

LFC Requester: _____

**AGENCY BILL ANALYSIS
2025 REGULAR SESSION**

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{Analysis must be uploaded as a PDF}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment**
Correction **Substitute**

Date 2/25/2025

Bill No: HB 303/HHHSC-a

Sponsor: Rep. Dow
Short Title: Exposure to Certain Drugs as Child Abuse

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with: HB 136, Fentanyl Exposure as Child Abuse, would also amend Section 30-6-1.

Relates to: An identical bill was filed in 2023 regular session as HB 221, Exposure of Children to Certain Drugs. It does not appear that the bill was ever heard in committee.

SECTION III: NARRATIVE

Changes to this analysis based on the House Health & Human Services Committee (HHHSC) amendment are in bold.

BILL SUMMARY

Synopsis: HB 303 proposes to amend the child abuse statute, NMSA 1978, Section 30-6-1, to include as child abuse a person knowingly, intentionally, or negligently, and without justifiable cause, causing or permitting a child to be exposed—to the extent that the child “tests positive” at birth—for a Schedule I or II controlled substance, unless the mother took the substance in accordance with a valid prescription. The bill also adds a new section for how a newborn child in a hospital setting can be “detained” by law enforcement in temporary protective custody.

The HHHSC amendments removed proposed language from subsections I and J that would have said, “It shall be no defense to the crime of child abuse that the defendant did not know that a child was present, a child could be found, a child resided on the premises or a vehicle contained a child.”

FISCAL IMPLICATIONS

This bill proposes to expand the definition of child abuse, which would theoretically result in more felony prosecutions. However, initial cases are certain to trigger constitutional challenge, so in addition to individual case defenses, the bill is likely to require motion hearings and appellate litigation until those issues are resolved. (See significant issues section below).

Analyst does not have access to data that would inform an estimate of how many new prosecutions this bill might generate, but anecdotally presumes that – without any threshold quantity of drugs detected or requirement that the amount be medically harmful – the number could be exceedingly high.

Engaging in additional and more complicated litigation could require additional funding for LOPD in order to protect the Sixth Amendment rights of defendants. A recent workload study by an independent organization and the American Bar Association concluded that New Mexico faces a critical shortage of public defense attorneys. The study concluded, “A very conservative

analysis shows that based on average annual caseload, the state needs an additional 602 full-time attorneys – more than twice its current level - to meet the standard of reasonably effective assistance of counsel guaranteed by the Sixth Amendment.”

https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/l-sclaid-moss-adams-nm-proj.pdf

SIGNIFICANT ISSUES

This bill proposes to allow prosecutions for child abuse based on a pregnant person’s 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.

Imposing criminal penalties on mothers whose newborns test positive for drugs has been widely criticized. The organization Pregnancy Justice has noted that clinical drug tests often result in false positives, and the threat of prosecution can deter pregnant people with substance abuse disorders from seeking medical care. *See* Pregnancy Justice, *Clinical Drug Testing of Pregnant People and Newborns* (2024), available at <https://www.pregnancyjusticeus.org/resources/clinical-drug-testing/>. According to the American College of Obstetricians and Gynecologists, “Clear evidence exists that criminalization and incarceration for substance use disorder during pregnancy are ineffective as behavioral deterrents and harmful to the health of the pregnant person and their infant.” American College of Obstetricians & Gynecologists, *Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period* (2024), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period>.

The proposed changes to Subsections I and J were removed by the HHS amendments, resolving the following issues from the original analysis: 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 the defendant’s actions must place the child “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...” 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.

It is worth noting that in the final FIR for the 2023 HB 221, several other agencies raised significant concerns about this legislation. CYFD and AOC both noted conflicts with the Abuse and Neglect Act and the federal Comprehensive Addiction and Recovery Act (CARA).

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS