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FISCAL IMPACT REPORT

ORIGINAL DATE 1/25/2016
SPONSOR Maestas **LAST UPDATED** _____ **HJR** 14

SHORT TITLE Transfer Probation to Judicial Branch, CA **SB** _____

ANALYST Rogers

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Indeterminate but will increase costs	Indeterminate but will increase costs	Indeterminate but will increase costs	Indeterminate but will increase costs	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorney (AODA)
- Attorney General’s Office (AGO)
- Law Offices of the Public Defender (LOPD)
- New Mexico Corrections Department (NMCD)
- New Mexico Sentencing Commission (NMSC)

SUMMARY

Synopsis of Bill

House Joint Resolution 14 proposes to transfer the administration of adult probation services from the executive branch, namely NMCD, to the judicial branch. If passed, the proposed amendment must be submitted to the people of New Mexico for their approval or rejection at the next general election or at any special election called for this purpose.

NMCD stated that the amendment, if passed, would remove NMCD from performing probation services for convicted offenders on behalf of the executive branch and would require the judicial branch to perform these services, most likely the AOC. NMCD would continue to provide supervision of criminal offenders on parole and to offenders on dual supervision (on both parole and probation at the same time).

FISCAL IMPLICATIONS

There are many factors that make determining the fiscal impact of this bill difficult. Below, NMCD states that personnel costs alone amount to at least \$8.5 million, including benefits. Besides costs for personnel, there are potential recurring and nonrecurring costs surrounding the transfer of probation from the executive to the judicial branch. Costs for equipment such as new computers, software, phones, office supplies, and potential need for additional space statewide must also be considered. There is potential that the bill could cost upwards of at least \$12 million, all of which would affect the general fund.

The AOC stated that it is difficult to calculate the anticipated budget transfer and personnel transfer from NMCD to the AOC without careful study, but that the AOC anticipates that millions of dollars and hundreds of employees would need to be transferred to the AOC in order to sufficiently administer the adult probation services pursuant to the Probation and Parole Act. The current location of the AOC cannot accommodate a probation division, including new employees to support the division.

NMCD stated that assessing the fiscal impact of the bill on the department is difficult as probation and parole officers do not carry caseloads that are designated as probation or parole only; officers carry a mix of offenders. This makes it difficult to quickly estimate how many officers or positions would need to be employed by or transferred to the judiciary.

The department stated that it currently supervises approximately 10,757 offenders on probation, 1,042 offenders on parole, and 1,129 offenders on dual supervision (on both probation and parole supervision). The department also supervises via the interstate compact process approximately 1,457 offenders on probation and 364 offenders on compact parole. Assuming that all probation (including compact probation) was moved to the judiciary, NMCD would supervise approximately 1,406 offenders on parole and 1,129 offenders on dual supervision.

NMCD estimated statewide personnel costs of \$8.5 million. The judiciary would need one chief probation officer at a salary of \$122.6 thousand, 13 supervisors (one in each judicial district) at a salary of \$63.4 thousand each, and 129 officers – half of whom are paid at \$59.1 thousand per year and half who are paid \$56.9 thousand per year.

The AOC points out that probation officers within the judicial branch are typically paid at a higher rate than those at NMCD and would require additional funding to bring several hundred probation officers and other probation personnel consisting of region managers, supervisors, hearing officers and secretaries under the judicial classification and compensation plan.

It is difficult to determine if the courts will have to enhance their existing case management system to account for the offenders on probation, or if there will be additional costs associated with the requirements of this bill.

NMCD also pointed out that there are currently approximately 1,482 probation offenders who have absconded from probation, and that the judiciary staff will have to search for these offenders, which may require additional hiring by the judiciary.

The Secretary of State estimates the cost of placing a constitutional amendment on the ballot to be \$104 thousand based on 2010 actual expenditures. This includes all necessary printing and advertizing. The next general election is in 2016, FY17.

SIGNIFICANT ISSUES

In response to House Bill 572, which in the legislative session of 2013 proposed a transfer of all probation services currently provided by the Probation and Parole Division of NMCD to the AOC, the AOC noted that the transfer of probation services would require a comprehensive transition plan, policies, and procedures approved by the Supreme Court for probation officers to operate under the umbrella of the judicial, given that probation officers will have arrest and enforcement powers and carry firearms. The AOC suggested that it might be more appropriate to study in the interim the transfer of probation services from the Corrections Department to the AOC and identify the resources needed, in particular the classification and number of employees within the Adult Probation and Parole Division connected to probation services. The AOC carries these same concerns with the introduction of HJR 14.

The New Mexico Sentencing Commission provided a survey commissioned between 2011 and 2012. Out of 46 respondents:

- 22 states and the District of Columbia indicated that probation is a function of the judicial branch for juvenile cases;
- 20 states indicated that probation is a function of the executive branch for adult misdemeanor cases; and,
- 29 states indicated that probation is a function of the executive branch for adult felony cases.

The AGO explained that probation and parole officers are governed by the same statutes. Sections 31-21-1 to 31-21-27 NMSA 1978, collectively “The Probation and Parole Act.” Under its terms, the director is to “provide probation and parole services and supervise probationers and parolees.” In case law, these officers are referred to as APPOs (Adult Probation and Parole officers). This amendment does not clarify how it would affect officers who also supervise parolees.

The AGO also state that the Parole Board Act, contained within the Probation and Parole Act Section 31-21-22 to 31-21-26 NMSA 1975 is presumably not part of this amendment. Under this Act, the parole board is a professional board comprising 15 members who are appointed by the governor with the consent of the senate.

The AGO went on to explain that currently, within the Corrections Act, Sections 33-1-1 to 33-1-9 NMSA 1978, probation officers “shall have the power of a peace officer with respect to arrests and enforcement of laws when on the premises of a New Mexico correctional facility or while transporting a person committed to or under the supervision of the corrections department; when supervising any person committed to or under the supervision of the corrections department anywhere within the state; or when engaged in any effort to pursue or apprehend any such person. No correctional officer or other employee of the corrections department shall be convicted or held liable for any act performed pursuant to this section if a peace officer could lawfully have performed the same act in the same circumstances.” It is unclear if the probation officers would have the same freedom from liability if acting under the auspices of the courts.

Lastly, the AGO also stated another possible complication would be communications between the probation officer and the court without the involvement of the attorneys. “It would not be advisable for courts to speak directly with probation officers, and formulate contracts for probationers, without the involvement of the attorneys. Moreover, the court is to make a determination, based upon the evidence presented which may include testimony of the probation officer, that the probationer violated his probation. The State must establish the probation violation with a reasonable certainty. *State v. Sanchez*, 2001-NMCA-060, ¶ 13, 130 N.M. 602. “The proof necessary is that which inclines a reasonable and impartial mind to the belief that a defendant has violated the terms of probation.” *State v. Martinez*, 1989-NMCA-036, ¶ 4, 108 N.M. 604. The proof must be “that which inclines a reasonable and impartial mind to the belief that [the] defendant had violated the terms of probation.” *State v. Pacheco*, 1973-NMCA-155, ¶ 8, 85 N.M. 778. This may be complicated if the probation officer is under the direct authority and supervision of the district court judge.”

NMCD also expressed concern that it would constitute a significant conflict of interest to have the judicial branch both convict and sentence offenders to probation, and then also supervise and act as witnesses against these same offenders in probation revocation hearings. The judiciary is currently neutrally and objectively able to observe the monitoring and supervision functions of NMCD when it conducts probation revocation or violation hearings, and to make appropriate rulings in favor of the probationer if NMCD acts improperly or unjustly during its supervision of an offender.

NMCD stated that in 2011, House Memorial 12 resolved that the legislative council direct the appropriate interim legislative committee to study moving the duties of the adult probation and parole division, as they relate to the duties of monitoring persons on probation, to the judicial branch of government. It further resolved that the committee work with NMCD and the AOC to determine the feasibility of moving the adult probation and parole division duties to the judicial branch. However, this feasibility study never occurred. Only the sentencing judges have the authority to impose probation and set probation conditions and only the Parole Board has the authority to set parole conditions.

Approximately 1,129 of NMCD’s probation and parole offenders are known as dual-supervision offenders; offenders being supervised on both parole and probation at the same time. Most probation and parole officers (PPOs) carry 100 cases on average, meaning that at least 12 PPOs are needed to supervise the dual-supervision offenders. NMCD currently has one PPO to supervise a particular dual supervision offender rather than have two PPOs supervise such an offender (one PPO to supervise the probation side and another PPO supervise the parole side).

Because the dual supervision offenders live all over the state, NMCD has more than 12 PPOs supervise caseloads consisting of only dual-supervision offenders. For this same reason, the judicial branch would also need more than 12 PPOs to supervise caseloads of only dual-supervision offenders.

If the judicial branch assumes the probation function, NMCD would still be responsible for supervising the parole function of these dual-supervision offenders, resulting in a duplication of services.

PERFORMANCE IMPLICATIONS

NMCD's caseloads and staff levels would both decrease if this bill passes, making it difficult to predict if NMCD's performance measures would be impacted positively or negatively by this bill.

ADMINISTRATIVE IMPLICATIONS

NMCD expressed concern that the passage of the bill would impact staff morale, as there is no guarantee that the officers currently serving would be hired by the judicial branch.

OTHER SUBSTANTIVE ISSUES

The AOC provided the analysis below to address the two basic issues that arise in the administration of probation services (Probation and Parole: Theory and Practice, Tenth Edition, 2009, by Howard Abadinsky):

1. Should probation be part of the judicial or executive branch of government?
2. Should probation be under municipal/county or state jurisdiction?

Those who support placement of probation services in the judicial branch state the following advantages (Nelson, Ohmart, and Harlow, 1978):

- Probation is more responsive to the courts, to which it provides services, when administered by the judiciary.
- The relationship of probation staff to the courts creates an automatic feedback mechanism on the effectiveness of various dispositions.
- Courts will have greater awareness of the resources needed by the probation agency.
- Judges will have greater confidence in an agency for which they are responsible, allowing probation staff more discretion than they would allow members of an outside agency.
- If probation is administered on a statewide basis, it is usually incorporated into a department of corrections, and under such circumstances, probation services might be assigned a lower priority than they would have as part of the judicial branch.

Those who oppose the placement of probation in the judiciary note the following disadvantages:

- Judges, trained in law and not administration, are not equipped to administer probation services.
- Under judicial control, services to persons on probation may receive a lower priority than services to the judge (e.g., presentence investigations).
- Probation staff may be assigned duties unrelated to probation.
- The courts are adjudicatory and regulative; they are not service-oriented bodies.

Placement in the executive branch has these features to recommend it:

- All other human services agencies are in the executive branch.
- All other corrections subsystems are located in the executive branch.

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- With executive branch placement, program budgeting can be better coordinated, and an increased ability to negotiate fully in the resource allocation process becomes possible.
- A coordinated continuum of services to offenders and better use of probation personnel are facilitated.

Over time, adult probation services moved from the judicial to the executive branch and into a single, statewide administrative body, with a trend towards centralization of services and funding, and are now located in the judicial branch in slightly more than a third of the states. (See the National Center for State Courts reporting of the Conference of Chief Justices (CCJ) and Conference of State Court Administrators (COSCA) Survey of Evidence-Based Practices in Sentencing and Probation re: branch responsibility for probation, with state-by state information.)

ALTERNATIVES

NMCD suggests that the feasibility study requested, but not ever conducted, pursuant to 2011's House Memorial 12 occur before consideration of this or future legislation.

POSSIBLE QUESTIONS

- How many probation officers/officers are located throughout the state?
- Would new offices need to be created?
- What would be the impact of transferring FTEs from the executive pay plan to the judicial?
- Can the current probation and parole IT systems operate under the judicials' infrastructure?

TMR/jle/jo/al