

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

**ORIGINAL DATE** 2/14/19

**SPONSOR** Cadena / Maestas      **LAST UPDATED** \_\_\_\_\_      **HB** 405

**SHORT TITLE** Sex Offender Probation Review Notices      **SB** \_\_\_\_\_

**ANALYST** Torres

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

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Indeterminate*			Indeterminate*	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

\*See fiscal implications.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Public Defender Department (PDD)

New Mexico Corrections Department (NMCD)

Administrative Office of the Courts (AOC)

Administrative Office of the District Attorneys (AODA)

New Mexico Attorney General (NMAG)

### SUMMARY

#### Synopsis of Bill

HB405 makes changes to the sex offender probation section of current law. The bill would give sex offenders the right to counsel at all probation hearings.

The bill retains the current law’s requirement that whenever the district court defers imposition of a sentence or suspends all or any portion of a sex offender sentence, the court must include a provision in the judgment and sentence that specifically requires the offender to serve an indeterminate period of supervised probation of not less than five years and not in excess of 20 years. The bill also retains the current law’s requirement that a sex offender’s period of supervised probation may be for a period of less than 20 years if, at a review hearing as provided, the state is unable to prove that the sex offender should remain on probation. The bill, however, indicates that the state’s burden of proof for continuing the probation is to be clear and convincing evidence.

The bill also requires the corrections department notify the relevant district attorney in the

district and the sex offender's attorney of record, prior to the end of the initial five years of supervised probation. The district attorney shall then petition the district court for a review hearing to consider the necessity of extending the supervised probation.

If the sex offender remains on supervised probation after five years, the district court must review the terms and conditions of the offender supervise probation at 2 1/2 year intervals thereafter. Prior to the end of each 2 1/2 year interval, the corrections department must notify the district attorney and the offender's counsel of record, and then the district attorney must petition the district court for a review hearing to consider the terms and conditions of the offender's supervised probation.

## **FISCAL IMPLICATIONS**

According to the Administrative Office of the Courts, "there are no significant fiscal implications for the district attorneys. Under HB405, the corrections department bears the burden of notifying the district attorney when a petition for continuing probation needs to be filed."

The bill gives sex offenders the right to counsel at all probation hearings. If the offender cannot afford his own attorney, an attorney would have to be appointed for the offender. This would likely increase the workloads of the Public Defender Department, or require that department to pay to have a criminal defense attorney represent the offender. The bill appropriates no money to cover these costs.

The bill also requires the relevant district attorney to prove by clear and convincing evidence that the sex offender should remain on probation after five years of supervised probation and at two and one half year intervals thereafter. If the state cannot meet this burden of proof, the offender will be released from probation with the NMCD at that time. NMCD reports that "the exact fiscal impact is unknown at this time. However, if the bill results in some number of sex offenders being removed from supervised probation who at a lower burden of proof would have remained on supervised probation, then it could result in a minimal to moderate expenditure decrease for the NMCD."

The cost per client in Probation and Parole for a standard supervision program is \$2,882 per year. The cost per client in Intensive Supervision programs is \$1,293 per year. The cost per client in Community Corrections is \$10,124 per year. The cost per client per year for female residential Community Corrections programs is \$23,972 and for males is \$23,497. Offenders placed on probation for the crimes covered by this bill seem likely to be immediately or eventually placed on standard supervision.

## **SIGNIFICANT ISSUES**

HB 405 requires the relevant district attorney and department of corrections to take certain actions prior to the end of each two and one-half year period, after the initial five-year period, but does not provide a remedy if that requirement has not been met. This procedural requirement may possibly lead to sex offenders being terminated from supervised probation prematurely. It also potentially raises the burden of proof on the State to prove at the review hearing because the "clear and convincing standard may be equivalent to/or a higher standard than the reasonable certainty standard." *State v. Sena*, No. 30,935, 2011 WL 5040943, at \*2 (N.M. Ct. App. Aug. 11, 2011).

### **ADMINISTRATIVE IMPLICATIONS**

The bill requires that NMCD keep track of when sex offenders have been on supervised probation for the first five years and then when they have served additional two and one half year periods on probation, so that it can notify the relevant district attorney and defense counsel and a review hearing can be scheduled. NMCD reports that it already generally tracks this information, and already provides it to the district attorneys so that probation review hearings can be timely held—this bill would make this tracking and notification a legal requirement. The NMCD has already absorbed this administrative burden at current staffing levels, although higher staffing levels would likely make this tracking and notification duty more manageable.

IT/sb