



Memorandum

To: Members of the General Assembly, Editorial Board Members and Columnists, State House Reporters

From: Marc Stier, Director, Pennsylvania Budget and Policy Center

Date: October 24, 2016

Subject: HB 1885 – Sanctuary Bill

Legislation rushed to the finish line in an election year is notorious for being both badly crafted and driven by less than pristine motives. And that certainly goes for HB 1885, the anti-sanctuary city bill passed by the House recently and currently under consideration in the Senate this week. The bill is being considered without sufficient attention to the serious costs it is likely to impose on county and municipal governments throughout the Commonwealth, which we estimate are likely to run between \$5 and \$13 million per year on a regular basis, not including the high risk of extraordinary additional costs in defending against, settling, and losing lawsuits for false imprisonment, or the burdens the law would place on businesses and families. The \$13 million annual cost alone would pay for an additional 150 police officers or sheriff deputies on the streets of our municipalities.

This memorandum aims to do a very quick analysis of these costs, not so much with the aim of reaching a definitive conclusion as to assert that a much more detailed analysis needs to be undertaken before the bill is enacted. At a time when so many state legislators complain about the “unfunded mandates” that the state imposes on local governments, it is striking that the bill is being rushed to passage with no serious analysis of the costs it imposes on local governments.

KEY ELEMENTS OF HB 1885

The proposed law has a number of parts. One would prohibit a municipality from adopting “an ordinance, regulation or plan or take any other action that limits or prohibits a public official, employee or law enforcement officer of the municipality from communicating or cooperating with an appropriate public official, employee or law enforcement officer of the Federal government concerning the immigration status of an individual in this Commonwealth.” This provision is aimed, most directly, at municipalities that do not honor requests not supported by a warrant by the Immigration and Customs Enforcement (ICE) agents to detain suspected undocumented immigrants for forty-eight hours beyond their release date so that ICE can decide whether to take the individual into federal custody. But it also is meant to penalize municipalities that make it a practice of not inquiring and collecting information about the immigration status of people who come into contact with its law officers and of not reporting such information to the federal government.

Any “sanctuary municipality” that as a matter of law or policy limits such cooperation with the federal government would face two huge—and unprecedented—penalties. First, the Treasurer would be barred from sending any state aid of any kind to that municipality. This, of course, means that Pennsylvania municipalities would lose substantial parts of their budget. Second, a municipality would be held strictly liable for any injuries to a person or property caused by the criminal activity of an undocumented immigrant, regardless of whether that undocumented immigrant had previously come into contact with a municipal law officer. This strict liability provision would open municipalities to paying large sums, regardless of whether its law enforcement officials had previously had any interaction at all with the undocumented immigrant convicted of the crime.

Another provision of the law, which creates substantial problems to which we attend below, requires that “A law enforcement officer of a municipality who has reasonable cause to believe that an individual under arrest is not legally present in the United States shall immediately report the individual to the appropriate United States Immigration and Customs Enforcement Office within the Department of Homeland Security.”

THE POTENTIAL COSTS OF HB 1885

There are other policy reasons to support or oppose HB 1885. Our goal here is entirely to point to the problematic fiscal impact of the proposed legislation. Perhaps the most striking feature of the debate on HB 1885 is that there has been no serious attempt to estimate the costs of the legislation on the counties and municipalities of the Commonwealth. [The House Fiscal Note](#) does not even try to identify, let alone estimate, these potential costs, which are of three kinds: the costs of holding people in prison far longer than they might otherwise be held in response to ICE detainer requests; the costs of paying damages to United States citizens who are unconstitutionally held in response to such requests; and the costs to businesses and families of the imprisonment of workers and family members in response to an ICE detainer.

The Costs of Incarceration

The first set of costs likely to result from HB 1885 are those of incarcerating people in county and municipal jails who would be incarcerated or incarcerated for substantially longer periods of time than they otherwise would be due to the enactment of HB 1885.

In analyzing those costs, we can take advantage of Colorado’s experience with SB 90, a law with provisions similar to HB 1885. SB 90 was enacted in 2006 and repealed in 2013, in no small part because of the unexpectedly high costs of implementing the legislation.

One might think that additional costs of imprisonment due to HB 1885 would be solely the result of obeying a detainer request from ICE to hold someone forty-eight hours beyond when they would have been released. These costs are serious. They were estimated to be \$1 million a year in Colorado in 2010-2011 and would most likely be at least the same, possibly more, in Pennsylvania in 2017.

The experience of Colorado shows us, however, that the true extent of additional incarceration resulting from HB 1885 is likely to be far greater than that of holding a certain number of people

an additional forty-eight hours. The proponents of SB 90 in Colorado did not recognize how the requirement that law enforcement agents report all people suspected of being undocumented immigrants would drastically change incarceration practices in the state. But, those practices changed substantially in ways that were thought to be so problematic and costly that the law was later repealed.

To understand this, one must recognize that the majority of people arrested by police officers are not held in prison for very long or at all. Many arrests for low-level crimes are non-custodial. In those cases, the police officer detains someone only long enough to issue a citation or summons to appear in court at a later date. Custodial arrests occur when the police arrest offenders and transport them to a detention center of some kind where they are booked and then held until they are released (sometimes after posting bond) or their case is adjudicated.

SB 90 in Colorado had the unintended consequence of incarcerating many more people for much longer period of time in two different ways: On the one hand, police officers carrying out what would be an otherwise non-custodial arrest of someone suspected of being an undocumented immigrant would typically place such a person in custody and then report them to ICE. On the other hand, people suspected of being an undocumented immigrant who were booked and held after a custodial arrest were generally deemed to be ineligible for pre-trial release even if they were capable of and willing to post bond.

A study of the effect of SB 90 on incarceration practices in Denver, carried out by our sister organization, the Colorado Fiscal Institute (CFI), showed that these two effects of SB 90 led to offenders subject to an ICE detainer being incarcerated an average of 22 days longer than offenders who were not subject to an ICE detainer.¹ And in many cases, offenders subject to an ICE detainer were being held for days or weeks when those accused of the same crimes who were not subject to a retainer were never incarcerated at all or were held for at most a day. The Colorado Fiscal Institute estimated that the added annual cost to municipalities of this change in incarceration practices was \$13 million per year.²

It is not easy to estimate the added cost of the additional incarceration that would result from HB 1885 in Pennsylvania. The Colorado Fiscal Institute's estimate is based on the actual experience of the law in operation. And many of the factors that go into their estimate—from the number of undocumented immigrants, to the number of ICE detainers that issued a request for detention, to the cost of holding a person in a county or municipal jail—are at present unknown or difficult to estimate in Pennsylvania.

But if we simply extrapolate from the best estimate of the proportion of population in Pennsylvania who were undocumented immigrants in 2010 (1.3%) as compared to Colorado at the same time (3.6%) and adjust for inflation, our estimate of the costs of HB 1885 to the county and municipality

¹ Kathy A. White and Lucy Dwight, "Misplaced Priorities: SB90 and the Costs to Local Communities," Colorado Fiscal Institute, December 2012. Our analysis in this section draws heavily on this work.

² Studies of other communities have found that inmates who are subject to ICE detainers are imprisoned far longer than those who are not subject to them. A study of New York City found that after controlling for race and level of offence, noncitizens with an ICE detainer were held for 73 days longer than those without an ICE detainer. See Aarti Shahani, "New York City Enforcement of Immigration Detainers, Preliminary Findings," (New York: Justice Strategies, 2010). A study of King County, Washington, found people held on the basis of an ICE detainer spent more than two-and-a-half times longer in jail than those with similar characteristics and charges. And, a study of Travis County, Texas found that the average jail stay for inmates with ICE detainers was 20 days longer than those without ICE detainers for people charged with misdemeanors and 41 days longer for those charged with felonies. For the King and Travis County findings see Katherine Beckett and Heather Evans, "Immigration Detainer Travis County, Texas," (Washington, D.C.: Immigration Policy Center), February 2010.

governments in the state is \$5.2 million. If, on the other hand, costs in Pennsylvania were roughly proportional to the absolute number of undocumented immigrants, which is about the same in the two states, our estimate would rise to almost \$13 million.³ Another fact that might lead our costs to be closer to the higher than the lower estimate is that Pennsylvania has almost ten times the number of municipalities (2561) as Colorado (271). Our relatively high number of municipalities is often held to increase the relative costs of local government in Pennsylvania compared to other states. That is likely to be the case here as well.

These cost estimates are high and certain enough that legislators should be aware of them, and, we believe, engage in a serious study to determine the definitive costs of the bill before enacting HB 1885. We should not follow Colorado down the path of putting a new law in place without understanding the consequences and the costs of that legislation. And if Pennsylvania does decide to enact HB 1885, it should insure that its county and municipal governments have the funds to carry it out without stretching their already-tight budgets.

The Costs of Settling Lawsuits for Civil Rights Violations

A second potential cost of HB 1885 is that of settling lawsuits for the unjust detention of U.S. citizens. A statewide policy of responding affirmatively to every ICE detainer request runs the risk of detaining citizens of the United States who then are likely to successfully sue the municipality and / or county for violating their civil rights.

This is not an idle or fanciful threat. It has happened in Pennsylvania. In November 2008, Ernesto Galarza, a New Jersey-born U.S. citizen of Puerto Rican descent was illegally held for three days in the Lehigh County Prison, despite posting bond, after ICE requested his detention on the suspicion that he was an undocumented immigrant. Galarza sued for damages on the grounds that his imprisonment violated his civil rights. In May 2014, the Third Circuit ruled in his favor and held that states and localities are not required to imprison people based on ICE detainers. Because ICE detainers are merely requests, Lehigh County was free to disregard the ICE request, and thus it shared in the responsibility for violating Galarza's Fourth Amendment and due process rights. The United States and the City of Allentown together paid Galarza \$50,000, and Lehigh County paid \$95,000 in damages and attorney's fees.

The determination on the part of county and municipal governments to avoid similar lawsuits is one reason that many Pennsylvania jurisdictions have written or unwritten policies to not honor detainer requests from ICE.⁴

We cannot estimate how many such cases would arise if HB 1885 were to become law. But it is reasonable to assume that they would occur from time to time. It is no easy matter for police officers to determine who is or is not an undocumented immigrant. That is precisely why there is a danger of these decisions being made, or being perceived to be made, by racial profiling. And if law enforcement officials are required by state law to report anyone who they "reasonably" suspect

³ One factor that might add to the cost in Pennsylvania is that many counties already suffer from a severe prison over-crowding problem. If HB 1885 forced municipalities to imprison so many people that they needed to build new prisons, the costs of would jump a great deal.

⁴ "A Changing Landscape: Pennsylvania Counties Reevaluate Policies on Immigration Detainers," Sheller Center for Social Justice, Temple University Beasley School of Law, March 2015, <http://www2.law.temple.edu/csj/files/a-changing-landscape.pdf>.

to be undocumented to ICE—and report on their compliance with ICE to the state—the temptation to over-report is likely to increase.

Under current law, our counties and cities have adopted formal or informal procedures that seek to find the appropriate balance in their own community between what they take to be their responsibility to support federal immigration policy on the one hand, and their effort to protect the rights of citizens and limit their exposure to lawsuits on the other. A blanket law for the whole state will upset the balance struck in communities across Pennsylvania, including those that have formal or informal policies to respond, as well as not respond, to ICE requests and those that seek to act on a case by case basis.

HB 1885 thus puts Pennsylvania municipalities in a Catch 22. If they follow the direction of the new law, and detain individuals beyond their ordinary release on the mere basis of an ICE detainer request, they risk being sued for violating the Constitutional rights of individuals. If they adopt a policy of honoring an ICE detainer request only when supported by a warrant, or that otherwise maintains policies that appear prohibited under the bill, they will be sued under the sweeping and unprecedented strict liability expansion in tort law. These are predictable consequences of the bill, but the annual cost they would impose on localities is impossible to calculate.

The Costs to the Community

In addition to the costs of incarceration and the threat of lawsuits for the violation of the civil rights of citizens, there are broader costs that would result from instituting a statewide policy to comply with every ICE detainer. There are the costs businesses must bear when immigrants are detained and cannot show up for work. And there are both private and public costs associated with the hardships imposed on the families of people who are incarcerated—many of which include U.S.-born children—including loss of income and a strain on social services and local schools. These broader burdens are difficult to quantify, but are undoubtedly real.

CONCLUSION

We have not attempted to give firm estimates of all the costs of HB 1885. Our goal has been to come up with the best estimate we could within current time constraints. Our analysis shows that those costs are possibly quite large and that they have not yet been considered in the General Assembly's evaluation of this bill. Regardless of whether one supports the general approach of HB 1885, it is impossible to deny that the General Assembly should seek more information and carefully think through the potential cost of HB 1885 before rushing to enact it.