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FISCAL IMPACT REPORT

ORIGINAL DATE 2/12/2021

SPONSOR Candelaria LAST UPDATED _____ HB _____

SHORT TITLE Possession of a Controlled Substance SB 216

ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	(\$3,035.6 - \$1,517.3)	(\$3,035.6 - \$1,517.3)	(\$6,069.3 - \$3,035.6)	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with House Bill 12, Senate Bill 288, and Senate Bill 363; May conflict with House Bill 183; Relates to House Bill 17, House Bill 187, and Senate Bill 13.

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 216 amends Section 20-31-23 NMSA 1978 to remove all felony penalties for drug possession except possession by adults within a drug-free school zone. Specifically, the bill removes the felony penalties for possession of 8 or more ounces of marijuana or synthetic cannabinoids and possession of all other controlled substances for which it is currently a felony to possess without intent to distribute, including PCP, meth, flunitrazepam, gamma hydroxybutyric acid (GHB), gamma butyrolactone, 1-4 butane diol, and schedule I or II narcotic drugs. Under SB216, possession of any amount of these controlled substances (outside a drug-free school zone) would be at most a misdemeanor.

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

FISCAL IMPLICATIONS

Lowering the penalties for drug possession will likely decrease the population of New Mexico's prisons and reduce long-term costs to the general fund. The Corrections Department (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. This bill will likely decrease the number of individuals incarcerated.

NMCD reports it is difficult to estimate the fiscal impact of removing felony penalties for possession of a controlled substance because many incarcerated individuals are serving time for more than one charge and currently no individuals are incarcerated in NMCD facilities solely for possession of marijuana. The agency notes that convictions solely for felony drug possession may be subject to conditional discharge, deferred sentencing, or partial or full sentence suspension.

However, while some offenders may be serving time for multiple charges, the Sentencing Commission (NMSC) reports the *highest* charge for 223 offenders admitted to NMCD in FY20 was simple drug possession pursuant to Section 30-31-23 NMSA 1978. They were serving an average of 15 months in prison and costing the state \$6.5 million. While data on the number of admissions for fourth-degree felonies versus misdemeanors for simple possession was not available, NMSC reports 90 percent of FY20 releases of offenders charged under this statute were for fourth-degree felonies after an average stay of about 15.6 months; assuming a similar split in admissions, this analysis estimates 201 offenders whose *highest* charge was a fourth-degree felony for simple possession were admitted to NMCD in FY20, costing the state \$6.1 million.

While some of the individuals admitted for fourth-degree felonies for simple possession may be serving sentences for other charges as well (and some may have been convicted of possession in a drug-free school zone, which remains a felony under SB216), it seems reasonable to assume that some proportion of these admissions will be impacted by the removal of felony penalties for possession of controlled substances. If admissions were decreased by between 25 percent and 50 percent in future fiscal years, NMCD would realize cost savings of \$1.5 million to \$3 million annually.

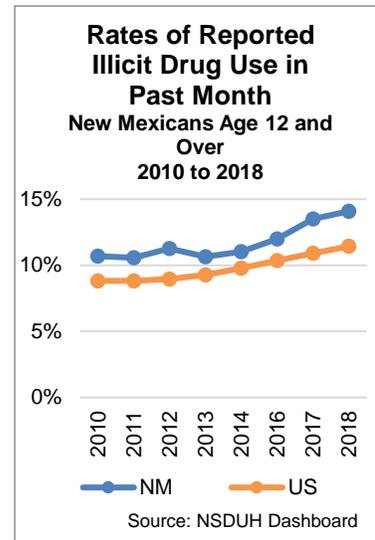
Furthermore, the Public Defender Department (PDD) notes that, because of the nature of addiction, drug users often incur repeat felonies for possession. The Habitual Offender Act imposes mandatory sentencing enhancements for prior felony convictions, which can require many of these offenders to serve significant prison terms. PDD believes the elimination of felony penalties for drug possession would significantly reduce the costs of incarceration.

PDD also notes that, because felony defense requires more complex and time-consuming court proceedings, SB216 may also significantly reduce the volume and scope of criminal litigation. The Administrative Office of the Courts (AOC) agrees, stating decreased penalties are likely to result in fewer defendants invoking their right to trials and jury trials. Decreased trials and jury trials will result in lower costs for judge time, courtroom staff time, courtroom availability, and jury fees.

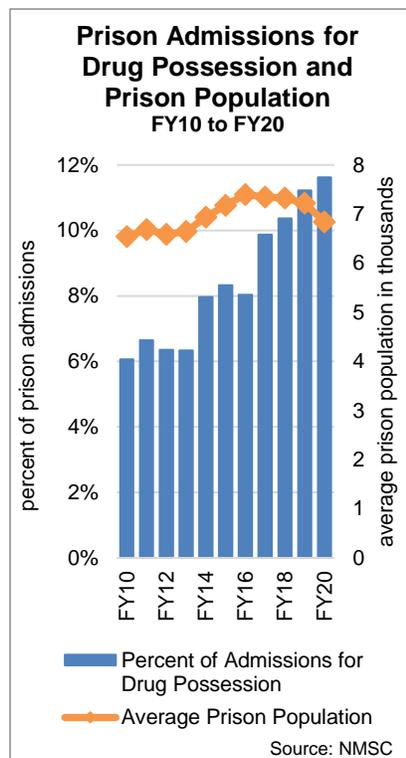
SIGNIFICANT ISSUES

Substance Use Disorder and Criminalization. Research shows incarceration is not an effective solution to substance abuse. A [2017 report from the Pew Charitable Trusts](#) examining all 50 states found no statistically significant relationship between state drug offender imprisonment rates and rates of illicit drug use, drug overdose deaths, and drug arrests.

According to data from the [National Survey on Drug Use and Health](#), in 2018, 14.1 percent of New Mexicans over the age of 12 reported using illicit drugs in the past month, compared with 11.4 percent nationally. Rates of illicit drug use in New Mexico exceeded the national rate every year between 2010 and 2018, but between 2016 and 2018, the rate of New Mexicans reporting illicit drug use increased at almost twice the rate of the national increase. Insufficient treatment resources make addressing this issue difficult. A [2020 Department of Health gap analysis of substance use disorder treatment](#) estimated only 34.3 percent of the estimated 204.7 thousand New Mexicans needing substance use disorder (SUD) treatment in 2018 received it.



Offenders sentenced for drug possession offenses comprise a growing share of prison admissions, posing significant social and financial costs to the state. While the state’s average prison population has declined 7.6 percent since FY16, the share of admissions made up of offenders whose highest charge was drug possession grew from 8 percent to 11.6 percent over the same period. According to the [Sentencing Commission’s July 2020 prison population forecast](#), New Mexico incarcerates people for drug crimes at a higher rate than the national average. New Mexico’s high rates of substance use disorders and increasing illicit drug use suggest these trends will continue absent legislative intervention.



A [2019 LFC report on substance abuse treatment and outcomes in New Mexico](#) found stigma associated with addiction is a significant obstacle to broadening access to effective treatment, despite research showing substance use disorder is best understood as a potentially deadly but treatable chronic disease. The report noted that, while medication-assisted treatment (MAT) has been demonstrated to be safer and more effective than either psychotherapy or medication alone for treating SUD, “doctors must undergo special training and receive a license from the Drug Enforcement Agency to prescribe these drugs. Numerous doctors interviewed for this report indicated that stigma within the medical community prevents their colleagues from obtaining these licenses or utilizing them fully, and that stigma can make the leadership of health systems hesitant to implement comprehensive addiction programs for fear of becoming a magnet for ‘those patients.’”

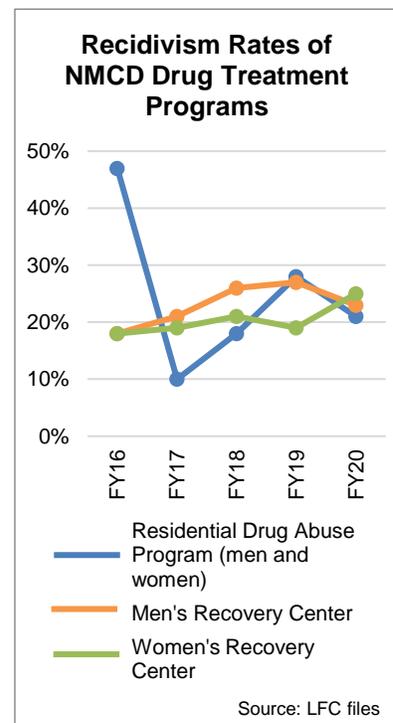
The 2019 report concludes that “effectively addressing substance abuse is difficult, in part, because it requires overcoming pervasive stigma. A wide body of research shows

that SUD are best understood and treated as chronic illnesses. Yet too often they are instead viewed as symptoms of moral failure. Stigma can prevent people from seeking help and providers from offering it, and it can dissuade the public and policymakers from pursuing bold solutions. Framing SUD as a moral failing does not allow us to make the critical connections between the disease and its origins in social determinants like poverty and childhood trauma, and creates ambivalence when action is needed. New Mexico will not get ahead of this crisis until we replace stigma with informed understanding and respond to SUD as the public health crisis it is.”

Criminalization of drug possession likely exacerbates this stigma, and correctional settings are unlikely to provide the most effective treatment to individuals in their care. LFC’s 2019 report notes that evidence-based SUD treatments are largely absent in New Mexico’s jails, despite high rates of substance abuse in the incarcerated population. Only two county jails offer MAT to inmates, and the report notes “one warden interviewed by LFC staff indicated that while his jail offered group therapy for substance abuse, its medical program did not offer MAT because the provider was philosophically opposed to treating addiction with drugs,” although the "drugs," in this case, are regulated and effective medicines. In New Mexico, for instance, accredited adult residential treatment centers are required to provide MAT to be eligible to bill Medicaid because it is a standard of care for facility certification by the American Society of Addiction Medicine. Such requirements for standard of care do not apply to jails and prisons.

LFC has also raised concerns regarding SUD treatment within prisons. Currently, MAT is only available for pregnant women at Western New Mexico Correctional Facility, although the department is exploring options to expand MAT to other facilities. Additionally, although NMCD’s Residential Drug Abuse Program (RDAP) (one of its largest in-prison approaches to address substance abuse) is evidence-based, it is not known how well it has been implemented. Significantly, LFC reported in [2007](#) and [2012](#) that an evidence-based therapeutic communities (TC) program within NMCD was failing to produce expected outcomes because the implementation did not align with best practices. LFC’s [2018 evaluation of NMCD’s recidivism reduction programs](#) noted RDAP is a type of TC, and NMCD could not demonstrate how RDAP differs from the underperforming TC model. The 2018 report recommended routine evaluation of programs such as RDAP, but NMCD has not undertaken such efforts.

Supervised offenders in the community (those on probation or parole) lack sufficient substance-abuse treatment resources. In FY19, only 8.5 percent of the estimated 12.6 thousand offenders needing such treatment were served by community corrections substance-abuse programs. The efficacy of NMCD’s substance-abuse treatment services in the community is difficult to determine because the department only reports recidivism rates for the men’s and women’s recovery centers, which serve only a small fraction of offenders. These programs use a research-based, inpatient TC model, but using a research-based model does not guarantee success. A [2015 NMSC study](#) found no statistically significant improvement on outcomes at the men’s center, and since the department began reporting on recidivism of these programs’ graduates in FY16, the recidivism rate has increased 5 percentage points at the men’s facility and 7 percentage points at the women’s.



Impact of Defelonization. SB216 would not decriminalize drug possession but would significantly reduce penalties. PDD notes that removing felony penalties also removes a significant number of adverse collateral consequences for defendants convicted of drug possession, which can impact access to housing, employment, and education. PDD adds that limitations on employment opportunities contribute to high recidivism rates and high unemployment rates for the communities to which they return.

PDD further states that punishing drug possession as a felony incentivizes law enforcement to police specifically with an eye toward catching people with drugs in their pockets. Innocuous encounters with police very often escalate to a drug investigation even when there is no public safety concern at play. A [2020 study of the effect of defelonization in California](#) found people who received drug convictions after defelonization had lower overall re-arrest and reconviction rates than people with comparable convictions and criminal histories released prior to the change. The study theorized that those declines are partly, perhaps mostly, the result of changing decision-making among law enforcement and prosecutors.

PDD concludes that defelonization of low-level drug crimes allows the criminal system to focus resources on more serious crimes, which can increase public safety. Moving away from punishing drug use also enables communities to deal with drug misuse and drug use disorder as a public health issue instead of a criminal issue.

PERFORMANCE IMPLICATIONS

AOC states the courts are participating in performance-based budgeting, and SB216 may have an impact on the measures of the district courts in the following areas:

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

ADMINISTRATIVE IMPLICATIONS

PDD notes that this bill would tend to shift some caseload from district courts to magistrate and municipal courts. Greater emphasis on court-ordered drug counseling programs is foreseeable.

AOC states there will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and fewer commenced prosecutions and appeals from convictions.

CONFLICT, RELATIONSHIP

SB216 conflicts with House Bill 12 and Senate Bill 288, which amend Section 30-31-23 NMSA 1978 to remove all penalties (misdemeanor and felony) for marijuana, including in a drug-free school zone, but do not alter penalties for synthetic cannabinoids or other controlled substances.

SB216 conflicts with Senate Bill 363, which amends Section 30-31-23 NMSA 1978 to remove all penalties (misdemeanor and felony) for marijuana, including in a drug-free school zone, as well as fourth-degree felony penalties for possession of the other controlled substances as SB216, with the exception of synthetic cannabinoids, for which the penalties for possession are not altered.

SB216 may conflict with House Bill 183, which also amends Section 30-31-23 NMSA 1978 to alter the available penalties for a minor in possession of a controlled substance from a fine of up to \$100 or 48 hours of community service by removing the fine and allowing for a penalty of up to 48 hours of community service (Subsection D). HB183 does not substantively alter any other provisions of this section, and SB216 does not make any changes to Subsection D.

SB216 relates to House Bill 17 and Senate Bill 13, which establish regulations related to marijuana and remove it from consideration as a schedule I or II controlled substance under Sections 30-31-6 and 7 NMSA 1978. The bill also removes the definition of marijuana from the Controlled Substances Act but does not amend Section 30-31-23 NMSA 1978.

SB216 relates to House Bill 187, which makes it unlawful for a person who is under the influence of any drug (not just to a degree that it renders the person incapable of safely driving) to drive a motor vehicle and makes it unlawful for a person to drive a vehicle if they have certain amounts of specific controlled substances or metabolites in their blood within three hours of driving the vehicle and the controlled substance or metabolite concentrations result from the consumption of a controlled substance before or while driving.

OTHER SUBSTANTIVE ISSUES

PDD notes SB216 does not address possession of certain “dangerous” prescription drugs under Section 26-1-16(E) NMSA 1978.

The Administrative Office of the District Attorneys (AODA) notes that, if SB216 is enacted, individuals can still be prosecuted for possession of controlled substances with intent to distribute as provided for in Section 30-31-20(A)(3) NMSA 1978. AODA also notes many possession cases are presently disposed of through pre-prosecution diversion and conditional discharge.

ER/al/sb