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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/12/14

SPONSOR Clahchischilliage LAST UPDATED \_\_\_\_\_ HB 266

SHORT TITLE Expand Criminal Sexual Contact and Exposure SB \_\_\_\_\_

ANALYST Chenier

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

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	See Fiscal Impact				Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Public Defender Department (PDD)  
 Administrative Office of the Courts (AOC)  
 Administrative Office of the District Attorneys (AODA)  
 Attorney General’s Office (AGO)  
 New Mexico Corrections Department (NMCD)

### SUMMARY

#### Synopsis of Bill

House Bill 266 would amend the Criminal Code to increase the penalties for crimes committed against children. The bill would:

- Expands the definition of second degree criminal sexual penetration to include penetration perpetrated on a child “thirteen to eighteen years of age when the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit”
- Removes the requirement that criminal sexual contact of a child thirteen to eighteen years of age when force or coercion is used must result in personal injury to the child;
- Reduces the age limitation on criminal sexual contact of a minor in the fourth degree from eighteen to sixteen and removes the requirement that the perpetrator must be associated with a school and that force or coercion must be used. It requires the perpetrator to be at least 18 years of age, four years older than the child, and not the spouse of the child;
- Requires the perpetrator of aggravated indecent exposure to be at least eighteen years of age, four years older than the child, and not the spouse of the child;
- Increases the penalty of aggravated indecent exposure for a child under 18 to a third degree felony.

## FISCAL IMPLICATIONS

Additional time and resources will be needed from prosecutors, the defense, and the courts, given the increase in penalties for the offenses, and the likelihood that offenders would fight more strenuously. Removing the personal injury requirement will save the need for medical testimony about bruising and the like, especially considering that children heal quickly and often don't report incidents promptly enough to document injuries, for reasons unrelated to the truthfulness of their experience, yet doctors still must be called to testify to the negative.

While this bill increases the criminal penalty for aggravated indecent exposure, it also limits or reduces the scope of that crime. It is therefore difficult to assess if the bill would result in an increase in NMCD's inmate population or probation and parole caseloads. However, the bill seems unlikely to impact a large number of offenders, and any increases in NMCD's inmate population or probation and parole caseloads is likely to occur more than three years from now.

## SIGNIFICANT ISSUES

PDD provided the following analysis:

The expansion of liability under Section 30-9-11(D) NMSA 1978 may create unintended consequences. The bill eliminates the requirement that the defendant be a school employee. This requirement defined a narrow purpose for this crime, which would be expanded to apply based on the age of the minor and the age-difference between the minor and the accused. The bill thus would narrow the applicable age limit of the minor from 18 to 16; and require the accused be at least four years older and not be the spouse of the minor. It also would eliminate the requirement that the touching be a result of force or coercion.

The resulting, expanded criminal offense would appear to mean, for example, that if a fifteen year old girl were with a nineteen year old boy and the boy touched the girl's fully clothed body on the breast area or buttocks, even with her consent or encouragement, the boy would be guilty of a 4<sup>th</sup> degree felony.

Accusations of "sexual crimes," much less prosecution, could have severe consequences on the life of the young person charged. Given the definitions, the new crime could apply to defendants as young as 17 (four years older than a 13-year-old), 18, 19, or 20 (four years older than a sixteen year old). It may be considered how many children of this age, even if those 18 and older are subject to prosecution as adults, have fully developed the capacity to foresee the consequences of behavior in these situations.

Impulsivity would not excuse the use of force or coercion under the current statute. However, the proposed changes would permit a felony prosecution even where the alleged conduct was not unwanted or unwelcomed and resulted in no physical or emotional harm to the other young person involved. Given the nature of the crime, any conviction also would have life-long consequences regardless of the sentence imposed – giving rise, now and in the future, to the requirement that the person register as a sex offender.

Another change, which adds the requirement that the exposure was in a "lewd and lascivious manner" -- is not defined and does not appear to be defined in New Mexico appellate cases. Additionally, while such standard may reflect a person's underlying

intent in some cases, it actually refers to the “way” the person acted rather than the person’s intent. In judging whether the conduct appeared “lewd and lascivious,” however, reasonable people differ.

For example, to some people, any intentional act of exposure might be deemed, at least presumptively, “lewd and lascivious” behavior based on a taboo against nakedness. For such individuals, someone who is a nudist may appear to be acting in a “lewd and lascivious” manner simply by being naked in a public setting, irrespective of whether the nudist has any sexual intent or is exposing themselves in a public place. In some cases, particularly when exposure does not take place in public, it should be noted, there are likely claims of privacy or freedom of expression that could be implicated by the suggested changes, irrespective of how a court might rule in an individual case.

The classification of the proposed new crime as a third degree felony may be examined by comparing this to the 4th degree punishment for other kinds of aggravated indecent exposure, including when committed during an assault, and aggravated assault, an aggravated assault with intent to commit a violent felony, a battery, an aggravated battery, criminal sexual penetration, or child abuse. While each of these circumstances also describes a separate criminal offense, the circumstances of these other offenses are also those arguably posing a greater risk of harm to the victim and a greater degree of sexual violence. The current statute already has provisions dealing with aggravated indecent exposure committed against a minor, which is classified as a 4th degree felony.

The AGO stated that the Bill amends Section 30-9-13 NMSA 1978, Criminal Sexual Contact of a minor in the second degree to include force or coercion, but excluding the previous caveat that it be force or coercion resulting in personal injury. The language is mirrored under Section 30-9-13(C)(2)(b) NMSA 1978 under Criminal Sexual Contact of a minor in the third degree. With these changes, the catch-all Criminal Sexual Contact of a minor in the fourth degree is amended to cover all criminal sexual contact of a minor for children thirteen to sixteen years of age (rather than thirteen to eighteen), when the perpetrator is eighteen years of age or older and at least four years older than the child and not the spouse of the child.

The AODA stated that “minors age 16 to 18 who are the victims of criminal sexual contact by school associates will no longer have the protection of strict liability, but will have to demonstrate use of position of authority, force or coercion, assistance by others, or use of a deadly weapon. This strict liability clause was implemented in response to many situations where the rest of the statute failed to protect, and since its implementation has frequently been invoked, the removal of this protection seems a step backwards.”