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FISCAL IMPACT REPORT

SPONSOR Maestas ORIGINAL DATE 2/7/15
LAST UPDATED _____ HB 361
SHORT TITLE Child Abandonment and Reckless Abuse SB _____
ANALYST A. Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 104, SB 182, HB 213, HB 499

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Public Defender Department (PDD)
Administrative Office of the District Attorneys (AODA)
Children, Youth and Families Department (CYFD)
New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

House Bill 361 amends the Abandonment or Abuse of a Child section of the Criminal Code, 30-6-1 NMSA 1978 by 1) replacing “negligent” abuse of a child with “reckless” abuse of a child; 2) clarifying the elements of abandonment and allowing for its inclusion as a lesser offense of reckless abuse (RA) and intentional abuse (IA) of a child; 3) separating out IA of a child from RA of a child; 4) adjusting the penalties associated with each offense; and 5) requiring counseling and parenting education for defendants upon a conviction.

Section 1: Designates Section 30-6-1 as the Definitions section, by deleting the current subsections 30-6-1 (B) through (K) and expanding upon the definitions currently in subsection A. Amended subsection B to define the legal elements related to “intentionally.” Amends subsection D by replacing the term “negligently” with “recklessly.” Subsection D removes the “should have known” phrase, and adds further language to define reckless; “disregard a substantial, foreseeable risk, . . .”

Section 2: Adds section 30-6-1.1 concerning the crime abandonment of a child. Subsection A of 30-6-1.1 clarifies the elements of the offense of abandonment, by adding the phrases “knowingly,” “without an intent to return,” and “is at foreseeable risk.” Subsection C provides that the offense of abandonment of a child can be a lesser included offense of RA of a child and IA of a child “by endangerment.”

Section 3: Adds section 30-6-1.2 creating a separate section for the crime of RA of a child. Subsection A outlines the elements of the crime, by substituting negligently with recklessly, and adding “thereby creating or disregarding a substantial and foreseeable risk of significant harm to the child.” Subsections B through E outline the penalties for RA of a child.

Section 4: Adds section 30-6-1.3 creating a separate action for the crime of IA of a child. The section retains the current elements from 30-6-1 (D), but removes negligently. Subsections B through F outline the penalties for IA of a child.

FISCAL IMPLICATIONS

NMCD indicates that estimates that the bill will result in a minimal to moderate increase in the number of offenders sentenced to NMCD custody or placed on probation or parole, and thus a minimal to moderate increase to its prison population and probation/parole caseloads. It costs the NMCD an average of \$42 thousand annually to incarcerate an individual remanded to its custody.

PDD and AOC anticipate minimal fiscal impact from the changes proposed in HB361.

SIGNIFICANT ISSUES

CYFD reports that under Baby Brianna’s law, the abandonment or abuse of a child statute under NMSA 1978 section 30-6-1(H) penalizes intentional abuse of a child in which a child under the age of 12 dies as a first degree felony resulting in the death of a child. The enhancement of “resulting in the death of a child” provides a penalty that allows for the perpetrator to be sentenced to life in prison. This bill *removes* Baby Brianna’s law by making the penalty of intentional abuse of a child under the age of 13 that results in that child’s death a first degree felony without the enhancement of resulting in the death of a child. This would only allow for a person who intentionally abuses a child when the abuse results in the death of a child to be sentenced to a maximum of 18 years in prison.

The penalties for abuses of children in this bill are no greater than that of the protections of adults under the current Criminal Code.

In this bill, under Intentional Abuse of a Child, when a child who is age 13 or over who is tortured, cruelly confined, or cruelly punished and suffers great bodily harm, the perpetrator would only be guilty of a third degree felony. Currently in law, aggravated battery of an adult that results in great bodily harm, NMSA 1978 Section 30-3-5 and assault with the intent to commit a violent felony against an adult under NMSA 1978 section 30-3-3 are both third degree felonies. If a person commits intentional abuse of a child of any age including of a 6 month old baby by intending to endanger that child by leaving the child in a situation that endangers the life or health of the child, or tortures, cruelly confines or cruelly punishes that child, and that act does not result in great bodily harm or death of a child, that person is guilty of a fourth degree felony.

Aggravated assault of an adult in which the adult is not even touched under NMSA 1978 section 30-3-2 is also a fourth degree felony.

Under Intentional abuse of a child, when a person knowingly and intentionally places a child in a situation that endangers the child's life or health, the person must actually intend to endanger the child. Determining intent is a very subjective analysis and would make it difficult to successfully prosecute an individual under this section of the bill.

Additionally, this bill removes negligent abuse of a child in its entirety and replaces it with the crime of reckless abuse of a child. However, reckless abuse of a child only applies to a situation in which a person is disregarding a *substantial* and foreseeable risk of *significant* harm. Under this bill it is not a crime for a person to place a child in a situation where there is a foreseeable risk of harm to the child, when the person does not leave or abandon the child, even if harm does in fact come to the child.

PDD opines that the restructuring of penalties allows for greater variation in what is truly a large sliding scale of conduct, rather than placing all child abuse crimes in the upper tier of New Mexico's sentencing scheme. The amendments properly recognize that many of the factual scenarios that fall within the scope of criminal child abuse do not result in harm and do not fall within the type of purposeful or cruel abuse that are now reserved only for the highest penalties in this bill. This restructuring of penalties is more rationally tied to culpability and harm, and would less often result in draconian punishments for lesser conduct. To the extent that the penalty alternations are, *generally speaking*, reducing penalties, it is worth noting that these modifications do not prevent the State from seeking strict penalties where appropriate. First, the criminal code contains other serious penalties for behavior that often overlaps with child abuse (assault, battery, homicide, sex crimes, etc.) and can in some cases be charged along with child abuse. Moreover, for intentional abuse, the bill newly provides for sentence enhancements when someone falls into a "repeat offender" pattern. Moreover, the civil system of custodial intervention (through CYFD) effectively protects children from lesser, non-criminal "bad parenting." Finally, felony sentences are currently (already) subject to being increased by up to one-third the basic sentence due to aggravating circumstances, which can address those outlier situations where a defendant exhibits greater moral culpability, but a lesser harm results.

PERFORMANCE IMPLICATIONS

This bill may have an impact on the measures of the district courts in the following areas: cases disposed of as a percentage of cases filed; and percentage change in case filings by type.

CYFD has performance measures related to the health and safety of children. Removing the portion of statute which makes leaving a child in an enclosed space with chemicals intended for or used in the manufacture of illegal pharmaceuticals *prima facie* evidence of child abuse may affect those measures. As New Mexico has several counties classified by the United States Drug Enforcement Agency as High-Intensity Drug Trafficking Areas, it is possible that there may be more children exposed to these chemicals than there are who are intentionally or recklessly exposed to inclement weather.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 182 carries penalties for intentional child abuse in line with or increasing that of existing

law, reflecting the concerns the community and legislature have had for these crimes. In HB 182, intentional child abuse with no death or great bodily harm caused is a second degree felony for a first offense (nine years' imprisonment), and a first degree felony (eighteen years' imprisonment) for a second or subsequent offense. In contrast, in HB 361, the penalty is dropped to a fourth degree felony, with proviso for additional two-year increments upon future convictions in a ten-year window. In HB 182, intentional child abuse with great bodily harm is a first degree felony regardless of the age of the child, whereas in HB 361 it is a second degree felony if the child is under age 13, and a third degree felony if the child is 13 to 18 years of age. Existing law has intentional abuse of a child resulting in death as a first degree felony (eighteen years) if the child is age 12 to 18, and a first degree felony resulting in the death of a child (life imprisonment) if the child was under 12 years of age. In HB 182, intentional abuse resulting in death of the child is a first degree felony resulting in death of a child (life imprisonment), regardless of age. But, in HB 361, death of a child under age 13 is only a first degree felony (eighteen years), while of a child age 13 to 18 years of age is only a second degree felony resulting in the death of a human being (fifteen years).

Relates to HB 104, HB 213 and SB 499.

TECHNICAL ISSUES

According to PDD, on page 7, line 6, the phrase “for a first offense” appears to have been left in due to oversight, as the penalty differential based on repeat offenses was removed.

CYFD points out that page 8 lines 19-23 – states that evidence that demonstrates that a child has been recklessly or intentionally exposed to the inclemency of the weather that presents a substantial and foreseeable risk of harm to the child’s life or health shall be deemed prima facie evidence of abuse of the child. However, this section does not define what type of child abuse this act would be prima facie evidence of as abuse of a child has been replaced with reckless abuse and intentional abuse. Moreover, page 9 line 2 also does not define the type of child abuse that action would be prima facie evidence of.

OTHER SUBSTANTIVE ISSUES

The PDD provides the following Supreme Court opinions which offer insight into past cases

- (1) that endangerment requires a “substantial foreseeable risk” of a harm and is “reserved for the most serious occurrences, and not for minor or theoretical dangers, *State v. Chavez*, 2009-NMSC-035, ¶¶ 16, 26, 146 N.M. 434;
- (2) that intentional child abuse cannot include a failure to act that is inherent to “permitting” abuse, *State v. Cabezuela*, 2011-NMSC-041, ¶¶ 36-37, 150 N.M. 654;
- (3) that to fall within criminal law, negligent child abuse by endangerment must in fact be reckless child abuse, requiring actual knowledge of the risks, not just a civil negligence standard of “should have known,” *State v. Consaul*, 2014-NMSC-030, 332 P.3d 850;
- (4) that negligent and intentional child abuse are in fact two separate and mutually

exclusive crimes, not two tiers of the same crime, *see State v. Schoonmaker*, 2008-NMSC-010, ¶ 46 n.4, 143 N.M. 373;

- (5) that abandonment may be a lesser-included offense of abuse, *see State v. Garcia*, 2014-NMCA-006, ¶¶ 45-50 (Vigil, J., dissenting), *cert. quashed*; and
- (6) that abandonment requires an intent not to return, *State v. Stephenson*, Slip op., N.M. Ct. App. No. 31,273, ¶ 22, 2014 WL 6454821 (Nov. 18, 2014).

According to the AOC, this bill attempts to codify change to case law in *State v. Consaul*. The bill however, does not entirely reflect the most recent case law and direction given by the New Mexico Supreme Court, but does address the core holding that is critical of the concept of negligent child abuse.

AODA reports that HB 361 would reduce penalties while adding more elements to what needs to be proven and eliminating sources of prima facie evidence of abuse of a child. This makes prosecution and accountability in these cases more difficult.

POSSIBLE QUESTIONS

Does “thirteen to eighteen” include children 18 years, 11 months, 30 days, 11 hours and 59 seconds, or one second before the person’s 19th birthday?

Does the law apply to 17 or 18 year olds who are emancipated?

How will children intentionally exposed to drugs other than methamphetamines be treated since the bill includes only methamphetamine?

ABS/bb/aml