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FISCAL IMPACT REPORT

SPONSOR Hochman-Vigil/Rehm/Figueroa/ Gallegos, DY ORIGINAL DATE 2/03/2020 LAST UPDATED 2/16/2020 HB 269/aHCPAC/aHJC/aHF1#1

SHORT TITLE Domestic Terrorism Changes SB _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate	Indeterminate	Indeterminate	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB172

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Department of Public Safety (DPS)
 Homeland Security and Emergency Management Department (HSEMD)
 Law Offices of the Public Defender (LOPD)
 Attorney General (NMAG)
 Corrections Department (NMCD)
 New Mexico Sentencing Commission (NMSC)
 Public Education Department (PED)
 University of New Mexico (UNM)

SUMMARY

Synopsis of HF1#1 Amendments

The House Floor #1 amendments to HB269, as twice amended, define the term “place of worship” to mean any physical location or religious assembly. They then include that type of location as an element in the definitions of the crimes of terrorism and making a terroristic threat.

It should be noted that the intent element of the crime of terrorism does not actions directed at or involving schools or community centers. See Section 3(C)(1) and (3).

Synopsis of HJC Amendments

The House Judiciary Committee amendments to HB269 as amended:

- Clarify that terrorism is any act that causes great bodily harm or death (with the intent defined in the original bill);
- Clarify that making a terroristic threat is threatening to commit not just any criminal offense, but an act of terrorism as defined in Subsection C, along with striking the requirement that the threat against a person at a school, community center or public accommodation, or against such a facility involve violence; and
- In defining “denial of service attack” in the new crime of cyberterrorism, clarify that the act of inundating or overloading, or attempting to inundate or overload, a computer network must be unlawful.

Synopsis of HCPAC Amendments

The House Consumer and Public Affairs Committee amendments to HB269:

- Reduce the new crimes of possessing a terroristic weapon and making a terroristic threat to third-degree felonies (leaving in place the second-degree felony designation for the new crime of terrorism);
- Strike language requiring imposition of a mandatory minimum sentence that cannot be suspended or deferred as to the three new crimes of terrorism, possessing a terroristic weapon, and making a terroristic threat;
- Strike language authorizing the charging as a separate offense if the same acts constitute a crime under a separate criminal provision;
- Strike language making each day of commission a separate offense;
- Add language requiring an intent to commit terrorism as an element of the crimes of possessing a terroristic weapon and making a terroristic threat; and
- Remove the modifier “whether real or imitation” as to a terroristic weapon.

NMCD, AOC, and other agencies responding to these amendments note the reduction from second degree to third degree and the addition of intent requirements could reduce the number and costs of both prosecution (including judicial hearings) and incarceration. Additionally, NMAG notes the language being stricken as described in the third and fourth bullets if left in place could lead to double jeopardy challenges if prosecutors were to charge separate crimes for the same acts.

Synopsis of Original Bill

House Bill 269 creates the crimes of terrorism, possessing a terroristic weapon and making a terroristic threat:

- **Terrorism:** a second degree felony for committing an act dangerous to human life that is also a criminal violation of state law with the intent to: (1) intimidate or coerce a civilian population, including committing mass violence in a public accommodation; (2) influence the policy of a state entity or political subdivision of the state; or (3) affect the conduct of a state entity, political subdivision of the

state or public accommodation by mass destruction, assassination, kidnapping or an act of violence enumerated as a serious violent offense in Section 33-2-34 NMSA 1978. The penalty for commission is three years, which cannot be suspended or deferred and is subject to sentencing enhancements.

- **Possessing a Terroristic Weapon:** a second degree felony for manufacturing, fabricating or possessing, in any manner, whether real or imitation, a weapon: (1) designed or intended to cause death or serious physical injury by the release, dissemination or impact of toxic or poisonous chemicals or their precursors; (2) involving any biological agent, disease or disease organism; or (3) designed to release radiation or radioactivity at a level dangerous to human life (other than a person when engaged in the manufacture of such weapons for lawful purposes). The penalty for commission is three years, which cannot be suspended or deferred and is subject to sentencing enhancements.
- **Making a Terroristic Threat:** a second degree felony for threatening to commit any criminal offense, unequivocally, unconditionally and specifically, whether that threat is made online or otherwise, involving violence against a person at a school, community center (limited to locations which primarily supervise children and where children congregate) or public accommodation, or to harm a school, community center or public accommodation with the intent to: (1) cause a reaction to the threat by an official or volunteer agency organized to deal with emergencies; (2) place a person in fear of great bodily harm; or (3) prevent or interrupt the occupation or use of a school or community center building.

HB269 expressly provides that prosecution for any of these three new crimes does not preclude prosecution pursuant to any other provision of law violated by the commission of these acts. It provides that a separate offense occurs on each calendar day on which any of the acts constituting these crimes is committed. It also grants NMAG power, concurrently with the local district attorney, to prosecute cases alleging these crimes.

In addition, HB269 creates a fourth new crime:

Cyberterrorism: a third degree felony for: (1) committing any of the acts prohibited by the Computer Crimes Act with the intent to intimidate or coerce a civilian population, influence the policy of a state entity or a political subdivision of the state or affect the conduct of a state entity or a political subdivision of the state; or (2) committing a denial of service attack with the intent to intimidate or coerce a civilian population, influence the policy of a state entity or a political subdivision of the state or affect the conduct of a state entity or a political subdivision of the state, and the computer network against which the denial of service attack is committed is: (a) administered or operated by a federal entity, state entity or a political subdivision of the state; (b) a utility provider, including a provider of electricity or water; or (c) a financial institution as defined in existing law (Section 58 -16-3(A)(23) NMSA 1978). “Denial of service attack” means preventing authorized access to computer resources or delaying time-critical computer operations by inundating or otherwise overloading a computer network, or attempting to overload a computer service.

The penalties for two other existing crimes are increased from fourth degree felonies to third degree felonies:

- Teaching or demonstrating the use of a device or technique capable of causing injury to or death of any person with the intent that the knowledge or skill taught, demonstrated or gained be unlawfully used to commit terrorism as defined in the bill; and
- Training, practicing or receiving instruction in the use of a device or technique capable of causing injury or death to any person with the intent that the knowledge or skill taught, demonstrated or gained be unlawfully used to commit terrorism as defined in the bill.

HB269 enacts a new statutory section within the Antiterrorism Act requiring state agencies to report any possible violation of the Act to (and provides for information sharing with) the New Mexico All Source Intelligence Center (Center). HB269 requires HSEMD to maintain the Center, a cross-jurisdictional partnership between local, state and federal agencies, to support the development of plans, policies and procedures that protect the state from border, criminal and terrorist threats.

FISCAL IMPLICATIONS

Of the responding agencies, AOC, LOPD and NMCD report increased fiscal impact due to the creation of four new crimes as well as increased punishment for two existing crimes. None of these agencies provide estimates of that impact, although LOPD reports that its cost to hire an FTE Assistant Trial Attorney is \$206.8 thousand annually, including salary, benefits and support staff. NMCD reports the average annual cost to incarcerate a single inmate is \$40.4 thousand. The impact to the judiciary would be proportional to the enforcement of this law and new prosecutions, according to AOC, which notes that as penalties increase, more jury trials are likely. NMAG reports that the expansion of its criminal jurisdiction to include the crimes being established in Section 3 of this bill may require additional resources, without further addressing or estimating such an increase.

SIGNIFICANT ISSUES

DPS calls attention to Section 1(C), which requires HSEMD to maintain the Center, a cross-jurisdictional partnership between local, state and federal agencies to protect the state from border, criminal and terrorist threats. It reports that federal law defines a participating agency as one exercising law enforcement or criminal investigation authority. Because HSEMD does not exercise such authority, and is not authorized to receive criminal intelligence information, DPS explains that HSEMD cannot perform the duties assigned to it in this subsection and in Section 4.

In addition, DPS points to a number of definitions that may raise issues. The definition of “public accommodation” may not include facilities such as private gyms that require memberships. Further, the definition of “civil disorder” requires two or more persons, so lone offenders are not subject to the bill’s provisions. The definition of “terrorism” as “committing an act dangerous to human life that is also a criminal violation of state law” with three identified intents, DPS advises, may be overbroad and therefore unconstitutionally vague. It suggests use of phrases such as “with purpose to terrorize” or “in a reckless disregard of the risk” in the definitions of both the crimes of terrorism and terroristic threats.

LOPD raises overbreadth as an issue as well. In addition to covering behavior already punished as criminal, it argues that the new terrorism crimes this bill proposes are exceedingly broad and unduly vague so that they cast the net far too broadly to target actual terrorists. According to

LOPD, creating such crimes has caused problems in other states. It also points out that terrorism is punished as a second degree felony and includes an act dangerous to human life that is already a crime when done with the intent to intimidate or coerce a civilian population. For example, if someone pulls a gun on two people and threatens them in any way, currently that act is aggravated assault with a deadly weapon. Under HB269, in addition to being aggravated assault with a deadly weapon, already a fourth degree felony, (Section 30-3-2, NMSA 1978), it will also be punishable as terrorism, a second degree felony. Meanwhile, there are no provisions that would ensure the statute targeted actual terrorists.

With regard to making a terroristic threat against a school, LOPD fears this is a crime that is likely to be charged against young people, like those who may call in a bomb threat because they do not want to go to school – not an act it believes should result in second-degree felony punishment. In order to target the intended offenders, LOPD recommends that the bill require an act in furtherance of the threat, proof that the person had a weapon, or some other indicator that the threat is imminent, likely, and not just words alone. An intent to terrorize should be paramount.

On the other hand, DPS expresses concern that the requirement that the threat be “unequivocal” will allow someone to make a threat (“e.g. tomorrow I will shoot up the school”) and then, after being found out, and then can add “just kidding” and defend by stating the threat was not unequivocal. DPS believes requiring that the threat be “unconditional” creates similar problems. This allows someone to threaten, “if x teacher doesn’t leave, I am going to shoot up the school” and then defend by stating that the threat was conditional. DPS suggests deleting the requirement that the threat be unequivocal and unconditional.

PED calls attention to an existing state law that reads, “No person shall willfully interfere with the educational process of any public or private school by committing, threatening to commit or inciting others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school.” Section 30-20-13(D), NMSA 1978. Commission of these acts is a petty misdemeanor. PED advises this is the state statute under which most school threats are prosecuted in New Mexico, although juveniles violating this act may be charged with the delinquent act of interference with the education process, depending upon prosecutorial discretion. Additionally, PED points out that issuing a threat — including over social media, via text message, or through e-mail — is a federal crime (18 U.S. Code § 875–Threatening Interstate Communications).

PED also cites neuroimaging research by which indicates teenagers have a heightened vulnerability to reward what drives risky behaviors. The incomplete development of brain mechanisms related to modulation of impulsive behavior reduces the tendency of teens to heed risk. Massachusetts General Hospital Center for Law, Brain and Behavior with Harvard Medical School. The bill’s definition of a threat against a school includes making a threat to commit any criminal offense involving violence against a person at a school to place a person in fear of great bodily injury. This definition may involve threatening to harm someone at school, and in such a case the threat may lead to a more severe consequence than would typically be warranted.

RELATIONSHIP

This bill relates to SB172, which creates a new fourth degree felony for threatening a shooting at a school or other place open to the public.

TECHNICAL ISSUES

On page 9, line 1, inserting the word “by” before the second “a” might clarify the exception being set forth.

On page 6, lines 14-19, HSEMD suggests, rather than creating a new more limited definition of “school”, using the existing statutory definition found in the statute defining the crime of unlawful carrying of a deadly weapon on school premises. See Section 30-7-2.1(B), NMSA. The existing definition ensures such areas as parking lots, buses and football stadiums are covered.

OTHER SUBSTANTIVE ISSUES

PED also reports that according to 2017 New Mexico Youth Risk and Resiliency Survey Results, 11.8 percent of students skipped school because of safety concerns on at least one day in the past 30 days, compared with 6.7 percent nationally. Further, as to cyberattacks, PED cites to a report by Campus Safety which indicates there were 122 cyberattacks last year at 119 kindergarten through 12 public education institutions, averaging an attack every three days, according to a new report on the misuse of technology in U.S. public schools. Cyberattacks have resulted in the theft of millions of taxpayer dollars, stolen identities, tax fraud and altered school records. The departments notes that New Mexico school districts and charter schools are not immune to cyberattacks as is illustrated by the ransomware attacks on Las Cruces Public School in October of 2019 and on Roswell Independent School District in September of 2019.

AMENDMENTS

HSEMD recommends this amendment to Section 1(C) to better define the role of the Center and align its role to the national standards for such centers:

“act as liaison between federal, state and local agencies to effect the improved sharing of counterterrorism intelligence, including maintaining the New Mexico all source intelligence center, which is a cross-jurisdictional partnership between local, state and federal agencies to lead and support the collection and sharing of criminal intelligence information, development of plans, policies and procedures that protect the state from border, criminal and terrorist threats;”.

MD/sb/rl