F I S C A L I M P A C T R E P O R T

SPONSOR Torraco **ORIGINAL DATE** 1/22/16 **LAST UPDATED** **HB**

SHORT TITLE Create Crime of DWI with Minor in Car **SB** 45

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 44, HB 74, HB 81, HB 82, HB 83, SB 118

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Children, Youth and Families Department (CYFD)
Public Defender Department (PDD)
Attorney General's Office (AGO)
Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of Bill

Senate Bill 45 proposes to create a new section under the DWI laws punishing driving with an alcohol concentration of .08 or more in the person's blood or breath at the time of driving when a minor (person under the age of 18) is in the car. This would be punished as a misdemeanor.

FISCAL IMPLICATIONS

All agencies responding indicate minimal fiscal impact.

SIGNIFICANT ISSUES

The PDD and AGO state that the State already charges driving while intoxicated with a child in the car as *felony* child abuse and this has been upheld. *See* ***State v. Orquiz***, 2012-NMCA-080, ¶ 1, 284 P.3d 418 (concluding that Defendant's act of actually driving while intoxicated "alone

provided a sufficient factual basis for his child abuse by endangerment conviction, even if his DWI did not otherwise separately evince indicia of unsafe driving.") However, there may be an increase in cases at both the trial and appellate level.

CYFD cites *State v. Castaneda*, 2001-NMCA-052, 130 N.M. 679 in which the court found that it was appropriate to charge the defendant in that case with both driving while intoxicated and child abuse when the defendant drove drunk with her children in the car. By combining these two offenses into a single charge, this bill could prevent a prosecutor from charging abuse of a child under NMSA 1978 Section 30-6-1 together with driving while under the influence under NMSA 1978 Section 66-8-102 when a person drives while intoxicated with a minor in the car.

Another significant implication of putting this crime into a new section is that the crime is not attached to the specific DWI penalties, requirements, and repeat offender structures that are located in §66-8-102. These include the provisions for interlock devices, alcohol and drug screening programs, DWI school, drug and alcohol treatment, and mandatory penalties for aggravated circumstances and subsequent offenses.

Although this bill will increase the potential jail time for a first offense DWI for when a minor is present in the vehicle by making the act a misdemeanor, a second and third offense DWI in the existing statute under §66-8-102 is already a misdemeanor. This section also includes the significant increased requirements for a conviction under that section, including increasing mandatory jail time, increasing probation time, and increasing interlock requirements.

If a person was convicted under the new section created by this bill, the conviction would not be included as a prior offense for the increased penalties for repeat DWI convictions. Under §66-8-102, a fourth conviction under that section is a fourth degree felony with a six month mandatory jail sentence, and the convicted person would be required to have an interlock device for life. Under the new section created by this bill, there is no increasing penalty for repeat offenses. If a person was convicted 4 or more times under the proposed section, that person would still only be guilty of a misdemeanor.

This new section could also be used to negotiate a lesser sentence by allowing someone who drove intoxicated with a minor in a car to plea to the new section which would not require that person to have an interlock device for any amount of time, or complete any of the other requirements that are currently imposed for a DWI conviction

AOC opines that if the proposed offense is charged in addition to a regular DWI, it is likely to raise double jeopardy challenges, as a double-description case (see also fiscal implications). For the type of appellate analysis performed in this type of case, see *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P. 2d 1223.

AODA notes that DWI with a child in the car can, depending on the facts, be charged with child abuse. If that does not result in death or great bodily harm, it is a third degree felony for a first offense and a second degree felony for a second or subsequent offense. If it does result in great bodily harm it will be punished as a first degree felony, and if charged as vehicular homicide, it will have a penalty of six years (third degree felony resulting in death of a human being). In criminal law, the more specific crime must be charged under the facts, so if this bill is enacted, it would draw the definition of this offense more closely and hence have the effect of reducing the penalty currently in use (third degree up to life imprisonment, as delineated above) down to this

misdemeanor offense (364 days in jail). That would be detrimental to the prosecution of these types of offenses and in deterring or punishing the harm sought to be prevented.

AODA further states that the bill as drafted makes no distinction between minors in the car and the possibility that a minor may in fact be the intoxicated driver. Another issue will be the multiple passenger situation: a car full of teens with an intoxicated driver, whether underage or not—will the driver be charged multiple counts for each passenger, or not? Likely the offenses will all merge into one for sentencing, at least. Additionally, the bill also makes no consideration for other circumstances under which DWI offenses are typically charged—for example, refusal to submit to testing upon suspicion of DUI. And, driving while under the influence of other substances not alcohol, or a mixture of substances, which is increasingly accounting for more DUI cases.

AGO states that SB 45 reduces the penalty of DWI with a minor in the vehicle from a felony offense to a misdemeanor offense. Moreover, SB 45 fails to address individuals who are "impaired to the slightest degree" under §66-8-102, NMSA 1978. This omission or oversight may prevent individuals who are "impaired to the slightest degree" from being charged under SB 45 and/or §30-6-1, NMSA 1978 when they have a minor in the vehicle.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to HB 81 and HB 83 – Increase Certain DWI Penalties; HB 82 Habitual Offender Sentencing and DWI; HB 44 – DWI for Certain Drugs & Interlocks; HB 74 – DWI Tests, Penalties and License Revocation; SB 118 Increase DWI Penalties

TECHNICAL ISSUES

CYFD states the new language of the bill is inconsistent with the existing driving while intoxicated language. The new language in the bill makes it unlawful for a person to drive while intoxicated with a minor in the vehicle with an alcohol concentration of .08 *at the time of driving*. The current existing language for driving while intoxicated at NMSA 1978 §66-8-102(C)(1) states that it is unlawful for a person to drive a vehicle with an alcohol concentration of .08 *within three hours of driving the vehicle*.

ABS/jo/jle