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## FISCAL IMPACT REPORT

**LAST UPDATED** \_\_\_\_\_

**SPONSOR** Lord/Jones **ORIGINAL DATE** 2/12/2023

**BILL**

**SHORT TITLE** Exposure of Children to Certain Drugs **NUMBER** House Bill 221

**ANALYST** Rabin

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT\*

(dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to CYFD	\$7,000.0	\$7,000.0	\$7,000.0	\$21,000.0	Recurring	General Fund
Costs to NMCD	NFI	\$3,615.6	\$7,231.2	\$10,846.8	Recurring	General Fund
<b>Total</b>	<b>\$7,000.0</b>	<b>\$10,615.6</b>	<b>\$14,231.2</b>	<b>\$31,846.8</b>	<b>Recurring</b>	<b>General Fund</b>

Parentheses ( ) indicate expenditure decreases.  
 \*Amounts reflect most recent analysis of this legislation.

Conflicts with Senate Bill 128

### Sources of Information

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Administrative Office of the District Attorneys (AODA)  
 Public Defender Department (PDD)  
 New Mexico Attorney General (NMAG)  
 Sentencing Commission (NMSC)  
 Department of Health (DOH)  
 Children, Youth and Families Department (CYFD)  
 Corrections Department (NMCD)  
 Department of Public Safety (DPS)

## SUMMARY

### Synopsis of House Bill 221

House Bill 221 would amend existing crimes regarding the abandonment or abuse of a child to apply penalties for exposing a child, in utero, to a Schedule I or II narcotic. Exposure that does not result in a child's death or great bodily harm would be punishable as a third-degree felony (which carries a sentence of three years of incarceration) for a first offense and as a second-degree felony (which carries a sentence of nine years of incarceration) for second or subsequent offense. Exposure resulting in death or great bodily harm would be punishable as a first-degree

felony (which carries a sentence of 18 years of incarceration) or, in some circumstances, a first-degree felony resulting in the death of a child (which carries a sentence of life imprisonment).

In addition, the bill would eliminate certain legal defenses to the charge of exposing a child to methamphetamine use or manufacture. The bill would also add a new statute to the Abuse and Neglect Act allowing medical personnel to “recommend” that law enforcement “detain” a newborn child, pending a court order.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

## FISCAL IMPLICATIONS

**Enforcement Costs.** The Children, Youth and Families Department (CYFD) writes it cannot absorb the fiscal implications of its duties under the bill with existing resources. The agency reports a “minimum 50 new legal staff and 75 new investigations staff will be necessary to ensure minimally adequate coverage of the expanded investigation and legal caseload,” which it estimates would cost an average of \$7 million per year.

**Incarceration Costs.** Incarceration drives costs in the criminal justice system, so any changes in the number of individuals in prison and jail and the length of time served in prison and jail that might result from this bill could have moderate fiscal impacts. The creation of any new crime, increase of felony degree, or increase of sentencing penalties will likely increase the population of New Mexico’s prisons and jails, consequently increasing long-term costs to state and county general funds. The Corrections Department (NMCD) reports the average cost to incarcerate a single inmate in FY22 was \$54.9 thousand; however, due to the high fixed costs of the state’s prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$26.6 thousand per year across all facilities. HB221 is anticipated to increase the number of incarcerated individuals.

HB221 expands the applications of an existing crime, essentially creating a new crime. The Sentencing Commission (NMSC) reports more than 2,000 children born in New Mexico hospitals were identified as being exposed to a controlled substance over a two-year period. This analysis assumes half of these cases would result in arrests and estimates a 27 percent conviction rate, resulting in estimated additional prison admissions of 135 per year. Without additional data on the number of cases in which such cases resulted in great bodily harm or death, the analysis conservatively assumes half these cases would result in third-degree felony admissions and half would result in second-degree felony admissions. Additionally, the bill assumes at least one additional person will be admitted for a first-degree felony due to the provisions of this bill. Overall, this bill is projected to result in total increased annual incarceration costs to the state of at least \$12 million. Costs to the state are estimated to be at least \$3.6 million in FY25 and will rise gradually over many years to reach \$12 million in FY39 and future fiscal years.

**Other Costs.** Additional increased system costs beyond incarceration, such as costs to the judicial branch for increased trials or to law enforcement to investigate and arrest individuals for the new crimes under HB221, are not included in this analysis, but could be moderate.

## SIGNIFICANT ISSUES

CYFD provides the following analysis:

This bill seeks to abandon the preventative approach currently considered best practices in child welfare and re-establish a punitive approach. Prior to the passing of the federal Comprehensive Addiction and Recovery Act (CARA), the nation was facing a public health crisis where pregnant women hesitated or did not seek out safe and necessary prenatal care and/or deliveries due to fear of incarceration, criminal prosecutions, and child welfare involvement. This led to many children born without prenatal care and post-natal care and monitoring. CARA was implemented to allow for the pregnant woman to seek out safe and necessary services and participate in a post-natal Plan of Care that would support the needs of both the mother and child.

The new process established by this bill is inconsistent with existing provisions of the Abuse and Neglect Act, creating a separate system for children under 72 hours of age, including, but not limited to, the issue of identifying the specific age-in-hours of a particular infant who has allegedly been exposed to controlled substances. There is also the issue of how the new process will work for children whose situation is reported while they are under 72 hours old, but not responded to until they are over 72 hours old.

Next, this bill prescribes a single response to a broad range of issues. These situations are best assessed and responded to on case-by-case basis, regardless of whether the response is rooted in the criminal provisions or the newly established provisions in the Abuse and Neglect Act. It also runs counter to the efforts in New Mexico, and nationally, to treat substance abuse and addiction as medical and mental health without criminalization; and would for all intents and purposes gut the CARA plan system.

Moving on, the bill states that “the taking of a newborn child into temporary custody under this section shall not be deemed an arrest, nor shall it constitute a police record”. This suggests that (a) law enforcement are prohibited from filing reports on the matter, and (b) the taking of a child who is alleged to have been an abuse or neglect victim into law enforcement custody could otherwise be considered an arrest. If the intent of this section is to prevent the parent from being charged with criminal child abuse, that provision should be (a) stated clearly and (b) included in the criminal code.

This bill also creates a conflict between the state and federal laws on marijuana. While marijuana is, like alcohol, a legal recreational drug in New Mexico, the federal government still classifies marijuana as a Schedule 1 drug, unlike alcohol, which means a newborn who tests positive for presumed parental marijuana use would be subject to the provisions of this bill while a newborn showing signs of prenatal alcohol abuse exposure would not.

The Public Defender Department (PDD) provides the following analysis:

This bill proposes to prosecute a person for child abuse based on their own use of a controlled substance during pregnancy. The New Mexico Court of Appeals addressed this exact issue in *State v. Martinez*, 2006-NMCA-068, 137 P.3d 1195. There, the Court held that a “child” for purposes of the child abuse statute is a “person” under the age of eighteen, and a fetus is not a “person” under New Mexico law. *Id.* ¶¶ 6-9. *See also State v. Willis*, 1982-NMCA-151, 652 P.2d 1222 (holding that an unborn fetus is not a “human being” within the meaning of the vehicular homicide statute). Analyst further presents concerns regarding the breadth of this legislation, as it appears to establish a third-degree felony every time an infant “tests positive,” without any minimal drug concentration requirement or corresponding evidence that the levels detected would be *harmful* to an infant.

The bill’s amendments to Subsections I and J of the child abuse statute are in direct conflict with the mens rea of the crime. NMSA 1978, § 30-6-1 (I)-(J). Section I provides that knowingly, intentionally, or negligently leaving a child in a facility used for production of a controlled substance is a prima facie case of child abuse, but the amendment does away with any defense that the person did not know a child was present. Similarly, Section J provides that knowingly or intentionally exposing a child to use of methamphetamine is a prima facie case of child abuse, with the same amendment as Subsection I. New Mexico precedent has long recognized that a person cannot be convicted of child abuse for generally negligent conduct without knowing that their behavior endangered a particular child that was foreseeable at the time of the conduct. *State v. Gonzales*, 2011-NMCA-081, ¶ 25, 150 N.M. 494 (“the consequences of the defendant’s actions must be specifically directed at children in the case of child abuse”); *see also State v. Clements*, 2006-NMCA-031, ¶ 16, 139 N.M. 147 (endangerment of children cannot be predicated on a child’s mere proximity to a dangerous situation, but rather that the defendant’s actions must place the child who is endangered “in the direct line of any danger” so as to create more than a “mere possibility of harm.”).

Section 2 of the bill is not criminal law and would not affect the Public Defender Department. It provides that “[a] newborn child may be detained in a hospital by a law enforcement officer upon recommendation of the human services department, children, youth and families department or a physician, registered nurse, licensed practical nurse or physician assistant...” [HB 221 at 4-6 (emphasis added)] if, among other things, the newborn child is identified as “being affected by substance abuse or demonstrating withdrawal symptoms resulting from prenatal drug exposure.” However, as noted above, without any required showing that the amount detected is *harmful*, these circumstances may not justify such blanket interference with parental custodial rights.

The Administrative Office of the Courts (AOC) writes:

HB221 does not explicitly or implicitly recognize New Mexico’s current laws regarding the 2019 enactment by the New Mexico Legislature of New Mexico’s

Comprehensive Recovery and Addiction Act (CARA), CARA, utilizing the federal Comprehensive Addiction Recover Act goal of keeping mom and baby together with supportive services, helps fund prevention, education, harm reduction, treatment and recovery services for pregnant people. Specifically, New Mexico's CARA focuses on supportive care for pregnant people affected by substance use and the coordination of services and support for the parents and family of newborns affected by substance exposure before birth.

The development and enactment of CARA followed the amendment to the federal Child Abuse Prevention and Treatment Act (CAPTA) which required all state child welfare agencies to ensure every baby born exposed to substances receive a plan of care and that data be reported to the federal agency. During the development of the plan, based upon reports of disparate and discriminatory impact (especially on women of color) New Mexico went beyond reporting to instead include changes and training to address the systemic inequity and instead provide a less stigmatizing, equitable plan. The steps undertaken and the ultimate law enacted was explored in depth by a taskforce which included healthcare providers, insurance care coordinators, state agency representatives and other stake holders who worked on a plan from 2017 until the bill's passing.

This addition to the Children's Code required hospitals to create plans of care when which are then sent to CYFD and the Dept. of Health. Significantly the legislation stated "substance use in pregnancy should not, by itself, be considered a reason for a mandatory child abuse report." This non-punitive approach to substance use in pregnancy is grounded in recognition that supportive assistance in reducing and eliminating substance use during pregnancy is more effective and that <sup>punitive</sup> approaches <sup>(see</sup> <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755302>) and lead to disparate results impacting BIPOC pregnant persons. See also [https://sitefinitystorage.blob.core.windows.net/sitefinity-production-blobs/docs/default-source/advocacy/2022-pps-on-advancing-racial-justice-in-health-care-through-adm---final.pdf?sfvrsn=3ba5e94f\\_3](https://sitefinitystorage.blob.core.windows.net/sitefinity-production-blobs/docs/default-source/advocacy/2022-pps-on-advancing-racial-justice-in-health-care-through-adm---final.pdf?sfvrsn=3ba5e94f_3)

HB221 by seeking to both criminalize and encourage removal of newborns who are born drug affected, would discourage pregnant people from seeking prenatal care and treatment for substance use disorders. This would result in greater risks for pregnant persons and their child and lessen opportunities for treatment for pregnant women as well as appropriate therapy for exposed infants. "Early identification and treatment of women with substance use disorders and/or dependence is a critical component of preconception and prenatal care and is important for supporting healthy birth outcomes." See *Criminalization of Pregnant Women with Substance Use Disorders*, AWHONN Position Statement [https://www.jogrn.org/article/S0884-2175\(15\)31770-6/fulltext](https://www.jogrn.org/article/S0884-2175(15)31770-6/fulltext) .

HB221 would result in disparate treatment of pregnant persons with substance use disorder and create a penalty class which does not impact other individuals with substance use disorder as well as from those pregnant persons who use alcohol or other unenumerated substances which create maternal and neonatal complications. As address in the American Journal of Obstetrics and Gynecology by Schemph A.H. and Strobino D.M. (<https://www.ajog.org/article/S0002->

[9378\(08\)02198-4/pdf](#) ) the threat of incarceration is an ineffective strategy for reducing substance abuse.

The Department of Health (DOH) expresses the following concerns:

Adverse, unknown, and unexpected results from parents who might be more likely to not seek prenatal care or medical care due to substance use and fear of punitive actions. If HB221 results in more substance using parents not seeking medical care, the risks to both the child and parents become greater.

Taking an infant into custody who exhibits withdrawal symptoms from methadone or buprenorphine may occur. It should be noted that methadone is a schedule II medication and per HB221 may be used lawfully if taken as prescribed, while buprenorphine is a schedule III medication that would not be subject to the provisions of HB221. Both medications are used to treat Substance Abuse Disorders in pregnant persons ([Drug misusing parents: key points for health professionals | Archives of Disease in Childhood \(bmj.com\)](#)), with the potential for neonatal abstinence syndrome. Defending against this use may subject parents engaged in a substance abuse treatment plan with an unnecessary abuse/neglect investigation – attempting to avoid detection by discontinuing use late in pregnancy could result in adverse outcomes.

## CONFLICT

House Bill 221 conflicts with Senate Bill 128, which makes changes to the Abuse and Neglect Act and the Family in Need of Court-Ordered Services Act and takes responsibility for removing from the home maltreated children or children suspected of being maltreated away from law enforcement officers and grants this responsibility to CYFD.

## TECHNICAL ISSUES

CYFD notes the following issues:

This bill appears to also create a conflict with the Cannabis Regulation Act, which states “A person shall not be denied parental rights or *custody of* or visitation with a minor child by the state or local government based solely on conduct that is lawful pursuant to the Cannabis Regulation Act” (26-2C-4(C)).

This bill is additionally directly in conflict with 32A-4-3(G):

A finding that a pregnant woman is using or abusing drugs made pursuant to an interview, self-report, clinical observation or routine toxicology screen shall not alone form a sufficient basis to report child abuse or neglect to the department pursuant to Subsection A of this section. A volunteer, contractor or staff of a hospital or freestanding birthing center shall not make a report based solely on that finding and shall make a notification pursuant to Subsection H of this section. Nothing in this subsection shall be construed to prevent a person from reporting to the department a reasonable suspicion that a child is an abused or neglected

child based on other criteria as defined by Section 32A-4-2 NMSA 1978, or a combination of criteria that includes a finding pursuant to this subsection.

Finally, the bill's language for the Abuse and Neglect Act lacks clarity in several respects. It does not identify who (law enforcement or CYFD) may take a newborn who is not in a hospital setting into temporary protective custody without a court order; it does not address the numerous non-drug related circumstances that might endanger a newborn; and it fails to provide any direction on the interactions with the other provisions of the Abuse and Neglect Act applicable to all children.

The office of the New Mexico Attorney General (NMAG) writes:

There may be some ambiguity in permitting "the human services department" or the "children, youth and families department" to recommend the detention of a newborn child. Insofar as both of these departments have large numbers of staff at varying levels of decision-making authority and professional expertise, the bill might benefit from clarifying who within these departments may recommend the detention of a newborn child.

NMAG further notes:

Section 32A-4-6 of the Abuse and Neglect Act already contains provisions permitting law enforcement and medical personnel to take a child into custody in limited circumstances. Although the bill's proposed new section of the Abuse and Neglect Act would appear to supersede Section 32A-4-6 where newborn children are concerned, it is likely that Section 32A-4-7 would still govern the release of a newborn child from said custody.

As drafted, HB 221 would allow certain health care professionals without the authority to diagnose disease or prescribe medications (such as a registered nurse or licensed practical nurse) to recommend the detention of newborn children.

The Administrative Office of the District Attorneys (AODA) writes:

The new language in House Bill 221 in Sections I and J precluding a defense based on the defendant's ignorance that a child was present would conflict with abuse of child statute intent elements in Section 30-6-1(D), which state "Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be harmed." This current language requires that a person know a child is present or was present. Therefore, it is an irreconcilable conflict to add new language that ignorance of the child's presence is not a viable defense.

AODA adds: "If the new Section 2 proposed in HB221 is passed, Sections 32A-4-3 duty to report, 32A-4-6 custody of a child, and 32A-4-7 release of a child under the Children's Code would also have to be amended to avoid a conflict in the statutes."

## OTHER SUBSTANTIVE ISSUES

NMSC reports:

Between 2008 and 2017, the rate of babies being diagnosed with Neonatal Abstinence Syndrome (neonatal withdrawal) increased 324% in New Mexico. (See “Neonatal Abstinence Syndrome Surveillance in New Mexico” by Luigi Saavedra, published New Mexico Epidemiology, Nov. 2018, available here: <https://www.nmhealth.org/data/view/report/2194/>.)

DOH writes:

In the United States, about 1 in 8 children ages 17 or younger are living in households with at least one parent who has a substance use disorder (SUD). While these 8.7 million children will not all experience abuse or neglect, they are at increased risk for child maltreatment and child welfare involvement compared to other children. [Children and Families Affected by Parental Substance Use Disorders \(SUDs\) | National Center on Substance Abuse and Child Welfare \(NCSACW\) \(hhs.gov\)](#)

There is increasing concern about the negative effects on children when parents or other members of the household use alcohol or drugs (either legal or illegal) (Drug misusing parents: key points for health professionals | Archives of Disease in Childhood (bmj.com)) or engage in illegal drug-related activity, such as the manufacture of methamphetamines in home-based laboratories. Many States have responded to this problem by expanding civil definitions of child abuse or neglect to include this concern: approximately 33 States and the Virgin Islands address in their criminal statutes the issue of exposing children to illegal drug activity, including:

- In 19 States the manufacture or possession of methamphetamine in the presence of a child is a felony I
- In 16 States, the manufacture or possession of any controlled substance in the presence of a child is considered a felony. I
- Twelve States have enacted enhanced penalties for any conviction for the manufacture of methamphetamine when a child was on the premises where the crime occurred. T
- Exposing children to the manufacture, possession, or distribution of illegal drugs is considered child endangerment in 14 States. E



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he exposure of a child to drugs or drug paraphernalia is a crime in eight States.
- I  
n North Carolina and Wyoming, selling or giving an illegal drug to a child by any person is a felony [Parental Substance Use as Child Abuse \(childwelfare.gov\)](http://childwelfare.gov)

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