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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/5/18

SPONSOR Martinez LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Driver's License Revocation Hearings SB 213

ANALYST Romero

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

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	\$0.0	Minimal/None	Minimal/None	Minimal/None	Recurring	Agency Operating

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Hearings Office (AHO)

Department of Public Safety (DPS)

### SUMMARY

#### Synopsis of Bill

Senate Bill 213 makes two significant changes to the Implied Consent Act regarding DWI license revocation hearings. First, as noted by the Administrative Hearings Office (AHO), the bill modifies the existing in-county hearing statutory language under the Implied Act by adding language giving AHO the discretion to set the matter as a videoconference hearing. The second change allows all parties, witnesses, and the hearing officer to appear via videoconference when AHO determines the hearing may proceed by videoconference. There are also other minor structural and language changes to the Implied Consent Act that do not change the substance of the statute.

### FISCAL IMPLICATIONS

The Administrative Hearings Office notes the following:

“The way the bill is crafted, in a manner that allows all parties, witnesses, and the hearing officer to appear via videoconference when the hearing officer deems it appropriate, it is now anticipated the videoconferencing could be achieved

without encumbering general fund dollars by using other existing IT infrastructure and equipment. To the extent there may be unanticipated fiscal costs for equipment acquisition and videoconferencing licensing subscriptions, NMDOT has indicated that they have grant funding to assist meeting these financials needs. Moreover, since the bill does not mandate use of videoconference hearings in all cases, to the extent resources are unavailable to install necessary equipment, the hearings can continue to occur in person without having a general fund impact.”

The Department of Public Safety noted that video conferencing equipment may be necessary to purchase and maintain with a recurring cost of less than \$20 thousand annually.

## SIGNIFICANT ISSUES

AHO also provided the following:

“The bill allows, but does not require, the conduct of an Implied Consent Act-DWI license revocation hearing by videoconference in a fair and efficient manner consistent with controlling case law.

In *Evans v. TRD, MVD*, 1996-NMCA-080, 122 N.M. 216, the New Mexico Court of Appeals considered whether the Implied Consent Act hearing could be conducted by telephone, rather than in-person, in the county of incident. The Court of Appeals in *Evans* ultimately held that telephonic hearings were not permitted under the current version of the Implied Consent Act for two reasons: (1) because of the mandatory statutory language that the hearing occur in the county of incident; and (2) because credibility determinations are an important factor in deciding these cases. The *Evans* court did allow that the Legislature could authorize telephonic hearings by changing the statutory language so long as it proceeded cautiously in light of the importance of credibility. *See id.*, ¶14. Despite rejecting telephonic hearings under the Implied Consent Act, the *Evans* court seemed to approve of other agencies conducting telephonic hearings when there was no clear statutory in person hearing requirement and where the agency was given rulemaking authority to implement fair hearings. *See id.*, ¶6.

Regarding the first main reason why the *Evans*’ court did not allow telephonic hearings, the mandatory in-county hearing language, this bill modifies that language to expressly allow (but not mandate) the conduct of a videoconference hearing at the discretion of the AHO hearing officer. AHO is tasked under the Administrative Hearings Office Act with conducting fair and impartial hearings and is granted rule-making authority to develop rules of procedure, which it could use to promulgate standards about when a videoconference hearing may be appropriate versus when an in person hearing would be necessary. This delegation of discretion under the bill to a hearing officer tasked with conducting a fair and impartial hearing, and the AHO’s rulemaking authority under the Administrative Hearings Office Act to develop rules for conducting videoconference hearing, is consistent with the other statutes where the *Evans*’ court suggested a permitted telephonic hearings. *See id.*, ¶6.

The bill also addresses the second major concern of the *Evans*' decision: preserving the importance of the hearing officer's credibility determination. Videoconference technology is qualitatively superior to the telephone discussed in *Evans*. Unlike the telephonic hearing rejected by *Evans*, the nature of live videoconferencing hearings provides the hearing officer with both audio and visual cues of demeanor, physical conduct of the witnesses, and any visual demonstrations from which to make a credibility determination. In *Maryland v. Craig*, 497 U.S. 836, 851 (U.S. 1990), as part of analyzing a broader Confrontation Clause question not present under Implied Consent Act cases, the United States Supreme Court noted that live, closed-circuit television broadcast of witness testimony provided the judge, jury, and the accused the ability to view the demeanor of the witness in a manner that was functionally equivalent to live testimony. Videoconferencing is actually superior to the closed-circuit broadcast discussed in *Craig* because it gives a two-way live feed for questioning. Today, all across New Mexico, courts conduct videoconference arraignment hearings where bond may be determined, which surely involves something closer to a liberty interest compared to the lesser privilege to drive at stake in an administrative license revocation hearing under the Implied Consent Act.

As the New Mexico Court of Appeals found, hearings under the Implied Consent Act do not implicate the Confrontation Clause of the Sixth Amendment of the United States Constitution. See *Bransford v. State*, TRD, 1998-NMCA-077, ¶21, 124 NM 285. In the criminal realm, videoconference witness appearances are generally insufficient to satisfy the Sixth Amendment Confrontation Clause unless the State can show that specific appearance furthers an important state interest. See *State v. Thomas*, 2016-NMSC-024, ¶27-29; See also *Craig*, 497 U.S. 836. However, since the Confrontation Clause does not apply to these hearings, see *Bransford* 1998-NMCA-077, ¶21, criminal cases like *Thomas* addressing the permissibility of videoconferencing hearings are not applicable to the analysis of this issue. The 10th Circuit has found that in instances where the "full demands of the Confrontation Clause" do not apply, like hearings under the Implied Consent Act, allowing telephonic testimony is constitutionally permissible at hearings. *U.S. v. Sunrhodes*, 831 F.2d 1537, 1543 (10th Cir. 1987). The technological advancement of videoconferencing is qualitatively superior to telephonic hearings found constitutionally permitted by the 10<sup>th</sup> Circuit when the confrontation clause does not apply.

In summary, the bill appears to establish a fair and legally permissible process where videoconference hearings may be conducted, but the bill does not mandate videoconference hearings. The Administrative Hearings Office and the assigned hearing officer will have discretion to require an in-person, in-county hearing if videoconferencing is not technically feasible in specific location or if the hearing officer determines that an in-person hearing is necessary to developing an adequate, complete, and fair record of the proceeding. We believe based on previous research that this change would make New Mexico consistent with a majority of states with a similar Implied Consent Act processes that permit telephonic and/or videoconference hearings in some manner."

## **PERFORMANCE IMPLICATIONS**

DPS notes that this bill, “will lessen the burden on an officer being available for scheduled hearings. NM state police officers are frequently assigned to other areas of the state out of their normal duty station. This makes it very difficult for the officer to manage scheduled hearings. Revocation hearings are rarely granted a continuance due to the strict timelines set by statute. Officers on shifts that are not in line with the Monday through Friday schedule of the set hearings also find it difficult to appear in person. The bill provides officers across the state reduced travel time to hearings, improving their ability to be responsive to the mandated revocation hearings which are a vital part in combating the DWI issues within this state.”

## **ADMINISTRATIVE IMPLICATIONS**

AHO notes that this bill will increase the agency’s scheduling flexibility and ability to consider meritorious continuance requests from law enforcement officers and drivers when scheduling conflicts arise.

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