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FISCAL IMPACT REPORT

ORIGINAL DATE 02/07/13

SPONSOR Garcia, M.H. LAST UPDATED _____ HB 234

SHORT TITLE Create Crime of Bullying SB _____

ANALYST Chenier

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney General’s Office (AGO)
 Department of Health (DOH)
 Department of Public Safety (DPS)
 Public Education Department (PED)
 Public Defender Department (PDD)

SUMMARY

Synopsis of Bill

House Bill 234 (HB 234) creates the new crime of “bullying” if it is proven that someone engaged in “a pattern of intentional conduct...that creates a hostile environment and substantially interferes with another person’s physical or psychological well being and that is motivated by an actual or perceived personal characteristic...or, threatening or seriously intimidating.” The crimes would be punished as a petty misdemeanor, unless the victim sustained bodily harm or substantial emotional distress and if so they would be punished as a full misdemeanor.

FISCAL IMPLICATIONS

The bill could create additional criminal matters filed in courts of jurisdiction and could require criminal investigations and/or investigative tasks. Presumably the charges would most often be filed against juveniles and be heard in children’s court. There may be a fiscal impact on DA offices if the facts are present to sustain the proposed new crimes.

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

SIGNIFICANT ISSUES

The PED provided the following:

In November 2006, the New Mexico Public Education Department (PED) adopted a Bullying Prevention Rule (NMAC 6.12.7) that required all public school districts, including charter schools, to adopt and implement an Anti-Bullying Policy, no later than April 1, 2007. The PED developed a School District Anti-Bullying Policy Guidance Document to support all public school districts, including charter schools, to develop and implement a policy. The PED also requires all public school districts, including charter schools to have a Safe School Plan in place. These Plans include the Bullying Prevention Policy that they have adopted. Schools would be required to update their Parent/Student handbooks to ensure that all parents and students are aware that bullying is a misdemeanor crime. Schools would need to update administrative policies and procedures to address a misdemeanor crime if bullying occurs in the public schools.

The DOH provided the following:

Almost 30 percent of youth in the United States (over 5.7 million) are estimated to be involved in bullying as either a bully, a target of bullying, or both. In a recent national survey of students in grades 6-10, 13 percent reported bullying others, 11 percent reported being the target of bullies, and another 6 percent said that they bullied others and were bullied themselves. (Nansel, Overpeck, Pilla, Ruan, Simons-Morton, & Scheidt, *Bullying Behaviors Among US Youth: Prevalence and Association With Psychosocial Adjustment*, 2001).

Bullying takes on different forms in male and female youth. While both male and female youth say that others bully them by making fun of the way they look or talk, males are more likely to report being hit, slapped, or pushed. Female youth are more likely than males to report being the targets of rumors and sexual comments. While male youth target both boys and girls, female youth most often bully other girls, using more subtle and indirect forms of aggression than boys. For example, instead of physically harming others, they are more likely to spread gossip or encourage others to reject or exclude another girl (*Journal of American Medical Association*, 2001). *For more information please see attachment I.

The AODA provided the following:

This bill is somewhat similar to the current statute against harassment. (See, Section 30-3A-2, NMSA 1978). That statute now requires a “pattern of conduct that is intended to annoy, seriously alarm or terrorize another person and that serves no lawful purpose (and) would cause a reasonable person to suffer substantial emotional distress.” There is no indication in this bill of what would constitute a “hostile environment” or how long the

hostile environment must be in place or its proximity to the possible victim. There is no indication of how it would be determined that the conduct “substantially interferes” with another person’s physical or psychological well-being. There is no explanation of what “well-being” means in the proposed statute. The bill, unlike the harassment statute, has no reference to having the conduct be such that a reasonable person would be affected. Any time that a statute requires persons to guess at the conduct that is prohibited or does not have an objective standard, it is subject to challenge as a violation of due process because people could not be sure what conduct constitutes a crime. *For more information regarding the AODA’s analysis please see attachment II.

The PDD provided the following:

HB 234 as written appears to be unconstitutional in that it covers conduct that would likely be constitutionally protected including public statements repeatedly criticizing a policy-maker, actor, or other public figure which then injure that person’s psychological well-being or create a “hostile environment,” which the act does not define. *See State v. Powell*, 114 N.M. 395, 397-98, 839 P.2d 139, 141-42 (Ct. App. 1992) (discussing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and declaring a statute unconstitutional as applied when the criminal charge was predicated on public statements that involve matters of public concern). *For more on the PDD’s analysis please see Attachment III

RELATIONSHIP

HB 234 relates to HB 54, which proposes to amend Section 22-2-21 NMSA 1978 which will require the Public Education Department to establish guidelines for school boards to promulgate policies specific to cyber bullying prevention by August 2013.

TECHNICAL ISSUES

The AGO provided the following:

The conduct proscribed by this bill is largely covered by harassment (§30-3A-2 NMSA) and stalking (§30-3A-3 NMSA). The bill, as drafted, is vague in that it does not explicitly require the perpetrator to intend the logical consequence of his or her actions. Additionally, the bill’s language would suggest that the victim’s response need not be held to any standard of reasonableness.

ALTERNATIVES

The AGO provided the following three suggested amendments:

1. Include language that the age of the perpetrator and victim are not components of the crime.
2. Include a clearer intent component – perpetrators must intend not only their immediate conduct but the logical consequences.
3. Include language requiring a reasonable person standard with regard to the mental state of the victim.

ATTACHMENT I

The DOH's analysis continued:

Children and youth who are bullied are typically anxious, insecure, and cautious. They suffer from low self-esteem, rarely exhibit self defense or retaliation when confronted by students who bully them. They are often socially isolated and lack social skills. One study found that the most frequent reason cited by youth for persons being bullied is that they "didn't fit in." Males who are bullied tend to be physically weaker than their peers (Journal of the American Medical Association, 2001).

There appears to be a strong relationship between bullying other students and experiencing later legal and criminal problems as an adult. In one study, 60% of those characterized as bullies in grades 6-9 had at least one criminal conviction by age 24. Chronic bullies seem to maintain their behaviors into adulthood, negatively influencing their ability to develop and maintain positive relationships (Olweus D., *Bullying at School: What we know and What we can do*, 1993).

In New Mexico, more than one-third (31.5%) of students were in a physical fight within the 30 days preceding the Youth Risk and Resiliency Survey. A fight was more common among boys (37.6%) than among girls (25.1%). Also, 11.3% of New Mexico students were in a physical fight and 18.7% were bullied on school property within the 30 days preceding the survey. Additionally, 8.1% of students did not go to school on at least one day in the preceding month because they felt unsafe at school (NM YRRS, 2011).

ATTACHMENT II

The AODA's analysis continued:

In addition to its other requirements, the bill would also require a showing that the offender was motivated by “an actual or perceived personal characteristic,” presumably of the victim although that is not stated, or that the conduct was such that it is “threatening or seriously intimidating,” presumably to the victim although that is also not stated. “Seriously intimidating” is not defined or explained. Unless voiced by an offender, proof of motive is difficult. Offenders who might be charged with bullying could argue that there wasn't anything personal about it, and—depending upon the facts--that their conduct was not such that it should be considered as threatening or seriously intimidating. They might claim it was, at most, just teasing.

Since the bill is premised on a pattern of conduct, offenders could claim that even if there was repeated behavior, their motives were benign or were different during the applicable time period or simply not present because they didn't consider the victim's personal characteristics. The offenders might also claim they didn't know the effects of their conduct and didn't intend the results upon the victim, or they didn't know their actions were being perceived as threatening or seriously intimidating because they believed a reasonable person would not have understood them as threatening or seriously intimidating. Proving all elements will be a challenge.

ATTACHMENT III

The PDD's analysis continued:

HB 234 could be subject to vagueness challenges because it does not incorporate a "reasonable person" standard and thereby permits punishment regardless of whether the victim's perception or injury is reasonable, rational, or foreseeable. *State v. Segotta*, 100 N.M. 498, 499, 672 P.2d 1129, 1130 (1983) ("A statute will be held unconstitutional in violation of due process of law, if the statute either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application."); *see also N.M. Mining Ass'n v. Water Quality Control Comm'n*, 2007-NMCA-084, ¶ 24, 142 N.M. 200, 164 P.3d 81 ("A law must provide fair and adequate warning to a person of ordinary intelligence of the conduct which is prohibited." (internal quotation marks and citation omitted)).

HB 234 also includes conduct that is already criminal under New Mexico law and largely regulated under state (New Mexico Education Code § 22-2-1 and New Mexico Administrative Codes §§ 6.12.7.1 – 6.12.7.8) and federal law (Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; and Title II of the Americans with Disabilities Act of 1990).

Unlike the criminal provisions currently addressing similar conduct, however, HB 234 does not include any exemptions for persons acting with "lawful authority" and does not incorporate a reasonableness or reasonable person standard into its analysis. New Mexico's current harassment (NMSA 1978, § 30-3A-2) and stalking (NMSA 1978, §§ 30-3A-3 – 30-3A-3.1) provisions already penalize the knowing pursuit of "a pattern of conduct that is intended to annoy, seriously alarm or terrorize another person" and results in "substantial emotional distress" and the knowing pursuit of a pattern of conduct "directed at a specific individual when the person intends that the pattern of conduct would place the individual in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint of the individual or another individual," respectively. Notably, such provisions expressly exclude lawful conduct (defined as "within the scope of lawful employment or constitutionally protected activity" by NMSA 1978, § 30-3A-3(B)(1)), while including reasonableness standards. NMSA 1978, § 30-3A-4 also sets forth that New Mexico's harassment and stalking provisions do not apply to "A. picketing or public demonstrations that are lawful or that arise out of a bona fide labor dispute; or B. a peace officer in the performance of his duties."

Physical or verbal threats which are "threatening or seriously intimidating" under HB 234, could also be penalized under existing assault provisions set forth in NMSA 1978, § 30-3-1 et. seq.

Because HB 234 provides punishment for acts which are already criminal, there are potential general-specific attacks that could be to preclude its application in many cases. *See State v. Cleve*, 1999-NMSC-017, 127 N.M. 240, 980 P.2d 23 (explanation of principles of general/specific statute rule and rule of lenity); *State v. Ibn Omar-Muhammad*, 102 N.M. 274, 277, 694 P.2d 922, 925 (1985) ("It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment.").

Notably, such provisions expressly exclude lawful conduct (defined as "within