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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/30/13

SPONSOR Espinoza LAST UPDATED \_\_\_\_\_ HB 122

SHORT TITLE Woman's Right To Know Act SB \_\_\_\_\_

ANALYST Trowbridge

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

|              | FY13     | FY14    | FY15    | 3 Year<br>Total Cost | Recurring<br>or Non-Rec | Fund<br>Affected                           |
|--------------|----------|---------|---------|----------------------|-------------------------|--|
| <b>Total</b> | Unknown* | \$100.0 | \$100.0 | \$300.0              | Recurring               | General<br>Fund/DOH<br>Operation<br>Budget |

(Parenthesis ( ) Indicate Expenditure Decreases)

\*See "Fiscal Implications" below

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Bernalillo County Metropolitan Court (BCMC)  
 Association of District Attorneys (AODA)  
 New Mexico Medical Board (NMMB)  
 Administrative Office of the Courts (AOC)  
 Department of Health (DOH)  
 Human Services Department (HSD)

### SUMMARY

#### Synopsis of Bill

The Administrative Office of the Courts (AOC) states that HB 122 would create the Woman's Right to Know Act (WRTKA), and provides that consent to an abortion is voluntary and informed only if the female is told by the performing or referring physician, at least 24 hours before the abortion, the name of the performing physician, specified medical risks associated with the particular abortion procedure to be employed, the probable gestational age of the fetus at the time the abortion is to be performed and the medical risks associated with carrying the pregnancy to term. (In the event of a medical emergency compelling an abortion, however, the physician is required to inform the patient, prior to the abortion if possible, of the medical indications supporting the physician's judgment that an abortion is necessary to avert her death or that a 24-hour delay will create serious risk of substantial and irreversible physical impairment

of a major bodily function, not including psychological or emotional conditions). Under the bill, revised information, indicated by physical examination, tests or subsequent availability of other information, may be communicated to the patient at any time prior to the performance of the abortion. The WRTKA further requires a female to be informed, at least 24 hours before the abortion, that medical assistance benefits may be available for prenatal care, childbirth and neonatal care, that the father is legally responsible to assist in the support of the child and that the patient has the right to review relevant printed materials described in the Act and that these materials are available on a state-sponsored web site. HB 122 requires the physician or the physician's agent to orally inform the female that the materials have been provided by the State, that they describe the unborn child and list agencies which offer alternatives to abortion and are available on the Department of Health (DOH) web site. Under the bill, the female is required to certify in writing that the information described in the WRTKA has been furnished to her and that she has been informed of her opportunity to review the described materials. The performing physician is required to receive, prior to the abortion, a copy of the patient's written certification.

The AOC indicates that HB 122 also requires, prior to a woman giving informed consent and prior to the administration of any anesthesia or medication in preparation for the abortion, that the performing physician or a certified technician take the following actions:

- perform an ultrasound on the pregnant woman;
- provide a simultaneous verbal explanation of what the ultrasound is depicting, including presence and location of the fetus within the uterus and the number of fetuses depicted;
- display the ultrasound images so that the patient may view them;
- provide a medical description of the ultrasound images, including the dimensions of the embryo or fetus and external members and internal organs;
- obtain a written certification from the patient, prior to the abortion that these ultrasound requirements have been complied with and to retain a copy of the certification; and
- using a hand-held Doppler fetal monitor, make the embryonic or fetal heartbeat audible for the pregnant woman to hear. (A physician or agent is not in violation of this requirement if an attempt, consistent with standard medical practice, has been made, the attempt does not result in the heartbeat being made audible *and* the physician has offered to attempt to make the heartbeat audible at a subsequent date.

The WRTKA does not prevent a woman from choosing to not look at images or listen to sounds detected by the hand-held monitor.

HB 122 requires the DOH to develop and maintain a web site to provide the information required under the WRTKA, with specified search and print capabilities. The bill requires an abortion provider's web site's home page to contain at least 2 direct links to the DOH informed consent materials on the department's web site.

HB 122 requires the DOH to create reporting forms, within 90 days of enactment, and physician submission of completed forms by February 28 of each year following a calendar year in any part of which the WRTKA was in effect. A physician who does not timely submit completed forms is subject to a late fee of \$500 or, if forms are more than a year late, to court sanctions for civil contempt.

Under the WRTKA, criminal penalties are set out as follows:

- a person who knowingly or recklessly performs or attempts to perform an abortion in violation of the WRTKA is guilty of a felony;
- a physician who knowingly or recklessly submits a false report under the WRTKA is guilty of a misdemeanor.

The bill specifically provides that no penalty may be assessed against the woman upon whom the abortion is performed or attempted to be performed.

HB 122 permits a civil action by a person upon whom an abortion has been attempted without complying with the WRTKA, against the person who attempted to perform the abortion in knowing or reckless violation of the WRTKA, for actual and punitive damages.

HB 122 also permits a civil action by a person upon whom an abortion has been performed without complying with the WRTKA, the father of the aborted fetus and the grandparent of the aborted fetus, against the person who performed the abortion in knowing or reckless violation of the WRTKA, for actual and punitive damages.

Under the WRTKA, a person with standing may seek an injunction against the Secretary of Health requiring that reports required under the Act be issued within a period stated by court order, provided the department fails to issue required public reports. Failure to abide by the injunction subjects the secretary to sanctions for civil contempt.

A prevailing plaintiff in any action under the WRTKA is entitled to reasonable attorney fees. Under the WRTKA, a prevailing defendant is entitled to reasonable attorney fees upon a finding that the plaintiff's suit was frivolous and brought in bad faith.

HB 122 sets out specific instructions for the court to protect the privacy and anonymity of the woman in every civil or criminal proceeding or action brought under the WRTKA.

### **FISCAL IMPLICATIONS**

The DOH observes that HB 122 includes a provision to impose a \$500 late fee for each additional 30 day period or portion and it is unclear what role DOH plays in the collection or accounting of fees.

Albuquerque Metro Court states that while the promulgation of the Woman's Right to Know Act would result in the creation of a new felony and a new misdemeanor charge and thus would increase the number of cases coming before the Metropolitan Court, it is impossible to quantify the volume of that increase and the resulting fiscal impact on the Court.

The Association of District Attorneys (AODA) notes that any time a new crime is created, additional resources are needed by the District Attorneys Offices. There are two new crimes created by this Act. It is unclear who would investigate these crimes - the police or the Department of Health or the DA's Office. AODA also indicates that because of the privacy requirements in the court proceedings, it would be the prosecutors who would have to be sure these requirements are met by keeping the name of the woman out of any documents filed in the case; preparing the court orders needed to seal the case and the findings required to explain why

anonymity of the female should be preserved.

The AOC states that there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law, commenced prosecutions, and any challenges to the proposed law's constitutionality. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

Costs reflected in the Operating Budget Impact for website development and additional staff to comply with the additional requirements.

Costs for the judiciary are not included nor are additional medical costs.

### **SIGNIFICANT ISSUES**

The AODA indicates that the only way to prove the felony would be by accessing the woman's medical records to determine if the information required by this Act was provided to her and to determine if she signed all of the appropriate acknowledgements of having received the information. Since medical records are confidential, it will be nearly impossible to access this information.

The AOC states that:

- 1) It can be expected that there will be challenges to at least portions of the WRTKA's constitutionality, should the law be enacted. One argument that can be anticipated is that the 24-hour waiting period that the WRTKA requires poses an undue burden in violation of the substantive due process rights of the woman seeking an abortion.
- 2) A question may arise as to how a prospective grandparent can have standing to sue under the WRTKA.
- 3) Section 3 (E): HB 122 does not preclude translation of information to the patient, but does not require it.

The DOH indicates that HB 122 mandates the performance of a ultrasound prior to an abortion and notes that the American Congress of Obstetricians and Gynecologists (ACOG) lists ultrasound as one of the examinations done in the first trimester of pregnancy between 11 to 14 weeks of pregnancy to help in the screening for birth defects. However, a routine ultrasound is not considered medically necessary for a first-trimester abortion and it can add significantly to the cost of the procedure. (And, ultrasound performed at this stage in pregnancy is too early to see the fetus as a human shape). Additionally, DOH states that informed consent is the required communication between a medical practitioner and patient of certain information before a procedure may be performed. Currently, the legal requirement for informed consent is the clear communication of "medical risks" and "benefits" such that a reasonable person can make a reasonable decision as to whether they will proceed.

DOH also notes that the Vital Statistics Act, 24-14-18 NMSA 1978, mandates that all abortions in New Mexico be reported to the State Registrar, and that these reports be statistical reports used only for medical and health purposes and shall not be incorporated into the permanent

records of the vital records system. Additionally, current reports do not include the name or address of the patient or of the name or address of the physician performing the abortion.

## **PERFORMANCE IMPLICATIONS**

The Bernalillo County Metro Court notes that Section 13 of the Act concerning sealing removes the ability of the Judge to decide whether to seal. Instead, paragraph A of that section provides that the court “shall issue orders to protect the privacy and anonymity of any female upon whom an abortion has been performed or attempted if she does not give her consent to such disclosure.” While paragraph C requires the Judge to enter findings, it dictates the outcome of those findings in that they are required to support the sealing order. In short, Section 13 eliminates the judicial discretion afforded Metropolitan Court judges in Rules 7-113 and 3-112 NMRA on whether or not to seal and mandates sealing if the patient does not consent to the disclosure of her identify.

DOH indicates that HB 122 does not include an appropriation for staff or other activities that will be required to carry out its provisions and requirements, which will increase the workload and time required to comply with the requirements of the proposed legislation.

AOC states that 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**

The DOH observes that the Vital Records Act (Section 24-14-1 NMSA 1978) currently has reporting requirements for abortions performed in New Mexico and states that such reports are for statistical use only. HB 122 creates duplicative reporting for abortions.

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

The Human Services Department (HSD) states that the bill does not distinguish between minor and adult women. HB 177 regards notification to parents of minors seeking abortions.

## **LEGAL/REGULATORY ISSUES**

DOH indicates that HB 122 may give rise to serious legal challenges relating to Constitutional Privacy Rights. Specifically, HB 122 may compromise a woman’s right to Privacy under the 14<sup>th</sup> Amendment’s concept of personal liberty and restriction upon state action, and the Ninth Amendment’s general reservation of rights to the people.

The U.S. Supreme Court has deemed abortion a fundamental right under the US Constitution, thereby subjecting all laws attempting to modify it to the standard of strict scrutiny.

## **DISPARITIES ISSUES**

The DOH notes that according to the Pregnancy Risk Assessment and Monitoring System (PRAMS), in New Mexico there are disparities observed among women whose unintended pregnancy results in a live birth. Minority (Native American and Hispanic), less-educated,

unmarried women who live in rural areas and depend on public assistance and Medicaid are more likely to give birth resulting from unintended pregnancy (<http://nmhealth.org/phd/prams/documents/DOH%20PRAMS%202008.pdf>). In addition to ultrasound requirement laws, other important determinants of a decision to abort include: marital status, urban residence, Hispanic ethnicity, and Catholic and Baptist religions ([http://www.na-businesspress.com/JABE/GiusM\\_Web12\\_5.pdf](http://www.na-businesspress.com/JABE/GiusM_Web12_5.pdf)). DOH adds that these social determinants are already more prevalent among New Mexico women with unintended pregnancy resulting in live birth. As a result, the ultrasound requirement laws may worsen unintended pregnancy health disparities.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?**

Requirements for informed consent mandating an ultrasound, the use of a fetal monitor with required information, mandating the development and maintenance of a Department of Health web site, and the imposition of fees and requirements pursuant to HB 122 will not occur.

### **AMENDMENTS**

The Association of District Attorneys suggests that this bill needs to determine what degree of felony will be committed if the doctor performs or attempts to perform an abortion in violation of this Act.

TT/bm