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FISCAL IMPACT REPORT

SPONSOR HRPAC **ORIGINAL DATE** 2/26/15
LAST UPDATED 3/7/15 **HB** CS/391/aHJC/aHF1#1

SHORT TITLE Parental Notification of Abortion Act **SB** _____

ANALYST A. Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY15 | FY16 | FY17 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|---------------|------|------|----------------------|------------------------------|------------------|
| Total | See Narrative | | | | | |

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 390/a and SB 437
Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
New Mexico Medical Board (NMMB)
Department of Health (DOH)

No Response Received From

University of New Mexico-Health Science Center (UNMH)

SUMMARY

Synopsis of HF1#1 Bill

House Floor amendment 1 to House Judiciary Committee amendment to House Regulatory and Public Affairs Committee substitute to House Bill 391 removes the remaining reference to “parent, guardian or custodian” not removed by the HJC amendment and removes pharmacist from those required not to participate.

Synopsis of HJC Amendment

House Judiciary Committee amendment to House Regulatory and Public Affairs Committee substitute for House Bill 391 provides an exemption to notification to “preserve the life or physical health of the pregnant female”. The bill expands notification of a pregnancy resulting from sexual abuse, rape or incest beyond “parent, guardian or custodian”.

Synopsis of Original Bill

House Regulatory and Public Affairs Committee substitute for House Bill 391 proposes to amend Section 30-5-1 to 30-5-7 NMSA 1978, which governs abortions. Specifically, it

- Creates a parental notification requirement for the physician when a non-emancipated minor elects to have an abortion performed. A physician may only perform an abortion on a minor when notification has been issued,
- Defines pregnancy as the implantation of the developing embryo in the uterus,
- Requires parental notification to a parent or guardian of a minor no less than 48 hours before the procedure is performed but does not require parental consent,
- Waives parental notification two unsuccessful attempts are made or if notification is refused,
- Waives notification if the physician certifies that an abortion is necessary to prevent the female patient's death and there is insufficient time to provide the notice,
- Requires the NMMB to promulgate, and CYFD to approve, a series of questions for health personnel to determine whether the pregnancy is due to sexual abuse, rape or incest,
- Requires medical staffers to receive no less than 8 hours of annual training concerning questioning and consultation procedures regarding pregnancies due to sexual abuse, rape or incest,
- Makes medical personnel and attending physicians responsible for determining whether the pregnancy is the result of sexual abuse, rape or incest, and must report such to CYFD,
- Creates a judicial exception to the notice requirement, requiring a hearing within 48 hours of a request, which will be confidential to ensure anonymity of the minor, allows the petition to be granted if the court finds the minor is sufficiently mature and well enough informed to decide intelligently with to elect the abortion or whether parental/guardian notification is not in the best interests of the minor where the pregnancy resulted from sexual abuse rape or incest. The court may appoint a guardian ad litem to represent the child,
- Requires DOH, Vital Records to establish reporting requirements for physician performing abortion and those reports are available for stratification and compliance requirements,
- Requires physicians to report particular statistics on abortions and notification,
- Provides for penalties of not less than \$5,000 and revocation or suspension of the medical license for not less than one year for physicians who knowingly and willfully fail to comply and requires the NMMB must enforce discipline of the Parental Notification Act, and
- Includes an emergency clause making the effective date immediately.

FISCAL IMPLICATIONS

HB 391 HRPAC substitute provides for a guardian at litem to be appointed for a child who has filed a petition in any district court for an order granting a waiver of notice and participates in the proceeding's on the minor's own behalf. The appropriation to the AOC for court-appointed attorneys is not adequately funded to meet its obligations. This requirement will add to the burden in an indeterminate amount.

DOH reports that it will incur IT and FTE costs for the performance and compliance with the data collection and public reporting, as well as costs associated with monitoring physicians

whom we do not license or regulate for compliance. DOH estimates the cost at \$150 thousand annually.

AOC reports that according to information provided by the DOH, 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, it is estimated 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. It is also estimated 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, it is estimated that the average cost per case will 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.

SIGNIFICANT ISSUES

According to the NMMB, it is being asked to participate in two areas. One appears to be inappropriate, the other, redundant.

First the NMMB does not determine standard of care. The appropriate body for the 'promulgation' of questions to determine whether rape, sexual abuse or incest has resulted in a pregnancy is not the New Mexico Medical Board.

Secondly, the bill limits the NMMB's decision-making powers in regards to discipline. When reports or complaints are received, including for such issues as characterized in this section, the medical board investigates and then determines the appropriate penalty as that relates to licensure and/or fines. Type and degree of action taken under this section is already the responsibility of the NMMB, and this section would disallow the Board from determining the type of licensure action taken in the event of a violation, as it is charged to do.

According to DOH, the addition in the definition section of the term "reasonable medical judgment" has been added so it could be included in the section that addresses when parental notification can be waived in circumstances where the physician believes that the abortion is necessary to prevent the female's death and there is insufficient time to make the notification. Under the substitute bill, the physician may waive the notice if in his/her "reasonable medical judgment" the procedure is necessary to prevent death and there is not enough time to make the notification. The addition includes the "reasonableness" or "reasonable man" standard to help guide physicians determining when this exception applies.

One of the more significant changes is the addition of the requirement that the exception to the notification requirement in cases of sexual abuse, rape and incest only applies if the sexual abuse, rape or incest was committed by a by a parent, guardian or custodian. This means that if the minor pregnant female was abused, raped or has a pregnancy that is the result of incest by someone other than a parent, guardian or custodian; they still must notify their parents prior to the procedure. The bill would afford certain protections to minors that were raped or abused by parents, guardians or custodians but those same protections would not be afforded to those that were raped or abused by a stranger or some other known person. The bill creates different protections afforded to minor pregnant females based on whether or not their abuser was a

parent, guardian or custodian; a factor that is not within the minors control but may result in lesser protections being afforded to those abused by strangers and other known persons.

AOC reports the following on the substitute bill.

- 1) The substitute for HB 391 defines “abortion” to mean the intentional termination of the pregnancy of a female by a person who knows the female is pregnant, thus including both a medical procedure and the inducement through medication within the definition.
- 2) While the substitute bill, Section 7(B) provides for the enforcement of the imposition of the civil penalty and the revocation of a license, the bill does not contain an appeal provision specific to the Act, nor make reference to any existing appeal provision currently in statute.
- 3) HB 391 requires a court to “make every effort” to hold a hearing within 48 hours of receiving a notification bypass petition from a minor. The bill also provides that the petitioner shall have a direct appeal of the decision of the district court to the NM Court of Appeals, and the appeal shall be expedited. While the HB 391 judicial bypass provisions place a lesser burden upon the courts, the direction to the courts to “make every effort” and to expedite an appeal may not provide sufficient guidance to the courts to ensure that the bill’s judicial bypass procedure passes constitutional muster, or, instead, places an impermissible burden upon the minor’s access to an abortion.
- 4) The portion of HB 391 permitting a pharmacist or person under the direction of a pharmacist to refuse to dispense drugs that result in the termination of pregnancy, as well as permitting hospital and medical facility employees, should they object to abortion on moral, religious or personal conviction grounds, to refuse to participate in medical procedures, including the dispensing of medication that will result in the termination of pregnancy, may face legal challenges.

According to the National Conference on State Legislatures, six states (Arizona, Arkansas, Georgia, Idaho, Mississippi, and South Dakota) have passed laws allowing a pharmacist to refuse to dispense emergency contraception drugs. Illinois passed an emergency rule that requires a pharmacist to dispense FDA approved contraception. Colorado, Florida, Illinois, Maine and Tennessee have broad refusal clauses that do not specifically mention pharmacists. California pharmacists have a duty to dispense prescriptions and can only refuse to dispense a prescription, including contraceptives, when their employer approves the refusal and the woman can still access her prescription in a timely manner. New Jersey’s law prohibits pharmacists for refusing to fill prescriptions solely on moral, religious or ethical grounds. Washington’s law allows pharmacists to dispense emergency contraception without a prescription through collaborative practice agreement and state-approved protocol. Washington and Wisconsin laws requires that emergency rooms provide information about emergency contraception upon request as well as dispense it upon request.

CYFD reports:

First, current law takes into consideration that the pregnancy may cause grave

impairment of the pregnant minor’s physical or mental health. This bill makes no similar consideration, but removes it entirely.

Second, the bill requires CYFD to approve questions and consultation procedures created by the NMMB that will be used to determine if the pregnant minor became pregnant due to sexual assault or incest. This type of task is outside the ordinary purview of CYFD’s mandate to protect children from abuse and neglect inflicted by parents, guardians and custodians, and the bill does not give adequate guidance as to the criteria for such approval. CYFD’s current practice is to use forensic interviews at safe house locations when it is necessary to question children who have been alleged to have experienced the trauma associated with sexual abuse. Forensic interviewers are required to have an extensive amount of training and experience to conduct such interviews. Requiring CYFD to approve questions and procedures for that type of trauma-laden experience is inappropriate and is better left to trained forensic interviewers. Additionally, if the child alleges sexual assault, it is in the child’s best interest that the number of interviews they are required to complete be limited. For example, it is not best practice to conduct both a safe house forensic interview and an interview at the abortion performing facility. The undue stress and trauma of the interviews should be limited.

Third, the bill requires that medical staff, intake employees, and physicians have only eight (8) hours of training with regard to questioning the pregnant minor to determine if the pregnancy resulted from sexual abuse or incest, and makes both the intake employee and the attending physician responsible for determining if the pregnancy is the result of sexual abuse, rape, or incest perpetrated by a parent, guardian, or custodian. CYFD’s current practice is to use forensic interviewers, who are required to have significantly more than eight (8) hours of training prior to attempting to make such determinations.

Finally, the bill allows for filing of a petition in district court for a waiver of the notification to the parent. A minor is unlikely to know how to navigate the court system without assistance thus making this option unlikely to be used. The court is allotted only forty-eight (48) hours to hold a hearing on a petition which will likely put strain on the judicial system depending on how many petitions are filed.

PERFORMANCE IMPLICATIONS

This bill may have an impact on the measures of the district courts in the following areas:

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

ADMINISTRATIVE IMPLICATIONS

According to DOH, the administrative impact could be significant. The bill proposes yearly reporting of all physicians who perform abortions to DOH and the production of an annual report that includes statistics from the courts through the physician. Abortion statistics are presently reported annually in “Selected Health Statistics,” as required by statute.

This substitute requires CYFD to approve questions and consultation procedures created by the New Mexico medical board that will be used to determine if the pregnant minor became

pregnant due to sexual assault or incest.

The substitute also requires physicians to contact CYFD if there is reason to believe that the pregnancy was a result of sexual abuse, rape, or incest by a parent, guardian, or custodian. Any increase in reports and/or investigations that occurs as a result of this reporting requirement shall be absorbed by existing resources.

CONFLICT AND RELATIONSHIP

Conflicts with HB 390, Related to SB 437.

TECHNICAL ISSUES

AOC reports that HB 391 does not require an attending physician or intake employee to inquire, investigate or discover whether a minor is seeking a judicial exception to the required notification, nor does it place a duty upon the courts to notify physicians that a petition has been filed to waive notification. The bill also does not require an attending physician or intake employee to inform a minor seeking an abortion of the availability of a judicial exception to notification as well as the exception to notification for sexual abuse, rape or incest.

The substitute requires physicians to contact CYFD if there is reason to believe that the pregnancy was a result of sexual abuse, rape, or incest by a parent, guardian, or custodian. Any increase in reports and/or investigations that occurs as a result of this reporting requirement shall be absorbed by existing CYFD resources.

OTHER SUBSTANTIVE ISSUES

DOH reports the following with regard to the substitute bill. The bill

- Muddies the concept of parental notification with informed consent. It further creates reporting requirements inconsistent with current law.
- 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.
- 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.”

DOH also reports that the bill treats pregnant minor females who have a pregnancy that is the result of sexual abuse, rape or incest by a parent, guardian or custodian differently than a

pregnant minor female who has a pregnancy that the result of sexual abuse, rape or incest by a stranger or other know person and offers less protections to the class of pregnant minor females who have a pregnancy that the result of sexual abuse, rape or incest by a stranger or other know person.

ABS/bb