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FISCAL IMPACT REPORT

ORIGINAL DATE 2/13/2020

SPONSOR SRC LAST UPDATED HB

SHORT TITLE Crimes Against Children with Disabilities SB 283/SRCS

ANALYST Glenn

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	See Fiscal Analysis			See Fiscal Analysis	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB97, SJM12

SOURCES OF INFORMATION

LFC Files

Responses Received From

Law Offices of the Public Defender (PDD)
Office of the Attorney General (NMAG)

No Response Received

Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Department of Health (DOH)
Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

The Senate Rules Committee Substitute for Senate Bill 283 amends Section 30-6-1 of the Criminal Code, which pertains to abandonment or abuse of a child, to provide increased penalties for abandonment or abuse of a child with a disability. The bill:

- provides that abandonment of a child with a disability is punishable as a fourth degree felony or as a first degree felony if the abandonment results in the child's death or great bodily harm;

- provides that abuse of a child with a disability that does not result in the child’s death or great bodily harm is punishable as a second degree felony for a first offense or as a first degree felony for a second or subsequent offense;
- establishes a rebuttable presumption that a parent, guardian or other person charged with care of a child knows if the child has a disability; and
- adds a definition of “disability” for purposes of Section 30-6-1. The definition provides that a medical diagnosis is not necessary to establish the existence of a child’s disability.

This bill does not contain an effective date. It is assumed that the effective date is 90 days following adjournment of the Legislature.

FISCAL IMPLICATIONS

Because the bill creates new crimes, it may result in additional expenses for law enforcement agencies, district attorneys and the courts, depending on the extent of any enforcement, investigative and prosecutorial efforts stemming from violations of the new criminal prohibitions. If there is an increase in convictions, NMCD may incur additional expenses related to a corresponding increase in the number of inmates housed in state correctional facilities.

LOPD states that SB283’s broad definition of “disability,” which does not require a medical diagnosis, makes it likely that the issue of whether a particular child has a disability will be raised more frequently in child abandonment and abuse cases. This would increase LOPD’s need for investigators and experts. In addition, the higher penalties proposed by the bill would make plea agreements less likely, which would increase the number of cases going to trial. An increase in trials would require LOPD to hire or contract with additional attorneys with sufficient experience to handle the cases. Any increase in the demand or need for more experienced attorneys and other personnel would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

SIGNIFICANT ISSUES

NMAG explains that the bill seeks to address situations in which caretakers, parents, and guardians abuse vulnerable children with disabilities. As an example, NMAG reports that in 2018, two babysitters were charged with forcing a ten-year-old child with Down’s syndrome to smoke marijuana and hitting him in the face. Both were convicted of various crimes for their conduct. This bill would increase the criminal liability of such defendants to reflect the heightened culpability of their actions for abusing a child with a disability.

NMAG states that, because the existence of a disability increases the sentence for the crime under the bill, the existence of the disability – and the defendant’s awareness of it – generally would be facts that would have to be proved beyond a reasonable doubt. Cases in New Mexico have held that statutes that increase the sentence of a crime due to the victim’s status require proof beyond a reasonable doubt that the defendant knew the victim’s status. *See State v. Nozie*, 2009-NMSC-018 (knowledge of victim’s identity as a peace officer was an essential element of aggravated battery on a peace officer); *State v. Valino*, 2012-NMCA-105 (knowledge of victim’s identity as a health care worker was an essential element of battery on a health care worker). The

bill establishes a rebuttable presumption that a parent, guardian or other caretaker knows if the child has a disability. This presumption appears at odds with the standard of proof New Mexico courts generally apply in cases involving crimes that require knowledge of a victim's status.

LOPD notes that children with disabilities are already protected by the existing abandonment and abuse penalties under Section 30-6-1. The increased punishment under the bill for a person who abuses a disabled child is based entirely on the child's status, rather than on the egregiousness of the person's conduct. Crimes based on the victim's status raise equal protection and due process concerns because they can lead to disparate punishment for similarly-situated persons or increased punishment for arguably less severe or harmful conduct. For instance, LOPD states that in a case where a child abuse allegation stems from a child being nearby when spousal abuse occurs, a parent or guardian of a child with even a mild disability would face harsher punishment than a parent or guardian of a child without a disability, even if the latter case involved greater violence or riskier conduct by the defendant.

LOPD states that the bill's broad definition of "disability" may include disorders such as Attention-Deficit/Hyperactivity Disorder (ADHD) and dyslexia. LOPD explains that, at the very least, the broad definition of "disability" would likely result in increased litigation over whether a particular child had a disability and whether the defendant knew the child had a disability. A similarly broad definition in the Americans with Disabilities Act (ADA) has resulted in litigation and confusion about whether ADHD and other conditions fall within the ADA's definition. *See* <https://hrdailyadvisor.blr.com/2015/09/14/wait-adhd-is-a-disability> (discussing human resources concerns related to whether ADHD is a disability covered by the ADA).

Like NMAG, LOPD refers to the burden of proof on the existence of a disability and the defendant's awareness of it. The state is required to prove that a child has a "disability," as broadly defined in the bill. A formal medical diagnosis is not required to establish the existence of a disability. Because of the presumption created by the bill, the state does not have the initial burden of showing the defendant knew the child had a disability. Instead, that burden is put on the defense, who must prove that the defendant did not know the child had a disability, as well as counter the state's proof on the existence of the disability.

LOPD points out that the bill does not affirmatively require knowledge of the disability as an element of the crime; it merely implies that knowledge in the presumption created by the bill. Additionally, the bill does not specify that the disability must exist at the time the alleged abuse or abandonment occurred.

RELATIONSHIP

Relates to:

SB97 Crimes Against Children Time Limits
SJM12 Protect Children from Abuse and Neglect

TECHNICAL ISSUES

The language in the bill creating a presumption that a parent or other person charged with the care of a child knows that the "child suffers from a disability" might be changed to "child has a disability." (Section 1, pp. 4-5 (adding subsection (L) to Section 30-6-1)).

ALTERNATIVES

LOPD suggests that the bill:

- require expert testimony to establish that a child had a disability at the time the abuse was inflicted; and
- remove the presumption of knowledge for parents, guardians, and caretakers and require the state to establish that a defendant knew the child was disabled at the time of the alleged abuse or abandonment.

BG/sb/rl