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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 01/24/09  
**LAST UPDATED** 02/18/09    **HB** 148

**SPONSOR** Gardner

**SHORT TITLE** Obstetrics Administrative Compensation    **SB**

**ANALYST** Hanika-Ortiz

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	\$75.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

New Mexico Medical Board (NMMB)  
 Human Services Department (HSD)  
 Health Policy Commission (HPC)  
 Department of Health (DOH)  
 Department of Workforce Solutions (DWS)  
 General Services Department (GSD)

### SUMMARY

#### Synopsis of Bill

House Bill 148 appropriates \$75 thousand from the General Fund to HPC in FY10 to convene a task force to devise a comprehensive plan for the creation, design and implementation of an obstetrics administrative compensation system to hear and determine claims regarding birth-related injuries.

The bill requires the comprehensive plan to determine the following:

- 1) the entity to administer the compensation system;
- 2) whether the compensation system will be the exclusive remedy;
- 3) whether the compensation system will provide compensation to claimants;
- 4) the types of qualifying birth-related injuries; and
- 5) whether a fund will be created or an existing fund used.

The task force will report its plan to the Legislative Health and Human Services Committee and the Legislative Finance Committee by July 1, 2010.

### **FISCAL IMPLICATIONS**

The appropriation of \$75 thousand contained in this bill is a recurring expense to the General Fund. Any unexpended or unencumbered balance remaining at the end of FY10 shall revert to the General Fund.

According to the December 2008 revenue estimate, FY10 recurring revenue will only support a base expenditure level that is \$293 million, or 2.6 percent, less than the FY09 appropriation. All appropriations outside of the general appropriation act will be viewed in this declining revenue context.

The bill does not identify a funding mechanism to implement and maintain an obstetrics administrative compensation system. For instance, in Virginia all licensed physicians, participating hospitals, and liability insurance carriers contribute annually to a compensation fund. Obstetricians who participate in the program pay an annual fee of \$5 thousand. The assessment on participating hospitals is \$50 per live birth up to \$150 thousand annually. Non-participating licensed physicians pay \$250 annually. Liability insurance carriers are assessed one quarter of one percent of their net direct liability insurance premiums. Virginia pays the expenses incurred in the care of the beneficiary; a one-time payment of \$100 thousand to the child's parents; and a death benefit of up to \$10 thousand. Virginia includes payment of loss of earnings from the age of 18 to 65 years. It is uncertain if New Mexico has the population base to support a similar compensation system.

HSD reports that if the "compensation fund" were to be the general fund a large potential liability could be created for the state. Any "compensation fund" established would also need to have procedures in place to ensure it remain actuarially sound.

HSD further reports that creating an alternative system for resolving claims related to birth injuries may create a precedent for other medical injuries.

HPC states that the appropriation in the bill will be spent on legal and policy consultations for implementation purposes. Task force members may be entitled to per diem and mileage as provided in the Per Diem and Mileage Act. Any additional fiscal impact to state agencies will be dependent upon what recommendations made by the task force are ultimately implemented.

### **SIGNIFICANT ISSUES**

HB 148 will enact the first of four recommendations outlined in an August 2008 HPC-sponsored Obstetric Health Care Practitioner Liability Insurance Task Force report.

Administrative compensation systems are an alternative to the current tort based system of addressing medical malpractice claims. There is no need to prove malpractice or to hire an attorney. There are often pre-determined damage amounts based upon the extent of the injuries.

DOH states that an administrative compensation system is expected to:

- 1) provide faster compensation to families suffering poor childbirth outcomes;
- 2) provide predictable and reliable amounts of compensation for specific injuries;
- 3) replace legal fees and court costs with lower administrative costs;
- 4) allow health care entities to more openly discuss and address system flaws that may produce poor childbirth outcomes; and
- 5) reduce the burden of liability insurance premiums for childbirth providers.

### **PERFORMANCE IMPLICATIONS**

The bill may not provide enough time for the task force to produce a quality, evidence-based report by July 1, 2010.

### **ADMINISTRATIVE IMPLICATIONS**

HPC will be required to collaborate with DOH, HSD, PRC, WSD, and persons with legal expertise and others to support task force efforts.

### **TECHNICAL ISSUES**

It is assumed that the bill refers to full-term live births.

Most compensation programs are for serious, birth-related neurological injuries (brain and spinal cord). The bill does not identify the types of qualifying injuries. Some refinements to the definition of a birth-related injury may make the eligibility criteria clearer immediately, and may help reduce the contentiousness of the eligibility process in the long run.

The bill does not define an obstetrical provider. A birth injury is not limited to the conduct of the medical doctor. It can also apply to nurses and others that provide healthcare that day.

### **OTHER SUBSTANTIVE ISSUES**

GSD reported that the recommendations of the task force created by the bill could impact the Risk Management Division (RMD). In RMD's experience, the person, or his legal representative if he's a minor or otherwise incapacitated, generally has 90 days from the date of injury to notify the division through a Notice of Tort Claim. Then the person generally has two years to sue from the date of injury. Suits often are active (open) for some time before completion through litigation or settlement, months or years depending on the complexity of the case. In RMD's experience, Plaintiff's attorneys generally charge between 30 to 40 percent plus costs of the litigation. RMD also noted that the tort process is somewhat different for claims against non-public, i.e. private, entities.

Lowering liability insurance costs for obstetricians may encourage physician recruitment and retention in New Mexico.

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

The current system of tort litigation for birth-related claims will continue.

**POSSIBLE QUESTIONS**

Will the public have access to a database of closed claims? Will participation be mandatory for all obstetrical providers? Will other non-physician providers who assisted in a poor birth outcome be protected as well as the participating physician and hospital? Will providers and hospitals need to provide informed consent to patients about their participation in a compensation program?

AHO/mc:svb