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FISCAL IMPACT REPORT

ORIGINAL DATE 1/25/18
SPONSOR Baca **LAST UPDATED** _____ **HB** _____

SHORT TITLE Penalties for Crimes Against Children **SB** 96

ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate but may increase costs			Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorneys (AODA)
- Children, Youth and Families Department (CYFD)
- Attorney General’s Office (AGO)

SUMMARY

Synopsis of Bill

Senate Bill 96 (SB 96) amends Section 30-6-1 NMSA 1978 by distinguishing the penalties for intentional abuse of a child and negligent abuse of a child, as follows:

- Intentional abuse of a child that does not result in death or great bodily harm is a second degree felony for the first offense.
- Intentional abuse of a child that does not result in death or great bodily harm is a first degree felony for every subsequent offense.
- Negligent abuse of a child that does not result in death or great bodily harm is a third degree felony for the first offense.
- Negligent abuse of a child that does not result in death or great bodily harm is a second degree felony for every subsequent offense.
- Both Intentional and Negligent abuse of a child resulting in great bodily harm is a first degree felony.
- Intentional abuse of a child resulting in death is a first degree felony resulting in the death of a child.
- Negligent abuse of a child resulting in death is a first degree felony.

SB 96 also amends Section 30-6-1(M) NMSA 1978 to clarify that a person who leaves an infant 90 days old or less at a safe haven site may be prosecuted for abuse of the infant for actions of the person occurring before the infant was left at the safe haven site.

SB 96 amends Section 30-9-1 NMSA 1978, governing the crime of enticement of a child, to:

- Increase the age limit under which a child can be the victim of enticement from 16 to 18
- Increase the penalty from a misdemeanor to a fourth degree felony if the child is at least 13 but under 18
- Increase the penalty from a misdemeanor to a third degree felony if the child is under 13

SB 96 also amends Section 30-37.3.3 NMSA 1978, governing criminal sexual communication with a child, to:

- Clarify that the crime consists of “providing” the child obscene images, rather than “sending”
- Clarify that the images can be of “any” person’s intimate parts, rather than only the provider’s

FISCAL IMPLICATIONS

AOC reported any additional fiscal impact to the judiciary would be proportional to the enforcement of this law and the commenced hearings. Increased penalties cases may result in an increase in the number of accused persons who will 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. There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

The AODA reported fiscal implications for the district attorneys are unknown. Higher potential penalties may result in more cases going to trial, or may result in more plea agreements. Because SB 96 expands the scope of the statutes defining enticement of a child and criminal sexual communication with a child, the district attorneys may see an increased caseload, resulting in additional costs. The agency also stated to the extent SB 96 results in increased incarceration, there will be increased costs to the state.

SIGNIFICANT ISSUES

AOC reported the following:

“SB 96 separates out and increases the penalties for intentional child abuse not resulting in death or great bodily harm from what is currently called abuse not resulting in death or great bodily harm. The amended language in Section 30-6-1(E) adds the term “negligent” before the term “abuse,” thus creating a section for negligent abuse and another section for intentional abuse. The purpose of SB 96 is to enact increased penalties for intentional child abuse. However, in adding the word “negligent” in Subsection (E), SB 96 is likely to perpetuate confusion that has existed in both case law and the Rules for Uniform Jury Instructions. This issue has been the subject of two fairly recent NM Supreme Court cases, *State v Consaul* and *State v Montoya*.

In *State v Consaul*, 2014-NMSC-30, the NM Supreme Court expressly overruled prior case law regarding criminal child abuse stating that, “what has long been called criminally negligent child abuse should be hereafter labeled reckless child abuse without any reference to negligence.” *State v Consaul*, 2014-NMSC-30, ¶37, 332 P.3d 850. *Consaul* explains at great length the Court’s history of discomfort with language often associated with civil negligence used in the context of criminal negligence. The Court specifically mentions Section 30-6-1(A)(3) and the phrase “knew or should have known,” concluding that the legislature must have “intended the term ‘reckless disregard’ to prevail when ‘knew or should have known’ conflicts.” *Id.* ¶40.

In *State v Montoya*, 2015-NMSC-10, the NM Supreme Court reiterated its holding in *Consaul*, stating that, “thus we now expressly adopt the same rule that ‘criminally negligent child abuse’ should hereafter be labeled ‘reckless child abuse’ without any reference to negligence.”^{8/}

A suggestion might be to amend 30-6-1 to reflect the recent NM Supreme Court decisions by replacing the word “negligent” in Section 30-6-1 with the word “reckless” wherever it appears. Replace the definition of negligently in Section 30-6-1(A)(3) with reckless

<p>"negligently" refers to criminal negligence and means that a person knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child.</p>	<p>“reckless” means to consciously disregard a substantial and unjustifiable risk of such a nature and degree that its disregard involves a gross deviation from a reasonable standard of conduct.</p>
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2) The SB 96 amendment to Section 30-6-1(L), noted above, reflects that, pursuant to the Safe Haven for Infants Act, Section 24-22-1 NMSA 1978 *et seq.*, an infant may be left at a safe haven site. Section 24-22-2(F) defines a “safe haven site” to mean a hospital, law enforcement agency or fire station that has staff on-site at the time an infant is left at such a site.

3) The SB 96 amendment to Section 30-9-1 NMSA 1978, in increasing the penalty for the crime of enticement of a child from a misdemeanor to a third or four degree felony, may result in an increase in the number of jury trials and appeals related to prosecution for the crime. As penalties increase, more people invoke their right to a jury trial, requiring additional resources.”

CYFD reported:

“Under current law, intentional child abuse resulting in death of a child between twelve and eighteen carries a lower penalty than intentional child abuse resulting in the death of a child under twelve. This bill will apply the same penalty, no matter the child’s age as defined in Section 1.

This bill acknowledges the distinction between negligent and intentional child abuse when viewed from the perspective of the offender’s mindset at the time of commission. This bill therefore increases the penalties for intentional child abuse because under UJI 14-141, the state must prove that the act was committed purposefully, as opposed

reckless disregard for the child’s health and safety.

This bill makes enticement of a child a felony. This bill will now be further aligned with Section 30-37-3.2—electronic solicitation of a child.

This bill eliminates the requirement that the state prove the image provided to a child depicted the offender’s intimate part. Providing obscene images of *any person’s* intimate parts meets the burden under this bill.

The updated language to include “providing” not only “sending” falls in line with current case law (*State v Tufts*, 2016-NMSC-20), where the Supreme Court held that “defendant’s act of handing the cell phone with the memory card he inserted into the phone to the child amounted to a violation of the statute.” The image in that case did not need to be electronically transmitted from one device to another via cell phone or internet service. This bill eliminates the argument that a remote transmission is required.”

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

AOC, AODA, and AGO reported this bill conflicts with HB 100 (also amending Section 30-6-1 NMSA 1978 to provide that a person who commits intentional abuse of a child of any age that results in the death of the child is guilty of a first degree felony resulting in the death of a child).

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