F I S C A L I M P A C T R E P O R T

SPONSOR Ryan **ORIGINAL DATE** 02/08/13 **LAST UPDATED** **HB**

SHORT TITLE Parental Notification Act **SB** 291

ANALYST Trowbridge

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		$93.0*	$93.0*	$186.0*	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)
*See Fiscal Implications

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Attorney General's Office (AGO)
Human Services Department (HSD)
Department of Health (DOH)
Public Defender Department (PDD)

SUMMARY

Synopsis of Bill

Senate Bill 291 (SB 291) enacts the Parental Notification Rights Act. The Act requires notice to a parent at least 48 hours before an abortion is performed on an unemancipated pregnant minor. ("Parent" is defined to mean a parent or guardian of an unemancipated pregnant minor.) It provides for an exception when the procedure is necessary to save the health of the patient and there is insufficient time to provide the required notice. SB 291 defines "unemancipated pregnant minor" to mean a pregnant female who is under 16 and who has never been married and has not been declared by court order to be emancipated.

The bill contains a judicial bypass procedure, during which the female is entitled to court appointed counsel and the court may appoint a guardian *ad litem* as well. In the bypass procedure, a court may determine that notification is not required upon finding that the unemancipated minor is mature enough to make the decision, or that an abortion is in her best

interest. This bypass procedure and any appeal therefrom must be confidential and handled on an expedited basis. A person or party granted admission to a closed hearing who intentionally divulges information regarding the hearing of the law is guilty of a petty misdemeanor.

SB 291 also authorizes civil actions by persons wrongfully denied notice and establishes criminal misdemeanor penalties for knowing or reckless violations of the Act, establishes annual reporting requirements for physicians, the courts, and the Department of Health, and repeals the criminal abortion statute (Section 30-5-3 NMSA 1978).

The bill provides for a fine of $500 against the physician for each 30 days for which the report is not filed (following an initial 30-day grace period.)

The bill would require DOH to publish an annual statistical report and, if the Secretary of DOH fails to do so, the bill would authorizes any group of 10 or more citizens to seek an injunction in a court of competent jurisdiction against the Secretary requiring that a complete report be issued. The bill subjects the Secretary to sanctions for civil contempt and payment of court fees for failure to comply with any such injunction.

The bill contains a severability clause and an effective date of July 1, 2013.

FISCAL IMPLICATIONS

The Administrative Office of the Courts (AOC) indicates that SB 291 would have a fiscal impact upon the judiciary. According to information provided by the Department of Health, 290 abortions were performed on minors in 2010. A survey of 1,519 unmarried pregnant minors in states where parental involvement is not mandatory found that 39 percent did not tell one or both parents about their intent to have abortions. Assuming the results are similar in New Mexico, AOC estimates that the district court caseload would increase by approximately 113 cases statewide. The average cost per case for all necessary court staff would be approximately $482. AOC also estimates that court-appointed attorneys, paid an average of $80 per hour, will cost an additional $240 per case for a total of $722 per case or $81,586.00 for 113 cases. Assuming that approximately 20 percent of the cases are appealed to the Court of Appeals, the AOC estimates the average cost per case to be approximately $521 in court and attorney costs, or $11,462.00 for 22 cases. The total estimated amount for 113 district and 22 appellate court cases is $93,048.00.

The bill requires that court staff and attorneys be available 24 hours a day 7 days a week. While larger courts may be able to rotate staff to be available nights and weekends smaller courts would be required to pay “stand-by” pay, at an additional $1.25 per hour, to ensure staff’s availability if necessary. AOC estimates that this would increase individual court’s costs for these hearings by about eight percent. Finally, there would also be costs associated with opening buildings and providing for security for courts that have to be opened after hours.

AOC states that any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. 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.

The Association of District Attorneys (AODA) indicates that the fiscal impact of this bill is substantial due to the many different systems it impacts. The courts, both trial and appellate, will have an increased caseload on issues that must be heard immediately. The requirement to allow

pregnant females access to these courts 24 hours a day, 7 days a week will be a huge burden on the courts. They will have to set up a whole new system of on call availability of judges and then provide that information to the public. Since the court systems are reducing business hours due to the economic situation, this will make the burden even greater. AODA also observes that two new crimes are created in this bill. That impacts on police, prosecutors, defense attorneys, courts, jails, prisons and probation and parole. Each of these systems will either need additional resources to handle these new crimes or they will need to decide to not pursue crimes that are already on the books.

SIGNIFICANT ISSUES

The Attorney General's Office (AGO) identified significant legal issues relating to SB 291;

> In 1973, the United States Supreme Court determined that statutes regulating abortions must allow, based on medical judgment, abortions not only when a woman's life is at risk, but also when her health is at risk. Roe v. Wade, 410 U.S. 113 (1973); reaffirmed in the context of parental consent and notification acts in Planned Parenthood v. Casey, 505 U.S. 833, 880 (1992); see too Ayotte v. Planned Parenthood of New England, 546 U.S. 320, 126 S.Ct. 961 at 967, reaffirming that States cannot restrict access to abortions that are "necessary, in appropriate medical judgment, for preservation of the life or health" of the female patient.
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> This bill complies with federal court decisions by allowing an exception when "the abortion is necessary to protect the unemancipated pregnant minor's health from danger" and there is insufficient time to provide the required notice. However, SB 291 falls short in those cases where there is sufficient time to provide notice and the pregnant minor's health is in danger. Under this circumstance, the pregnant minor would have a constitutional right to an abortion without parental notification.
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> And while the bill otherwise complies with federal court decisions on parental notification, it is unclear how state courts would rule under the New Mexico state constitution.
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> The New Mexico state constitution has been interpreted by the N. M. Supreme Court to afford even greater protections than the federal constitution. Our Supreme Court so held in New Mexico Right to Choose/NARAL v. Johnson, 126 N.M. 788 (1998), when it ruled that the Medicaid regulation restricting state funding of abortions for Medicaid-eligible women violated the Equal Rights Amendment of our state constitution.
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> Although our New Mexico courts have not been faced with analyzing the issues that arise in parental notice or consent statutes, courts in other states have. In 2000, the New Jersey Supreme Court found that the State's interest in enforcing its parental notification statute, which is substantially similar to this bill, failed to override the substantial intrusion it imposed on a young woman's fundamental right to abortion and was unconstitutional under the equal protection guarantee contained in its state constitution (because it imposed no corresponding limitation on a minor who seeks medical and surgical care otherwise related to her pregnancy). Planned Parenthood of Central New Jersey v. Farmer, 762 A.2d 620 (2000).

> Other jurisdictions have recognized that a minor's right to privacy is fundamental, and because it is implicated in parental consent statutes, the state must be able to satisfy a strict scrutiny review by demonstrating a compelling state interest that imposes the least restrictive means available. Consent statutes containing provisions similar to SB 230 have not withstood judicial scrutiny of this nature. See In re T.W., 551 So. 2d 1186, 1195, 1196 (Fla. 1989); see too American Pediatrics v. Lungren, 940 P.2d 797 (1997) (declaring California's consent with judicial bypass statute unconstitutional solely on privacy grounds). See also, State v. Planned Parenthood of Alaska, 35 P.3d 30 (2001), where the Alaska Supreme Court directed the lower court to conduct an evidentiary hearing to determine whether, under the Alaska Constitution's guarantee of privacy, the state has a compelling interest in enforcing its parental consent statute, and, if so, whether that statute contains the least restrictive means necessary to promote such an interest.
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> Thus, this bill, if enacted, may be found unconstitutional under not only the right to privacy, equal protection, and due process clauses of the N. M. Constitution, but also under the separate equal rights guarantees contained in the New Mexico Constitution. But again, there are no controlling state court decisions involving parental notice.

The AODA questions whether SB 291 violates Roe v. Wade. AODA indicates that it might, since there is no state interest set out in this bill as to why this additional burden should be put on unemancipated pregnant minors. Additionally, the AODA observes the bill creates a $500 fine for doctors who fail to submit the required reports in a timely manner; however, it does not state who can impose this fine (probably the Department of Health) and how the fine will be collected. A court order would seem to be necessary to do both of these things.

AOC states that the bill in Section 7: Requires physicians and the courts to submit annual reports to the Department of Health. Physicians must report: the number of parents provided notice by mail and the number provided personal notice as well as the number in each category who went on to obtain an abortion; the number of abortions performed upon unemancipated pregnant minors without notice; the number of abortions performed after judicial authorization without parental notification. Physicians who fail to file timely reports with the Department of Health are subject to a $500 monetary fine and in certain instances sanctions for civil contempt.

AOC also notes it must submit the following information to the Department of Health: the total number of motions or petitions filed pursuant to the Act; the number of cases in which the court appointed a guardian *ad litem*, the number in which the court appointed counsel; the number in which the judge authorized an abortion without parental notification; the number in which the trial judge denied the petition; and the number of appeals filed, affirmed, and reversed.

Based on this information the Department of Health must issue an annual report. If it fails to do so "any group of ten or more citizens . . . may seek an injunction against the Secretary of Health. The DOH indicates that SB 291 proposes that a late fee of $500.00 be assessed on any physician that does not submit timely reports on abortions performed. Yet, SB 291 does not specifically identify the state entity responsible for collecting the fines, or where the late fees should be deposited or the procedure for assessing the fee.

The Human Services Department (HSD) states that currently in the Medicaid program, parental consent is required for an unemancipated minor for cases not involving life endangerment, rape or incest. However, this requirement can be bypassed when the practitioner determines that the

client is capable of making her own decision concerning abortion. The Medicaid Program currently pays for state-funded abortions for medical reasons and, when certain criteria are met, federally funded abortions.

LEGAL/REGULATORY ISSUES (OTHER SUBSTANTIVE ISSUES)

The Department of Health (DOH) maintains that SB 291 conflicts with the Vital Statistics Act, Section 24-14-18 NMSA 1978, which mandates that all abortions occurring 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 statistical records of the system of vital records and health statistics. Additionally, DOH reports that SB 291 also conflicts with the following statutes: 24-8-5 NMSA 1978 states that, "Neither the state, its local governmental units nor any health facility furnishing family planning services shall subject any person to any standard or requirement as a prerequisite to the receipt of any requested family planning service…."

DOH notes Section 24-1-13.1 NMSA 1978 states, "A health care provider shall have the authority, within the limits of his license, to provide prenatal, delivery and postnatal care to a female minor. A female minor shall have the capacity to consent to prenatal, delivery and postnatal care by a licensed health care provider." Finally, regarding enforcement, there is no known mechanism for DOH to determine if a physician or their agent "…provided during the previous calendar year the notice described in Section 3 of the 'Parental Notification Rights Act'," and was not in compliance in reporting the activity for the year.

PERFORMANCE IMPLICATIONS

AOC reports that the courts are participating in performance based budgeting. This bill may have an impact on the measures of the courts in the following areas:

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

ADMINISTRATIVE IMPLICATIONS

The AOC indicates that SB 291's requirements give these cases precedence over all other matters; that courts, court staff, and attorneys be available twenty-four hours a day seven days a week; that the judge enter written findings of fact and conclusions of law and that decisions be rendered by 5:00 p.m. the next day all have administrative implications for the judiciary. Courts are typically open to the public from 8:00 a.m. to 5:00 p.m. Monday through Friday. This bill would require that court employees and attorneys be available at any time day or night to conduct a full evidentiary hearing. Although judges are available to issue bench warrants during non-business hours these do not require a full evidentiary hearing as contemplated by SB 291. These requirements may be particularly burdensome in smaller courts. For example, if the only available judge is in the middle of a murder trial the judge would be required to recess the trial and have the jury, witnesses, and attorneys all wait while the judge takes evidence and conducts the hearing contemplated by this bill.

DOH observes that SB 291 proposes yearly reporting of all physicians who perform abortions to DOH and the production of an annual report that includes statistics from the Administrative Office of the Courts.

SB 291 proposes that DOH ensure that all currently licensed physicians are informed of these new requirements by October 1, 2013, and all physicians who subsequently become licensed in this state would be informed about parental notification for abortions at the same time that they receive their license. There are nearly 8,000 licensed physicians in the State, and DOH is not the licensing entity for physicians in New Mexico. DOH adds that the proposed legislation contains no 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 conduct DOH-named activities.

HSD states that Medicaid Program rules would need to be changed. Otherwise, the administrative responsibilities are all assigned to DOH.

DUPLICATION, RELATIONSHIP

SB 291 duplicates HB 177. Additionally, HSD observes that SB 291 relates to HB 84, Unborn Victims of Violence Act, and HB 122 Women's Right to Know Act

TECHNICAL ISSUES

The Public Defender Department (PDD) reports the language of the proposed Act appears to be redundant in that it mandates that "[a]n abortion shall not be performed upon an unemancipated pregnant minor," since abortions cannot be performed on individuals who are not pregnant.

Also, PDD states the definitional language regarding an "unemancipated pregnant minor" might need to be clarified to specify that it means "a pregnant female human who is under sixteen years of age.

OTHER SUBSTANTIVE ISSUES

HSD states that presumably, SB 291 does not intend to apply to the termination of ectopic pregnancies based on the "protection of health from danger"; so the bill should be clarified to exempt ectopic pregnancies from the provisions. HSD adds that presumably, the bill would not apply to "morning after pills" administered by either physician or by a pharmacist without physician involvement because in most cases it would not be known for certain if the patient were pregnant. But the bill is not fully clear on that point.

DOH observes that geographic distribution of abortion service in New Mexico is limited; there are limited numbers of abortion providers and a relatively high number of uninsured teens making access to this service a challenge for low-income rural teens. Additionally, 52.5 percent of all abortions in New Mexico are to Hispanic females (www.cdc.gov/mmwr/pdf/ss/ss5713.pdf).

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AODA notes that pregnant minors under the age of 18 who request an abortion would still need a parent or guardian to also request the abortion for the minor - Section 30-5-1 (C). There would also be no provision for a minor to seek a court order for an abortion without parental consent.

TT/svb