

LFC Requester:	
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**AGENCY BILL ANALYSIS
2017 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

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: Date 2-24-17
Original **Amendment** **Bill No:** HB43
Correction **Substitute**

Sponsor: Youngblood & Clahchischilliage **Agency Code:** 264
Short Sexual Offense **Person Writing** Gail MacQuesten
Title: Definitions **Phone:** 466-0532 **Email** gailmacquesten@gmail.com

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
0	0	n/a	n/a

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		
0	0	0	n/a	n/a

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	unknown	unknown	unknown	unknown	Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

The House Judiciary Committee Substitute for HB43 amends NMSA 1978, Section 30-9-11(E), the definition of criminal sexual penetration in the second degree, to include criminal sexual penetration perpetrated “on a child thirteen to eighteen years of age when the perpetrator is in a position of authority over the child and uses that authority to coerce the child to submit.”

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

It is not known whether HB43s will increase costs for the district attorneys. It is not clear if it expands the definition of criminal sexual penetration in the second degree, because the statute already covers criminal sexual penetration by use of coercion on a child thirteen to eighteen years of age. There will likely be litigation on the issue, however, and that may increase costs to the district attorneys, appellate attorneys and courts.

SIGNIFICANT ISSUES

HB43s amends the definition of criminal sexual penetration in the second degree to include criminal sexual penetration perpetrated “on a child thirteen to eighteen years of age when the perpetrator is in a position of authority over the child and uses that authority to coerce the child to submit.” It is not clear how this amendment is to be applied, given the existing definition of “coercion” in the statute, and the existing provision making criminal sexual penetration of a child by certain persons in positions of authority a fourth degree felony.

Definition of coercion.

Section 30-9-11 already defines criminal sexual penetration in the second degree to include criminal sexual penetration perpetrated on a child thirteen to eighteen years of age by the use of coercion. “Force or coercion” is defined in NMSA 1978, Section 30-9-10(A) to mean:

- (1) the use of physical force or physical violence;
- (2) the use of threats to use physical violence or physical force against the victim or

- another when the victim believes that there is a present ability to execute the threats;
- (3) the use of threats, including threats of physical punishment, kidnapping, extortion or retaliation directed against the victim or another when the victim believes that there is an ability to execute the threats;
- (4) the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reasons to know that the victim is unconscious, asleep or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act; or
- (5) the perpetration of criminal sexual penetration or criminal sexual contact by a psychotherapist on his patient, with or without the patient's consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy.

If HB43s requires "coercion" as defined in the existing statute, there is no need for HB43s because the existing statute already makes criminal sexual penetration of a minor by the use of coercion a second degree felony. If HB43s is attempting to recognize that sex between a child and person in a position of authority over that child is by its very nature coercive, it should change the definition of "coercion" to include that situation. The current definition is narrow and does not recognize that type of inherent coercion. Instead, "coercion" refers to the use of force or physical violence, or threats to the victim or another, or attacking the victim when the victim is asleep or physically helpless.

If the drafters want to punish criminal sexual penetration of a child by a person in position of authority who uses that authority to obtain sex with a child (without using force or threats), they need to take a different approach. One approach would be to change the definition of coercion. That is how the statute addresses the issue of sex between a patient and a psychotherapist – that situation is included in the definition of coercive, so the relationship itself is treated as inherently coercive. ("Psychotherapist" is defined to include licensed social workers, counselors, religious functionaries acting as pastoral counselors, and others.) Another approach would be similar to the one taken in HB43s – add a new crime in the statute setting out what constitutes a second degree criminal penetration. But instead of referring to "coercion," make all sex between a person in position of authority and a child a second degree felony.

Potential conflict with fourth degree criminal sexual penetration

Note that the existing statute already provides that sex between a child and certain persons in positions of authority is a fourth degree felony (without requiring proof of coercion.) The fourth degree felony is very limited, applying to criminal sexual penetration not defined in the other subsections perpetrated on a child thirteen to sixteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child learns while performing services in or for a school that the child is a student in a school.

It is difficult to read the existing statute and HB43s together. Is all sex between a child and a person in a position of authority a second degree felony, or only when there is "coercion" as defined in the statute? Or are teachers and other school employees not considered persons in a position of authority and therefore guilty only of a fourth degree felony if they have sex with a child? Is there a distinction between teachers who use their position of authority to obtain sex with a child (a second degree felony) and teachers who do not use their position of authority to obtain sex with a child (a fourth degree felony)?

PERFORMANCE IMPLICATIONS

See Significant Issues, above.

ADMINISTRATIVE IMPLICATIONS

New jury instructions will be required to reflect the new statutory descriptions of the offense.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None found.

TECHNICAL ISSUES

A spouse of a minor is a “household member,” and likely exercises undue influence over the minor. If HB43s is read to include coercion by use of a position of authority, it would criminalize consensual sexual contact between a husband and wife if one is under eighteen. As discussed above, whether HB43s actually expands the definition of coercion to include the use of undue influence by use of a position of authority, or if it still requires a showing of “coercion” as defined in the statute, is unclear.

OTHER SUBSTANTIVE ISSUES

None.

ALTERNATIVES

None proposed.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

New Mexico’s criminal statutes will continue to have a very limited recognition of the use of force or coercion by persons in a position of authority in sexual crimes against children. Sexual crimes against children committed by persons in positions of authority will continue to have low penalties.

AMENDMENTS

None proposed.