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

SPONSOR	Maestas/Chasey/Rue /Martinez	**ORIGINAL DATE** **LAST UPDATED**	2/19/19 3/10/19	**HB**	564/aHJC/aSJC
SHORT TITLE	Probation & Parole Good Behavior			**SB**	
				ANALYST	Edwards

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Potentially substantial impact, see fiscal implications	Potentially substantial impact, see fiscal implications	Potentially substantial impact, see fiscal implications	Potentially substantial impact, see fiscal implications	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to House Bill 267, House Bill 342.

SOURCES OF INFORMATION
LFC Files

Responses Received From
Department of Public Safety (DPS)
Law Office of the Public Defender (LOPD)
New Mexico Attorney General (NMAG)
New Mexico Sentencing Commission (NMSC)
Crime Victims Reparation Commission (CVRC)
New Mexico Corrections Department (NMCD)
Administrative Office of the Courts (AOC)
Bernalillo County Metropolitan Court (BCMC)

Responses Not Received From
Adult Parole Board (APB)
Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to House Bill 564 removes the strikethrough in Section 1(A), retaining language allowing NMCD to determine if the agency is able to provide

the needed supervision.

In Section 1(B)(E), language is added to the provisions governing tapered probation restrictions after one year of supervision for those placed on supervision by a district or magistrate court judge to not include persons convicted of a sex offense.

The SJC amendment strikes the HJC amendments to Section 5. The SJC amendment to Section 5(A)(2) strikes the list of required information that should be considered by the Parole Board. A new Section 5(B) is added to require that, after a hearing, the board shall enter specific findings in support of its decision and deliver the findings in writing to the inmate. Section 5(E) is amended to read *only* an inmate sentenced to life imprisonment without possibility of release or parole is ineligible for parole.

Section 5(F) is amended to clarify that, except for sex offenders, felony offenders who served a sentence of more than one year in a state correctional facility shall be required to service periods of parole. In Section 5(J), reference to "Parole Board Act" is stricken.

In Section 6(C) language stricken regarding judicial discretion to impose intensive supervision regardless of recommendations made by the Corrections Department is reinstated with new language clarifying judicial discretion can only override to Corrections Department recommendation if a valid risk and needs assessment was provided to the judge and considered.

Section 8(C)(1), regarding sanction severity for nontechnical violations established at probation revocation hearings was stricken and moved to technical violations established before a court.

New sections setting out the applicability date (January 1, 2020) and effective date (January 1, 2020) are established.

Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 564 strikes Section 5 from the original bill and replaces it with new amendments to the statute on parole authority and procedure, Section 31-21-10 NMSA 1978.

This amendment retains the requirement that the Adult Probation and Parole Board consult a validated risk and needs assessment, if provided by NMCD, when deciding what conditions of parole to impose that was in the filed version of House Bill 564.

Additionally, the amendment changes Section 31-21-10 NMSA 1978 by requiring someone who has been sentenced to life imprisonment to be paroled after serving 30 years (rather than merely being eligible for parole) unless the Parole Board makes a finding that the person cannot fulfill the obligations of a law-abiding citizen. The specific findings required of the Parole Board have been narrowed, and the bill has added that the board shall not deny parole solely based on the offense the person committed (though the Board may consider the offense for which the inmate was convicted). Additionally, this Section of House Bill 342 changes the two-year parole requirements for those convicted of first, second, or third degree felonies so that it only applies to those whose sentence of imprisonment exceeds one year or has been ordered parole by a court, and, similarly changes the two-year parole requirement for those convicted of a fourth degree felony.

The amendment also adds an applicability section to the House Bill 564, so that the provisions concerning Section 31-21-10 NMSA 1978 only apply to a person serving a term of incarceration on July 1, 2019 and to a person whose term of incarceration commences on or after July 1, 2019. Additionally, the amendment adds an effective date of July 1, 2019 to the bill.

Synopsis of Original Bill

House Bill 564 changes various requirements around probation and parole, including defining the purpose of probation to be "to enforce victim restitution, hold people accountable for their criminal conduct, promote a person's reintegration into law-abiding society and reduce the risks that the person will commit new offenses."

The bill adds the requirement that a person who has been placed on supervised probation shall, after one year, have 30 days of supervised probation changed to unsupervised probation for every 30 days served without a probation violation.

Among the most major changes in the bill is the requirement that the Corrections Department operate probation and parole supervision based on a validated risk and needs assessment and best practices such as cognitive-behavioral programming. The bill also requires the court to consult a validated risk and needs assessment when considering probation, if provided by NMCD. The bill requires NMCD to focus its resources at the start of an offender's term of supervision and to apply a consistent, graduated sanction system that is responsive to both positive and negative behaviors. The bill removes language allowing NMCD to determine if the agency is able to provide the needed supervision.

The bill also changes the requirements of presentence reports to include the state personal identification number, victim impact information, record of prior convictions, and results of any validated risk and needs assessments, as well as any other information the court may request. It removes requirements for mental and physical health to be reported.

House Bill 564 requires the Parole Board to consult a validated risk and needs assessment, if provided by NMCD, when deciding on parole conditions.

The bill amends 31-21-13.1 NMSA 1978, Intensive Supervision Programs (ISP), by striking the maximum caseload of 40 ISP offenders per officer and requiring the Corrections Department to provide training, resources, and case loads that enable effective operation. The bill also requires the court to consult a validated risk and needs assessment when considering ISP for an offender. NMCD may only recommend an offender for ISP if they score as high risk and if they would have been otherwise recommended for incarceration.

The bill renames 31-21-4 NMSA 1978 from "Return of Parole Violator" to "Parole Violations." House Bill 564 provides that parolees shall only have a warrant issued for their arrest to answer a charge of non-technical violations rather than any violation of conditions of release as in the present statute. The changes to this section of law also include that the Board or the Director of Adult Probation and Parole Division of NMCD may issue a notice to appear to answer a charge of a technical violation.

House Bill 564 adds language concerning probation revocation hearings for non-technical violations and provides that if a non-technical violation is established at the hearing, the sanction for the violation shall be commensurate with the seriousness of the violation and not a punishment for the offense for which the probationer was placed on probation, and that the court may continue or revoke the probation, impose detention for up to 90 days, or any other order it sees fit. Additionally, the court may issue a notice to appear to answer a charge of a technical violation.

House Bill 564 creates a framework for medical and geriatric parole. Rather than as in present statute, whereby the inmate has to initiate the review process by the Adult Parole Board, under the changes in the bill the director of the Adult Probation and Parole Division shall authorize release of eligible inmates and notify those inmates of the opportunity to apply for medical or geriatric parole. House Bill 564 establishes criteria for the director to use to determine whether someone is eligible for medical or geriatric parole.

House Bill 564 also mandates that the Parole Board release an inmate on medical or geriatric parole upon authorization by the director, unless the Board finds by clear and convincing evidence that the inmate’s release is incompatible with the welfare of society. The Board may not deny medical or geriatric parole solely because of the inmate’s criminal history. House Bill 564 also repeals the current section of law concerning the medial and geriatric parole program, Section 31-21-25.1 NMSA 1978.

House Bill 564 creates two new sections of the Probation and Parole Act, concerning incentives and sanctions for technical violations of probation or parole and technical violation hearings. The incentives and sanctions system is to provide for graduated responses to technical violations of supervision conditions. Under the system, a probation or parole officer who reasonably believes that a parolee has committed a technical violation that requires a sanction shall consult the incentives and sanctions system to determine the appropriate response and impose a non-detention sanction. Graduated sanctions for technical violations may include three day or seven day detention in a county jail or other place of detention, which time shall be counted as time served under the sentence. Under the new language, if the probation or parole officer seeks to impose detention for a technical violation, the officer shall review the violation and proposed detention with a supervisor; House Bill 564 lays out the mechanism for seeking a waiver from the probationer or parolee for the detention, and a review process if the waiver is rejected.

The incentives and sanctions system shall apply to persons whose probation or parole commences subsequent to the effective date of this 2019 act and to all persons on probation or parole on the effective date of this 2019 act.

FISCAL IMPLICATIONS

The impacts of the bill, both potential savings due to reduced recidivism and additional costs to create, educate on, and sustain new probation and parole practices will most likely be significant.

<u>Analysis from the Corrections Department was not received in time for this report; however, it is not believed the HJC or SJC amendments substantively change this bill’s fiscal impact analysis.</u>

One of the most costly measures in the bill is the requirement that the Corrections Department operate probation and parole supervision based on a validated risk and needs assessment and best

practices such as cognitive-behavioral programming. NMCD currently utilizes the COMPAS risk and needs assessment, which has not yet been validated. LFC does not currently have data on the needs of the probation and parole population as determined by COMPAS, but should before the end of session. Preliminary LFC analysis of the risk and need assessments provided by NMCD for *all new prison admissions in FY18* indicate a total estimated cost of $18.6 million to treat behavioral, substance use, vocational, and basic educational needs; FY18 funding levels were $9.6 million, a gap of $9 million.

Both LFC and NMCD are working to ensure validated risk and needs assessments are done consistently and timely for all inmates in custody and offenders on community supervision in order to better address their needs. Assuming the gap in needs is similar for the probation and parole population, the total funding needed to provide supervision based on COMPAS results could be millions of dollars.

A 2018 LFC program evaluation found in FY18, the Parole Board received 19 applications for medical parole of which it granted 5, or 26 percent. Of the 19 applications, two were for inmates who were either discharged or passed away. Overall, the Board held 3,811 hearings – medical parole applications accounted for 0.5 percent of total activity. In 2008, the Pew Center on the States' Public Safety Performance Project identified the average cost of an older prisoner to be $70 thousand per year. Accounting for medical inflation, the LFC evaluation estimated the state paid about $1.1 million in FY18 for geriatric medical costs alone that could have been avoided.

NMCD states "the fiscal impact is substantial. The bill requires the [Probation and Parole Division] PPD Director or designee to identify all of those inmates eligible for geriatric or medical parole, and to notify those inmates of the opportunity to apply for medical or geriatric parole. The Director is not a physician and is not in a position to realistically determine which inmates are eligible for medical or geriatric parole in many cases. The Director will have to consult with its medical vendor or other medical staff in some cases to determine if a particular inmate's medical or physical conditions makes him terminally ill or permanently and irreversibly physically incapacitated. There is no appropriation in the bill to pay these substantial medical consultation costs, or for the FTEs needed to determine whether inmates are eligible for medical or geriatric parole. The NMCD estimates that it would need to hire a medical director ($260 thousand in yearly salary and benefits), a psychiatric director ($260 thousand in yearly salary and benefits) and an epidemiologist ($90 thousand in yearly salary and benefits). Part of their job duties would involve consulting with PPD and the NMCD's medical vendor or the University of New Mexico Health Sciences Center, to determine geriatric and medical parole eligibility for inmates."

NMCD did not provide a potential cost impact due to the remaining provisions of the bill.

Bernalillo County Metropolitan Court explains:

> If defendants who are under the jurisdiction of the Metropolitan Court are no longer to be supervised by the Court's in-house Probation Division and now are to be supervised by state Probation and Parole, then the Metropolitan Court would no longer be incurring the cost of roughly 78 FTE probation officers and related staff currently employed by the Court.
>
> The Metropolitan Court is ever-exploring ways to expand and improve its programs. In October of 2018, the Court was awarded nearly $2 million in federal funding to enhance

substance use treatment services in its DWI/Recovery Court (RC), Mental Health Court now known as Behavioral Health Court (BHC), Urban Native American Healing to Wellness Court (HWC), Domestic Violence Solutions Treatment Education Program (DVSTEP), Community Veterans Treatment Court (CVC), Behavioral Health DWI Court (BHC DWI), and the Solutions Treatment Options Program (STOP). The grant was issued from the Substance Abuse and Mental Health Services (SAMHSA).

Previously, in September of 2016, the Metropolitan Court was awarded nearly $1.4 million in federal funding to enhance its DWI Recovery Court (f/k/a DWI/Drug Court), Healing to Wellness Court, and Community Veterans Court. The grant is from the Department of Justice's Bureau of Justice Assistance (BJA) and SAMHSA.

Both the 2016 and the 2018 federal grants, which total over $3 million, are being used by the Metropolitan Court to expand its capacity to reduce crime and substance use among high risk and high needs offenders through a scientific approach. Integral to the Metropolitan Court's ability to utilize these federal grants is the close supervision of the defendants, who are participating in the above specialty court programs, by the court's own in-house probation officers. These probation officers are divided into units that are tied to each of the specialty court programs (described in more detail under Significant Issues below).

In addition, with the volume of defendants supervised by our Probation Division, the Court has collected probation fees as follows:

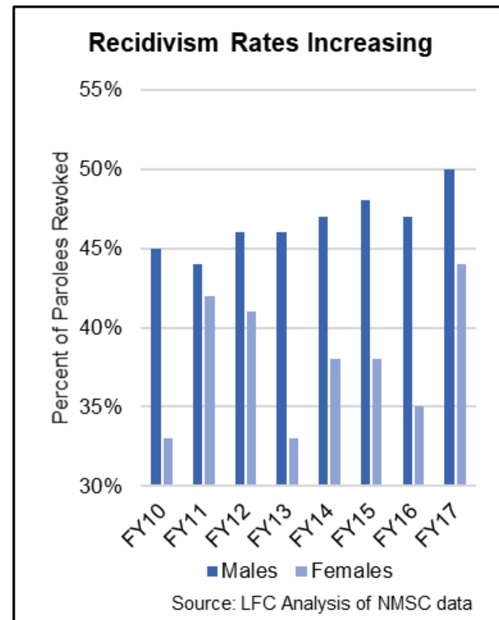
FY18: $42,916
FY17: $42,635
FY16: $45,545

By statute (NMSA 1978, § 31-20-6), these fees are paid to the Corrections Department Intensive Supervision fund. If the Court were no longer supervising these defendants, it would not be collecting these fees.

AOC explains: "as currently written, House Bill 564 has no appropriation. Any fiscal impact on the judiciary would be proportional to the reduction in arrests, charges, and prosecution prevented by enacting this legislation. The scope is unknown without having data on the number of arrests, charges and prosecutions that will be eliminated by passing this bill. Section 8, a section describing technical violation hearings, may affect the courts. Depending on the number of referrals to the court from the NMCD hearing officer, under new subsection (D), additional judicial resources may be needed to conduct hearings on the referrals and dispose of the matter as required by law."

LOPD states "while it is impossible to calculate at the outset what savings House Bill 564 might bring to the Law Offices of the Public Defender (LOPD), it is highly likely the bill would have a positive fiscal impact on LOPD by reducing the expenditure of attorney resources on probation violation hearings because many of the violations that presently require hearings and potentially heavy sanctions would be covered by House Bill 564's technical violation program. This would better assist LOPD in reducing it present caseload because LOPD represents a substantial number of cases based wholly on probation violations. Therefore, in the long run, House Bill 564 is likely to reduce costs to LOPD and New Mexico."

SIGNIFICANT ISSUES



In October 2018, the Legislative Finance Committee released a program evaluation of the Corrections Department. According to New Mexico Sentencing Commission data, those returning to prison represented 41 percent of all admissions in FY17. In FY17, NMCD reported a recidivism rate over 50 percent for the first time in the past decade, a 5 percent increase since FY10 or the equivalent of approximately $6 million per year in additional costs.

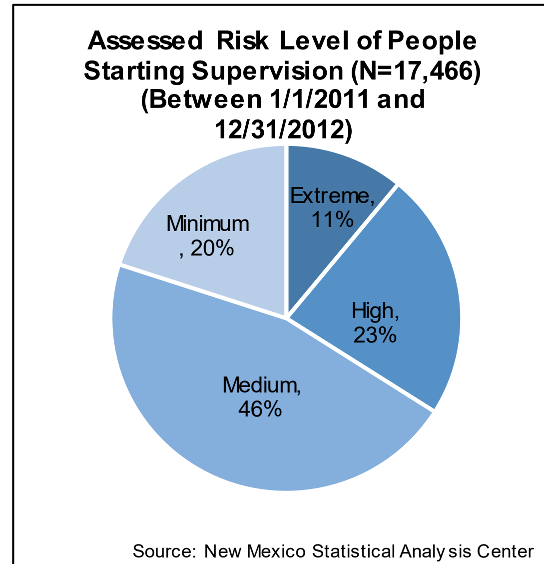
One of the report's findings encouraged NMCD to improve case management of parolees to ensure connection to services, implement evidence-based programs statewide - including graduated interventions, short jail-time, etc. - to maximize attempts to divert offenders from full revocation.

LFC and NMCD have begun an analysis of the department's risk and needs assessment, known as COMPAS, with the goal of estimating the fidelity of its implementation and use and the gap between current funding and total needed funding for evidence-based programming statewide for both inmates and offenders on supervision. There are about 7,300 inmates in prisons and about 17,000 offenders on probation and parole.

According to the Bureau of Justice Assistance (BJA) and the Substance Abuse and Mental Health Services Administration (SAMSHA), the most important step in reentry planning is obtaining information about an individual's risk of reoffending and programmatic needs. Once a validated risk and needs instrument is used, the implementation of evidence-based programs can be better targeted to individual inmates to achieve outcomes like recidivism reduction, educational attainment, stable housing, and consistent employment. The US Department of Justice identifies five principles of recidivism reduction, four of which are highlighted below:

- Principle I: Upon incarceration, every inmate should be provided an individualized reentry plan tailored to his or her risk of recidivism and programmatic needs
- Principle II: While incarcerated, each inmate should be provided education, employment training, life skills, substance abuse, mental health, and other programs that target their criminogenic needs and maximize their likelihood of success upon release
- Principle III: Before leaving custody, every person should be provided comprehensive reentry-related information and access to resources necessary to succeed in the community
- Principle IV: During transition back to the community, halfway houses, and supervised release programs should ensure individualized continuity of care for returning citizens

The LFC also recommended in the 2018 program evaluation that NMCD work with state health agencies to discuss methods of incentivizing long term care providers in the community to accept medical parole-eligible inmates to make better use of medical parole rules. Section 31-21-25.1 NMSA 1978 provides for approval or denial of applications by inmates for medical and geriatric parole for low-risk geriatric, permanently incapacitated, or terminally ill inmates. However, statute does not require the department to report on inmates who are eligible for medical parole to the Parole Board for consideration.



Many inmates in New Mexico are not granted medical parole because correctional staff cannot arrange for a long term care facility (LTC) placement for them. Regulations surrounding LTC facilities are numerous, including federal rule F224 established by the Centers for Medicare & Medicaid Services which states "each resident has the right to be free from mistreatment, neglect and misappropriation of property. This includes the facility's identification of residents whose personal histories render them at risk for abusing other residents, and development of intervention strategies to prevent occurrences, monitoring for changes that would trigger abusive behavior, and reassessment of the interventions on a regular basis." Rule F224, according to the Corrections Department, is often used as justification by LTC facilities for denying patients with felony history. As a result, inmates who need care difficult to provide in prison settings remain incarcerated, driving up medical costs.

The LFC report explains "efforts should be made by the Human Services Department and the Department of Health to develop incentives for long term care and nursing home providers to accept hard-to-place patients, including those with criminal backgrounds. Strategies like providing special insurance or bonds to help mitigate risk for providers who accept hard-to-place individuals may help enhance the use of medical parole."

NMAG, in response to the HJC amendment, states: "The amendment changes the procedure for paroling inmates sentenced to life imprisonment. Instead of providing that an inmate become eligible for parole after 30 years, the amendment mandates parole after 30 years unless the board makes specific findings that the inmate is unable or unwilling to be a law-abiding citizen. The amendment also limits the board's ability to consider the nature of the offense in determining whether an inmate may be paroled."
NMCD provided analysis, below:

> The NMCD's risk and needs assessment tool is not yet validated, and the probation and parole part of it may not be fully validated for at least one year. If the instrument is not able to be validated, which seems unlikely, the NMCD will have to find a new instrument. The bill should allow NMCD additional time to validate its instrument for probationers and parolees, as this process takes time.
>
> The bill's deletion of the language at the end of Section 31-20-5 (A) (regarding if it is

feasible for the NMCD to furnish supervision) should be removed. The NMCD needs to be able to take the positon that it is not feasible for it to supervise every single misdemeanor offender on probation. Currently, the NMCD only supervises a small number of such offenders. The NMCD does not have the resources to supervise all or a large number of misdemeanor offenders, and this bill does not appropriate any funds to the NMCD to do so.

The presentence investigations section (section 31-21-9) removes the requirement that the NMCD include physical and mental conditions in the investigation, and this information can be crucial for the court to consider.

Removing the 40 offender maximum caseload requirement for intensive supervision officers, and requiring that they instead be provided training, resources and caseloads that enable them to be effective, seems reasonable and is a more flexible approach with the NMCD determining appropriate caseloads.

The bill's language in Section 10 D stating that graduated sanctions may include three and seven day detention could be construed to prevent the NMCD from using, on a uniform state-wide basis of course, sanctions greater than or different from three and seven day sanctions.

This bill requires some entity, presumably either the NMCD or the sentencing court, to have 30 days from the offender's supervised probation period changed to unsupervised probation for every 30 days served (on supervised probation) without a probation violation. Presumably, it would be the NMCD who would deduct the credits administratively, but it is not clear. Perhaps because the probation time is being changed to unsupervised probation and the NMCD has no authority to supervise offenders on unsupervised probation, the sentencing court will have to order, track and account for the unsupervised probation period.

Other than for dual supervision offenders (those serving a parole term at the same time as a probation term), the bill as amended places no limit on which probationers must be given the credit. This means that sex offenders and other potentially dangerous offenders (such as those convicted of serious violent offenses as defined by state statute) would be mandated to receive the credit or reduction as well as lower risk offenders. For example, a sex offender serving a five to twenty year indeterminate probation term (and not on parole) and who under current law must serve five years on probation before he must appear in front of the sentencing judge to make a determination of whether or not to extend the sex offender supervised probation beyond five years would, under this bill, complete his supervised probation term after only two and one half years without any hearing or determination by the sentencing judge. It is not clear how this part of the bill would impact sex offender probationers, because the sex offender probation statute require the sex offender to first serve five years of supervised probation before they get are entitled to their first hearing to determine whether or not to continue the offender on probation—does this mean that the offender would never get a hearing because he never completes five years on sex offender probation, that the sex offender would get his first hearing after serving less than five years on supervised probation, or what exactly? The problem with this portion of the bill is that you are likely to have sex offenders who commit new crimes including sex offenses while on unsupervised probation, and the NMCD has no authority to ask the court or district attorney to revoke the probation. Another problem with this part of the bill is that in many cases, you are likely to have sex offenders and other high risk offenders commit new offenses or engage in other potentially problematic activities (such a sex offender who is a pedophile engage in

grooming behavior or suggestive texting with minors) while on unsupervised probation, and no one (NMCD, the court or the district court judge) will know anything about it, to the detriment of public safety. It is also problematic under this bill that the NMCD also lacks any discretion or authority not to award the credit or reduction due to the severity of or the public safety concerns or particular circumstances arising out of the underlying conviction for a particular offender.

Under the prison "good time" laws in existence, NMCD has the explicit statutory authority to forfeit a portion of the earned "good time" if the inmate engages in misconduct or fails to program while in prison. However, this bill as does not allow NMCD to forfeit the supervised probation reduction or credit previously earned even if the offender commits a new crime or other probation violation after going several months without any violations. Again, because the offender will in many cases already be on unsupervised probation, the NMCD may not know or be aware of these violations. The bill encourages offenders to "save up" their violations for nearer the end or at the end of their supervised probation term, as they know that their previously earned reductions or credits cannot now be taken away or forfeited after they are placed onto unsupervised probation.

While the bill does require the offenders to first serve a year of supervised probation before becoming eligible for the reduction or credit, the bill still fails to consider the fact that some offenders will inevitably still owe restitution when they go onto unsupervised probation. The bill does not authorize the sentencing judge or the NMCD to seek to restore any reduction previously received, be the offender then on supervised or unsupervised probation. Similarly, the bill also fails to consider the fact that some offenders will still be in need of continued counseling or therapy (as determined by the counselor or therapist), and will in some cases immediately terminate the counseling or therapy once on unsupervised probation.

NMCD already has in place a policy and procedure, CD-051500 and 051501, PPD Review of Offender Progress for Early Termination Consideration, which allows NMCD to ask the sentencing judge to terminate the probation supervision early if the offender has served at least half of his supervision period, is on medium to low supervision, has paid all restitution, and has no full violation reports in the past year prior to the request and no preliminary or intermediate sanctions on record within 6 months of the request. However, under the policy, sex offenders, murderers, and certain other designated offenders (felony DWI, armed robbery, child abuse GBH, etc.) are not eligible for early termination consideration by the sentencing judge. The policy considers public safety concerns much more than this portion of the bill does.

This bill would as a general rule appear to endanger public safety and give NMCD no discretion or ability to limit or forfeit the supervised probation credit or reductions earned. It also encourages offenders to try to better hide their violations so that they can be placed on unsupervised probation for what in many cases will be a significant portion of their probation term.

The bill will also likely result in additional litigation regarding whether a probation violation or violations has occurred. This is in part because the portion of the bill regarding the changing of the probation from supervised to unsupervised probation refers to a probation violation, but does not specify if his means a non-technical violation, technical violation, or both. While the court or parole board would presumably have the authority to revoke the

probation or parole of an offenders on unsupervised probation or parole, it is very likely that neither would ever know of the violations committed by the offender on unsupervised probation or parole. Again, the NMCD PPD has no authority to supervise or track the behavior of offenders on unsupervised probation or parole.

The bill also interferes with the sentencing judges' ultimate authority to decide and control the length and conditions of offenders' probation periods, and with NMCD's or the PPD's discretion in whom it refers to the judge for an early probation release consideration.

The bill also requires the PPD Director or designee to identify all of those inmates eligible for geriatric or medical parole, and to notify those inmates of the opportunity to apply for medical or geriatric parole. The Director is not a physician and is not in a position to realistically determine which inmates are eligible for medical or geriatric parole in many cases. The Director will have to consult with its medical vendor or other medical staff in some cases to determine if a particular inmate's medical or physical conditions makes him terminally ill or permanently and irreversibly physically incapacitated. There is no appropriation in the bill to pay these substantial medical consultation costs, or for the FTEs needed to determine whether inmates are eligible for medical or geriatric parole (see fiscal implications section). Further, the bill requires the PPD Director to make recommendations for medical or geriatric parole which must be followed by the Parole Board unless the Board finds by clear and convincing evidence that the inmate's release is incompatible with the welfare of society. The bill essentially makes the NMCD PPD director or designee responsible for deciding whether to grant geriatric or medical parole, and encourages the Parole Board to merely rely on the Director's recommendations to grant such parole without making a reasonable effort to find clear and convincing evidence to the contrary.

BCMC submitted the following detailed analysis:

House Bill 564 proposes that all defendants placed on probation by "any court" would be supervised by State Probation and Parole. This would result in the elimination of the Bernalillo County Metropolitan Court's in-house Probation Supervision Division and would detrimentally impact the ability of the Court to effectively manage the thousands of criminal cases filed in the Metropolitan Court each year. If Metropolitan Court's own Probation Officers were no longer supervising defendants placed on Probation by the Court, and if they now were supervised by State Probation and Parole, it also would debilitate the effectiveness of the Metropolitan Court's many Specialty Court Programs. The Metropolitan Court's Specialty Court Programs depend on daily participation and support by the Court's in-house Probation Officers, who are part of each of those Specialty Court Program Teams as they supervise the defendants participating in those diversion programs.

Furthermore, the proposal in Section 1 of House Bill 564, where after one year on supervised probation, thirty (30) days of supervised probation would automatically be reduced to unsupervised probation for every thirty (30) days served without a probation violation also would detrimentally impact the Metropolitan Court's Specialty Court programs, which depend on defendants' participation for certain minimum periods of time, subject to the period of the Court's jurisdiction, to allow for those defendants to successfully navigate the phases of those programs and thereby ensure community safety as well as increase the likelihood that defendants successfully complete the programs and thereby reduce the risk of recidivism by these defendants.

1. Metropolitan Court – Court of Limited Jurisdiction: The Bernalillo County Metropolitan Court ("Metro Court") is a court of limited jurisdiction (*See* 34-8A-1 through 34-8A-15), and as a general matter has substantive jurisdiction over misdemeanor offenses only. With the exception of conducting felony first appearances and preliminary hearings on defendants charged with felonies, who have been arrested in Bernalillo County, and the pretrial supervision of those felony defendants (up to 60 days) pending their preliminary hearing in the Metropolitan Court, the Metropolitan Court does not have jurisdiction in felony matters.

2. Metropolitan Court – Operates 24/7 due to Volume of Criminal Cases in Bernalillo County: Metropolitan Court is the only Court in the state that operates 24/7 and holds Court six (6) days each week. Historically, roughly one-third (1/3) of the cases filed in the state are filed in the Bernalillo County Metropolitan Court. In calendar year 2018, 45,577 criminal cases were filed in the Metropolitan Court. Of those cases, 39,312 were misdemeanor criminal cases. Due to enormous volume of criminal cases filed in the Metropolitan Court, the Court operates 24/7 with Court staff stationed both at the Court and at the Metropolitan Detention Center so that as defendants are being booked into ("MDC"), Court staff are receiving the criminal complaints, initiating criminal cases, and scheduling those defendants for arraignments or felony first appearances before a Metropolitan Court Judge. For defendants, who are not processed for release under the Metropolitan Court's Release on Recognizance ("ROR") program, they are seen by a Metropolitan Court Judge within 24-48 hours as the Metropolitan Court conducts arraignments and felony first appearances six (6) days each week.

3. State Probation and Parole Does Not Supervise Defendants for Metropolitan Court – Metropolitan Court Operates its own In-House Probation and Pretrial Supervision Division: Due to the enormous volume of criminal cases filed in the Bernalillo County Metropolitan Court each year, the Court has long operated its own Probation and Pre-Trial Supervision Division. Over two-thirds (2/3) of the third (3rd) floor of the Metropolitan Courthouse is devoted to its Probation Supervision Division. Currently, the Metropolitan Court has roughly Seventy-Eight (78) FTE Probation Officers and related staff working in that division. The Division is divided into Fourteen (14) probation units, which includes Twelve (12) units for each of the Metropolitan Court's Specialty Court Programs (described below), as well as a Standard Pretrial and Probation Supervision unit (for those misdemeanor defendants, who are on either pretrial supervision or probation, but who are not in one of the Metropolitan Court's Specialty Court Programs) and a specialized Felony Pretrial Supervision unit, which was created solely for the purpose of supervising those felony defendants (described in Section 1 above) for up to sixty (60) days pending their preliminary hearings in the Metropolitan Court.
   The Metropolitan Court's Probation Officers have the responsibility of ensuring that the defendants they supervise comply with Court Orders. But they are also committed to promoting positive changes in the lives of the defendants they supervise through supervision and intervention strategies. Additionally, the probation officers are charged with the responsibility of monitoring restitution, treatment compliance, drug and alcohol screenings, preparing pre-sentence reports, appearing in court and making recommendations on sentencing, preparing for probation violation hearings, and working closely with Probation Officers in specialty court programs to ensure appropriate transfers are made when a defendant is either being referred from one unit to another.

Approximately, Three Hundred (300) defendants are seen daily by Probation Officers in the Metropolitan Court's own Probation Supervision Division. This translates into roughly Seventy-Eight Thousand (78,000) defendant appointments with Probation Officers in the Metropolitan Court each year. Of those defendants, roughly 100 are drug tested each day (approximately 26,000 drug tests yearly) by the Metropolitan Court's in-house U/A technicians. On a daily basis, defendants are ordered by Judges to report to the Probation Supervision Division before they are to leave the Courthouse. So those defendants go straight from the Courtroom to the second floor of the Courthouse where they are promptly seen by a Probation/Supervision Officer for an intake appointment and are provided with information and materials regarding their supervision by the Division. When the Court's Probation Officers believe that a defendant has violated conditions of release or probation, they are immediately taken directly to a Courtroom by the Court's Probation Officers to be seen by a Metropolitan Court Judge. While often a warrant is issued and those defendants are placed under arrest and remanded into custody until they are brought back before the Court (e.g. when they are no longer under the influence of drugs or alcohol in violation of their conditions of probation), there are other times where the defendant and Probation Officer appear before the Judge merely to address other issues.

If State Probation and Parole were now supervising these defendants, it would result in unnecessary delays in the supervision of these defendants, in the reporting of violations to the Court, and of these defendants appearing before the Court when a Probation Officer has identified a potential violation or other issue.

4. Metropolitan Court's Specialty Court Programs – Defendant Participants Supervised by Metropolitan Court's Own In-House Probation/Pretrial Supervision Officers: The Metropolitan Court administers a number of Specialty Court Programs for its criminal cases, which provide intensive judicial oversight, probation supervision, specialized treatment, and referrals to ancillary services for participants. The Court, in response to identified and emerging community needs, serves the demographics of the community by utilizing evidence-based interventions that are based on each participant's risk and need level. As such, the period of time that defendants spend in each phase of a specialty court program is tied to their level of risk and needs, subject of course to the jurisdictional limits of the Court.

   At any given time, approximately, Four Hundred (400) defendants are participating in one of one of the Metropolitan Court's Twelve (12) Specialty Court Programs as follows:

   a. DWI/Recovery Court ("RC"), which is a program that has been a key component in the Metropolitan Court's efforts to enhance community safety, promote evidence–based practices for accountability, and rehabilitation of offenders with two or more DWI convictions;
   b. Urban Native American Healing to Wellness Court ("HWC"), which is program that creates an atmosphere of healing through best practices and traditional methods in pursuit of spiritual and physical recovery for Native Americans with two or more DWI convictions;
   c. Solutions Treatment Options Program ("STOP"), which operates as a track within the Metropolitan Court's DWI Recovery Court and serves offenders who have been charged with a non-violent, felony substance-use related crime in Bernalillo

County, which has been pled down to a misdemeanor and focuses primarily on individuals charged with auto theft;

d. Mental Health Court now known as Behavioral Health Court ("BHC"), which focuses on individuals with mental illness who are involved with the criminal justice system;
e. Behavioral Health DWI Court ("BHC DWI"), which is focused on offenders charged with misdemeanor driving while intoxicated (DWI) offenses and who also have a diagnosis of a co-occurring substance use disorder and mental illness, or are developmentally disabled;
f. Domestic Violence Early Intervention Program ("DVEIP"), which targets domestic violence offenders without prior domestic violence or violent felony convictions;
g. Domestic Violence Solutions Treatment Education Program ("DVSTEP"), which works to reduce the cycle of violence and recidivism among high risk domestic violence offenders, while also providing treatment and counseling to victims and children;
h. Community Veterans Treatment Court ("CVC"), which targets veterans of military service from any era regardless of discharge status, in the National Guard, or in the Reserves and who have been charged with a misdemeanor;
i. Outreach Court, which is a program that is dedicated to working on improving the quality of life of Albuquerque's homeless who end up in the criminal justice system by addressing the issues that initiated their homelessness;
j. Pre-Adjudication Animal Welfare ("PAW"), which programs involves an innovative judicial approach to misdemeanor offenses involving the cruelty to or neglect of animals;
k. Courts to Schools ("CTS"), which is a program that is designed to bring the courtroom experience into the school system by exposing high school students to the procedures and realities of the criminal justice system by holding court in a school and typically sentencing DWI defendants; and
l. First Offender Program ("FOP"), which is programs for defendants charged with their first DWI offense.

Each of these Specialty Court Programs utilizes a number of different strategies to support community safety, reduce recidivism, and guide the defendants participating in those Programs to a more successful future. Each Specialty Court Program has a team consisting of the Presiding Program Judge, the Specialty Court Division Director, the Program Probation Officers, the Program Manager, the treatment provider(s), who have contracted with the Court to provide services for the Participants, an Assistant District Attorney, and a Public Defender. Each Program's Team works to identify the causative factors related to the defendant's entry into the criminal justice system and to provide a multidisciplinary approach to provide the defendants participating in the Program with the essential tools for a successful outcome. Each Specialty Court Program outlines clear requirements, obtainable goals, structure, incentives, and immediate consequences for violations. Additionally, the Specialty Court Programs utilize therapeutic interventions, judicial interaction/oversight, drug and alcohol screenings, and regular – often weekly – face-to-face contact with Metropolitan Court's Specialty Court Probation Officers to promote consistency and to provide support for the participants. Defendants, who meet the Program requirements and agree to participate in the Program, earn incentives and gain an improved understanding of how to live healthier lives.

With House Bill 564, not only would these defendants not be supervised by the Metropolitan Court's in-house probation officers, but the length of their period of probation (as to those specialty court programs that are post-adjudication) would be automatically reduced based on the formula proposed in Section 1 of the bill without regard to the Orders of the Specialty Court Program Judge and irrespective of the phases and requirements of the particular Specialty Court Program in which the defendant is participating. Each of the above-described Specialty Court Programs is narrowly tailored to meet the needs of that population of participants and is further customized to meet the risk/needs of each individual defendant. These programs are not conducive to a formulaic reduction of the length of the program as such could compromise the integrity of the program and the defendant's success under the program but also could compromise community safety and increase the likelihood those defendants will recidivate.

5. Risk and Needs Assessment Tool Currently Utilized by the Metropolitan Court: Metropolitan Court has long recognized that best practices require defendants be assessed using a validated, evidence-based risk and needs assessment tool. As such, the Metropolitan Court currently uses any one of several validated, evidence-based tools, such as the Risk and Needs Triage Tool ("RANT"), Global Appraisal of Individual Needs tool ("GAIN"), and the Level of Service Inventory Revised screening instrument ("LSI-R"). The Court also requires external providers with whom it has contracted to provide case management, treatment, and counseling, etc. to regularly evaluate defendants using only validated, evidence-based risk and needs assessment tools. The Court also employs one (1.0) FTE Court Clinician, who meets with defendants in order to ensure that defendants are properly supervised based on risk and need. Now, under Section 1 of the bill, the Metropolitan Court would be required to consult "a validated risk and needs assessment, if provided by the corrections department, when deciding what conditions of probation to impose."

AOC provided the following points for consideration:

Reduce recidivism: Consistent interventions for incarcerated adult and juvenile offenders with behavioral health diagnoses to provide resources is likely to reduce recidivism. Developing this framework would likely improve outcomes of our problem solving courts through the collaboration of case management.

Possible delays in sentencing: The proposed amendment to Section 31-20-5(C) NMSA 1978, which would require the corrections department to "complete a validated risk and needs assessment and provide it to the court for consultation when the court decides what conditions of probation to impose," could lead to delays in sentencing, if the courts have to wait for the report before imposing conditions of probation. In addition, the corrections department will not usually have any contact with misdemeanor defendants from the magistrate or metropolitan court. Therefore, it may be difficult for the department to conduct the assessment for those offenders, which would further delay their sentencing.

Post-Conviction Risk Assessment: Amendments to Section 31-21-13.1 of House Bill 342 require a judge to consult with adult probation and parole division of DOC and consult the risk and needs assessment. Importantly, the amendments direct DOC to recommend "only

> those individuals who score as high risk and who would have otherwise been recommended for incarceration to participate in intensive supervision programs.
>
> Risk and needs assessments (RNA) instruments are not intended to replace judicial discretion, but should be considered an element of evidence-based sentencing and corrections practices. Although RNAs are considered a best practice in impacting recidivism by addressing needs, risk and responsiveness to treatment/cognitive levels, judges must consider all purposes of sentencing when setting terms and conditions of probation. Sentencing decisions have multiple purposes: punishment, rehabilitation, deterrence and restitution. See the guide produced by the National Center for State Courts, titled "Using Offender Risk and Needs Assessment Information at Sentencing". See also the Council of State Governments (CSG) brief "Understanding Risk and Needs Assessment.

LOPD explains "Section 11 allows for a "signed waiver" in which a probationer or parolee can accept detention and admit the violation. This may prove to be problematic. A probationer has a right to counsel in probation revocation proceedings. See *State v. Leon*, 2013-NMCA-011, ¶ 12, 292 P.3d 493. A waiver conducted outside the court and without the benefit of counsel would draw a due process and Sixth Amendment challenge, especially because it impinges on the probationer or parolee's liberty interest."

NMSC explains "House Bill 564 addresses the growing understanding that modernizing probation and parole policies is a critical part of criminal justice reform. A 2017 report from The Marshall Project captured the issue in its title: 'At Least 61,000 Nationwide Are in Prison for Minor Parole Violations: But the number is probably far higher'."
NMSC also states "the geriatric parole provisions, as of June 30, 2017, 2.8 percent of the states confined male population and 1.1 percent of the confined female population was 65 or older."

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to House Bill 267, House Bill 342.

TECHNICAL ISSUES

BCMC states: House Bill 564 could be amended so that it is clear that State Probation and Parole would not be supervising defendants under the jurisdiction of the Metropolitan Court. Furthermore, Paragraph E of Section 1 could be modified so that it only applies to defendants who are being supervised by State Probation and Parole and does not apply to defendants who are being supervised by the Metropolitan Court's Probation Supervision Division. House Bill 564 could be amended to allow the Metropolitan Court to continue to use such validated, evidence-based screening tools in its discretion and that State Probation and Parole not be required to such risk and needs screening assessments to the Metropolitan Court. House Bill 564 could be amended so that it is still clear that the tolling allowed by Section 31-21-15 still applies to the Metropolitan Court."

NMCD suggests the following:

> Remove the geriatric and medical parole portion of the bill; or add an appropriation for the Parole Board so that it can hire staff and pay for the medical consultations needed to determine which inmates should be released on medical or geriatric parole.

Remove the reduction of supervised probation or parole section of the bill, or amend it to exclude sex offenses and serious violent offenses; and amend this section to restore more supervised probation for offenders who commit new offenses or engage in a pattern of numerous technical violations.

Reinsert the deleted language on page 2, lines 5-7, so that the NMCD maintains the ability to argue that it is not feasible for the NMCD to supervisor misdemeanor offenders. If the courts overwhelm the NMCD with misdemeanor probationers, it will impede the NMCD PPD's ability to properly supervise its felony probationers.

TE/gb/al/sb