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## FISCAL IMPACT REPORT

SPONSOR Torraco ORIGINAL DATE 2/16/15  
LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE DWI with Minors in Vehicle SB 499

ANALYST A. Sánchez

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

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		\$32.5		\$32.5	Nonrecurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 30, HB 32, HB 86, HB 120, HB 131 and HB 355

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)

Public Defender Department (PDD)

Department of Health (DOH)

Administrative Office of the District Attorneys (AODA)

Taxation and Revenue Department (TRD)

Children, Youth and Families Department (CYFD)

### SUMMARY

#### Synopsis of Bill

Senate Bill 499 proposes to add a new penalty to the Motor Vehicle Code, making it a misdemeanor to have a child under the age of 18 in the vehicle if the driver has an alcohol concentration of .08

### FISCAL IMPLICATIONS

The PDD reports that it will likely be able to absorb cases under the proposed law. AOC states that the bill will have minimal administrative costs.

TRD reports that it will cost approximately \$32.5 thousand to make changes to its computer system to accommodate the requirements of SB 499.

### SIGNIFICANT ISSUES

According to PDD, often times, the risk of harm posed to minors in vehicles where the driver is under the influence of intoxicating liquor or drugs is insufficient to sustain a child abuse conviction. This legislation appropriately addresses the risk of harm to minors in a DWI situation. See *State v. Roybal*, 1992-NMCA-114, ¶ 32, 115 N.M. 27 (finding that mere proximity to a dangerous situation is insufficient to support a conviction for child abuse); *State v. Ungarten*, 1993-NMCA-073, ¶ 11, 115 N.M. 607 (indicating that the legislature intended a more restrictive meaning and required a reasonable possibility or probability of harm), *abrogated by State v. Chavez*, 2009-NMSC-035, ¶ 21, 146 N.M. 434 (establishing a new approach); *State v. Trujillo*, 2002-NMCA-100, ¶ 14, 132 N.M. 649; *Chavez*, 2009-NMSC-035, ¶ 35, 146 N.M. 434 (recognizing that not every risk rises to the level of child endangerment and that the risk of harm must be substantial and foreseeable).

Of course, if the minor is injured or killed or if the driver commits additional reckless conduct, above and beyond mere DWI, there are statutes currently in place under which the driver can be properly charged, including the child abuse statutes. See *State v. Castaneda*, 2001-NMCA-052, ¶¶ 21-22, 130 N.M. 679 (child abuse conviction upheld where evidence established that the defendant was driving intoxicated on the wrong way of a divided highway); *State v. Guilez*, 2000-NMSC-020, ¶ 25, 129 N.M. 240 (child abuse conviction upheld where the defendant was also convicted of reckless driving for speeding after dark, without headlights or taillights, and running into a fence with the child unrestrained in the car); *State v. Watchman*, 2005-NMCA-125, ¶¶ 4-7, 138 N.M. 488 (child abuse conviction upheld when defendant drove drunk with child in car and then left child in the car in an unsafe area while the defendant went to the bar See also *State v. Santillanes*, 2001-NMSC-018, ¶¶ 2, 38, 130 N.M. 464 (vehicular homicide conviction upheld where defendant drove intoxicated and collided with an oncoming truck, causing the death of his minor passengers).

According to DOH, in 2011, 332 children 14 years or younger were in alcohol-involved crashes in New Mexico ([www.unm.edu/~dgrint/reports/dwirep/dwir11.pdf](http://www.unm.edu/~dgrint/reports/dwirep/dwir11.pdf)). Nationally, it is estimated that 20 percent of all motor-vehicle traffic fatalities among children involve alcohol ([www.nrd.nhtsa.dot.gov/Pubs/811870.pdf](http://www.nrd.nhtsa.dot.gov/Pubs/811870.pdf)). New Mexico is one of only four states that does not have statute defining child endangerment because of DWI. Penalties vary by state. For example, in New York State it is a felony to drive while intoxicated with a passenger under 16 years of age, but in Wisconsin the penalty is a misdemeanor for the same offense ([www.madd.org/laws/law-overview/DUI\\_Child\\_Endangerment\\_Overview.pdf](http://www.madd.org/laws/law-overview/DUI_Child_Endangerment_Overview.pdf)).

The National Conference of State Legislatures (“NCSL”) noted, in 2003, that at least 27 states had passed laws since the early 1990s to expand protection for children and punish those drunk drivers who put them at risk. As the NCSL reported

The approach 21 states have taken [as of 2003] is to increase the penalties for drunk driving if a child is in the vehicle. From significantly higher fines and longer mandatory jail sentences to longer license suspensions and felony convictions, drunk drivers who endanger children often find themselves facing double the penalties of a standard drunk driving offense. Under the laws passed in most of these states, the child need not suffer physical harm for the stiffer penalties to apply.

At least four states have adopted laws making it a separate offense to have a child in the vehicle while the driver is under the influence of alcohol or controlled substances. In

establishing separate offenses, Arizona, Georgia, Idaho and Ohio have followed the trend of creating aggravated drunk driving offenses where there are special circumstances, such as a particularly high level of intoxication or endangering a child.

See NCSL legislative briefing on “*Driving Drunk With Kids in the Car*,” @ <http://www.ncsl.org/Portals/1/documents/pubs/lbriefs/2003/drivingdrunk.pdf>

The AODA reports that SB 499 might supplant the current charge of child abuse for someone who is intoxicated and drives with a child in the vehicle. Child abuse can occur by “...a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be placed in a situation that may endanger the child’s life or health.” See, Sect. 30-6-1(C)(1), N MSA 1978. Cf., *State v. Chavez*, 2009-NMCA-089 (Sufficient evidence to sustain convictions for both DWI and child abuse where woman drove a vehicle with her six-year old daughter inside while intoxicated.) Prosecuting someone for child abuse and DWI is permissible since they are directed at two different goals. See, *Chavez*, supra, *State v. Castaneda*, 2001—NMCA—052, Cf., *State v. Santillanes*, 2001—NMSC—018 (Prosecution under both vehicular homicide statute and child abuse resulting in death statute is permissible but punishment may only be imposed for one, the most serious offense.)

Additionally, AODA states that the Supreme Court has held that the legislature by enacting the motor vehicle code as a whole did not intend to repeal the child abuse statute as it applies to children in vehicles. See, *State v. Guilez*, 2000—NMSC—020. See also, *Castaneda*, supra. However by enacting a separate statute that requires exactly the same proof that is required to prove child abuse, driving while intoxicated with a child in the vehicle, would very likely result in a challenge to that premise. A well-established principle of statutory interpretation is that the specific charge should prevail over the general so courts could find that the later, more specific charge of driving while intoxicated with a minor in the vehicle should prevail over a more general charge of child abuse.

AODA further states that violation of the child abuse statute is a felony, the degree of which varies from third degree to first degree, depending upon whether it is a first or subsequent offense, and whether the child suffers serious injury. See, Sect. 30-6-1(E)-(F), NMSA 1978. SB 499 would make being DWI with a minor in the vehicle a misdemeanor, and since it would be contained in the motor vehicle code the maximum penalty would be a fine of no more than \$300 or imprisonment for no more than 90 days or both. See, Sect. 66-8-7, NMSA 1978.

Lastly, AODA opines that the bill would probably also invite challenges that it violates the double jeopardy clause since being DWI would, apparently, violate two separate statutes and be subject to multiple punishments for the single act of driving while intoxicated. See, Amendment V, *U.S. Const.* and Article II, Sect. 18, *N.M. Const.*

## PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

## ADMINISTRATIVE IMPLICATIONS

TRD reports that should this bill be enacted, it may not be able to implement the changes by July 1, 2015 when the bill takes effect as its system is scheduled to be placed into production on May 25, 2015.

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

SB 499 is related to HB 30, HB 86, HB 131, HB 355, and HB 359 which all relate to penalties for DWI.

HB 30 proposes that a printed legend be placed on the driver's license of a person whose license is revoked for driving under the influence, or for violation of the Implied Consent Act, indicating that the person is prohibited from purchasing alcoholic beverages.

HB 86 proposes to increase the requirements to be met for removal of an ignition interlock device before reinstatement of a driver's license.

HB 131 would amend Section 66-5-29 NMSA 1978 so that the amount of time that a person's driver's license is revoked for driving under the influence would depend on the person's blood or breath alcohol concentration (BAC) and number of offenses instead of the number of offenses alone.

HB 355 proposes to strike the definition of aggravated driving under the influence, increasing the penalty based on number of offenses.

HB 359 proposes to increase penalties for fourth and subsequent DWI offenses.

### **TECHNICAL ISSUES**

According to CYFD, the 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/aml/bb