews, could reduce trauma for our children by limiting the number of times they must provide interviews, statements, and testimony.

The amendments do raise one potential conflict, an issue that may already exist but is highlighted by the changes. The Children's Code defines "child" to be a person under the age of 18. 32A-1-4C. 38-6A-1B currently defines a child witness to be under the age of *16*. The amendments to the Act add *incapacitated* 16- and 17-year-olds as

applicable witnesses. This leaves 16- and 17-year-olds that are not found to be incapacitated without the protection of the Act. Based on the definition of child (under 18) in the Children's Code, these 16- and 17-year-olds should have the protections of this Act, at least in the context of proceedings under the Children's Code.

Additional Concerns are cited by the Law Offices of the Public Defender in their original analysis of the bill:

Section 4: Legislating Rules of Evidence

Rule 11-807 NMRA, the "Residual exception" to the rule against hearsay, allows admission of hearsay if the statement: (1) has particular guarantees of trustworthiness, (2) is offered as a material fact, (3) is more probative than other evidence for the point offered, and (4) serves the purposes of these rules and the interests of justice, and is not covered by another exception. Rule 11-807(A)(1)-(4) NMRA. The Residual exception "is to be used sparingly, especially in criminal cases. Section 4 would make a forensic interview (as defined) admissible as substantive evidence if the protected witness is also

subject to cross-examination and "if the court finds that the forensic interview bears adequate circumstantial guarantees of trustworthiness" based on its timing, content, and context." Section 4 could also deem admissible any prior statement by the protected witness, if it is "nontestimonial" and "bears adequate circumstantial guarantees of trustworthiness."

Section 4 would essentially create a statutory hearsay exception similar to the residual exception, but loosening the standard to only the first of four requirements. The existing Residual exception, Rule 11-807, "can be used to admit out-of-court statements that otherwise bear indicia of trustworthiness equivalent to those other specific exceptions." *Leyba*, 2012-NMSC-037, ¶ 20 (quoting *State v. Trujillo,* 2002-NMSC-005, ¶ 16, 131
N.M. 709. *Leyba* clearly places the burden on the proponent to who that the evidence carries "indicia of trustworthiness equivalent to those other specific exceptions." *Id.* ¶ 21. The hearsay rules are necessarily rigorous. Creating a statute that alters and *reduces* their gatekeeping function [may] undermine the core purposes of Evidentiary Rules.

Where Rules of Evidence are adopted and maintained by the Supreme Court, statutes that conflict with the Rules of Evidence are an unconstitutional violation of Separation of Powers. *See In re Det. of Lane*, 182 Wash. App. 848, 856, 332 P.3d 1042 (2014) (finding statute that exempts rules of evidence in particular hearing type conflicts with the rules of evidence and is therefore unconstitutional because "*the Rules of Evidence prevail.*"); *State v. Pearson*, 633 N.W.2d 81, 84-85 (Minn. Ct. App. 2001) ("the rules of evidence prevail in a conflict between a procedural rule and a statute." (citing *State v. Johnson*, 514 N.W.2d 551, 553-54 (Minn.1994) (stating that legislature has no constitutional authority to reserve a right to modify or enact statutes that will govern over court rules of procedure already in place))); *see also Seisinger v. Seibel*, 220 Ariz. 85, ¶ 8, 203 P.3d 483, 486-87 (2009) (holding that evidentiary statutes are not necessarily unconstitutional if they are "'reasonable and workable'" statutes that *supplement* the Rules of Evidence (quoting *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 591, 691 P.2d 678, 682 (1984)).

PERFORMANCE IMPLICATIONS

According to the Administrative Office of the Courts' original analysis of the bill:
This bill may have an impact on the performance measures of the district courts, collected for performance-based budgeting, in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

This bill may have an impact on the Judiciary's performance measures without the additional resources to comply with the bill.

According to the Law Offices of the Public Defender's original analysis of the bill:
There are significant performance implications for the LOPD should CS/HB173 be passed. In addition to the constitutional concerns, citing Orona, this bill is also risking constant claims of "unfair surprise" at trial, when new information come to light for the first time, resulting in increased motions for a mistrial or new trial based on discovery or Brady violations or on newly discovered evidence. See Brady v. Maryland, 373 U.S. 83, 86-87 (1963) (recognizing a defendant's due process rights are violated when the prosecution suppresses favorable evidence); Rule 5-614 NMRA (Motion for new trial)

Additionally, LOPD has adopted formal Performance Standards which attorneys are expected to adhere to. Standard 4.1 regarding Case Review and Preparation requires attorneys to conduct witness interviews unless there is a sound strategic reason not to perform them. See https://www.lopdnm.us/wp-content/uploads/2022/10/2016PerfStand.pdf. If HB 173 were enacted, it would force LOPD attorneys to violate LOPD standards for effective representation.

Any litigation disputes and constitutional objections raised by the defense that were denied below would then need to be litigated on appeal. Given the severity of the limitations sought to be imposed by CS/HB173, such matters would likely need to be litigated on appeal in a significant number of cases where the rights and procedures provided for in HB 173 were followed.

ADMINISTRATIVE IMPLICATIONS

There may be an administrative impact on the courts as the result of an increase in caseload or in the time necessary to dispose of cases, or both. This legislation could result in litigation challenging the constitutionality of this bill. In addition, this legislation could also result in additional hearings dealing with whether interrogatories can be issued and the substance of the interrogatories.

TECHNICAL ISSUES

According to the Children, Youth and Families Department's original analysis of the bill:
See Substantive Issues concerning the exclusion of 16- and 17-year-old children who have not been found to be incapacitated from the protections granted incapacitated 16- and 17-year-old

children by this bill. (Suggested remedy for this issue in Amendments section below.)

According to the Law Offices of the Public Defender:
Section 3 references the right to refuse an interview regarding a "criminal or noncriminal offense." The phrase "noncriminal offense" is confusing as "offense" typically means a criminal offense. It is unclear what other circumstances the bill is seeking to address.
Analyst also notes that the striking for all statutory factors in Section 6 renders the statute title inaccurate, as it is titled "Factors for determining whether to permit alternative method."

OTHER SUBSTANTIVE ISSUES

According to the Office of the Attorney General:
Section 4 permits the admission of out-of-court statements. Rule 11-802 recognizes that the legislature can provide that certain out-of-court statements are admissible notwithstanding the rule against hearsay. See id. ("[h]earsay is not admissible except as provided…by statute"). To make this legislative authorization more clear, the drafters could expressly state that the interviews and previous statements of fact are not hearsay.

According to the Administrative Office of the Courts original analysis of the bill:
It is unclear whether the well-intentioned intent of protecting children gives adequate consideration to a defendant's due process right to know the nature of the evidence against him/her/them, which is often discovered through the course of pre-trial interviews.

A practical consideration is that no pretrial interviews could occur in cases with a child witness as a result of CS/HB173, and this will result in an increase the number of jury trials. The bill also presents significant issues with respect to a defendant's right to a competent attorney. By placing a defendant's right to exculpatory evidence against a victim's right to refuse access to that evidence, CS/HB173 increases the chances of possible mistakes, abuse, and wrongful convictions.
As discussed above, it is through pre-trial interviews that both sides explore the limitations and strengths of their cases. The proposed changes in HB173 could also lead to fewer pleas (one of the most common times for a plea is right after pretrial interviews) and an increase in trials.
In League of Women Voters v. Boockvar, No. 578 M.D. 2019 (Jan. 7, 2021), the Court declared the proposed amendment to Article I of the Pennsylvania Constitution unconstitutional. The proposed amendment sought to mandate a number of new and independent rights to victims of crime, including the right to refuse to be interviewed. The Court held that the proposed amendment will immediately, profoundly, and irreparably impact individuals who are accused of crimes, the criminal justice system as a whole, and most likely victims as well.

According to the Law Offices of the Public Defender's original analysis of the bill:
The prosecution already can file motions in particular cases involving particular victims whom the prosecution has reason to believe would be significantly and adversely affected by being questioned by defense counsel or an investigator, and upon a showing of such need (such as the testimony of a mental health professional as to the victim's fragile mental state), the district court could fashion an appropriate remedy.

ALTERNATIVES

According to the office of the Attorney General:
Amend the state constitution to recognize the right of crime victims to refuse to consent to interviews. See Ariz. Const. art. II, § 2.1(A)(5) (" a victim of crime has a right…[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant").

According to the Law Offices of the Public Defender's original analysis of the bill:
LOPD strongly recommends that the bill contain an explicit exception to guarantee one defense pretrial interview.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the Law Office of the Public Defender:
Existing protective options for vulnerable witnesses would remain available in appropriate cases. The prosecution will still wield significant power in limiting the questioning of victims through the plea agreement process (refusing to plead cases where the defense insists on an interview) as described in State v. Serros, 2016-NMSC-008, ¶ 71.

PROPOSED AMENDMENTS

According to the Children, Youth, and Families Department's original analysis of the bill: Change "sixteen" in 38-6A-2(A), to "eighteen" so the definition of "adjudicated incapacitated adult witness" helps achieve the purpose of these amendments, which is to give incapacitated adults the same protections as children in the statutorily enumerated contexts. AND change "sixteen" in 38-6A-2(C)(1) and (C)(2) to "eighteen" so the definition of "child witness" aligns with the Children's Code, which defines "child" as a person under the age of 18.

SD/al/hg/ne/rl/ne