

<b>LFC Requester:</b>	<b>Aurora Sanchez</b>
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**AGENCY BILL ANALYSIS  
2015 REGULAR SESSION**

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**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** February 18 , 2015  
**Prepared:** \_\_\_\_\_  
**Bill No:** HB 440 s

**Sponsor:** Rep. Sarah Maestas Barne

**Agency Code:** Attorney General’s Office  
S’

**Short Title:** Child Porn Images as individual offenses Substitute

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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
Previous companionship between HB 440 and HB 251.

Duplicates/Relates to Appropriation in the General Appropriation Act:

**SECTION III: NARRATIVE**

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

**BILL SUMMARY**

Synopsis:

The Substitute for House Bill 440 seeks to amend sections 30-6A-2 and 30-6A-3 of the Criminal Code by making each depiction of a child engaged in a prohibited sex act an individual offense and revising the definitions of “visual or print medium” and “prohibited sexual act.”

The bill not only adds a new subsection (H) to 30-6A-3 stating “that for the purposes of the section, the possession, distribution or manufacture of each separate depiction of a child under eighteen years of age engaged in a prohibited sexual act contained on an item of visual or print medium shall be considered a distinct act and shall be charged as an individual criminal offense pursuant to the relevant subsection of the statute,” but it also revises the definition of visual or print medium by adding the language “any single visual depiction of a

prohibited sexual act” to 30-6A-2 (B)(1) and 30-6A-2(B)(2) and the language “created or stored.”

The bill amends the definition of “prohibited sexual act” in section 30-6A-2 to include “a simulation of any of the acts provided in paragraphs (1) through (5).” In the current version of section 30-6A-3, simulations of prohibited sexual acts are included as criminal conduct alongside the acts themselves. The bill 440 simplifies 30-6A-2 and 30-6A-3 by including simulations in the definition of “prohibited sexual acts,” rather than piecemeal throughout the sections.

## **FISCAL IMPLICATIONS**

Note: N/A

## **SIGNIFICANT ISSUES:**

The current versions of sections 30-6A-2 and 30-6A-3 were recently interpreted by the New Mexico Supreme Court to be “insurmountably ambiguous” relating to what constitutes an individual act. Practically, this meant that the possession of a single image of child pornography was penalized identically as the possession of multiple images. The Supreme Court recommended a revision of the statute to clarify the legislature’s intent. This bill likely clarifies this statute by amending the definitions of “visual or print medium” to penalize any single visual depiction separately, as well as including a catch-all in subsection (H) of 30-6A-3.

In calling for legislative review and evaluating arguments made by the defense and state, the Supreme Court noted that possession causes equal or greater harm than the original manufacture because it further disseminates the original trespass and stated that a unitary conduct analysis for possession is not likely what the Legislature intended because a defendant would have no incentive to stop downloading child pornography after the first image.

The root problem with the pre-existing statute under the Supreme Court’s analysis was the definition of “visual or print medium.” This bill not only clarifies legislative intent in the body of the statute under subsection (H), but fixes the perceived ambiguity in the definition of “visual or print medium,” by adding the phrase “any single visual depiction of a prohibited sex act” under 30-6A-2 (B)(1) and (2) to the original language. It also adds the words “created or stored” to the definition, updating the original language to apply to offenders using a computer or electronic storage device to compile or develop a collection. The language under subsection (H) clarifies that **each** depiction of a child under eighteen years of age engaged in a prohibited sexual act contained on an item of visual or print medium shall be considered a distinct act and shall be charged as an individual act.

The clarification made by the House Bill 440 substitute does not require prosecutors to charge multiple possessions of each visual depiction independently. Nor does it require

the sentences of the possession of multiple visual depictions to be imposed consecutively. Prosecutors and courts appear to retain charging and sentencing discretion under the plain language of the bill.

#### **PERFORMANCE IMPLICATIONS**

Note: N/A

#### **ADMINISTRATIVE IMPLICATIONS**

Note: N/A

#### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP:**

Previous companionship between HB 440 and HB 251.

#### **TECHNICAL ISSUES**

Note: N/A

#### **OTHER SUBSTANTIVE ISSUES**

Note: N/A

#### **ALTERNATIVES**

Note: N/A

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo

#### **AMENDMENTS**

Note: N/A