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

SPONSOR Duhigg/Stapleton **ORIGINAL DATE** 02/10/21 **LAST UPDATED** 02/12/21 **HB**

SHORT TITLE Probation & Parole Sanctions **SB** 141

ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	$0.0	($10,188.8) to ($6,782.5)	($10,188.8) to ($6,782.5)	($20,277.5) to ($13,585.0)	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to House Bill 201, Senate Bill 247, and Senate Bill 114.

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Public Defender Department (PDD)
Attorney General's Office (NMAG)
Sentencing Commission (NMSC)
Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

Senate Bill 141 revises the system governing violations of probation or parole (collectively, "supervision") conditions. Under current law, all violations are considered equally, and penalties are determined at the discretion of the courts, the Parole Board, and probation and parole officers. SB141 proposes to distinguish between "technical" and "standard" violations of parole conditions. Standard violations comprise absconding, committing a new crime, and (for probationers convicted of sex offenses and serious violent offenses) victim contact or violations of specific probation conditions established at sentencing. Technical violations comprise all other violations of supervision conditions.

The bill provides for the court to issue a warrant for a probationer charged with a standard violation, while the Parole Board or the Corrections Department's (NMCD) Probation and Parole Division (PPD) may issue a warrant for a parolee charged with a standard violation. An offender

may be arrested for a standard violation without a warrant, and may be arrested for a technical violation without a warrant if a probation and parole officer believes they pose a flight risk. Additionally, a parolee serving a sentence for a sex offense, serious violent offense, or human trafficking may be arrested for a technical violation; this provision does not apply to probationers.

SB141 provides that, at the time of sentencing, offenders may waive formal resolution of technical supervision violations before the court or Parole Board in favor of a system of graduated sanctions that probation and parole officers must follow before referring a case to the court or board for formal resolution. The graduated sanctions required before a formal hearing are:

- First sanction: three day noncarceral sanction;
- Second sanction: five day noncarceral sanction;
- Third sanction: up to three days' incarceration;
- Fourth sanction: up to seven days' incarceration; and
- Fifth or subsequent sanction: formal resolution before the court or Parole Board

Notably, probation and parole officers are given discretion not to impose sanctions or to impose lesser sanctions.

If formal resolution was not waived or the graduated sanctions have been exhausted, an offender receives a formal hearing before the court or Parole Board. If a standard probation violation is established, the court may choose to continue or revoke probation, order a new probation, or require the offender to serve up to the balance of their sentence. If a standard parole violation is established, the board may choose to continue or revoke parole, impose a penalty of up to 90 days' incarceration, or impose any other order the board sees fit. A technical supervision violation carries a penalty of up to 30 days' incarceration, unless the court or board determine additional detention is necessary for the offender's rehabilitation or public safety, and may also be addressed with a nondetention sanction.

Additionally, the bill limits probation to the lesser of five years or the maximum incarceration available, but this provision does not apply to DUI cases.

There is no effective date of this bill. It is assumed that the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

Almost one third of offenders who are reincarcerated within three years of their release from New Mexico's prisons have had their parole revoked, often as a result of technical parole violations or drug use. Analysis of a random sample of parolee files from 2016 by LFC's program evaluation team found 90 percent of parole violations were related to substance abuse or absconding. In FY20, technical parole violations accounted for 71.9 percent of parole violations and comprised 22.6 percent of overall prison admissions. While high, these numbers were a decrease from FY19, when such revocations comprised 93.9 percent of parole revocations and 29.8 percent of prison admissions.

In FY20, 619 offenders were readmitted to prison for technical parole violations. NMCD reports the average cost to incarcerate a single inmate in FY20 was $44.8 thousand; however, due to the high fixed costs of the state's prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of $23.3 thousand per inmate per year across all facilities. The Sentencing Commission (NMSC) reports that offenders admitted to NMCD off parole spent an average of 344 days in prison in FY20. From these data, it can be estimated that technical parole revocations cost the state $13.6 million in FY20.

While this bill would not entirely eliminate parole revocations for technical violations, it will likely significantly decrease these revocations and, as a result, decrease costs to NMCD to incarcerate these offenders. If revocations for technical parole violations are reduced by 50 percent to 75 percent as a result of this bill, NMCD would realize savings of $6.8 million to $10.2 million per year.

Similar data for probation violations were not available at the time of this writing, but it is likely this bill would also decrease costs incurred by NMCD and county jails to incarcerate inmates whose probation was revoked due to technical probation violations.

SB141 provides that the court or Parole Board may choose to impose a nondetention sanction for technical parole violations. Such a sanction can include a fixed term in a community corrections program pursuant to the Adult Community Corrections Act. NMCD raises concerns that, if such sanctions are imposed frequently, costs to community corrections could exceed available resources. However, this is unlikely to occur. NMCD received increased appropriations for community corrections in FY20 ($3 million) and FY21 ($500 thousand), and the LFC recommendation in the General Appropriation Act of 2021 contains an additional $1.6 million for community corrections programming in FY22. Additionally, the annual marginal cost of incarcerating an inmate in FY20 ($23.3 thousand) was significantly greater than the annual cost of supervising an inmate ($3,776); savings due to reduced revocations under this bill could be reallocated to cover additional participation in community corrections programs.

The Public Defender Department (PDD) and the Administrative Office of the Courts (AOC) both anticipate reduced costs under this bill. PDD represents probationers in district court when probation violations are referred to the district attorney for revocation proceedings; because many technical violations would be resolved administratively under SB141, the LOPD probation revocation caseload would likely decrease. AOC notes that any fiscal impact on the judiciary would be proportional to the reduction in arrests, charges, and prosecution prevented by enacting this legislation, but the scope of the fiscal impact is unknown without having data on the number of arrests, charges and prosecutions that will be eliminated by passing this bill.

SIGNIFICANT ISSUES

Sanctions. NMSC notes that an emerging area of consensus among criminal justice reformers across the political spectrum is that probation and parole violations need to be sanctioned proportionately, and that minor violations of probation or parole conditions should not result in a return to incarceration, citing a policy statement from the American Conservative Union Foundation and a report from Human Rights Watch and the ACLU.

PDD states that, because probation and parole are designed to enable individuals to reintegrate into society, the distinction between technical and standard violations is an important one. Many

jurisdictions in New Mexico have adopted local rules creating graduated responses to technical violations in recognition of the distinction between struggling to comply with conditions and flagrant disregard for supervision. To ensure uniformity throughout the state and to prevent undue incarceration for technical violations (the stated purpose of the bill), PDD states something akin to a local technical violation program needs to be explicitly codified. However, NMAG raises concerns that SB141 will supplant individually tailored plans established by specific districts.

AOC notes that improving the sanctions model for technical violations is in line with national probation reforms, and states that a violation of supervision conditions does not necessarily mean an offender has become a public safety risk or has committed a new offense. However, the agency adds that a 2019 brief from the Pew Charitable Trusts found that incorporating a sanction grid/matrix that identifies categories of violation types and matches a sanction response to the offender's need/risk and violation type has been shown to reduce officer bias and support long term behavioral change. According to a 2017 study by the National Center for State Courts, using violation sanctions could range from increased treatment and increased reporting to a period of home confinement based on policy and sanction matrix. AOC states that bias and disparate treatment can occur when sanctions are determined by officers who may not have the benefit of established policies driven by data and best practice, so matching the violation type to a level and applying sanctions identified for that level provide for better long-term success. Agencies that have implemented both a sanction matrix and incentives system have seen success in reducing revocations and improving probationer success. For these reasons, AOC believes a sanction grid should be required as part of the sanction response improvements for all probation departments local and state. In addition, the agency notes that training and education for staff, stakeholders and others would assist in creating a common knowledge base, consistency, and consensus regarding evidence-based practices and national standards.

AOC raises concerns that, although SB141 postpones custody sanctions, the bill still focuses on incarceration as the primary tool to achieve desired behavior or compliance with supervision conditions, rather than focusing on constructive and rehabilitative services. The agency notes that treatment courts have been employing the risk-needs-responsivity framework for many years and there have been many lessons learned in the decades of responding to violations. According to AOC, the best interventions are those that are responsive to the risk and needs of the individual on probation, and supervision intensity and services should be predicated upon objective screening instruments. AOC expresses concern that SB141 seems to be substituting a one "one-size-fits-all" approach for another less restrictive one, and individual probationers are not assured to receive the supervision and services that are responsive to their unique cases.

AOC adds that, without thorough and recurring training, SB141 may be reduced to a checklist used as a stepping-stone to eventual incarceration. The agency states that requirements to train personnel in core correctional practices, behavior response best practices, and motivational enhancement protocols would provide a context for the structure employed in the bill, helping probation and parole officers understand the rationale behind the structure of the bill and develop the skills necessary to utilize SB141 with positive effect. AOC states that officers who understand concepts such as "habituation" (where the individual becomes accustomed, and thus less responsive to punishment) and "ceiling effects" (where the officer runs out of sanctions before other interventions have a chance to take effect), as well as the positive outcomes associated with incorporating gradually escalating sanctions, would be able to apply the framework of SB141 in a productive way.

NMCD raises concerns that a provision in the bill stating that once graduated sanctions are imposed, offenders shall not be subject to further technical violation sanctions for the same technical violation instance unless the offender fails to comply with the imposed sanctions. The agency states that there are cases in which prior violations are not noted or observed on the date of the violation, but could be considered significantly concerning when learned at a later date. The Attorney General's Office (NMAG) adds that probation and parole officers sometimes forgo pursuing potential violations where the evidence of a violation is undeveloped, sometimes electing to pursue these violations at a later date as evidence materializes, and states that the New Mexico Court of Appeals has stated that this rationale does not offend due process.

AOC raises concerns that a provision of the bill stating that, if a technical violation is not sanctioned, it shall not be counted as a sanction for purposes of the graduated sanction structure established by this bill, may have the unintended consequence of increasing technical violations recorded with SB141. This would occur if officers begin documenting all violations instead of providing case management that allows for violations to be used as opportunities for growth. AOC expresses concern that this may put probation and parole officers in the position of having to document everything formally for fear that earlier, less formal, interventions will not be considered legitimate.

NMCD notes that the bill should specify a timeframe to complete a sanction of community service or add language requiring such a sanction be completed in a reasonable amount of time. The agency adds that an employed individual working more than 50 hours per week would have a more difficult time completing community service quickly than an unemployed individual.

NMAG adds "Technical-violation language is found only in probation provisions. *See* Rule 5-805(C). Statutorily mandating that the parole board follow gradual sanctions threatens to erode the board's long-time statutory autonomy and begins to create rights to parolees which will allow them to challenge the board's decisions in the courts."

Detention Location. NMCD raises concerns regarding SB141's requirement that parole sanctions ordered by the Parole Board be served in county jails. The agency notes that parolees remain in NMCD custody, so the agency would still be responsible for some or all of the daily costs of incarceration at county jails. The agency notes it is not responsible for the availability or quality of programming options at county jails, but that active participation in programs is required for meritorious ("good time") deductions authorized for returned parole violators. NMCD states that availability of deductions based on type of arrest and the county where the sanction is served might serve as the basis for a lawsuit, the costs of which cannot be easily estimated but might be substantial.

It may be desirable to amend these provisions to allow incarceration sanctions imposed by the Parole Board to be served at county jails or NMCD facilities. While longer-term sanctions may be better served in prisons, shorter-term sanctions may be best served in county jails.

Applicability. Because Section 31-21-5 NMSA 1978 defines "probation" as only applying to "adult" defendants and defines "adult" as "any person convicted of a crime by a district court" (emphasis added), AOC notes that the provisions of SB141 appear to apply only to NMCD's PPD, and not metropolitan and municipal court probation services or county misdemeanor compliance programs. If this is the intention of the bill, AOC suggests amendments be made

elsewhere in the bill to clarify the exclusion of such programs from its provisions. AOC notes that the Metropolitan Court employs 73 probation supervision officers to supervise defendants on probation for misdemeanor offenses within its jurisdiction; those officers supervised 6,270 probationers in FY20.

Absconding. PDD, NMAG, and AOC submitted the following analyses regarding the definition of "absconding" in SB141:

PDD:

> Absconder is defined to require a particular purpose. This is critical to distinguish between someone who is affirmatively avoiding their obligations and prototypical "technical violation" conduct for missed appointments. The only way to distinguish is to require the person acted "with a purpose to evade their supervision obligations by hiding within or secretly leaving the jurisdiction." *See State v. Robbins*, 188 P.3d 262, 266-67 (Or. 2008) ("In determining whether a defendant has absconded from supervision, appellate courts must consider whether the defendant's acts show the intent that inheres in the definition of 'abscond'—not simply that the defendant failed to attend one meeting with a probation officer or could not be located for a brief period of time, but *that the defendant sought to 'evade the legal process of a court by hiding within or secretly leaving its jurisdiction.*'") (quoting Webster's Dictionary) (emphasis added). It is worth noting that, "Usually, of course, an appellate court has no direct way to discern a defendant's intent in taking particular actions. But a court may infer intent from the nature of the defendant's acts themselves." *Id.* at 267.

NMAG:

> The proposed definition for "absconding" will, in practice, heighten the standard needed to prove that an offender is a fugitive from justice. The phrase "with a purpose to evade compliance with the person's supervision obligations" imparts upon the State the burden of proving why an individual offender failed to appear for a probation appointment, even when the probationer perhaps admits he or she did so knowingly. The preceding phrase ("willfully makes the person's whereabouts unknown or willfully fails to report as ordered") succinctly captures the State's current burden of proof; proving a fugitive's subjective specific intent to evade compliance with probation is not in line with current law, and represents a departure from present evidentiary requirements.

AOC:

> ...the definition of "absconding" in new paragraph G of Section 31-21-5 NMSA 1978 goes beyond the requirements found in case law that that the probationer was required to report to probation, probation made efforts to give notice regarding reporting requirements, the probationer did not report, a bench warrant was issued, and the probation officer made active efforts to serve the warrant. *See State v. Jimenez,* 2004-NMSC-012. Does a failure to appear for an appointment constitute, …"willfully make[ing] the person's whereabouts unknown or willfully fail[ing] to report as ordered with a purpose to evade compliance with the person's supervision obligations by making the person's self unavailable for supervision, which may be inferred from surrounding circumstances" thus making it a "standard violation, rather than a "technical violation"

for "missing a scheduled supervision appointment"?

Other Significant Issues. PDD notes that SB141's requirement that a waiver of formal resolution occur at sentencing (when probation and/or parole are imposed by court order) is important because it is a time when the defendant is represented by counsel.

AODA notes that the prosecutor will be responsible for recommending that the court make specific and particular conditions of probation in the order placing a defendant on probation that would warrant a "standard violation" designation, and they must convince the court by clear and convincing evidence to include such conditions.

AOC raises concerns that the bill's proposed Subsection E of Section 31-21-15 NMSA 1978 in provides that, "If imposition of sentence was deferred or suspended, the court may impose any sentence that might originally have been imposed, but credit shall be given for time served on probation." The agency provides the following explanation:

> If a violation occurs and a sentence has been deferred, then the Court may impose any sentence that it might originally have imposed. *State v. Kenneman,* 1982-NMCA-145. But, if a sentence has been suspended and a violation occurs, then the court may only order the defendant to serve the balance of the sentence previously imposed but suspended, or any lesser sentence. Id. at ¶ 7. There are also exceptions provided by law for when where credit is not given for time served on probation. *See e.g.* Section 66-8-102(U) NMSA 1978 concerning DWI; Section 30-3-15 NMAS 1978 concerning battery against a household member; and Section 30-3-16 NMSA 1978 concerning Aggravated Battery against a Household Member.

AOC suggests that, because of differences in the law between deferred and suspended sentences, proposed Subsection E of Section 31-21-15 NMSA 1978 should be amended to provide, "If imposition of sentence was deferred ~~or suspended~~, the court may impose any sentence that might originally have been imposed~~, but credit shall be given for time served on probation~~. But, if imposition of a sentence was suspended, the court may impose the balance of the sentence previously imposed or any lesser sentence. Credit shall be given for time served on probation except as otherwise provided by law."

AOC notes that the amendment to Section 31-20-5 NMSA 1978 proposed in this bill appears to provide for two inconsistent limits on probation: no more than five years and "no longer than the maximum allowable incarceration time for the offense or as otherwise provided by law." AOC suggests keeping a distinction between probation terms for district courts, which primarily handle sentencing on felony cases with much longer terms of incarceration, and magistrate and metropolitan courts, where the potential incarceration time is much shorter.

ADMINISTRATIVE IMPLICATIONS

If enacted, AOC states it will have to update the judgment and sentence forms to include the language that a defendant voluntarily waives future formal resolution for technical probation violations. Judgment and sentence forms may also need to be updated or new forms created to allow courts to specify the additional standard violations for defendants serving probation for sex offenses or serious violent offenses. Where forms have been developed for probation violations, updates may be needed to address factors supporting additional detention beyond 30 days for

technical violations.

RELATIONSHIP

SB141 relates to House Bill 201, which also amends Section 31-20-5 NMSA 1978 and provides for early probation release for some defendants; to Senate Bill 247, which prohibits the imposition of a sentence of life without parole on a child and provides parole procedures for such offenders and also amends Section 31-21-10 NMSA 1978; and to Senate Bill 114, which provides for a new system of medical and geriatric parole and also amends Section 31-21-5 NMSA 1978.

TECHNICAL ISSUES

Proposed Paragraphs 1 and 2 of Subsection A of Section 31-21-15 NMSA 1978 provides that the court may issue warrant for a probationer charged with a standard violation or may issue a notice to appear to answer a charge of a standard or technical violation. However, proposed Subsections A and F of Section 31-21-14 NMSA 1978 provide that the Parole Board or PPD director may issue a warrant for a parolee charged with a standard violation or may issue a notice to appear to answer a charge of a technical violation. There is no provision allowing for a notice to appear for a parolee charged with a standard violation, which may lead to additional costs if it is required a warrant be issued and served in all such cases.

Proposed Subsection C of Section 31-20-5 NMSA 1978 provides for the court to designate specific and particular conditions as warranting a standard violation for probationers convicted of sex offenses or serious violent offenses. However, the bill does not provide for the court or Parole Board to designate such conditions as warranting a standard violation for parolees. As a result, the definition of "standard violation" differs for probationers and parolees, and only absconding or committing a new offense are considered standard violations for parolees. The bill subsequently provides that while probationers may only be arrested without a warrant for a standard violation or a technical violation if they are believed to be a flight risk (proposed Subsection A of Section 31-21-15 NMSA 1978), parolees convicted of sex offenses, serious violent offenses, *or human trafficking offenses* may also be arrested without a warrant for any technical violation (proposed Paragraph 3 of Subsection A of Section 31-21-14 NMSA 1978). As a result, parolees may be arrested for a much wider array of technical violations than probationers based on their offense type (not just violations of specific and particular conditions designated by the court or Parole Board), and offenders who would not face such a consequence if they were on probation for human trafficking would face it on parole.

AOC notes that the amendment to Section 31-21-14(A)(2) changes the language to allow a probation or parole officer, rather than the PPD director, to arrest a parolee or to provide a written statement for a warrantless arrest; however, this language was not changed in Section 31-21-15(A)(3).

Proposed Subsection B of Section 31-21-14 NMSA 1978 states that a parolee must remain incarcerated pending a hearing as provided by law upon any charge of violation. Because parolees may be arrested for technical violations if they were convicted of certain offenses or pose a flight risk, the bill provides that they will be incarcerated, even though the system of graduated sanctions established in Section 1 of the bill may apply to those offenders, who would therefore not face a hearing. There is no similar provision for probationers.

AODA notes that, presently, the district attorneys' offices file motions to revoke or review probation when a probationer commits a violation(s). AODA states that it is not clear from the bill whether the district attorneys' offices have a duty to prosecute a defendant for technical violations, and it could be argued that the NMCD's PPD prosecutes technical violations in court.

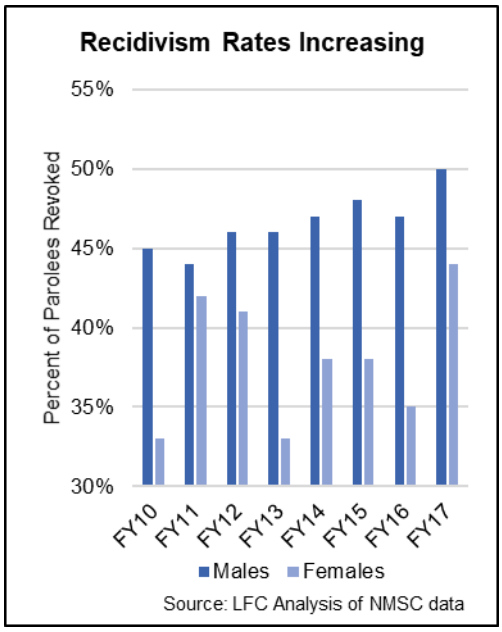
AOC suggests Section 4 of the bill concerning the proposed definition of "standard violation" could either be more robust or have language added as "specified in the order of probation."

AOC notes that limited examples of technical violations are provided in the definition of "technical violations" in the amendments to Section 31-21-5 NMSA 1978 without a clear statement that such list is not exhaustive.

AOC notes that while Sections 31-21-14(A)(2) and (3) and 31-21-15(A)(3) require a written statement by the probation or parole officer, Sections 31-21-14(A)(4) and 31-21-15(A)(4) do not.

OTHER SUBSTANTIVE 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.

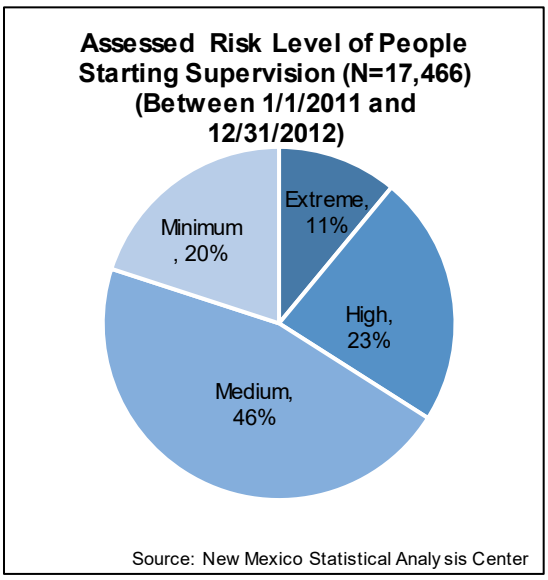


One of the report's findings encouraged NMCD to improve case management of parolees to ensure connection to services, implement evidence-based programs statewide (including graduated interventions, short jail-time, etc.) to maximize attempts to divert offenders from full revocation.

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 U.S. Department of Justice identifies five principles of recidivism reduction, four of which are highlighted below:

- Principle I: On 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.



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