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## FISCAL IMPACT REPORT

SPONSOR McSorley DATE TYPED 2/11/04 HB \_\_\_\_\_

SHORT TITLE Subpoenas for Medical Records SB 262

ANALYST Dunbar

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY04	FY05	FY04	FY05		
	NFI				

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Department of Health (DOH)  
 NM Commission on Higher Education (NMCHE)  
 Department of Public Safety (DPS)  
 New Mexico Corrections Department (NMCD)  
 Administrative Office of the District Attorneys (AODA)  
 Attorney General's Office (AG)  
 Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Bill

Senate Bill 262 amends 14-6-1 NMSA 1978, protecting the confidentiality of health information. The amendment: 1) provides that a patient's medical records are provided to law enforcement only upon issuance of a subpoena by a court, requiring proper notice, 2) provides for language clean-up in the bill including changing the name of the Health and Environment Department to the Department of Health.

#### Significant Issues

SB262 would supply the statutory authority for a procedure for releasing medical information to law enforcement, a known procedure that ultimately gives better protection to patient's medical records.

The proposed legislation raised the following issues:

- ❑ The Department of Public Safety indicated that the law raises the difficulty of the investigation if the victim or subject involved in the investigation or the representative can not be located. This would occur on a limited basis.
- ❑ Administrative Office of DA's concerns focus on providing notice to the patient and therefore, hampering the investigation.
- ❑ The Medicaid Fraud Division of the New Mexico Attorney General's Office note that the bill would violate federal regulations and place the state plan in jeopardy for continued federal funding. This is explained as follows:
  1. Medicaid programs requires that Medicaid Provider Agreements indicate that program providers furnish "any information regarding payments claimed by the provider for furnishing services" to the Medicaid Fraud Control Unit and to the Medicaid Agency (the Human Services Department in New Mexico). See 42 CFR 431.107.
  2. Human Services Department is required by federal law to refer suspected fraud on the Medicaid program to the Medicaid Fraud Control Unit. See 42 CFR 455.21.
  3. Agencies would be hampered or unable to obtain recipient medical records to document non-delivery of services. The Medicaid Fraud Division believes that obtaining a subpoena and providing notice will effectively stop investigations of Medicaid fraud by providers.

## **ADMINISTRATIVE IMPLICATIONS**

SB262 would increase administrative duties to assure compliance with the provisions, but these could be accomplished with existing DOH staff.

## **CONFLICT**

The bill may conflict with federal regulations. Reference "Significant Issues" above.

## **TECHNICAL ISSUES**

Clarification of the bill to specify the form of the notice to the patient would be helpful and reduce administrative confusion to both law enforcement and the Department of Health. It would also help reduce the administrative impact on the Department of Health if the bill specified the type of evidence that Department personnel could rely upon to show that law enforcement did provide the patient with the required notice. As an example, should the Department of Health rely upon:

- ❑ A verbal assertion by law enforcement personnel that the patient was given notice?
- ❑ A copy of any written notice given to the patient by law enforcement?
- ❑ An affidavit by law enforcement setting forth the time and manner that notice was given to the patient?

DPS point out there is no language in the act allowing judges the authority to utilize judicial discretion if disclosure would harm the victim or jeopardize the investigation.

AODA's are further concerned that there is no mechanism for law enforcement to petition a court for subpoena when there is no open case.

AODA argue that the bill contradicts long standing and constitutional methods of investigation used by law enforcement nationwide which includes properly obtaining records by the use of search warrants or Grand Jury subpoenas that preserve the integrity and secrecy of an investigation when required.

### **OTHER SUBSTANTIVE ISSUES**

Confidentiality of patient information has been a tenet for years, and has been reinforced in recent years with the Health Insurance Portability and Accountability Act (HIPAA). Clarity is needed, as specified by DOH, to be able to carry out the provisions of SB262.

For example, should notice be provided to the patient prior to law enforcement's seeking the subpoena, or should the notice be given after the subpoena were issued but a reasonable time prior to making the request for the medical records? The timing of the notice is important if the rationale for the notice is to give the patient to whom the notice is provided a reasonable opportunity to oppose the release of the patient's medical records to law enforcement. If the notice were not required to be provided until after the subpoena is issued, the patient would not have an opportunity to oppose the issuance of the subpoena when the court was considering the request for the subpoena. If notice were not provided to the patient within a reasonable time before the law enforcement official appeared at the health facility (perhaps, 48 hours), the patient would not have any opportunity to get the subpoena quashed.

DOH states that the bill is consistent with the HIPAA Privacy Rule, 45 CFR §§ 160 & 164 and does not conflict with the Public Health Emergency Response Act, NMSA 1978, §§ 12-10A-1 to 12-10A-19.

### **AMENDMENTS**

As discussed above, recommend amendments as follows:

- ❑ Indicate when notice must be provided to the patient by law enforcement,
- ❑ Establishes the form of the notice that must be given to the patient by law enforcement, and
- ❑ Establish the minimal requirements of the evidence that the Department of Health can accept from law enforcement to show that law enforcement provided the statutorily required notice to the patient.
- ❑ Indicate that notification is to be done within a specified time line unless the authorizing Judge is provided probable cause by the requesting law enforcement officer showing reason for the delay in notification. Notification delay will be determined by authorizing Judge. This amendment was suggested by DPS.

**BD/yr:dm**