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## FISCAL IMPACT REPORT

SPONSOR Park DATE TYPED 2/6/04 HB 490

SHORT TITLE Create Offense of Child Endangerment SB \_\_\_\_\_

ANALYST Maloy

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY04	FY05	FY04	FY05		
	NFI		See Narrative	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

HB 490 duplicates SB 448.

Conflicts with HB 316.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Children, Youth and Families Department

Public Defenders' Department

Office of the Attorney General

Administrative Offices of the Courts

### SUMMARY

#### Synopsis of Bill

House Bill 490 creates a new category for the crime of "child endangerment". The bill adds transporting a child in a motor vehicle while under the influence of intoxicating liquor or drugs to the definition of the crime "child endangerment".

Thereafter, the bill establishes a degree of offense scale:

- Where there is no harm to the child, the offender is guilty of a third degree felony.
- Where there is injury to a child, the offender is guilty of a second degree felony.
- Where there is great bodily harm to a child, the offender is guilty of a first degree felony.

The bill also provides that any person charged with this offense who has had a prior DWI conviction in the preceding 10 years shall have his basic sentence increased by two years for each prior DWI conviction.

The bill states that sentences imposed pursuant to prior DWI convictions shall not be suspended or deferred.

The bill defines “prior DWI conviction” as including not only a New Mexico state conviction, but also a conviction in any other jurisdiction in the United States, including tribal jurisdiction.

### Significant Issues

#### **The Public Defenders’ Department offers:**

- Injury” for purposes of the second degree felony has no definition. If a child suffers a scratch or bruise, is that an injury? How big must the scratch or bruise be? The definition of “great bodily harm” will be taken from NMSA 1978 section 30-1-12.

#### **The Children, Youth and Families Department notes:**

- The New Mexico Court of Appeals has already determined that a person who drives while intoxicated with a child in the car can be charged with child abuse. It was also determined by the Court of Appeals, however, that each DWI incident could only result in one conviction for child abuse regardless of the number of children in the car because driving while intoxicated is a single act. It is an open question whether the present bill could allow for multiple convictions child endangerment if there is more than one child in the car. An amendment to the bill stating that each child in a car is a separate offense under the provisions of the bill would clearly indicate to the judiciary that multiple charges and punishments are intended. In any event, this bill would allow for an increase of two years for each prior DWI conviction that would not be available for a conviction under Section 30-6-1.

#### **The Office of the Attorney General states:**

- This bill makes the distinction that each victim—“a child” – is protected irrespective of injury or other consequences. This bill would effectively overrule State v. Castaneda, 2001-NMCA-052, 130 N.M. 679, 30 P.3d 368 (intoxicated mother was prosecuted with one count of child abuse for each of four children in the car she was driving; no injuries sustained; if no child is injured and more than one child is in the vehicle, only one count of child abuse may be prosecuted).
- The bill provides for a range of punishments involving DWI and transportation of a child or children, depending on the severity of the harm caused to the child/children. Such a distinction is well advised.
- The definition of “child” should be included. For example, “Any person under the age of eighteen years.”
- This bill conflicts with the proposed amendments to Section 66-8-102 included in Senate Bill 144/207/SJCS, and House Bill 94/HJCS, involving the commission of a DWI with a passenger or passengers under the age of eighteen. These two bills provide that this cir-

cumstance—a child in the vehicle during a DWI—is defined only as an aggravated DWI and provides for much lower penalties than provided in House Bill 490. Unlike House Bill 490, no consideration of possible injury or death is included in these two bills.

- Assuming three possible laws may apply to a set of circumstances, i.e. Section 66-8-102(D)(4), as proposed in both Senate Bill 144/207/SJCS, and House Bill 94/HJCS is enacted, Section 30-6-1, and this bill, the following hierarchy of possible crimes and punishments would result:

Aggravated DWI	Misdemeanor, first offense, 90 days,
Child endangerment	First, second or third degree felony (depending on injury), and
Child abuse	First, second or third degree (depending on injury).

- A “prior DWI conviction” should take into account any difference in the wording or language used to describe a comparable offense in a jurisdiction other than New Mexico. For example, suggested language to define a conviction from another jurisdiction other than New Mexico may be: “For purposes of this section, a prior conviction for driving while under the influence of intoxicating liquor or drugs includes any crime committed outside the jurisdiction of New Mexico and with similar or comparable elements to Section 66-8-102 NMSA irrespective of the punishment, required BAC level, or if the offense is included in a motor vehicle code, criminal code, or otherwise.”

## FISCAL IMPLICATIONS

There is no appropriation contained in this bill. There will be slight administrative cost increases for the Children, Youth and Families Department as it works to address the “endangered” child’s needs through the protective services program. Also, law enforcement and legal entities, including the courts, public defenders and district attorneys, will likely see an increase in case loads. Because of the enhanced sentences and the potential risk of losing a child to state custody, offenders will be less likely to accept plea bargains, and convictions will be more frequently appealed.

## CONFLICT AND RELATIONSHIP

### The Office of the Attorney General notes:

- Conflicts with House Bill 94/HJCS involving the crime of aggravated DWI if a passenger or passengers is/are under the age of eighteen.
- Conflicts with Senate Bill 144/207/SJCS involving the crime of aggravated DWI if a passenger or passengers is/are under the age of eighteen.
- Possible conflict with Section 30-6-1, Abuse or Abandonment of a Child. This conflict may be resolved by arguing that this proposed child endangerment statute specifically applies in the case of DWI with a child in the vehicle.

**The Public Defenders' Department notes:**

- The child abuse statute, NMSA 1978, section 30-6-1, has already been applied to persons who drive while intoxicated with children in the car. The offense is a third degree felony without injury, increased to a second degree felony for the second and subsequent offenses. The offense is a first degree felony if there is death or great bodily harm to the child.
- HB 316 makes driving while intoxicated with a child under 18 an aggravated DWI.

**OTHER SUBSTANTIVE ISSUES**

- Conceivably, an 18-year-old intoxicated driver could be charged with child endangerment (up to a first degree felony level) if a 17-year-old passenger was seriously injured in an automobile accident, even if the 17-year-old participated in the drinking / intoxication.

This is likely beyond the intended bill objective.

**ALTERNATIVE**

**The Office of the Attorney General notes:**

- The only law applicable would be the child abuse statute, Section 30-601, and if enacted, the aggravated DWI provision that addresses the situation when a child is in the vehicle and a DWI is committed. Also, the holding in State v. Castaneda would remain law, and failing to allow a separate prosecution for child abuse for each child in a vehicle.

**SJM/dm:yr**