F I S C A L I M P A C T R E P O R T

SPONSOR Gallegos, DY **ORIGINAL DATE** 03/09/15 **LAST UPDATED** 03/11/15 **HB** 506/aHSCAC

SHORT TITLE Battery of CYFD Workers **SB**

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

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

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From

Children, Youth & Families Department (CYFD)
Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Attorney General's Office (AGO)
Public Defender Department (PDD)

SUMMARY

Synopsis of HSCAC Amendment

The House Safety and Civil Affairs Committee amendment to House Bill 506 makes the felony of aggravated assault on a public service worker a third degree felony (originally it was classified as a fourth degree felony). It also strikes the new crime of assisting in a battery on a public service worker.

Synopsis of Original Bill

House Bill 506 enacts a new criminal statute creating the crimes of assault, aggravated assault, battery, aggravated battery, and assisting or being assisted by another in committing a battery, when the victim is an employee of CYFD (referred to as a "public service worker") and is performing the employee's job duties.

- "Assault" consists of an attempt to commit a battery or any unlawful act, threat or menacing conduct that causes the worker to reasonably believe that he or she is in danger of receiving an immediate battery. This offense is a misdemeanor.

- "Aggravated assault" consists of unlawfully assaulting or striking at a worker with a deadly weapon, or willfully and intentionally assaulting a worker with intent to commit any felony. This offense is a fourth degree felony.

- "Battery" is the unlawful, intentional touching or application of force when done in a rude, insolent or angry manner. This is a fourth degree felony.

- "Aggravated battery" consists of the unlawful touching or application of force with intent to injury. When this offense inflicts great bodily harm or is done with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted, it is a third degree felony.

- Assisting or being assisted by another person in committing a battery on a worker is a fourth degree felony.

The effective date of this bill is July 1, 2015.

FISCAL IMPLICATIONS

AODA advises that HB 506 will increase costs to the district attorneys by making prosecution of assault and battery more complex. If a victim is a CYFD employee, the district attorneys will need to determine if the case comes under the general assault and battery statutes or under the more specific crimes established in HB 506. If the case is brought under HB 506, the district attorneys will have additional proof elements. New jury instructions will need to be developed for these new crimes. Additionally, the increased sentences imposed upon conviction of these crimes could lead to fiscal impacts on the PDD, the courts and NMCD.

SIGNIFICANT ISSUES

As CYFD comments its Protective Services Division benefits from this law to the extent there are enhanced penalties for assaulting its employees, since currently those employees are covered under the general statutes governing assault and battery. Similarly, Juvenile Probation Officers and Juvenile Justice Behavioral Health Therapists who work in the Juvenile Justice Division are not included in the definition of "peace officer" under existing statutes that provide special protection to peace officers, and also benefit under this legislation. Similarly, AOC notes a CYFD worker's core functions often necessarily include intervention into highly emotional, antagonistic, and often violent circumstances which may occur without the presence of law enforcement; increased, specific penalties applicable to violence against CYFD workers may be warranted to the extent they act as a deterrent.

However, AODA advises that while these new crimes generally track the language used in the general assault and battery statutes, some provisions in the general statutes do not appear in HB 506. Further, the penalties set by HB 506 are sometimes higher and sometimes lower than those in the general statutes. The result is that there are inconsistencies and gaps:

> Assault (Section B), tracks the language of the general assault statute, Section 30-3-1 NMSA 1978, with two exceptions:
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> 1. It leaves out language making "the use of insulting language toward another

impugning his honor, delicacy or reputation" an assault. Conduct against a public service worker may be a specialized assault, a general assault, or both, depending on the facts of the case. Issues may be raised as to whether a case may be brought under the general statute based on insulting language if the victim is a public service worker because that provision was not included in the specific statute. If such a case cannot be brought, then a public service worker has less protection than a private citizen.

2. The penalty for assault is raised from a petty misdemeanor to a misdemeanor.

Aggravated assault (Section C) again generally tracks the language of the general assault statute, Section 30-3-2 NMSA 1978, and keeps the penalty a fourth degree felony. However, it leaves out language making an assault committed while disguised an aggravated assault. Again, this raises questions about which statute will apply in a particular case, and whether a case can be brought under the general statute if the specialized statute does not make that particular conduct a crime.

Further, the criminal code contains a statute covering aggravated assault with intent to commit a violent felony, which is a third degree felony. See Section 30-3-3. Because HB 506 does not have an equivalent provision, and because Section C includes assault with "intent to commit *any* felony," public service workers receive only the protection given by HB506. The penalty imposed on a perpetrator who commits assault with intent to commit a violent felony will be higher if the victim is not in the protected class because the case will be prosecuted under Section 30-3-3 and will be penalized for a third degree felony instead of a fourth degree felony.

Battery (Section D) tracks the general battery provision of Section 30-3-4 NMSA 1978, but raises the degree of the crime from a petty misdemeanor to a fourth degree felony.

Aggravated battery (Section E) tracks the general aggravated battery provision of Section 30-3-5 NMSA 1978, but only addresses batteries that inflict great bodily harm or are committed with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted. Such crimes are third degree felonies under both HB 506 and Section 30-3-5. But Section 30-3-5 also addresses batteries that result in an injury causing painful temporary disfigurement or temporary loss or impairment of function, making that crime higher than simple battery, but lower than aggravated battery (inflicting great bodily harm or done with a deadly weapon). HB 506 does not recognize a similar level of crime between simple battery and aggravated battery inflicting great bodily harm or done with a deadly weapon.

Assisting in a battery (Section F) makes it a fourth degree felony to assist, or be assisted by someone else, in the commission of a battery on a public service worker. In effect, this creates a new type of accessory crime or conspiracy crime specific to the crime of battery on a public service worker. Accessory is already covered under Section 30-1-13 NMSA 1978, and conspiracy is already covered in Section 30-28-2 NMSA 1978. There is no need to further complicate the criminal statutes by making specific accessory and conspiracy crimes related to specific underlying crimes. In addition, the crime of being assisted by someone else in the commission of a battery may be challenged because it contains no requirement that the person being assisted have any knowledge or intent that another person participate.

In short, AODA believes HB 506 to be redundant except to the extent it makes simple battery on a public service worker a fourth degree felony (an increase in penalty from up to 6 months in county jail to eighteen months incarceration in a correctional facility) and simple assault on a public service worker a full misdemeanor (an increase in penalty from up to 6 months up to less than one year in county jail). Every other part of this bill is already covered by the general criminal offenses, and HB 506 just requires additional proof without any gain. Further, it expresses concern that each inconsistency discussed above creates an issue for prosecutors in interpreting the statute and in bringing the prosecution. It, along with PDD, also note that, based on recent case law interpreting statutes governing batteries on health care workers and peace officers, the prosecutor likely will be required to show that the defendant *knew* the victim was a public service worker engaged in that worker's official job duties.

There also appear to be overlaps between HB 506 and other specific criminal statutes for certain classes of public workers. Although HB 506 includes within its definition of public service worker employees of the juvenile justice division, CYFD points out that New Mexico courts have determined Juvenile Correctional Officers within that division are protected under Section 30-22-21 through 30-22-26, as being included in the definition of "peace officer". There are also specific criminal statutes which apply to health care workers and school personnel in this division. See Sections 30-3-9.2 and 30-3-9. (In another inconsistency, aggravated assault under these two statutes is a third degree felony, the penalty for which is 3 years incarceration in a correctional facility, while under HB 506, aggravated assault against a public service worker is a fourth degree felony, the sentence for which is 18 months incarceration in a correctional facility.) However, juvenile probation officers and juvenile justice behavioral health therapists are not included in the definition of "peace officer" and benefit from this legislation.

Additionally, PDD provides this analysis of the impact of HB 506:

> This bill adds to the growing number of felony batteries. The question is when the exceptions to simple battery swallow the rule. This bill adds a large number of public service workers on whom the commission of simple battery would now be a felony. It is important to remember that battery is not always the most obvious act. Hitting and punching are what we think of, but battery is really just an unlawful touching. Lightly pulling hair, or a gentle poking, even if done playfully, is a battery if the recipient does not want to be touched. The reason battery is a misdemeanor is because of the very minor acts that can constitute a battery. The regular additions of more situations in which simple battery is classified as a felony means that eventually simple battery will become a felony. Meanwhile, public service workers are protected by the general assault and battery laws that already exist.
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> HB 506 makes aggravated battery of a public service worker a third degree felony, whether or not there is injury. Thus, for example, someone who uses a baseball bat and hits somebody ("does so with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted"), but causes only minor bruising is guilty of a third degree felony. The punishment would be the same as someone who uses a baseball bat and hits somebody in the head and caused brain damage. The separation that exists in the existing aggravated battery statute (section 30-3-5) should remain, as it recognizes the level of damage caused by the aggressor.

Further, PDD calls attention to the nature of a public service worker's job and the fact that they

work with juveniles:

> children are often going to be the ones charged under this statute as juvenile justice workers and juvenile probation officers are included in the list of positions in HB 509. Because science has identified profound differences between adult and juveniles brains, e.g. children's minds have an inability to assess consequences, increased risk-tasking, and poor impulse control, the Court explained that science "both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs" the child will reform. *Miller v. Alabama*, 132 S.Ct. 2455, 2458 (2012). Thus, there may be a concern that this statute will simply bring more children into the juvenile justice system, children that CYFD might be charged with protecting, but who might playfully poke or pull hair.

OTHER SUBSTANTIVE ISSUES

AODA notes that there are a number of existing statutes that create specialized assault and battery crimes when the victim is engaged in a specific profession. See, for example, Section 30-3-9 NMSA 1978 for school personnel, Section 30-3-9.1 NMSA 1978 for sports officials, and Section 30-3-9.2 NMSA 1978 for health service professionals. Other specialized assault and battery crimes appear outside the criminal code. See, for example, Section 7-1-75 NMSA 1978 for employees of the Taxation and Revenue Department. It notes that, because of this proliferation of specialized assault and battery statutes, prosecutors must determine if a specialized statute applies instead of the general statute. If the specialized statute applies, the prosecution must be brought under that statute, and the prosecutor must meet the specific proof requirements set out in that statute, including the additional proof requirements regarding the status of the victim.

AODA reports that these statutes are scattered throughout New Mexico statutes, and it can be difficult to maintain consistency. For example, assault and battery against a Taxation and Revenue Department employee is punishable by a fine of $100 to $500 or imprisonment of not less than 3 days or more than six months, or both. In other words, it is a petty misdemeanor. In contrast, a sentence for aggravated battery under the general statutes is much higher: it is a third degree felony with a potential sentence of three years. This raises the question of why a public employee should receive <u>less</u> protection under the criminal statutes than a private citizen. Once people engaged in specific professions are given <u>more</u> protection (presumably because the legislature has determined that they need additional protection) the question becomes, why is one profession deserving of more protection than another?

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

As AODA notes, assaults and batteries against CYFD workers will be prosecuted under existing statutes on assault and battery.

MD/bb/je