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FISCAL IMPACT REPORT

ORIGINAL DATE 2/8/2022

SPONSOR HJC LAST UPDATED _____ HB 9/HJCS

SHORT TITLE Unlawful Access to Firearm by Minor SB _____

ANALYST Rabin

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to NMCD	\$0.0	At least \$23.4	At least \$33.1	At least \$56.6	Recurring	General Fund
Costs to Counties	At least \$4.8 to \$9.6	At least \$9.6 to \$19.2	At least \$9.6 to \$19.2	At least \$24.0 to \$48.1	Recurring	County General Funds
Total	At least \$4.8 to \$9.6	At least \$33.1 to \$42.7	At least \$42.8 to \$52.4	At least \$80.6 to \$104.7	Recurring	State and County General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Public Defender Department (PDD)
 Attorney General's Office (NMAG)
 Sentencing Commission (NMSC)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

The House Judiciary Committee substitute for House Bill 9 creates two new crimes, recklessly making a firearm accessible to a minor (a misdemeanor, punishable by up to a year in jail) and recklessly making a firearm accessible to a minor resulting in great bodily harm or death (a fourth-degree felony, carrying an 18-month prison sentence). Both crimes require the person charged with the crime to have kept or stored the firearm "in a manner that is in reckless disregard of a minor's ability to access the firearm." If, in such circumstance, a minor obtains access to a firearm and unlawfully brandishes, displays, or shows the firearm in a threatening manner or causes injury to another person not resulting in great bodily harm or death, the person who stored the firearm is guilty of the crime of recklessly making a firearm accessible to a minor. If the minor in question

instead uses the firearm in a manner that causes great bodily harm or death to another person, the person who stored the firearm is guilty of the crime of recklessly making a firearm accessible to a minor resulting in great bodily harm or death.

The bill further specifies that the new crimes do not apply in the following situations:

- A minor obtains the firearm as a result of illegal entry to the premises;
- The firearm is kept in a locked container and is securely stored or in a location that a reasonable person would believe to be secure;
- The firearm is carried on the person or within close proximity to the person (such that the person can readily retrieve it and use it as if carried on their person);
- The firearm is locked with a safety device that renders it inoperable;
- The person is a law enforcement officer or military service member and a minor obtains the firearm during (or incidental to) the performance of the person's duties; or
- A minor obtains or discharges the firearm in a lawful act of self-defense or defense of another.

The bill also specifies that evidence the person attended a firearm training course prior to the incident is admissible in any related court proceedings, and the bill does not preclude claims under other sections of law or civil actions.

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

Incarceration drives costs in the criminal justice system, so the primary fiscal implications examined in this analysis relate to changes in the number of individuals in jail or prison that might result from this bill. The creation of any new crime, increase of felony degree, or increase of sentencing penalties could increase the population of New Mexico's prisons and jails and long-term costs to state and county general funds. This bill could increase the number of individuals incarcerated in both state prisons and county jails.

The newly created crime of recklessly making a firearm accessible to a minor resulting in great bodily harm or death is a fourth-degree felony, which carries an 18-month prison sentence; the average length of time served by offenders released from prison in FY21 whose highest charge was for a fourth-degree felony was 516 days. The Corrections Department (NMCD) reports the average cost to incarcerate a single inmate in FY21 was \$49.6 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 \$23.4 thousand per inmate per year across all facilities. Each offender sentenced to prison under this bill could therefore result in estimated increased costs of \$33.1 thousand to NMCD. This analysis assumes at least one individual per year is admitted to jail for this offense. These additional costs will begin to be realized in FY24 (accounting for some time to adjudication) increasing the following year as an offender admitted in FY24 serves the remainder of their term and another offender is admitted.

The newly created crime of recklessly making a firearm accessible to a minor is a misdemeanor offense, which is punishable by up to a year in jail. For purposes of this analysis, it is estimated

that an individual could spend between six months and one year incarcerated for this offense. LFC estimates a marginal cost (the cost per each additional inmate) of \$19.2 thousand per county jail inmate per year, based on incarceration costs at the Metropolitan Detention Center. Each offender sentenced to jail under this bill could therefore result in estimated increased costs of \$9,614 to \$19.2 thousand per year to counties. This analysis assumes at least one individual per year is sentenced to jail for this offense. To account for time to adjudication, no costs are anticipated to be incurred until six months into FY23, so the cost for FY23 is prorated to account for this, while the costs in FY24 and future fiscal years are estimated at the full annual cost.

SIGNIFICANT ISSUES

The Public Defender Department (PDD) reports that “While penalties are not provable deterrents of criminal conduct, in the context of regulatory schemes like firearm regulations, otherwise responsible gun owners are more likely to comply with secure storage requirements to avoid criminal liability than other forms of criminal behaviors.”¹

PDD adds “It remains true that an adult who purposefully gave a child access to a gun to commit a crime might be prosecuted for more serious crimes, including accessory liability or conspiracy to a commit the crime. If the gun was used to kill someone, the adult might be guilty of involuntary manslaughter. HB9 provides an alternative charge when a gun owner’s culpability falls below that required for those offenses.”

The Administrative Office of the Courts (AOC) notes HB9 adds the *mens rea* of “reckless disregard” to the storage of firearms. Reckless disregard, or recklessness, has been defined by the Court Rules in Uniform Jury Instruction.

The Attorney General’s Office (NMAG) suggests this bill may be challenged on grounds that it violates the Second Amendment of the U.S. Constitution. NMAG believes HB9 is likely to survive such a challenge.

TECHNICAL ISSUES

NMAG suggests the term “securely stored” be defined within the bill or removed. According to NMAG, “If that phrase is removed, both ‘locked container’ and ‘or in a location’ would be modified by the standard “that a reasonable person would believe to be secure.”

NMAG notes the phrase “children and” in Subsection F(2) is unnecessary. If the language is retained, NMAG suggests replacing “children” with “minor” for consistency.

NMAG adds:

The language of Subsection A is unclear as to whether the authorization by a parent or guardian is always an element of unlawful access to a firearm by a minor. The drafters might consider replacing “when” with “is accessed by a minor” to clarify the apparent intent that unlawful access to a firearm is committed in two alternative ways – where a firearm is stored in a manner that (1) the firearm is accessed by a minor without

¹ See Jessica Colarossi & Kat J. McAlpine, *The FBI and CDC Datasets Agree: Who Has Guns—Not Which Guns—Linked to Murder Rates*, The Brink (Aug. 6, 2019), available at <https://www.bu.edu/articles/2019/state-gun-laws-that-reduce-gun-deaths/>

authorization by a parent or guardian, or (2) the firearm is accessed by a minor (regardless of authorization by a parent or guardian) and subsequently used in the commission of a crime. Alternatively, if the intent is that all unlawful access of a firearm by a minor requires proof of a lack of authorization by the parent or guardian of the minor and that the subsequent use in the commission of a crime is only a sentencing factor, the drafters could consider deleting “or when used in the commission of a crime” from Subsection A. Under that interpretation, it is unnecessary to include that language in Subsection A because it is not a determinative factor as to whether the defendant’s conduct is “unlawful.”

NMAG also states “The phrase ‘based on objective facts and circumstances’ in Subsection B appears to be surplusage in light of the use of ‘reasonable’ earlier in the same clause.”

AOC notes the definitions of minor elsewhere in the Criminal Code do not require a youth to be unemancipated to be considered a minor, while HB9 requires the youth to be unemancipated. It may be desirable to consider amending the definition in HB9 to align with existing statute.

AOC adds:

Subsection D of the committee substitute creates the requirement that “evidence of attendance” at a firearm safety training course prior to an allegation or proven violation of the statutes shall be admissible at any action, proceeding, trial, or sentencing commenced pursuant to the section. The substitute does not state what is included as evidence of attendance, whether it be documentation such as a certificate, or testimony by the accused or another. Also, attendance can mean anything from going to a firearm safety training course for a few minutes to completing a course which took months or years. Although the trier of fact weighs the evidence presented in front of them, the broad scope of the term “evidence of attendance” could allow for otherwise inadmissible hearsay or any array of testimony or documents to be presented to a jury with little instruction as to the role this evidence plays. Additionally, the automatic admissibility of all evidence of this category takes away the discretion of the judge to apply the Rules of Evidence.

OTHER SUBSTANTIVE ISSUES

The Sentencing Commission states:

According to data from the Centers for Disease Control and Prevention, New Mexico has one of the highest firearms death rates in the country (tied with Wyoming for 3rd in 2019 data, the latest available – CDC data can be seen here: https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm).

Research has found that there is a strong correlation between stronger gun laws and lower firearm mortality. A recent study by the National Academies of Sciences “found that state laws restricting firearm storage and use are associated with a subsequent 11% decrease in the firearms-related death rate.” (Schell, et al., “Changes in firearm mortality following the implementation of state laws regulating firearm access and use”, *Proceedings of the National Academies of Science of the United States* (2020), available here: <https://www.pnas.org/content/117/26/14906>).

AOC notes that child access prevention (CAP) laws can be found in 30 states (including Washington, D.C.). AOC also provides the following information:

Doctors at Boston Children’s Hospital feel that gun violence among children in the United States is a public health emergency. See <https://answers.childrenshospital.org/gun-violence-and-children-why-its-a-public-health-issue/> (accessed January 24, 2022).

In 2020, the Boston Children’s Hospital published their results of a 26-year-old study with the objective of evaluating the association between state CAP laws and pediatric firearm fatalities in the international, peer reviewed, pediatric medical journal, *JAMA Pediatrics*, in the article, “Child Access Prevention Firearm Laws and Firearm Fatalities Among Children Aged 0 to 14 Years,1991-2016.” The article splits CAP laws into two main categories, recklessness laws and negligence laws. Recklessness laws hold firearm owners liable for directly providing firearms to a minor, while negligence laws hold the firearm owner liable for the unsafe storage of firearms, with variability in how storage is defined and what penalties are imposed. The article came to the following conclusions:

In this study, there was an association between more-stringent state CAP laws and decreased pediatric firearm fatality rates in children aged 0 to 14 years. Specifically, there was a significant reduction in firearm-related homicides, suicides, and unintentional firearm-related deaths in states with negligence CAP laws, but not in states with recklessness CAP laws. The passage of stringent negligence CAP laws across all states may have the potential to reduce firearm fatalities in children by up to 29%. See <https://jamanetwork.com/journals/jamapediatrics/article-abstract/2761305> (accessed January 24, 2022). See also <https://answers.childrenshospital.org/child-access-prevention-laws-spare-gun-deaths-in-children/> (accessed January 24, 2022).

AOC adds:

Although guns used in school shootings are often from the shooter’s home, parents are rarely charged because laws aimed at restricting gun access are not always enforced and vary in strength according to the article, “EXPLAINER: How Unusual is it to Charge Parents in School Shootings?” See <https://www.pbs.org/newshour/nation/explainer-how-unusual-to-charge-parents-in-school-shooting> (accessed January 24, 2022).

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