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FISCAL IMPACT REPORT

SPONSOR Kintigh ORIGINAL DATE 03/10/09
LAST UPDATED _____ HB 856
SHORT TITLE Controlled Substances in Newborn Babies SB _____
ANALYST Hanika-Ortiz

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$0.1 unknown but significant	\$0.1 unknown but significant		Recurring	Various

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Attorney General (AG)
Public Defender Department (PDD)
Human Services Department (HSD)
Health Policy Commission (HPC)
Department of Health (DOH)
Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

House Bill 856 enacts a new section of the criminal code to make it a fourth degree felony to give birth to an infant with a controlled substance in its blood, not lawfully prescribed to the mother. Any subsequent conviction for this crime would be a third degree felony.

Any woman convicted of this crime would be required to complete a substance abuse treatment program. If any portion of the imposed sentence is suspended or deferred, the period of probation may extend up to five years for a first conviction and up to ten years for a second conviction.

The bill also amends NMSA 1978, Section 24-1-6, Tests Required for Newborn Infants, to require that a blood sample taken from a newborn to screen for congenital diseases be preserved for six months.

FISCAL IMPLICATIONS

PDD reports that legislation resulting in new crimes will result in an increased caseload for the Department. NMCD reports that the bill would negatively impact the Department's ability to perform prison-related services if there are more than just a few additional convictions each year.

HSD reports that the bill will require one addition to the current panel of blood screenings already given to newborns in the physical health setting. DOH notes that if an additional diagnosis or condition is added to the newborn genetic screening panel, costs of the screening kit would increase and impact the Department's budget.

HSD further reports that the bill will require mandatory substance abuse treatment for mothers whose infants are positive for an illegal or non-prescribed substance in their bloodstream. No mechanism or funding source for such mandatory treatment is identified. Behavioral health services for Medicaid recipients and uninsured adults are administered through HSD within the Behavioral Health Collaborative.

SIGNIFICANT ISSUES

DOH provided the following comments:

The New Mexico Controlled Substances Act lists substances that include marijuana, cocaine and heroin, and narcotics lawfully prescribed. The Act does not list alcohol or tobacco, although these substances are the most commonly used and known to have negative consequences for the infant when consumed by a woman during pregnancy.

The New Mexico's mandatory child abuse reporting laws apply to physicians, thus a drug addicted mother may forego seeking important health and social services during her pregnancy for fear of criminal charges.

The bill would subject the pregnant offender to sentencing pursuant to 31-19-1 NMSA 1978 and she would face a criminal sentence of up to one year in jail. This raises the issue of separation of mother from child and research shows that parental incarceration can negatively affect the emotional, behavioral, and psychological development of children

PERFORMANCE IMPLICATIONS

The AOC and PDD note that in *State v. Martinez*, 2006-NMCA-068, 139 N.M. 741, 137 P.3d 1195, the New Mexico Court of Appeals found that a mother who gives birth to a drug addicted child cannot be charged with child abuse because a fetus is not a child for the purposes of the child abuse statute.

The AG notes that there is a legal argument that the criminalization of childbirth for women that are addicted to drugs creates an incentive to abort pregnancies that would otherwise result in criminal prosecution.

ADMINISTRATIVE IMPLICATIONS

DOH will need to amend its rules to require that blood samples taken from newborn infants for screening purposes pursuant to the Public Health Act be retained for six months.

TECHNICAL ISSUES

HSD notes that the bill does not state what shall be done with the results of the screen and how follow-up or intervention will occur. The bill is also unclear whether or not all babies will be tested or if the inclusion of drug testing will be only for a select population of birth mothers.

NMCD reports that by extending the probation period for a second conviction from five to ten years, the women convicted of this crime are subject to longer probation periods than every offender except certain sex offenders (who have a five to twenty year indeterminate probation period).

OTHER SUBSTANTIVE ISSUES

DOH further notes that policymakers have grappled with numerous ways that society can address the problem of women's substance abuse during pregnancy. The Guttmacher Institute's January 1, 2008, State Policies in Brief series on *Substance Abuse During Pregnancy* reports that no state specifically criminalizes drug use during pregnancy. However, prosecutors have attempted to rely on other criminal laws already on the books to attack prenatal substance abuse. The South Carolina Supreme Court has upheld such a conviction, ruling in *Whitner v State* that a woman's substance abuse late in pregnancy constitutes criminal child abuse.

ALTERNATIVES

State health agencies report that early prenatal health care is shown to improve birth outcomes by identifying certain health problems and by educating pregnant women on the best health habits for enhancing the baby's development, including the avoidance of illegal substances, tobacco, alcohol, pesticides, and other substances.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

There would be no mandate for mothers who gave birth to an infant whose blood contains a controlled substance to participate in substance abuse treatment or recovery services.

AHO/mt

