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FISCAL IMPACT REPORT

SPONSOR Youngblood ORIGINAL DATE 2/9/2018
LAST UPDATED _____ HB 262
SHORT TITLE Pretrial Risk Assessments for Bail SB _____
ANALYST Edwards

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY18 | FY19 | FY20 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|-------|--------------------|--------------------|----------------------|------------------------------|------------------|
| Total | \$0.0 | At least \$60.0 | At least \$35.0 | At least \$95.0 | Recurring | General Fund |

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 74, HJR 5, HJR 6, SB 13, SB 44, and SJM 13.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Law Office of the Public Defender (LOPD)
Administrative Office of the Courts (AOC)
New Mexico Attorney General (NMAG)
New Mexico Sentencing Commission (NMSC)

SUMMARY

Synopsis of Bill

HB 262 would require that a pretrial risk assessment instrument, used for determination of pretrial release, shall be standardized and based on analysis of empirical data and factors relevant to risk of failure to appear and public safety. The assessment shall be consistent with current research and best practices and be regularly reviewed and adjusted as appropriate for accuracy.

The assessment shall not include ethnicity, immigration status, gender, religion, sexual orientation, employment status, socioeconomic status, or arrests that did not lead to conviction in assessing risk, and shall give appropriate weight to criminal history in a manner that minimizes economic and racial disparities. Once adopted, the assessment shall be transparent and all documents upon which its validation rely shall be open to public inspection, testing, and auditing. The assessment shall be annually validated by the Sentencing Commission.

FISCAL IMPLICATIONS

NMSC explains “while the adoption of a validated pre-trial risk assessment would result in greater consistency in pre-trial release decisions across New Mexico, this bill puts a tremendous responsibility on the Sentencing Commission. Without providing additional resources to the Commission, the NMSC would be required to annually validate the instrument. This task would have to be performed by a Master’s-level trained researcher. The first-year validation would require significantly more resources, involving other NMSC staff and Institute for Social Research contract research staff. In subsequent years, NMSC estimates it would require a minimum of 0.5 FTE (approximately \$35 thousand annually). The systematic collection and analysis of this information would be a large task requiring resources that NMSC does not have in the current budgetary framework. This bill does not contain an appropriation.”

In June 2017, LOPD implemented department-wide trainings on the Arnold risk assessment tool presently in use for all of its staff and contract lawyers, as well as select support staff. The costs of training on any given instrument will vary with the instrument, but, with the Arnold tool, LOPD training required securing a conference room for 350 people, engaging several expert trainers, and used up to 2.5 hours of time for each participant. Costs of training all LOPD staff, contract attorneys, and appropriate support staff necessary to maintain the effective assistance of counsel guaranteed under the state and federal constitutions, would be wasted should the Arnold tool be abandoned. LOPD would have to bear the cost of re-training on whatever new instrument is developed. Presumably courts and DAs would require similar re-training costs under such a scenario. Since the Arnold instrument is provided to New Mexico courts free of charge, the costs of studies developing and validating any new tool, as well as implementing such a tool, might accrue to New Mexican taxpayers.

AOC believes there will be administrative costs for courts and the Administrative Office of the Courts to provide data, technical assistance and other information to the New Mexico Sentencing Commission for its yearly validation of risk assessment instruments.

SIGNIFICANT ISSUES

NMSC states, using FY17 statistics published in the New Mexico Judiciary Statistical Addendum, if a pre-trial risk assessment was performed at all first appearances, an estimated 77,890 assessments would occur annually in Magistrate and Metropolitan Court. It is not clear if the assessment would have to be redone as felony cases move over to the District Courts.

LOPD provided the following analysis:

Presently, New Mexico courts are using the Public Safety Assessment [hereinafter *PSA*] tool developed by the nonprofit, public interest [Arnold Foundation](#) to support determinations of pretrial release risk for defendants in New Mexico state courts. The PSA was created using a database of over 1.5 million cases drawn from more than 300 jurisdictions across the United States. The Arnold PSA is in use in about 40 jurisdictions across the country. It is being used free of charge by New Mexico courts. To the knowledge of reviewer (who has been a member of the New Mexico Supreme Court’s Ad Hoc Pretrial Release Committee since its inception three years ago following the decision of *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276), there exists no other accredited pretrial release instrument with the bona fides of the Arnold Foundation’s PSA.

While the Arnold PSA appears to meet all the fairness, usefulness and validity aims of the proposed legislation, it is probably true that all documents upon which its development are based are not open to public inspection, testing and auditing - it is likely that various privacy laws preclude such universal public inspection of all the documents utilized by the Arnold researchers. Accordingly, upon enactment of the proposed legislation, New Mexico courts would no longer be able to rely on the accredited tool that is most widely accepted by jurisdictions across the country - and would have no better tool to replace it.

The New Mexico Supreme Court already is actively engaged in shepherding the development of procedures and rules to protect the constitutional rights of all stakeholders in the pretrial release process, both through its aforementioned Ad Hoc Pretrial Release Committee and also through its jurisprudence (having recently decided three cases involving interpretation of the issues presented by pretrial release rules). See *State v. Ferry*, 2017-NMSC-___, ___ P.3d ___, No. S-1-SC-36786, 2017 WL 6764128 (N.M. Dec. 28, 2017); *State v. Groves*, 2018-NMSC-___, ___ P.3d ___, No. S-1-SC-36363, 2018 WL 359473 (N.M. Jan. 11, 2018); and *State ex rel. Torrez v. Whitaker*, 2018-NMSC-___, ___ P.3d ___, No. S-1-SC-36379, 2018 WL 359480 (N.M. Jan. 11, 2018).

NMAG states “the New Mexico Supreme Court (by June 5, 2017 Supreme Court Order No. 17-8300-005) promulgated rules requiring courts to consider any available results of a pretrial risk assessment instrument "approved by the Supreme Court," under Rule 5-401(C) NMRA, Rule 6-401(C) NMRA, Rule 7-401(C) NMRA, and Rule 8-401(C) NMRA. HB 262 would not, by itself, require courts to instead consider only pretrial risk assessment instruments meeting the standards set forth in HB 262. Some standards in HB 262 conflict with those in the Rules approved by the New Mexico Supreme Court; e.g., HB 262(A)(4) precludes consideration of employment status while Rule 5-401(C)(3)(a) allows the court to consider employment.”

The AOC provided the following detailed history of risk assessments in New Mexico:

Since June 2017, the Second Judicial District Court and the Bernalillo County Metropolitan Court have used a risk assessment instrument known as the Public Safety Assessment, or PSA, to provide objective information to judges in determining conditions of release for felony defendants awaiting trial. The PSA was created by the Houston-based Laura and John Arnold Foundation using pretrial records of about 1.5 million cases from approximately 300 jurisdictions nationwide. The PSA is used by about 38 jurisdictions across the country, including the states of Arizona, Kentucky and New Jersey.

The PSA produces risk scores of the likelihood that defendants will commit a new crime if released pretrial or fail to return to court. Defendants with an elevated risk of committing a violent crime are also flagged by the PSA. Risk scores fall on a scale of one to six, with higher scores indicating a greater level of risk.

Judges retain all of their authority and discretion in setting pretrial release conditions for defendants in accordance with rules of criminal procedure approved by the New Mexico Supreme Court.

The PSA uses nine factors that researchers found to reliably gauge a defendant's pretrial risks:

- Whether a defendant's current offense is violent.
- Whether the person has a pending charge when arrested.
- Whether the person has a prior misdemeanor conviction.
- Whether the person has a previous felony conviction.
- Whether the person has a prior conviction for a violent crime.
- Whether the person has failed to appear at a pretrial hearing in the last two years.
- Whether the person has failed to appear at a pretrial hearing more than two years ago.
- Whether the person previously has been sentenced to incarceration.
- The person's age at the time of arrest.

Potentially discriminatory information, such as a person's ethnicity, income and educational level, is not included in the PSA.

For more information about the Laura and John Arnold Foundation and the PSA *see*: <http://www.arnoldfoundation.org/initiative/criminal-justice/>

Since the pilot project with the PSA was implemented, the Arnold Foundation has audited the Second Judicial District Court and the Metropolitan Court to check sample data sets, and it determined the courts were correctly calculating risk scores.

The Second Judicial District is working with the University of New Mexico's Institute of Social Research on a preliminary assessment of outcomes, including whether defendants while on pretrial release failed to appear in court or were arrested on a new criminal charge. The assessment will help in evaluating whether supervision levels should be adjusted for the various risk levels of defendants.

Use of the PSA or other risk assessment instruments may eventually be expanded to other courts if approved by the state Supreme Court.

Other risk assessment instruments are used by two other district courts.

The Thirteenth Judicial District Court uses the Kentucky Pretrial Release Assessment (KPRA-S) on criminal defendants that appear in magistrate courts and district court in Sandoval and Valencia counties. The Arnold Foundation developed the KPRA-S before it created the PSA.

The Eleventh Judicial District Court uses the Ohio Risk Assessment System-Pretrial Assessment Tool (ORAS-PAT) for defendants referred by judges to the court's pretrial services program. The Ohio Department of Rehabilitation and Correction contracted with the University of Cincinnati's Center for Criminal Justice Research to develop the Ohio Risk Assessment System.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to HB 74, HJR 5, HJR 6, SB 13, SB 44, and SJM 13.

TECHNICAL ISSUES

LOPD points out the word “validated” is defined in Section B of the proposed legislation but appears to be used in different ways in Section A.

LOPD also suggests Section A of the proposed legislation could be amended as below, as this would maintain a guarantee of the public’s ability to watchdog the instrument’s validity while not destroying access to the only reliable instrument presently available:

“(6) once adopted, be transparent and ~~all documents, records~~ studies and information used to build or validate the risk assessment shall be open to public inspection, auditing and testing;”

The AOC states “HB 262 Section 1(A)(6) seeks to provide for transparency by requiring public disclosure of ‘all documents, records and information used to build or validate’ a risk assessment adopted in New Mexico. However, HB 262 does not reference the Inspection of Public Records Act, Sections 14-2-1 to -11 NMSA 1978, which includes certain exceptions, including for trade secrets, some law enforcement records and for records “otherwise protected by law.”

AOC also points out that “several terms used in HB 262 are imprecise, such as Section 1(A)(3)(a) ‘risk to public safety’ and ‘economic disparities’ in Section 1(A)(5). The Arnold Foundation’s PSA measures a defendant’s risk of ‘new criminal activity,’ which is more precise. Financial statements are not gathered from defendants when data is being input into the PSA, raising questions how ‘economic disparities’ can be measured or an assessment tool evaluated to determine whether it is minimizing that factor.”

OTHER SUBSTANTIVE ISSUES

The AOC provided the following information on pretrial assessment tools in other states:

Courts may not maintain or hold the documents “used to build or validate” a risk assessment instrument. Some of those records may be held by the organization that developed the assessment, which could be a private foundation such as the Laura and John Arnold Foundation that created the PSA used in Bernalillo County. HB 262 raises a policy question of whether to impose a blanket disclosure requirement on private vendors for what may be proprietary research and work product. In preparing risk assessments, the courts use information from the FBI’s National Crime Information Center, which has restricted access. Protected law enforcement records could be subject to disclosure under HB 262.

A requirement for annual validation of a risk assessment could be overly burdensome. One year also may not provide enough time for a meaningful follow-up period for researchers to evaluate the outcomes of defendants and validate whether an assessment tool accurately measured their pretrial risks of new criminal activity. For more information on validation studies of pretrial risk assessments, see the National Criminal

Justice Association’s [Center for Justice Planning](#).

Requiring the regular validation of an assessment tool – rather than mandating a specific time period – is an alternative approach taken in legislation proposed in other states, including California, Missouri and Hawaii.

[California AB 42 of 2017/2018](#)

Pretrial assessment tool “shall be regularly validated and adjusted, as appropriate, to ensure that the assessment instrument is equally accurate across all racial groups, ethnic groups, and genders. The validation study shall include testing for predictive bias, and disparate results by race, ethnicity, and gender. The tool shall be adjusted to ensure accuracy and to minimize disparate results.”

[Missouri HB 1335 of 2018](#) (some language identical to the California bill)

Pretrial assessment tool “shall be regularly validated and adjusted, as appropriate, to ensure that the assessment instrument is equally accurate across all racial groups, ethnic groups, and genders. The validation study shall include testing for predictive bias, and disparate results by race, ethnicity, and gender. The tool shall be adjusted to ensure accuracy and to minimize disparate results.”

[Hawaii SB 2860 of 2018](#)

Any risk assessment used by the judiciary shall “be locally validated and regularly revalidated to assess the tool’s appropriateness for Hawaii and to evaluate its impact on racial and ethnic disparities.”

HB 262 Section 1(A)(4) prohibits a pretrial risk assessment instrument from using certain factors in determining a defendant’s risk score: “Race, ethnicity, national origin, immigration status, gender, religion, sexual orientation, education level, employment status, socioeconomic status, arrests that did not lead to conviction or housing status.” The language appears intended to eliminate factors that could introduce unintended bias in a risk assessment, but it doesn’t take into account that future research may change what is considered to be best practices and reliable measures for measuring a defendant’s risks. The list of specific excluded factors may be unnecessary because Section 1(A)(5) requires that any risk assessment instrument “give appropriate weight to factors, including criminal history, in a manner that ensures accuracy while minimizing racial and economic disparities.” Additionally, HB 262 Section 1(A)(3) requires that any risk assessment instrument be regularly reviewed and adjusted based on best practices and standards to ensure the tool “is equally accurate across all racial groups, ethnic groups and genders” and that a validation study “include testing for predictive bias and disparate results by race, ethnicity and gender.”

Section 1(A)(4) also may be contradictory to other provisions of HB 262 if it prevents the collection of data about a defendant’s race, ethnicity, gender and possible other factors necessary for researchers to evaluate whether a risk assessment instrument is neutral as to those factors.

HB 262 Section 1(B)(2) defines “validated” as “developed through peer-reviewed research and statistical analysis based on the characteristics of the population being assessed as enumerated in this section. It is unclear whether the “population” represents only criminal defendants in New Mexico or also refers to a broader, potentially multi-state population used in validation of a risk assessment instrument by its developer.

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