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

SPONSOR Larranaga **ORIGINAL DATE** 1/31/07 **LAST UPDATED** **HB** 239

SHORT TITLE Parental Notification for Abortions **SB**

ANALYST E. Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	**FY08**		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to SB442

SOURCES OF INFORMATION
LFC Files

Responses Received From
Attorney General's Office (AGO)
Corrections Department
Administrative Office of the Courts (AOC)
Department of Health (DOH)

SUMMARY

Synopsis of Bill

House Bill 239 proposes to enact a new law, the Parental Notification Act to require parental or guardian notification at least 48 hours before an abortion is performed on an unemancipated minor (younger than 16 years) or a female of any age who has been declared incompetent and has had a guardian or conservator appointed. The only exception to the notification requirement is when the procedure is necessary to save the life of the patient and there is insufficient time to provide the required notice. The bill contains a judicial bypass procedure which allows a court to direct that notification is not required upon a finding that the minor or incompetent woman is mature enough to make the decision, or that an abortion is in the patient's best interests. This bypass procedure must be confidential and expedited, but no time limits are set. The bill also contains reporting requirements, both on the doctor who performs the procedure and on the Department of Health to publish statistics on an annual basis. The bill also makes the performance of an abortion in knowing or reckless disregard of the Act a misdemeanor.

Finally, it creates a civil cause of action that allows a parent or guardian wrongfully denies notice to sue a physician who performs an abortion without the requisite notice, and awards attorney fees to the prevailing party in certain circumstances.

FISCAL IMPLICATIONS

According to DOH, HB239 could require DOH to provide administrative support for contacting physicians; follow up to assure that reports are submitted to the DOH; the statistical compilation of physician reports, as well as coordination with the administrative offices of the courts in order to assemble an annual public report on adolescent abortion services. HB239 does not include any budget to support the above-mentioned functions. The cost for two FTE to support these functions is $93,000.

Fiscal impacts to the AOC are listed below.
Giving an additional level of priority to specific types of cases in an effort to reach an expedited adjudication will have a fiscal impact on the court's operation because other cases, perhaps of equal importance and severity of criminal charges, may be delayed resulting in an increase in caseloads in the courts, thus requiring additional resources to handle the increase.

Further, the bill proposes that the administrative office of the courts provide reports to DOH under the Act. The information is presently not being collected and would require that a data system be established in order to provide the information to the department of health on an annual basis.

In addition, 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 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.

In order to provide 24-hour access, the court of appeals would have to set up an emergency telephone number and a workable procedure for contacting three judges (for a three-judge panel) on short notice. This procedure may require acquisition and maintenance of pagers and/or mobile telephones for the judges and appropriate staff. It would also require staff time to monitor the emergency telephones and possible overtime compensation for clerical and legal staff if they were required to open the court and its offices for filings or emergency hearings. The fiscal impact on the district courts would be similar but would only involve one judge and a court monitor.

Additional fiscal impact would be incurred by AOC, which would pay for court appointed guardians *ad litem* in cases where the pregnant female chose not to consent to the notification of her parent or guardian and she petitioned the district court for an order for an abortion without notification.

SIGNIFICANT ISSUES

The Attorney General's Office notes the following:

1. The "medical emergency" exception dispensing with notice when the life of the patient is in danger is too narrowly drawn, and would render the Act unconstitutional. (See discussion below under Other Substantive Issues.

2. The provision regarding notice to a guardian or conservator of an incompetent may be overbroad, and thus unconstitutional. (See discussion below under Other Substantive Issues).

3. The judicial bypass procedure may not be specific enough to guarantee the expedited proceeding to which the unemancipated minor or incompetent is entitled, which would render the Act unconstitutional.)

4. Under independent state grounds, the Act may be unconstitutional. (See discussion below under Other Substantive Issues.)

PERFORMANCE IMPLICATIONS

HB239 relates to the DOH Strategic Plan, Program Area 1, Objective 2: Prevent Teen Pregnancy.

ADMINISTRATIVE IMPLICATIONS

According to DOH administrative impact to could be significant. HB239 proposes yearly reporting of all physicians who perform abortions to DOH and the production of an annual report that includes statistics from the administrative offices of the court. Abortion statistics are presently reported annually in "Selected Health Statistics", as required by statute.

HB239 proposes that DOH would ensure that all currently licensed physicians be informed of these new requirements by October 1, 2007 and all physicians who subsequently become licensed in this state would be so informed at the same time as they receive their license. There are over 6,000 licensed physicians in the State although the number of physicians who actually perform abortions is very small.

HB239 also proposes that the DOH would bring court action against individual physicians who have not submitted timely reports. A minimum of one FTE would be necessary for collection, tracking and reporting of data and another FTE financial analyst to track non-reporting and associated fines, plus substantially increased postage and printing.

According to AOC, requiring the New Mexico court of appeals and the state district courts to be accessible 24 hours a day, seven days a week, would have a great administrative impact. Currently, the court of appeals accepts cases for filing from 8:00 a.m. to 12:00 noon and from 1:00 p.m. to 5:00 p.m. on normal workdays, not including state holidays or weekends. The Court of Appeals now accepts filings in Santa Fe and Albuquerque. In order to provide 24-hour access, the court would have to set up an emergency telephone number and a workable procedure for contacting three judges (for a three-judge panel) on short notice. This procedure may require acquisition and maintenance of pagers and/or mobile telephones for the judges and appropriate staff. It would also require staff time to monitor the emergency telephones and possible overtime compensation for clerical and legal staff if they were required to open the court and its offices for filings or emergency hearings.

The impact on the district courts would be similar to the court of appeals. If the unemancipated minor or incapacitated person chose not to consent to the notification of her parent or guardian and she petitioned the district court for an order for an abortion without notice, the district court would need to have a judge and court monitor available to process and hear the case.

If proceedings identified in this bill shall be given precedence over other pending matters before the court so that the court may reach an expedited decision without delay, there would be an administrative impact on the courts as a result of additional case priority given to these cases and an increase in caseload and/or in the amount of time necessary to dispose of this case type.

TECHNICAL ISSUES

The AGO and AOC note the following:

1. Section 3(A) might contain language concerning the exceptions set forth in Section 4.

2. Section 3(B) and (C) refer only to the parent, but should include guardians and conservators of incompetent females (as in 3(A)).

3. Section 6(A) (2) (page 6, line 6) "of" should be "for".

4. Section 3.C.: Rather than add language explaining what "restricted delivery to the addressee" means, amend the language to make its meaning clear, if necessary.

OTHER SUBSTANTIVE ISSUES

The Department of Health notes that HB239 conflicts with the Vital Statistics Act, 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. The Act mandates that the reports shall not include the name or address of the patient and that DOH shall not release the name or address of the physician involved in the abortion.
In addition, HB239 also conflicts with the following statutes:

24-8-5 NMSA 1978, which 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…."

24-1-13.1 NMSA 1978 which states that "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."

The Attorney General's Office notes the following:

1. Medical emergency exception. As drafted, the notification requirements in HB 239 do not apply upon a physician's certification that an immediate abortion is necessary to prevent the death of the unemancipated or incompetent female. 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 Ayottev. Planned Parenthood of New England, 546 U.S. 320, 126 S.Ct. 961 at 967, reaffirming that State's cannot restrict access to abortions that are "necessary, in appropriate medical judgment, for preservation of the life or health" of the female patient. Minors as well as adults are entitled to the protections afforded by the U.S. Constitution. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1967); Belotti v. Baird, 443 U.S. 622 (1979); see also Hodgson v. Minnesota, 497 U.S. 417 (1990) (declaring unconstitutional a two-parent notification requirement for a minor's abortion without judicial bypass). The Act's limitation to life-threatening conditions is unconstitutional. See Planned Parenthood v. Neely, 804 F.Supp. 1210 (D.C. Ariz. 1992), declaring unconstitutional a consent statute that did not contain an exception when health was threatened; see also Planned Parenthood of Blue Ridge v. Camblos, 155 F.3d 352 (4th CA 1998), upholding a notification statute that allowed abortions on minors without notification when to wait for notification would pose a serious health risk; and see also Planned Parenthood of Rock Mountain Serv. v. Owens, 287 F.3d 910 (10th Cir. (Colo.) 2002), declaring unconstitutional requirement of parental notification before performing abortion on minor except when imminent death of minor, finding statute did not take into account instances when there is a health risk.

2. Incompetents. The term "incompetent" in HB 239 is not defined. Under the New Mexico Probate Code, which contains the statutory mechanism for appointing conservators and guardians for individuals who are determined to be incapacitated, such a person retains all legal and civil rights except those expressly limited by the court order or which are specifically granted to the guardian in a court order. See NMSA 1978, § 45-35-301.1 (1989); see too § 45-5-209(E) re guardians of minors. Thus, to the extent this bill requires notification to a guardian or conservator in a situation where an "incompetent" individual retains the right to make this decision, the bill conflicts with that statute, and may also violate that person's rights under both the federal and state constitutions.

3. Lack of deadlines re judicial proceedings. Although the bill requires cases brought by unemancipated minors or incompetents seeking to bypass the notice requirements by "given precedence" at the trial court level, that the decision be issued "promptly and without delay" and that an "expedited" appeal be available, the absence of any timetables or deadlines for trial court hearing, decision or appellate ruling has rendered similar provisions in other states unconstitutional under Belotti. Glick v.McKay, 937 F.2d 434, 440-441 (9th CA 1991), overruled on other grounds sub nom Lambert v. Wicklund, 520 U.S. 292 (1997); Planned Parenthood v. Lawall, 180 F.3d 1022 and 193 F.3d 1042(9th CA 1999); compare Memphis Planned Parenthood v. Sundquist, 175 F.3d 456 (6th CA 1999) (upholding Tennessee notification statute containing deadlines for hearings and appeals).

4. Independent State Grounds. In addition to the mandates of the federal constitution, the New Mexico constitution may afford greater protections. Our Supreme Court so held in New Mexico Right to Choose/NARAL v. Johnson, 126 N.M. 788 (1998), in ruling that the Medicaid regulation restricting state funding of abortions for Medicaid-eligible women violated the Equal Rights Amendment of our state constitution. Although our 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 HB 239, 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 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 HB 239 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). Lastly, 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. State v. Planned Parenthood of Alaska, 35 P.3d 30 (2001). Similarly, HB 239, if enacted, may be found unconstitutional under the right to privacy, equal protection, due process or equal rights guarantees contained in the New Mexico Constitution.

The judiciary has concerns with unemancipated minors and incapacitated persons entering into court hearings without representation by legal counsel.

ALTERNATIVES

Ensure through appropriate funding, an inter-agency and community-based collaboration to provide adequate counseling for teens with unplanned pregnancies.

POSSIBLE QUESTIONS

Courts already take reasonable action to see that cases are adjudicated in the most expedited manner possible. Section 4(D) requires that the court assign some level of additional priority to this type of case to assure that a decision is reached as quickly as possible. Would adding an additional level of priority for these cases jeopardize the six-month rule for cases already on the court's docket?

EO/mt