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## FISCAL IMPACT REPORT

**LAST UPDATED** \_\_\_\_\_  
**ORIGINAL DATE** 1/29/23

**SPONSOR** Lord/Block

**BILL**

**SHORT TITLE** Chemical Castration of Some Sex Offenders **NUMBER** House Bill 128

**ANALYST** Daly

### REVENUE\* (dollars in thousands)

| Estimated Revenue |           |           | Recurring<br>or Nonrecurring | Fund<br>Affected |
|-------------------|-----------|-----------|------------------------------|------------------|
| FY23              | FY24      | FY25      |                              |                  |
| \$402.6           | \$1,610.3 | \$1,610.3 | Recurring                    | General Fund     |

Parentheses ( ) indicate revenue decreases.  
 \*Amounts reflect most recent version of this legislation.

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

|                          | FY24                         | FY25                        | FY26                        | 3 Year<br>Total Cost         | Recurring or<br>Nonrecurring | Fund<br>Affected       |
|--------------------------|------------------------------|-----------------------------|-----------------------------|------------------------------|------------------------------|------------------------|
| Costs to NMCD            | \$0.0                        | At least \$26.6             | At least \$37.6             | At least \$64.2              | Recurring                    | General Fund           |
| Costs to<br>County Jails | Indeterminate<br>but minimal | At least \$9.6 to<br>\$19.2 | At least \$9.6 to<br>\$19.2 | At least \$19.6<br>to \$38.4 | Recurring                    | County General<br>Fund |
| DOH                      | \$539.4                      | \$2,157.6                   | \$2,157.6                   | \$4,856.6                    | Recurring                    | General Fund           |

Parentheses ( ) indicate expenditure decreases.  
 \*Amounts reflect most recent version of this legislation.

### Sources of Information

LFC Files

#### Responses Received From

Department of Corrections (NMCD)  
 Department of Health (DOH)  
 Department of Public Safety (DPS)  
 Law Offices of the Public Defender (LOPD)  
 New Mexico Attorney General (NMAG)  
 New Mexico Sentencing Commission (NMSC)

## SUMMARY

### Synopsis of House Bill 128

House Bill 128 requires a person convicted of seven different offenses of criminal sexual penetration, criminal sexual contact, and criminal sexual contact of a minor undergo chemical

castration treatment as a condition of parole, in addition to any other punishment prescribed for that offense or any other provision of law. The person is required to start the procedure a month before release and continue treatment until the court decides it is no longer necessary. The person must pay for the procedure himself or herself, though release shall not be denied based on an inability to pay. HB128 includes provisions to determine indigency. HB128 also requires a person released under this section to authorize DOH to share with the parole board all medical records relating to this treatment.

A person may elect to stop receiving the treatment at any time and may not be forced to receive the treatment, however that refusal shall constitute a parole violation and the person shall be immediately remanded to the custody of NMCD for the remainder of the sentence from which the person was paroled. A court must inform the person about the effect of the treatment and any side effects that may result from it. The person must then acknowledge receipt of the information in writing. Only an employee of DOH may administer the treatment. A person who intentionally stops receiving the treatment required under this section is also guilty of a fourth degree felony.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

## **FISCAL IMPLICATIONS**

Incarceration drives costs in the criminal justice system, so any changes in the number of individuals in prison and jail and the length of time served in prison and jail that might result from this bill could have moderate fiscal impacts. The creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico's prisons and jails, consequently increasing long-term costs to state and county general funds. NMCD reports the average cost to incarcerate a single inmate in FY22 was \$54.9 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 \$26.6 thousand per year across all facilities. 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. The fourth-degree felony contained in Subsection H could increase the number of incarcerated individuals and increase the time they spend incarcerated.

The proposed new fourth-degree felony criminal penalty carries an 18-month prison sentence; NMSC estimates 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. Based on the marginal cost of each additional inmate in New Mexico's prison system, each offender sentenced to prison for this crime could result in estimated increased costs of \$37.6 thousand to NMCD.

It is difficult to estimate how many individuals will be charged, convicted, or get time in prison or jail based on the creation of a new crime. Without additional information, this analysis assumes at least one person will be admitted to prison each year for this crime, at a cost of \$37.6 thousand, although it seems possible this penalty could be levied so rarely that the impact could be lower. Because the estimated time served is greater than one year, the costs of one year (\$26.6 thousand) would be incurred in the first year of incarceration, while the cost of the remaining 151 days (\$11 thousand) would be incurred in the second year of incarceration. To account for time to adjudication, no costs are anticipated to be incurred until one year after the bill takes effect, in FY25. Because the estimated time served is greater than one year, costs are anticipated

to increase in FY26, as an offender admitted in FY25 serves the remainder of their term and another offender is admitted but will level out that same year (as offenders begin to be released from prison) and remain level in future fiscal years.

Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials or to law enforcement to investigate and arrest individuals for the new crimes under HB128, are not included in this analysis, but may exist.

Additionally, DOH reports that, due to the requirement in Subsection C that the parolee pay for all costs of treatment, assuming 221 participants per year and that 75 percent are able to at least cover costs through insurance, Medicaid, or self-pay, total revenue per year would be for medication (approximately \$1.5 million), testing (\$91,163) plus visit (\$19,098), or \$1,610,261 a year. However, for FY23, assuming approximately three months of revenue (assuming eligible individuals enrolled immediately), DOH operating costs would be approximately 25 percent of that amount, or \$402,565.

Further, based on the provision requiring DOH must administer the treatment, and again assuming 221 participants a year, DOH estimates total operating costs of medication (\$2,000,000), testing (\$121,550) and PS&EB (\$7,912+\$16,236+\$11,926 = \$36,074/year) to be \$2,157,624 a year. For FY23, assuming approximately three months of operating costs (assuming eligible individuals enrolled immediately), operating costs would be approximately 25 percent of that yearly amount, or \$539,406. DOH also notes there may be additional operating costs related to increased liability insurance for DOH providers.

## SIGNIFICANT ISSUES

Based on analyses of numerous agencies with expertise in the matters addressed in HB128, a number of significant issues arise.

NMAG advises HB128 will be subject to scrutiny under the Eighth amendment of the U.S. Constitution, which prohibits cruel and unusual punishment. (Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, U.S. Const. amend. VIII). The New Mexico Constitution includes the same restriction. See N.M. Const. art. II, § 13. It goes on to state:

The New Mexico Supreme Court has held that the state constitution’s prohibition against cruel and unusual punishment affords greater protection than its federal counterpart. (“Article II, Section 13, prohibiting cruel and unusual punishment, have been interpreted as providing greater protection than their federal counterparts. *See State v. Vallejos*, 1997–NMSC–040, ¶¶ 35–38, *State v. Rueda*, 1999–NMCA–033, ¶¶ 9–14,” cited by *Montoya v. Ulibarri*, 2007–NMSC–035, ¶ 22.). While chemical castration has withstood challenges in other states, it is unclear how courts in New Mexico would decide if the law was litigated.

Similarly, LOPD warns HB128 might violate these constitutional prohibitions, citing John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. St. Thomas L.J. 559 (2006); and *Weems v. United States*, 217 U.S. 349, 404 (1910) (quoting a Georgia case holding that the cruel and unusual punishment

clause “was, doubtless, intended to prohibit the barbarities of quartering, hanging in chains, castration, etc.”). It notes that the existence of chemical castration laws in other states does not mean that HB128 would pass constitutional muster in New Mexico. Further, DOH expresses concern it would likely be subject to suit for monetary damages for alleged violations of constitution rights, under the New Mexico Civil Rights Act and/or under 42 U.S.C. § 1983.

LOPD calls particular attention to the scope of HB128, which it comments

[HB128] is substantially broader in application than existing chemical castration laws in other states. It would impose chemical castration as a mandatory condition of parole for all convictions for criminal sexual penetration and criminal sexual contact, with no limitation to violent crimes or crimes against minors. By contrast, the laws in other states are more selective. For example, based on a brief review of other states’ statutes:

- Alabama Code § 15-22-27.4 limits chemical castration to sex offenses against a person under the age of 13;
- California Penal Code § 645(a) allows, but does not require, chemical castration for some violent sex crimes where the victim is under the age of 13. It becomes mandatory upon a second conviction;
- Florida § 794.0235(1)(a) allows, but does not require, courts to impose chemical castration as a condition of parole when a defendant has been convicted of “sexual battery,” which appears to require penetration, not just sexual contact. FSA § 794.011(1) (j). Chemical castration becomes mandatory on a section offense, § 794.0235(1) (b). However, a court-appointed medical expert must determine that the defendant is an appropriate candidate for treatment. § 794.0235(2)(a);
- Louisiana Revised Statutes § 538(C) limits chemical castration to second offenses or crimes against children under the age of 13, and chemical castration is discussed as part of a broader “treatment plan”; it is not mandatory; and
- Montana Code § 45-5-512 appears to have only discretionary chemical castration, not mandatory provisions.

NMSC also raises similar concerns about the breadth of the bill’s coverage. It notes the various crimes encompassed by Sections 30-9-11 through 30-9-13 NMSA 1978 run the gamut of crimes: from a misdemeanor to the first degree felony of aggravated criminal sexual penetration (life imprisonment). Because HB128 makes no distinction between these vastly differing crimes, NMSC believes it would likely violate the cruel and unusual punishment provisions of the US and New Mexico Constitutions.

Additionally, LOPD points out that all other states’ laws requiring this form of treatment define or at least give examples of the drugs that could be administered to sex offenders. It believes that the differences between those laws and HB128 suggest that HB128 might be unconstitutional even though these narrower chemical castration laws are in effect in other states.

As to the individual provisions of HB128, LOPD asserts the bill is ambiguous or confusing in several instances:

- 1) HB128 imposes chemical castration “as a condition of parole” for any person convicted of an offense in Sections 30-9-11 through 30-9-13. But not every person convicted under these statutes will be subject to parole, and it is not clear whether or how

HB128 would apply to people who were convicted of the specified crimes but not placed on parole.

There are two forms of parole that defendants might have to serve. In either case, a person is paroled only after serving a prison sentence. The person might have fully completed his sentence, or he might have received a partially suspended sentence (in which case the person is simultaneously on probation and parole). The two forms of parole are:

- Sex offender parole, defined in Section 31-21-10.1, which would apply to people who served a prison sentence for any of several sex offenses: aggravated criminal sexual penetration, first- through third-degree criminal sexual penetration (§ 30-9-11(C)-(F)), or second- through fourth-degree criminal sexual contact of a minor (§ 30-9-13(B)-(D)). People may be on sex offender parole for an indeterminate term of 5-20 years or 5 years to life. Section 31-21-10.1(A).
- Ordinary parole for a felony *not* subject to sex offender parole, such as fourth-degree criminal sexual penetration (§ 30-9-11(G)) or fourth-degree criminal sexual contact of an adult (§ 30-9-12(C)). In either of those cases, the person's prison sentence would be followed by a one-year period of parole. Section 31-21-10(D).

However, if a person is given a fully suspended sentence and is not sent to prison, the person is not placed on parole, although they would be placed on comparable probation. A person would also not be subject to parole for a conviction for misdemeanor criminal sexual contact of an adult under Section 30-9-12(D). Since HB128 requires chemical castration only “as a condition of parole,” it appears not to apply to people who are convicted of the listed sex offenses but never placed on parole.

2) Subsection B says that chemical castration will begin at least a month before a parolee is released from prison and shall continue “until the court determines that the treatment is no longer necessary.” It is not clear which court would make this determination or how this review would be triggered. The district court that imposes the initial sentence is not involved in the parole process; decisions about conditions of parole, parole violations, etc. are made by the parole board rather than a court. HB128 also gives no guidance about how a court would determine that treatment was not necessary, which factors the court would consider, or what burden of proof would apply.

Subsection B also does not address what would happen if a person were released from parole without ever obtaining this finding from a court. Presumably, since chemical castration is a condition of parole, the person could stop taking chemical castration drugs once he was released from parole, but HB128 does not actually say this.

3) Subsection E says that if a person chooses not to be chemically castrated, it will be treated as a parole violation, and the person will be remanded to prison “for the remainder of the sentence from which the person was paroled.” It is not clear what this means. Many parolees will have fully finished serving their underlying sentences before they begin parole. If the bill means that they will be remanded for the remainder of their *parole terms*, this is likely to be an extraordinarily long sentence—if the person is serving sex offender parole, the minimum term is five years, and the maximum term is either 20 years or the rest of the person's life. *See* § 31-21-10.1(A).

If the bill means that the person would be remanded for the remainder of the underlying sentence, this is also a confusing outcome. Imposing the remainder of a suspended sentence usually requires finding a violation of *probation* rather than parole. Probation and parole often impose similar conditions (although this bill would add a big condition to parole), and a parolee often has one combined probation/parole officer, but the processes for finding a violation are different in the two systems. A defendant charged with a probation violation is entitled to a hearing in court, with a lawyer to represent him, and the judge determines whether a violation has been committed and what the penalty should be. A parole violation is judged by the parole board, and the defendant is not entitled to a lawyer. Revoking a person's suspended sentence through a *parole* process rather than a *probation* process could lead to due process challenges in court.

Similarly, NMAG notes that the crimes to which this bill applies do not have mandatory incarceration terms, so there would not necessarily be a parole term. Thus, the legislative intent is unclear as to impact of HB128, if at all, to situations where there is no term of incarceration. Again, NMAG points to conflicts arising from the indeterminate nature of a sex offender's parole term: an initial five year parole is served, followed by a review hearing by the parole board, and review hearings may continue at 2 ½ year increments. That process, NMAG points out, conflicts with Subsection B, which directs that a court determine when treatment is no longer necessary. Additionally, sex offenders may have concurrent supervision with probation and parole, which operate independently. An offender may be released from probation supervision but required to stay on parole supervision, and vice versa. If chemical castration is a condition of parole, it would be monitored and enforced by the parole board; if it is a condition of probation, it is enforced by the court.

NMCD calls attention to another confusing provision of the bill. Subsection D directs a court determine indigency, but advises that in New Mexico, it is the parole board and not the courts that is the entity that may consider whether a parolee is indigent.

## ADMINISTRATIVE IMPLICATIONS

NMCD notes that DOH is to administer the treatment, but the bill gives no direction as to coordination between NMCD's prisons and probation and parole divisions in order to provide access and monitoring.

## OTHER SUBSTANTIVE ISSUES

NMSC adds this analysis to the discussion concerning other states' chemical castration laws:

Only a few states have some sort of chemical castration law on the books. Only three – California, Florida, and most recently (2019) Alabama – make it mandatory. In California, the law is used for repeat sex offenders whose victims were under 13. Florida makes it mandatory for repeat offenders. Alabama makes it mandatory when the victim is under 13. HB128 appears to be based on Alabama's law, but is far more wide-ranging. A summary of state laws can be found in the FindLaw article "Chemical and Surgical Castration for Sex Offenders", available at: <https://www.findlaw.com/criminal/criminal-charges/chemical-and-surgical-castration.html>. By all accounts, the chemical castration

laws in the states where it is possible have been rarely used. Critics of the existing laws note their possible violation of the cruel and unusual punishment, rights to privacy, and medical ethics.

LOPD also points out that the term “chemical castration” is never defined, and it is not clear which drugs a parolee might be required to take under this statute. It suggests the medical risks to parolees are impossible to evaluate without this information—which might further support the constitutional challenge discussed above. In addition, it comments on the practical concerns of chemical castration, be it voluntary or mandatory:

Most chemical castration methods would effectively reduce the sex drive and the seminal fluid in a male. This does not, however, guarantee the elimination of sexual violence or aggressive behavior. Critically, the consensus appears to be that as punishment levied involuntarily against sex offenders, chemical castration alone may not be effective and comes with a host of medical-ethical concerns. When chemical castration is employed as a “treatment” for sexually aggressive behavior, any success comes when it is part of voluntary plan that includes assessment and supportive psychotherapy. But mandatory chemical castration is not a cure-all to prevent sexual crimes. *See* Lee JY, Cho KS. Chemical castration for sexual offenders: physicians' views. *J Korean Med Sci.* 2013 Feb; 28(2):171-2; Warda Imran, *How effective a punishment is 'chemical castration'?* (March 15, 2021), available at <https://www.dw.com/en/combating-sexual-violence-is-chemical-castration-a-valid-method/a-56839505>.

DOH calls attention to significant ethical concerns raised by this bill. It notes that some critics contend that chemical castration laws are improperly coercive to inmates, who might be forced to choose between staying in prison and taking the drug. Concerns about side effects and whether prisoners receive enough information to make appropriate, informed decisions also exist. What

Finally, DOH notes it is unclear if women who have been convicted of these offenses would be expected to participate in the program. It also suggests that participation for transgender persons may need to be addressed.

MD/ne/al