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## FISCAL IMPACT REPORT

SPONSOR Reeb/Castellano/Rehm/Montoya LAST UPDATED \_\_\_\_\_  
ORIGINAL DATE 3/2/23  
SHORT TITLE Child Sex Offense Penalties BILL NUMBER House Bill 485  
ANALYST Daly

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

	FY28	FY29	FY30	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
NMCD	\$67.79	\$147.55	\$209.36	\$424.70	Recurring	General fund

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

Relates to HB128, HB445 and SB215

### 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)  
Department of Public Safety (DPS)  
Law Offices of the Public Defender (LOPD)  
New Mexico Adult Parole Board (NMAPB)  
New Mexico Attorney General (NMAG)  
Corrections Department (NMCD)  
New Mexico Sentencing Commission (NMSC)

## SUMMARY

### Synopsis of House Bill 485

House Bill 485 amends existing law governing sexual exploitation of children, criminal sexual communication with a child, sentencing provisions for sex offenses involving children, and probation and parole of sex offenders.

***Sexual Exploitation of Children.*** HB485 removes the phrase “copying by any means” from the definition of “manufacture” of child pornography. Thus, copying child pornography by any means is punished the same as distributing it (a third degree felony-Section C) rather than

punished as “manufacturing” (a second degree felony-Subsection E). In other words, Sections 1 and 2 would reduce copying child pornography from a second degree felony (which currently results in a penalty of 12 years) to a third degree felony (which currently results in a penalty of 11 years). See NMSA 1978, § 31-18-15(A). It also increases punishment for possession from a fourth degree felony to a third degree felony if the person intentionally possesses more than 25 images, films, photographs, other visual or print media, or combination thereof. Additionally, for distribution, copying, and recording, the bill increases the basic sentence by a mandatory two years (making those years non-deferrable and the first years served) if an individual depicted in the pornography is found to be under 13 years of age. For youthful offenders, the two-year increase is discretionary. The two-year enhancement applicable to a distribution, copying, or recording offense does not require that the defendant “intentionally” or “knowingly” (or has reason to know) the material involves a child under 13 years old. See Sections 1 and 2.

***Sexual Communication with a Child.*** The bill specifies it is not a defense to sexual communication with a child that the intended victim was a peace officer posing as a child under the age of 16. See Section 3.

***Sentencing Provisions.*** The basic sentence for third degree sexual offenses against a child is increased from six years to 11 years. See Section 4.

***Sex Offender Probation.*** These offenses are added to the statute governing sex offender probation, which subjects a person convicted of any one of them to five to 20 years of sex offender probation, and requires court review after an initial five years of supervised probation, and at two and one-half year intervals thereafter:

- Aggravated criminal sexual penetration;
- Criminal sexual penetration (CSP) in the fourth degree (first through third degree CSP offenses are already in existing statute);
- Criminal sexual contact of minor (CSCM) in the fourth degree (second and third degree CSCM are already in existing statute);
- Criminal sexual contact in the fourth degree;
- False imprisonment when committed with intent to commit a sexual offense;
- Aggravated indecent exposure;
- Enticement of a child;
- Incest when the victim is under 18;
- Child solicitation by electronic communication for convictions occurring on or after July 1, 2013;
- Solicitation to commit criminal sexual contact of a minor in the second, third, or fourth degree; and
- Attempt to commit any of the listed offenses other than solicitation of criminal sexual contact of a minor when the attempt constitutes a felony. See Section 5.

***Sex Offender Parole.*** These offenses are added to the statute governing sex offender parole, which requires parole board review after an initial five years of supervised parole, and at two and one-half year intervals thereafter:

- Criminal sexual contact in the fourth degree;

- False imprisonment when committed with intent to commit a sexual offense;
- Aggravated indecent exposure;
- Enticement of a child;
- Incest when the victim is under 18;
- Solicitation to commit criminal sexual contact of a minor in the second, third, or fourth degree; and
- Attempt to commit any of the listed offenses other than solicitation to commit criminal sexual contact of a minor when the attempt constitutes a felony.

HB485 does not specify if these new offenses would subject a parolee to five to 20 years of parole or five years to life parole. See Section 6.

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.

## **FISCAL IMPLICATIONS**

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 significant 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, consequently increasing long-term costs to the general fund. Longer sentences are expected to result in fewer releases relative to admissions, driving up overall populations. 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.

Overall, this analysis estimates HB485 will result in increased annual incarceration costs to the state. Because this bill, among other changes, increases sentences for sex offenses against children from six to 11 years, it potentially increases the length of stay for these crimes, so the bill's full cost impacts will not be felt for many years. Costs to the state are estimated to be at least \$67.79 thousand in FY28 and will rise to \$209.36 thousand in FY30 at which point it will level off for future fiscal years.

Additional system costs beyond incarceration, such as additional costs to the judicial branch for increased trials or increased costs for probation and parole are not included in this analysis, but could be significant.

## **SIGNIFICANT ISSUES**

AODA raises double jeopardy concerns in Section 2(D)'s changes, which impose a mandatory two year enhancement of the basic sentence, which cannot be suspended or deferred, for any intentional recording (or having reason to know or knowing that such recording may occur) of any prohibited sexual act or simulation of such an act upon a finding that the child is under 13. The existing law already increases the penalty from that of a third degree (11 years) to a second degree felony (12 years) if the child is under 13.

LOPD raises another legal issue arising from the provision in Section 5(F)(11) adding child solicitation by electronic communication to the sex offender probation law, which includes by its language “convictions occurring on or after July 1, 2013”. As the LOPD advises, this language:

Would apply punishment retroactively, making it potentially a violation of federal and state prohibitions on ex post facto punishment. *See State v. Ordunez*, 2012-NMSC-024, ¶ 17, 283 P.3d 282 (“New Mexico courts have long recognized that a statute that increases the punishment allowable for a previously committed offense violates the ex post facto ban”); *State v. Adam M.*, 1998-NMCA-014, ¶¶ 4, 7, 10-11, 124 N.M. 505, 953 P.2d 40 (holding that an amendment extending the maximum age from eighteen to twenty-one for children’s court jurisdiction over juvenile probation and incarceration could not be retroactively applied to a child whose offense had occurred before the amendment because the “ex post facto prohibition does not allow for a law that increases the punishment for an offense after the offense has been committed”).

Additionally, LOPD calls attention to Section 6’s failure to indicate which of the new offenses being included in the sex offender parole law are subject to the five to 20 year parole period and which, if any, are subject to the five years to life parole period. The agency comments that this failure is likely to result in confusion and litigation. This same argument applies with equal force as to Subsection I(6), child solicitation by electronic communication device, which is one of the offenses already listed in the existing statute; the statute is similarly unclear as to which parole period is applicable to that crime. LOPD notes that in the past when amendments to the Sex Offender Registration and Notification Act were similarly unclear the courts defaulted to the shorter period.

The amendments contained in Section 2, raising penalties in sexual exploitation of children crimes, also give rise to issues, particularly as to the intent element. AODA comments on the lack of requirement that a person know or have reason to know that the child is under 13. LOPD comments that:

HB485 inconsistently addresses intent requirements. For instance, HB485 increases punishment for possession if more than 25 images are “intentionally” possessed, suggesting that the defendant must know the images contain child pornography. Specifying that the images must be “knowingly” possessed would make the requirement clearer and head off potential litigation over what “intentional” means in this context. At the same time, the sentencing increases for distribution, copying, and recording do not similarly clarify if the defendant must know the images or children at issue are under 13 years of age.

Because of the lack of clarity in these requirements, the intent issues will likely result in additional litigation, as they have already for this statute. *See State v. Adamo*, 2018-NMCA-013, ¶ 32, 409 P.3d 1002 (rejecting that a defendant must knowingly or even recklessly possess child pornography and holding that while the defendant must intentionally possess pornography, he only must have reason to know the pornography involves an individual under 18); *State v. Rael*, 2021-NMCA-040, ¶ 1, 495 P.3d 598 (trying to clarify the intent standard), *cert. granted*.

This lack of clarity in the intent could easily be prevented by specifying that the defendant must knowingly possess material involving minors and knowingly (or at least

recklessly) copy, distribute, or record material in which the children are under 13. Clarifying such matters would ensure that the significant punishment provided for the conduct is only applied to those acting with a truly guilty mind, instead of applying to items unwittingly possessed, distributed, copied, or recorded.

CYFD comments on another aspect of Section 2's modifications to the sexual exploitation of children statute. In reference to the language that provides for a discretionary imposition of the two year increase of the basic sentence when the offender is a youthful offender, it explains the procedure involved in imposing punishment:

The court holds a hearing to determine if the youth is amenable to treatment or if they are to be transferred to the adult system for sentencing. If the court determines that the youth is amenable to treatment, the case is then sent for disposition under the children's court within the juvenile justice system. If the court determines that the youth is not amenable to treatment, then the youth is sentenced in the adult court.

CYFD goes on to advise HB485 will have little to no impact on CYFD juvenile justice clients, since it makes no mention of or provision for youthful offenders who remain in the juvenile justice system. It advises that in FY20, FY21, and FY22 there were a total of 209 clients referred to juvenile probation for delinquent sexual acts which involved a child victim under the age of 13. None of these client's cases resulted in an adult sentence; all remained within the juvenile system for disposition.

Another issue arises as to Section 4's change in the basic sentence for third degree sexual offenses against a child, which increases from six years to 11 years. While that sentence is consistent with that imposed for copying child pornography, see Sections 1 and 2, the change in Section 4 sweeps within it at least two other crimes: criminal sexual contact of a child under 13, a criminal sexual contact of a child between 13 and 18 under certain circumstances.

Finally, NMSC provides this analysis of issues involving special penalties such as those contained in HB485. It advises that it:

Is presently undertaking a review and update to the state's Criminal Code. As part of this process, the Commission engaged the services of the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota to analyze the Criminal Code for its strengths and weaknesses. One item of concern for the Robina Institute was that the Criminal Code has a number of special statutes that fall outside of the normal penalty structure in the state. HB 485 would continue that use of special penalties in the Criminal Code, as it increases the penalty for a third degree felony for a sexual offense against a child from six years imprisonment to 11 years imprisonment. Under Section 31-18-15 NMSA 1978 (the Criminal Sentencing Act) the basic sentence for a third degree felony is three years imprisonment.

## **ADMINISTRATIVE IMPLICATIONS**

NMAPB reports HB485 could create additional administrative duties for the volunteer parole board members, including additional file preparation and review for the sex offender parole hearings in light of the added list of offenses falling under sex offender parole requirements. Additionally, NMAG reports it is statutorily required to handle cases that come before the

NMAPB, which workload would increase under the bill.

## **RELATIONSHIP**

NMAPB reports that House Bill 380 amends the parole board enabling statute, allowing for parole board members to be compensated for administrative services outside of board hearings and meetings, including pre-hearing preparation.

HB128, HB445 and SB215 also involve sex offenses and sex offenders, but do not appear to conflict with this bill.

HB458 and SB61 also amend the same section of existing law that Section 4 amends, but does not appear to conflict with this bill.

## **TECHNICAL ISSUES**

AODA raises this technical concern as to the title of the bill: the substance of the bill go beyond sex offenses against children with the last two sections. Because a bill can only embrace one subject, suggest deleting “against children” in the “relating to” clause, and adding something about increased probation and parole supervision in the title so those sections are not rendered void. See NM Const. Art. IV, Sec. 16.

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