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## FISCAL IMPACT REPORT

SPONSOR SJC ORIGINAL DATE 2/16/2017  
 LAST UPDATED 2/24/2017 HB \_\_\_\_\_

SHORT TITLE Pregnant/Lactating Alternative Sentencing SB 277/SJCS

ANALYST Rogers

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	\$0.0	Potentially Significant	Potentially Significant	Potentially Significant	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 277 and SB 293.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Department of Health (DOH)

New Mexico Corrections Department (NMCD)

Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of SJC Substitute

The Senate Judiciary Committee Substitute for SB 277 creates a new statutory section to permit judges to grant release from incarceration to a woman who is due to give birth. The SJC substitute makes a series of technical changes to the original bill.

- Section 1(A) line 17 replaces “the court shall take into account” with “the court shall consider.”
- The original bill allowed the court to release a woman prior to the presumptive birth day of her child and for up to 18 months after – unless a finding is made that either “that public safety or the well-being of the woman or her child would not be best served outside of a correctional setting.” The sub removes the language “[O]r the well-being of the woman or her child would not best served outside a correctional facility” and replaces with “that public safety would not be best served by the woman’s release.”
- The SJC substitute retains the presumption shall be in favor of release.

## FISCAL IMPLICATIONS

There is no appropriation contained in this bill; however, the bill could increase the corrections department operational costs.

NMCD states “the fiscal impact on NMCD is unknown, but likely substantial. This fiscal impact could include the cost of providing adequate housing to pregnant woman during the course of the custodial release, as well as costs associated with the woman’s behavioral health and mental health care, prenatal care, and nourishment/basic needs for herself and her new baby. Additionally, the bill exposes NMCD to substantial legal liability by potentially ordering the release of a pregnant woman who may be at high risk of committing other crimes, fleeing, or injuring herself or others while on release. Nothing in the bill exempts or protects the NMCD from being sued under New Mexico or federal law if the female offender commits a crime or otherwise harms herself or others while on release, be that release custodial or noncustodial. The bill appropriates no money to NMCD to cover potential costs.”

AOC states 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 any additional court proceedings held pursuant to SB 277. 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.

## SIGNIFICANT ISSUES

NMCD submitted the following analysis to the original bill that still relates to the terms of the substitute:

This bill places the operational burdens of custodial release of an inmate (already incarcerated and under supervision of NMCD) on the NMCD. While the bill allows judges to order such releases, it does not delineate what the NMCD’s responsibilities would be if the judge ordered a custodial release—would the NMCD have to send a correctional officer or probation officer to check on the woman in person, pay for electronic monitoring and monitor her, or what? The bill also does not contemplate or address what would happen if the women failed to return to prison after the term of her court-ordered release has expired—would she be considered a fugitive from justice or be subject to additional criminal penalties besides just serving the remainder of her sentence once or if she was ever located?

There is already in the law the substantial opportunity for the courts to address the issue of the female offender’s pregnancy before that offender is booked into a jail or NMCD prison facility. For those females pregnant or lactating with pending trials, judges have the authority and mandate to consider factors that will assure appearance at trial and account for the safety of the community. For example Rule 7-401, Bail, Section B of the Rules of Criminal Procedure for the Metropolitan Courts, lists Factors to be Considered in Determining Conditions of Release. This allows courts, in regard to individuals with pending trials, to determine the type of bail and which conditions of release will reasonably assure appearance of the person as required and the safety of any other person in the community. Adding pregnancy and lactation status to this list within this rule may better serve the intent of this bill, and would likely often allow the courts to address and resolve these issues even before sending the female offender to jail or prison.

The bill may impede the discretion of the NMCD to operate its prisons in accordance with law. First, it requires the court to take into account a woman's pregnancy and lactation status when considering whether she should receive any good time or earned meritorious deductions. The bill could be construed to allow the sentencing court to order more good time for pregnant women in a NMCD prison than is allowed by statute for other prisoners, or to prevent the NMCD from forfeiting good time for the pregnant female offender if she engaged in misconduct or refused to program while in prison. Second, it forces the NMCD to expend substantial resources monitoring and supervising one prisoner on custodial release, even when such a release might jeopardize public safety because of the criminal history, current classification level and prison adjustment history of the woman; and even when such a custodial release would take away already limited manpower resources from other needed programs and prison activities.

The bill's requirement of a release or essentially a furlough is also inconsistent with current law, which allows NMCD at its sole discretion to authorize furloughs for certain prisoners, but only if certain circumstances or elements are first met. Those elements are: (1) if the prisoner is seeking to work at paid employment outside the prison or to attend school; (2) the prisoner is a minimum custody level inmate; (3) the prisoner is not afflicted with any serious emotional or personality defect; and (4) the prisoner has not been convicted of a crime involving assaultive sexual conduct nor violence to a child, nor has been linked with organized criminal activity. Section 33-2-44 NMSA. This bill would allow the court to require the pregnant woman to be released even if she was not a minimum custody inmate, even if she had a personality or emotional disorder, even if she has been linked with organized crime or convicted of sexual conduct or violence against a child, and even if otherwise based on the NMCD's expertise and experience it appeared likely that the woman would seek to avoid returning to prison or would jeopardize public safety by committing crimes or other harms to herself or others while on the custodial release.

Nothing in the bill exempts or protects the NMCD from being sued under New Mexico or federal law if the woman commits crimes or otherwise harms herself or others while on release.

While the NMCD certainly respects the intention of the bill, this legislation requires the NMCD to expend substantial resources monitoring and supervising one or more prisoners on release even while it has limited manpower and budgetary resources to supervise the large number of offenders who remain incarcerated in its prisons. The costs of supervising even one female offender on a custodial release could be significant, especially if the release was likely to jeopardize public safety because of the criminal history, current classification level and prison adjustment history of the released female offender.

AOC submitted the following analysis to the original bill that still relates to the terms of the substitute:

There is no guidance as to what type of court hearing is necessary to determine whether release is appropriate, nor guidance as to who brings this petition for release, appeal, or motion to revoke the release. The bill does not provide guidance to the court as to factors or weight in determining how release would affect public safety or good time, although the presumption shall be in favor of release remains in the SCJ substitute.

AOC points out that SB 277 “does not contain a definition of “lactation status” and does not provide guidance for the courts as to the weight to be given to lactation status in determining whether a prisoner is eligible for release or bond, or in the computation of good time credit. Section 1(A) does require a presumption be made in favor of release for a woman who is pregnant or lactating.”

According to a 2004 Bureau of Justice Statistics survey cited by the AOC, 3 percent of women in federal prisons and 4 percent of those in state prisons were pregnant upon arrival. The statistics on pregnancy in local jails is older – a 2002 survey found that 5 percent of women entered local jails pregnant. At those rates, approximately 9,430 pregnant women are incarcerated annually. There is even less data on what kind of medical care pregnant prisoners receive.

AOC also submitted analysis on the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, known as the Bangkok Rules, which recommend that “for a pregnant woman or a child’s primary caregiver, ‘non-custodial measures should be preferred where possible and appropriate.’ Still, in 2017, the issues facing incarcerated pregnant women are more about receiving appropriate prenatal care and whether a woman is shackled during and after giving birth, rather than whether a woman is granted release from incarceration before and after childbirth and while lactating.”

Additional reporting on whether and which states provide alternative to incarceration programs for incarcerated mothers and mothers to be, the AOC recommends National Women’s Law Center’s 2010 report, *Mothers Behind Bars*.

The Department of Health (DOH) states the positive health effects of breastfeeding are well recognized as breast milk is uniquely suited to the human infant’s nutritional needs with properties that protect against a host of illnesses and diseases for both mothers and children. Breastfeeding has been recommended by numerous prominent organizations of health professionals because breastfeeding provides many important health, psychosocial, economic, and environmental benefits. Organizations such as the American Academy of Pediatrics all recommend that infants be breastfed for at least 12 months and be exclusively breastfed for the first 6 months. D

OH also states “the U.S. Surgeon General’s 2011 Call to Action to Support Breastfeeding, Appendix B, lists the excess health risks associated with not breastfeeding, which include ear infections, eczema, diarrhea, vomiting, respiratory hospitalizations including asthma, childhood obesity, type 2 diabetes, leukemia and sudden infant death syndrome for full-term infants; necrotizing enterocolitis for pre-term infants; and breast and ovarian cancer for mothers.”

Analysis from DOH explains a Committee Opinion on Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females, issued by the American College of Obstetricians and Gynecologists (ACOG) and reaffirmed in 2016, recommends that federal and state governments adopt policies to support provision of prenatal care for pregnant and postpartum incarcerated women and adolescents. In addition, ACOG recommends that incarcerated mothers who wish to breastfeed be allowed to either breastfeed their infants or express milk for delivery to the infant. If the mother expresses her milk, accommodations should be made for freezing, storing, and transporting the milk.

DOH states “if it is not an option for mother and child to be together, correctional facilities should have provisions for 1) visiting infants and 2) to allow for women in facilities without prison nurseries to maintain their milk supply. Safety and security are of utmost importance, and protocols should be established that mirror other types of tissue collection and transport. Although maintaining adequate safety is critical, correctional officers do not need to routinely be present in the room while the prisoner is either in the room breastfeeding or expressing breast milk.”

DOH also submits the following:

Breastfeeding remains the preferred method of nourishment for all children, this is in part because non-breastfed children have a 2.6 times higher chance of experiencing abuse than breastfed children. (Strathearn L, Mamun AA, Najman JM, & O’Callaghan MJ. 2009. Does breastfeeding protect against substantiated child abuse and neglect? A 15-year cohort study. *Pediatrics*, 123(2), 483–93.).

A 2009 New York Correction Law allows a mother of a nursing child to be accompanied by her child if she is committed to a correctional facility at the time she is breastfeeding. This law also permits a child born to a committed mother to return with the mother to the correctional facility. The child may remain with the mother until one year of age if the woman is physically capable of caring for the child (2009 N.Y. Laws, Chap. 411; SB 1290).

A 2012 study examined the breastfeeding knowledge, beliefs, and experiences of pregnant women incarcerated in New York City jails. Findings showed that breastfeeding is valued by incarcerated pregnant women and has the potential to contribute to their psychosocial well-being and self-worth as a mother. Three main themes emerged from women's collective stories about wanting to breastfeed and the challenges that they experienced. First, incarceration removes women from their familiar social and cultural context, which creates uncertainty in their breastfeeding plans. Second, incarceration and the separation from their high-risk lifestyle makes women want a new start in motherhood. Third, being pregnant and planning to breastfeed represent a new start in motherhood and gives women the opportunity to redefine their maternal identity and roles. Understanding the breastfeeding experiences and views of women at high risk for poor pregnancy outcomes and inadequate newborn childcare during periods of incarceration in local jails is important for guiding breastfeeding promotion activities in this transient and vulnerable population. Implications from the findings will be useful to correctional facilities and community providers in planning more definitive studies in similar incarcerated populations (BIRTH 39:2 June 2012).

DOH also states the population impacted by this bill is incarcerated women. According to the Sentencing Project, in 2014, the imprisonment rate for African American women (109 per 100,000) was more than twice the rate of imprisonment for white women (53 per 100,000). Hispanic women were incarcerated at 1.2 times the rate of white women. The American College of Obstetricians and Gynecologists (ACOG) states Women and adolescent females represent an increasing proportion of inmates in the US correctional system. Incarcerated women and adolescent females often come from disadvantaged environments and have high rates of chronic illness, substance abuse, and undetected health problems. Most of these women are of reproductive age and are at high risk of unintended pregnancy and sexually transmitted infections, including HIV. Understanding the needs of incarcerated women and adolescent females can help improve the provision of health care in the correctional system.

DOH explains the impact this bill may have on health equity/disparities is that the infants of incarcerated women from predominately disadvantaged environments with high rates of chronic illness, substance abuse, and undetected health problems, may have healthier outcomes, which in turn, could reduce subsequent health costs.

#### **ADMINISTRATIVE IMPLICATIONS**

NMCD states “the custodial release may interfere with the safe and secure operation of NMCD’s female facilities by taking away the limited staffing and budgetary resources from other needed programs and prison activities. A noncustodial release may also interfere with the safe and secure operations if the female offender failed to return at the end of this release, and the NMCD had to search for the offender and try to bring her back to prison to serve the remainder of her sentence.”

#### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Relates to HB 277 and SB 293.

#### **OTHER SUBSTANTIVE ISSUES**

NMCD states the bill addresses the length of the release but does not address the circumstances under which, or even if, a custodial or noncustodial release could be terminated early due to factors like criminal activity, use of alcohol or drugs, abuse of the child, etc..

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