# F I S C A L  I M P A C T  R E P O R T

**SPONSOR** Gentry **ORIGINAL DATE** 2/9/18 **LAST UPDATED** **HB** 299

**SHORT TITLE** Sexual Offenses Against Children & Minors **SB**

**ANALYST** Chilton

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

| | FY18 | FY19 | FY20 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|---|---|---|
| **Total** | NFI | >$11,079.0 | >$11,079.0 | >$22,158.0 | Recurring | General Fund |

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to and partially conflicts with House Bill 309
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)

## SUMMARY

Synopsis of Bill

House Bill 299 makes changes to the definitions and classifications of child sexual penetration and child sexual contact, and establishes new, increased penalties for one category of these acts. It makes changes in Sections 30-9-11 and 30-9-13 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) Defines all other sexual penetration of a victim between 13 and 18 not meeting criteria in (1) above as second-degree sexual penetration, adding that definition to other second-degree sexual penetration criteria, including penetration accompanied by force or

coercion causing personal injury to the victim, when another felony is committed concomitantly, when sexual penetration occurs with an incarcerated person as the victim, or when the perpetrator is armed with a deadly weapon.

3) Maintains existing definitions of third- and fourth-degree sexual penetration, and does not specify changes in penalties for these crimes.
4) 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."
5) 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, or when the perpetrator is in a position of authority over the child (removing the necessity to prove the "use of the authority to coerce the child to submit) rather than a second-degree felony.
6) Establishes a minimum imprisonment of 18 years for first degree criminal sexual contact
7) Makes criminal sexual contact of a minor less than 13 years of age not subject to (5) above a second degree felony rather than a third degree felony
8) Defines criminal sexual contact of a minor in the third degree as all criminal sexual contact with a child not specified above as of first-degree or second-degree status or of a minor when perpetrated by a school employee, school health provider, or school volunteer.

## FISCAL IMPLICATIONS

A major increase in penalties for first-degree child sexual contact would be made (from minimum imprisonment 3 years to a minimum imprisonment of 18 years for criminal sexual contact in the first degree). The costs of incarceration average $37,492.80 per person per year in New Mexico, according to the Department of Corrections. Thus, the 15-year addition to the minimum sentence would result in an additional cost of $562,392 per offender. The New Mexico Sentencing Commission provides the following table regarding convictions for criminal sexual contact with a minor:

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

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

Thus, for the average year, the additional cost for incarceration of all offenders of what would now be deemed criminal sexual contact with a minor, second degree, and what would with House Bill 299 be called criminal sexual contact with a minor, first degree, the increase in incarceration from a minimum of three years to a minimum of eighteen years would cost the Department of Corrections and the state $11,079,000.

In addition, 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. PDD states that "Accurate prediction of the fiscal impact on [PDD] would be impossible to speculate; assessment of the required FTE and contract resources would be necessary after the implementation of the proposed higher-penalty scheme. Any increase in the demand or need for more experienced attorneys or other personnel would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates. Courts, DAs, AGs, and NMCD could anticipate increased costs should these prove necessary for [PDD]."

In addition, PDD states that "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:

> 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 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.)

HB299 leaves in place Subsection G of the statute, which makes CSP on a child thirteen to eighteen a fourth degree felony "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." This 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 fourth degree felony, punishable by 18 months, under the more specific provisions of Subsection G? Why is there such an extreme gap in potential sentences between the two crimes?

Increasing the confusion is the change made by HB299 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.) HB299 changes the provision, removing the language regarding force and coercion, and stating that CSP in the second degree is <u>all</u> CSP perpetrated "on a child thirteen to eighteen years of age <u>not otherwise specified in Subsection D of this section</u>." (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 G, 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 specified in Subsection D), or does it fall to a fourth degree felony under the more specific provisions of Subsection G?

<u>Criminal Sexual Contact of a Minor</u>

Section 2 of HB299 raises the level of each offense described in the Criminal Sexual Contact of a Minor statute. It also changes the definition of what will now be first degree Criminal Sexual Contact of a Minor (CSCM), 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 also 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. HB299 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.

CYFD states that HB299 "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 299 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.

## TECHNICAL ISSUES

House Bill 299 specifies a markedly increased penalty for first-degree criminal sexual contact with a minor (changing the minimum sentence from three to 18 years), but does not make changes in penalties for other crimes delineated in the bill.

**CONFLICT** with House Bill 309, 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