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## FISCAL IMPACT REPORT

SPONSOR Cisneros DATE TYPED 03/10/05 HB 419/aSPAC/aSJC/aSF1  
 SHORT TITLE Medicaid Recipient Home Birth Access SB #1  
 ANALYST Weber

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			\$800.0	Recurring	General

(Parenthesis ( ) Indicate Expenditure Decreases)

### REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY05	FY06			
	\$2,200		Recurring	Federal Medicaid

(Parenthesis ( ) Indicate Revenue Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Human Services Department (HSD)

Attorney General Office (AGO)

### SUMMARY

#### Synopsis of Senate Floor Amendment #1

On page 3, line 3 after the word “services” insert “provided the patient signs a release of liability form acknowledging sufficient understanding of the procedures involved to rise to the level of informed consent”.

#### Significant Issues of Senate Floor Amendment

Human Services contributes the following material.

Medicaid supports home birth as a viable option for delivery and supports efforts to ensure access to this service. However, the Department has significant concerns about SB 419.

The Department is concerned about the precedent this would set for other practitioner groups who are having difficulty obtaining affordable malpractice insurance. We are concerned with the concept of “any willing provider” and believe it important to maintain control over the credentialing policies and processes while allowing contracted managed care organizations (MCOs) some flexibility in forming their provider networks.

The option of not requiring providers to carry adequate malpractice liability coverage would be a violation of the Department’s existing provider agreements with Medicaid providers. Current provider agreements contain the following provision: “The Medicaid provider shall: ... 1.7. Assume sole responsibility for all applicable taxes, insurance, licensing and other costs of doing business.” To modify the malpractice insurance requirement for one group of providers would essentially create a house of cards for the Medicaid program.

Eliminating malpractice coverage would also be a violation of the Department’s responsibility to our Medicaid clients. These clients have an implicit trust that the healthcare services provided through our program are safe and sound. Further, there is an understanding that the client would have some recourse in the event of any losses they might suffer. While the risks involved with midwifery and home births are minimal, and that only a small number of lawsuits have been filed in the past 30 years, we have a responsibility to our clients to assure them the possibility of restitution in the unlikely event of some negative outcome.

We also have a responsibility to the taxpayers in the sense that we cannot leave the state financially vulnerable. If there is ever cause for a Medicaid client to file a malpractice suit against an uninsured Medicaid provider, we believe that the client could turn to the state.

While the bill includes language that would exempt the MCOs from liability, the Department is doubtful whether this exemption would be upheld in court in the event of a negative outcome attributable to a contracted practitioner. Further, SB 419 does not appear to extend the same exemption to the State.

SB 419 also includes a section that would require informed consent from Medicaid clients. The Department takes great care to ensure that written materials for clients are clear and comprehensible and are translated into Spanish, if necessary. We would hope that similar care is taken to ensure that Medicaid clients fully understand what they are signing. *Similar concerns would apply to the new amended language.*

Finally, there are concerns about cost. While routine home births are likely less expensive for the Medicaid program than routine hospital deliveries, the Department believes that the additional risk involved will lead to increased rates. There will also be costs to the state in the event of a lawsuit or settlement.

## **UPDATED FISCAL IMPLICATIONS**

HSD amends the fiscal implication from the original fiscal impact report.

There are potential increased costs to the state in three areas – MCO rates, Medicaid cost of care,

and state legal settlements. First, contracted MCOs will be taking on additional risk if forced to contract with uninsured providers. The Department expects to see an increase in the negotiated rates as the MCOs compensate for this additional risk. These costs are estimated at \$3 million, representing the cost to an MCO that has one legal settlement in the event of a negative outcome. (This increase can also be thought of as approximately \$1 per member per month). Secondly, even one negative birth outcome can have significant impact on the Medicaid budget as the program provides for medical care for the infant. These costs can be up to \$1 million per year or more and can last for the life of the individual. Finally, the state could face lawsuits in the event of a negative home birth outcome. While there have not been many successful lawsuits against midwives over the years, it is assumed that SB 419 will lead to an increase in home births and therefore a higher incidence of negative outcomes. We have not estimated any cost to GSD Risk Management for these potential settlements.

#### Synopsis of Senate Judiciary Committee Amendment

On page 2 line 19 at the start of new material insert “The human services department, the medicaid program and a”. This clarifies responsibility but does not change the substance of the bill.

#### Synopsis of Senate public Affairs Committee Amendment

Through out the bill the term “licensed” midwife is changed to “registered lay” midwife. This does not change the substantive issues.

#### Synopsis of Original Bill

Senate Bill 419 creates new sections of the Public Assistance Act to: 1) require managed care organizations (MCO) and Medicaid to contract with licensed midwives (LM) and certified nurse midwives (CNM) regardless of whether they carry current malpractice insurance; 2) require a sufficient number of LM and CNM be contracted to ensure access to their services for Medicaid members; 3) Exempts MCO from liability from services performed by contracted LM and CNM who do not have malpractice insurance and 4) requires LM and CNM to obtain written informed consent from patients that also includes notifying them of the MCO exemption from liability

#### Significant Issues

The Attorney General worries about possible constitutional issues.

Section 3 of SB 419 may violate the NM Constitution by limiting liability of managed care organization that credentials non - covered midwife by depriving patient of right to remedy under law.

Art. I § 4 of the NM Constitution guarantees the inherent and inalienable rights to life, liberty, the possession and protection of property, and of seeking and obtaining safety and happiness to the people of NM. Art. I § 18 guarantees that no person shall be deprived of life liberty of property without due process of law, nor denied equal protection under the law.

In Lemuz v Fieser, 261 Kan. 936, 933 P2d 134 ( 1997), the parents of a neurologically damaged

newborn challenged a Kansas statute that limited the liability of a health care facility for actions of a physician who was not an employee. The Court held that the statute under which the medical facility was held not liable was constitutional because the legislature had provided an adequate quid pro quo for the statutory abrogation of the right to sue the hospital. Under the Health Care Stabilization Act, Kansas health care providers may qualify for affordable liability coverage with a \$ 300,000.00 cap, and therefore state has agreed to bar claims of independent liability of the health care facility.

The proposed bill attempts to address the problem of prohibitively expensive medical malpractice premiums by permitting midwives to treat patients without professional malpractice insurance, while at the same time attempting to address the concomitant problem of lack of access to obstetricians. The amendment further requires private for profit managed care organizations to credential such individuals, and then attempts to remove the liability of the MCO. Unlike Kansas, the legislature has not provided any quid pro quo to compensate a victim of negligence. This is probably unconstitutional for the denial of due process and equal protection under the law.

In addition, the population most likely to receive services under this Act may be both indigent and vulnerable, furthering the argument for greater, not less, State protection.

The Human Services Department comments.

Medicaid supports home birth as a viable option for delivery and supports efforts to ensure access to this service.

Concerns about this bill include: 1) the precedent this would set for other practitioner groups who would also like to not have to carry malpractice insurance and 2) while the bill exempts the MCO from liability, it does not address the state, which contracts with the MCO's for Medicaid services 3) this legislation protects the MCO (and the State).

A contract between an MCO and an individual provider is a private matter between the contracting parties. The MCO should be able to choose with whom to contract and what terms to include in the contract.

## **FISCAL IMPLICATIONS**

If the statute is challenged and determined to be unconstitutional, there could be increased costs to the state under Risk Management defending the use of health care practitioners who are not covered by professional malpractice insurance as currently required.

## **POSSIBLE QUESTIONS**

What entity will be responsible for determination of the skills and professionalism of the midwives if the MCO is required to use any and all and no insurance is necessary?

Who or what entity would be financially responsible in the event of negligence on the part of the mid-wife.? Is it reasonable that no entity is responsible in the event of negligence?

**MW/lg:yr:rs**