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## FISCAL IMPACT REPORT

**SPONSOR** Maestas/Youngblood/ Ely **ORIGINAL DATE** 2/01/18 **LAST UPDATED** 2/05/18 **HB** 296

**SHORT TITLE** Child Abuse Penalties **SB** \_\_\_\_\_

**ANALYST** Daly

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

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		See Fiscal Implications	See Fiscal Implications	See Fiscal Implications	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 100\*

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

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

### SUMMARY

#### Synopsis of Bill

House Bill 296 updates existing law governing child abuse. It removes the crime of abandonment of a child, while creating a presumption that certain conduct constitutes child abuse. It also creates, amends and distinguishes the definitions and penalties for reckless abuse of a child and intentional abuse of a child.

Reckless Abuse. A new Section 30-6-1.1 enacts the crime of reckless abuse of a child committed by a person who recklessly, and without justifiable cause, causing or permitting a child to be placed in a situation knowing that it may endanger the child’s life or health, thereby creating or disregarding a substantial and foreseeable risk of significant harm to the child. (Section 2) “Recklessly” replaces “negligently” (the term used in the existing statute), and is defined as referring to criminal negligence and describing acts that disregard a substantial, foreseeable risk, where the person knew of the danger involved and acted with a reckless disregard for the safety or health of the child. (Section 1(C)) Penalties are based upon any resulting injury or death, as reflected in this chart (in which great bodily harm is abbreviated as “GBH”):

**Reckless Abuse**

<b>Factor</b>	<b>HB 296 Penalty</b>	<b>Existing Penalty</b>
No physical injury	Fourth degree felony	Third degree felony (1 <sup>st</sup> offense); Second degree felony (2 <sup>nd</sup> and Subsequent)
Physical injury- no GBH	Third degree felony	No comparable aggravating factor
GBH- child under 12	Second degree felony	First degree felony
GBH- child 12 to 18	Third degree felony	First degree felony
Death- child under 12	First degree felony	First degree felony
Death- child 12 to 18	Second degree felony resulting in death of a human being	First degree felony

Intentional Abuse of a Child. HB 296 provides a new definition of “intentionally” as describing acts that are done purposefully and with a conscious objective to endanger or abuse a child, even if the person did not intend the resulting harm. (Section 1(B)). A new Section 30-6-1.2 redefines the crime of intentional abuse of a child committed by a person who knowingly and intentionally, and without justifiable cause, causes a child to be placed in a situation that endangers the child’s life or health intending the endangerment, or tortures, cruelly confines or cruelly punishes. (Section 3) Again, penalties are based on the child’s resulting injury or death, as shown in this chart:

**Intentional Abuse**

<b>Factor</b>	<b>HB 296 Penalty</b>	<b>Existing Penalty</b>
No physical injury	Fourth degree felony	Third degree felony (1 <sup>st</sup> offense); Second degree felony (2 <sup>nd</sup> and Sub.)
Physical injury-no GBH	Third degree felony	Third degree felony (1 <sup>st</sup> offense); Second degree felony (2 <sup>nd</sup> and Sub.)
GBH- child under 12	Second degree felony	First degree felony
GBH- child 12-18	Third degree felony	First degree felony
Death of child when committed by parent, guardian or custodian	First degree felony resulting in death of a child	First degree felony resulting in death of a child
Death of child under 12 when committed by a person who is not a parent, guardian or custodian	First degree felony resulting in death of a child	First degree felony resulting in death of a child
Death of child 12 to 18 when committed by a person who is not a parent, guardian or custodian	First degree felony	First degree felony

Statutory Presumptions. A new Section 30-60-1.3 declares that exposing a child to weather or methamphetamines use or consumption constitutes prima facie evidence of child abuse. (Section 4) It also reinstates the concept from existing statute that a parent, guardian or custodian who leaves an infant in compliance with the Safe Haven for Infants Act will not be prosecuted for abuse of that child (for delivering the child to the safe haven, see NMSA 1978, Section 24-22-3).

The effective date of HB 296 is July 1, 2018.

### **FISCAL IMPLICATIONS**

This bill both enhances and reduces penalties for child abuse. To the extent it enhances sentences, LFC staff notes those sentences over time will increase the population of New Mexico's prisons and long-term costs to the general fund. According to NMCD, the cost per day to house an inmate in public state prisons in FY17 was an average of \$123 per day, or about \$44,895 per year. Increased length of stay would increase the cost to house the offender in prison. In addition, sentencing enhancements could contribute to overall population growth as increased sentence lengths decrease releases relative to the rate of admissions, pushing the overall prison population higher. NMCD's general fund budget, not including supplemental appropriations, has grown by an average of two percent, and the FY18 budget is 11 percent higher than FY14, closely mirroring the inmate population growth of 10 percent. The LFC reported in its FY19 budget recommendation that NMCD ended FY17 with a \$1 million budget surplus.

Societal benefits, particularly to potential victims, would also accrue through enhanced sentences if they reduce or delay re-offenses. LFC cost-benefit analysis of criminal justice interventions shows that avoiding victimization results in tangible benefits over a lifetime for all types of crime and higher amounts for serious violent offenses. These include tangible victim costs, such as health care expenses, property damage and losses in future earnings and intangible victim costs such as jury awards for pain, suffering and lost quality of life.

LOPD notes that this legislation proposes a range of penalties, suggesting the possibility of more precisely targeting the conduct alleged. However, it comments that the degree of charge for a given event remains in the control of the prosecution. If more higher-penalty trials result from enactment, LOPD warns it may need to hire more trial attorneys with greater experience and support staff as necessary. AOC reports that with regard to increased penalties, as penalties become more severe, defendants may invoke their right to trial and their right to trial by jury. More trials and more jury trials will require additional judge time, courtroom staff time, courtroom availability and jury fees. Although AOC advises these additional costs cannot be quantified, it notes that HB 296 contains added gradations of child abuse, which could provide more opportunities for plea bargaining, resulting in reduced trial costs and fewer judicial resources being expended. The increased costs associated with increased penalties and the decreased costs associated with added gradations of the crime of child abuse could potentially offset one another to some degree.

### **SIGNIFICANT ISSUES**

As reflected in the tables in the Synopsis section above, the penalties imposed in some instances are less than those in current law, and more gradations are included. LOPD comments HB 296's

restructuring of penalties allows for greater variation in what is truly a continuum of conduct, rather than placing all child abuse crimes in the upper tier of New Mexico’s sentencing scheme even when no injury occurs. LOPD asserts that these penalties are more rationally tied to culpability and harm, and would less often result in draconian punishments for lesser conduct.

### Abandonment of a Child

HB 296 removes the crime of abandonment of a child. Section 30-6-1 NMSA 1978 currently defines the crime to consist of the parent, guardian or custodian of a child intentionally leaving or abandoning the child whereby the child may or does suffer neglect. (Misdemeanor penalty, unless it results in child’s death or great bodily harm, which is a second degree felony.) AOC advises that if the elements constituting the crime of abandonment of a child are also elements found in the crimes of reckless and intentional abuse of a child as defined in HB 296, then the conduct constituting the crime of abandonment of a child will not go unprosecuted or unpunished, and the absence of the crime of abandonment of a child will not have adverse consequences.

LOPD provides this analysis of the existing crime of child abandonment:

because of the somewhat amorphous nature of child abandonment and possible difficulty in distinguishing between child abuse by endangerment and abandonment, the Bill wisely forecloses potentially messy litigation of the issue by striking abandonment from the statute. *See e.g., State v. Garcia*, 2014-NMCA-006, ¶¶ 45-50, 315 P.3d 331 (Vigil, J., dissenting) (suggesting abandonment could be a lesser-included offense of abuse); *State v. Stephenson*, 2017-NMSC-002, 389 P.3d 272 (Sep. 26, 2016) (indicating that abandonment requires an intent not to return or an intent to return, but exposing the child to neglect). New Mexico courts have long recognized that the civil system of custodial intervention (through CYFD) is appropriate where the allegations involve lesser, non-criminal acts of “bad parenting” or neglect not rising to the level of criminal abuse. Striking abandonment helps keep this distinction intact while allowing for punishment under the abuse provisions when the child is recklessly or intentionally left in a sufficiently dangerous situation.

### Reckless and Intentional Child Abuse

Additionally, AOC calls attention to the absence of a definition of “knowingly,” although the word is used in new Section 30-6-1.3, Intentional Abuse of a Child, which uses the phrase “knowingly and intentionally.” The definition of “intentionally” appears to include a knowledge element, because it requires that the act be done purposefully and with a conscious objective to endanger or abuse a child, even if the person did not intend the resulting harm. If the definition of “intentionally” covers the knowledge requirement for the crime, the undefined word “knowingly” should be left out of the definition of the crime. If “knowingly” is an alternative to “intentionally,” or something required in addition to the requirement that the act be done “intentionally,” then the word “knowingly” should be defined.

NMAG advises that the Supreme Court of New Mexico has recognized that the child abuse statute, as currently written, is in desperate need of fixing. *See State v. Consaul*, 2014-NMSC-030; *State v. Montoya*, 2015-NMSC-010; *State v. Cabezuella*, 2015-NMSC-016. The Supreme Court has interpreted the child-abuse statute in an attempt to make it constitutional. In so doing,

it withdrew all of the child-abuse jury instructions (UJIs) in 2015 and replaced them. As a result, the current UJIs bear only a passing resemblance to the statute.

NMAG expressly raises issues with the definitions of “intentionally” and “recklessly”:

First, Paragraph B of Section 1 provides a definition of “intentional” which substantially changes the current law. *Cabezuela* declared, in an attempt to bring uniformity and clarity to the law, that UJI 14-610 (definition of “intentional” as it relates to child abuse) was rescinded, and that UJI 14-141—the definition of “intentional” for most, if not all, other crimes—was to be used going forward. 2015-NMSC-016, ¶ 42. *Cabezuela*’s declaration did indeed bring uniformity and clarity by axing an unnecessary, conflicting “intentional” definition. Thus, the introduction of a new child-abuse-only definition for “intentional” is likely unnecessary and potentially inconsistent with UJI 14-141. This will very likely only sow confusion.

Second, Paragraph C of Section 1 does not appear to comport with the current state of the law. Recklessly is already defined. *See* UJI 14-612. It is currently an “objective” standard. Rather than using the current definition, Paragraph C of Section 1 instead crafts a new, heightened standard, which is purely subjective. Therefore, in order to convict anyone for reckless child abuse, a prosecutor would have to prove that the defendant had personal knowledge or belief that his acts were reckless—an impossible hurdle. It also muddies the waters between “intentional” and “reckless” child abuse. After all, if a defendant personally knew that her/his acts were recklessly dangerous, isn’t she intending to abuse the child? Paragraph A of Section 2 appears to contain a truncated definition of reckless. The UJI 14-612 definition should be used in full, and placed under the definition section to avoid confusion.

NMAG also points to Section 3(A), which provides a definition of “intentional child abuse” which contains a mens rea component that potentially conflicts with the definition of “intentional” in Section 1(B). It expresses concern that this section might invite confusion in interpreting the statute, as well as with UJI 14-141.

On the other hand, LOPD provides a different interpretation of applicable case law, citing one of those same cases, particularly *State v. Consaul*, 2014-NMSC-030, ¶ 28, 332 P.3d 850 (noting “this Court has struggled over the years to differentiate criminal negligence from civil negligence.”). LOPD comments:

This Bill addresses many of the concerns raised by the courts and codifies the rulings in a number of cases. First, the Bill dispenses with the “should have known” language that aligns itself with concepts of civil negligence and has been deemed inappropriate in criminal cases. *Consaul*, 2014-NMSC-030, ¶ 37 (“[W]hat has long been called ‘criminally negligent child abuse’ should hereafter be labeled ‘reckless child abuse’ without any reference to negligence.”); *id.* ¶ 39 (the Court noted it shared the “concern expressed in our precedent over continued use of the phrase ‘knew or should have known’ in our jury instructions because of its close association with principles of civil negligence and ordinary care.”)

LOPD also comments on HB 296’s recognition of intentional child abuse and reckless child abuse as, in fact, two separate crimes involving distinct mental states. *See State v. Schoonmaker*, 2008-NMSC-010, ¶ 46 n.4, 143 N.M. 373. In clarifying the distinction between intentional and

reckless abuse, LOPD believes the bill codifies recent case law interpreting intentional child abuse by requiring a “conscious objective.” See *State v. Granillo*, 2016-NMCA-094, ¶ 17, 384 P.3d 1121 (holding “that the *mens rea* for intentional child abuse by endangerment requires a conscious objective to achieve a result—endanger the child.”) and imposes harsher punishment for crimes committed with greater culpability. LOPD believes these are necessary amendments to this statute.

### CONFLICT, RELATIONSHIP

HB 296 conflicts with HB 100. Under HB 296, intentional child abuse resulting in death of a 12 to 18 year old child by a person who is not a parent, guardian or custodian is a first degree felony, while under HB 100, the penalty is first degree felony resulting in the death of a child. Except for its amendment of Subsection K, HB 100 otherwise leaves the existing provisions of Section 30-1-6 intact, while HB 296 revises that section as discussed herein.

### TECHNICAL ISSUES

AOC points out that the definition of “reckless” at page 2, line 14 refers to reckless disregard for a child’s safety or health, while the definition of the crime of reckless child abuse at page 4, line 21 speaks in terms of a child’s life or health.

### OTHER SUBSTANTIVE ISSUES

NMSC provides this breakdown of admissions to the NMCD where the most serious offense was any level of child abuse (from no physical injury up to and including death of a child) for fiscal years 2005 through 2017:

Admission Fiscal Year	Total Number of Child Abuse Admissions
2005	110
2006	97
2007	79
2008	105
2009	120
2010	106
2011	120
2012	109
2013	106
2014	127
2015	127
2016	103
2017	77

### WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

LOPD asserts that even where no physical harm results and no harm was intended, the lowest possible sentence is a third degree felony.