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FISCAL IMPACT REPORT

ORIGINAL DATE 02/27/07

SPONSOR Adair LAST UPDATED _____ HB _____

SHORT TITLE Court-Ordered Fetal Alcohol Parent Treatment SB 1175

ANALYST Geisler

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		Indeterminate, see narrative				

(Parenthesis () Indicate Expenditure Decreases)

Relates to: HB 141, SB 1166, SB 954, and HB 523.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General (AG)
 Department of Health (DOH)
 Children, Youth, & Families Department (CYFD)
 Administrative Office of Courts (AOC)
 Department of Corrections (DOC)
 Health Policy Commission (HPC)

SUMMARY

Synopsis of Bill

Senate Bill 1175 requires the Department of Health to implement a program for court-ordered contraceptive treatment (Depo-Provera treatment for first occurrences, request for sterilization after second occurrence) for the biological parents of a baby born with Fetal Alcohol Syndrome or Drug Addiction. Failure to comply with a court order for sterilization is a fourth degree felony, and incarceration can be ordered until completion of sterilization.

FISCAL IMPLICATIONS

The costs to implement SB 1175 are indeterminate. DOH will be responsible for additional program administration costs as well as costs of contraception or sterilization. There would also be additional costs to the courts and the corrections department.

SIGNIFICANT ISSUES

Senate Bill 1175 seeks to address the serious problem of Fetal Alcohol Syndrome (FAS) which is a manifestation of specific growth, mental and physical birth defects associated with the mother's high levels of alcohol use. DOH reports that the incidence of alcohol related birth defects in NM is 1 in 100 births.

DOH provides:

Use of alcohol just before pregnancy may be a problem because women are often not aware they are pregnant in the earliest weeks and may unknowingly expose their fetus. Fetal Alcohol Spectrum Disorder (FASD) does not only occur in children of mothers who abuse alcohol or are heavy drinkers. The latest research shows that as little as two drinks in early pregnancy or four drinks all at once (a binge episode) can kill developing brain cells. For that reason, no amount of alcohol is considered safe for a pregnant woman. Data show that nearly 44% of New Mexico women drank alcohol in the three months before pregnancy. Once they get into prenatal care, this figure drops, e.g., to 4% in late pregnancy.

Ascertaining the occurrence of addicted births is not straightforward. DOH staff or facilities do not provide obstetric or newborn care and do not attend to women who deliver. Drug or alcohol use by a woman during pregnancy would be known to the mother and only possibly to her health care provider, even if she receives appropriate prenatal care. Intra-uterine exposure to alcohol may not be detected until the child is 4-6 years of age, and only a few infants with severe birth defects may be identified early. Intra-uterine exposure to drugs has a range of problems for a newborn; symptoms of withdrawal would become more readily apparent than in the case of an infant exposed to alcohol.

One of the definitions of "abused child" is a child who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child's parent (32A-4-2 NMSA 1978). When a woman gives birth to a drug- or alcohol-addicted baby, the infant is considered to be at risk and providers are obligated to report to the Children Youth and Families Department (not DOH).

While Depo-Provera is an extremely effective contraceptive option, it would not be appropriate to legislate its use. All drugs have contraindications and prescriptions are based on a health care provider's assessment of the patient. Depo-Provera is contraindicated in women who have liver disease or dysfunction, complications of alcohol and/or drug abuse, and may not be medically appropriate for other women.

SB 1175 raises new issues of civil rights. While there is some legal precedent in some states for sterilization of people who are mentally incompetent, the involuntary sterilization of competent adults by the state may represent an invasion of some civil rights. On the basis of recent legislation and case law regarding rights to bear children, SB 1175 could seem unconstitutional with problems concerning privacy, civil rights and due process issues. For more on this issues, see discussion below under substantive issues.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 141, which is an act relating to crimes against children and establishes the offense of giving birth to a child who has fetal alcohol syndrome. SB 1166, which proposes that the Department of Health design and implement procedures for the purpose of identifying and initiating Depo-Provera contraceptive injections for women who give birth to drug- or alcohol-addicted babies for a second time. Senate Bill 954 would appropriate \$350,000 from the General Fund to the Department of Health (DOH) for expenditure in Fiscal Year 2008 to support and strengthen a fetal alcohol syndrome prevention program at the University of New Mexico (UNM) that delivers programs in English and Spanish and initiates collaborations statewide. House Bill 523 appropriates three hundred fifty thousand dollars (\$350,000) from the general fund to Children, Youth and Families Department for expenditure in 2008 to contract with a nonprofit organization for a fetal alcohol syndrome awareness pilot project. The project shall use the media and associated awareness initiatives in public schools and target health areas throughout the state

TECHNICAL ISSUES

Title X funds are for voluntary contraceptive services. NM DOH is a grantee of the Title X Federal grant, which mandates voluntary participation of clients [Title X Law and Implementing Regulations 59.5(a) (2)].

OTHER SUBSTANTIVE ISSUES

AG provided background on legal issues:

This bill provides for mandatory involuntary contraception and sterilization of persons parenting children born with fetal alcohol syndrome or drug “addiction”, as determined by the Department of Health. The bill would impose coercive incarceration on parents who fail to comply with court ordered mandatory sterilization. The bill will most likely be subject to legal challenge as an intrusion upon the constitutional right to procreate, discussed in the United States Supreme Court decision of *Skinner v. Oklahoma*, 316 U.S. 535 (1942). The Court considered an Oklahoma law providing for mandatory sterilization of habitual criminals and stated:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to re-examine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

The bill will most likely be scrutinized to determine whether its intent is punitive, i.e. to punish parents who produce babies with fetal alcohol syndrome or drug “addiction”, or whether its compulsory contraceptive and sterilization provisions are based upon the theory of “eugenics”, which advocates the improvement of human hereditary traits through various forms of

intervention, or whether its intent is to prevent future procreation by a certain class of individuals (alcohol and drug users) because of the harm they may cause to their offspring (“fetal rights”). In any event, the bill will most likely be subject to “strict scrutiny” and examined in light of equal protection and due process rights. Also, it will be examined to determine whether its application would result in a disproportionate negative impact upon certain classes of individuals based upon wealth, gender, race, etc.

States have attempted to deal with the issue of fetal alcohol syndrome and drug dependent or addicted children in various ways. Some states have considered criminalizing drug or alcohol during pregnancy. This approach has been criticized by leading medical and public health groups because they fear that such prosecutions would deter women from obtaining necessary health care and would thus cause harm to both maternal and fetal health. In some states, a pregnant woman’s drug use is supposed to trigger only an evaluation of parenting ability and the provision of services, whereas in others it provides the basis for presuming neglect or qualifies as a factor to be considered in terminating parental rights.

http://www.drugpolicy.org/library/governmental_response_p1.cfm.

<http://www.news.uiuc.edu/news/05/1108pregnant.html>.

In lieu of government action, a non-profit organization known as “Project Prevention” pays drug addicts and alcoholics \$300 for volunteering to receive long-term contraception or sterilization. However, this program has also been the subject of criticism and controversy.

<http://www.answers.com/topic/project-prevention>.

<http://projectprevention.org/>.

The bill also raises issues regarding the impermissible intrusion by the legislative branch into the conduct of the judicial branch. Its provisions *require* judges to order involuntary long-term contraception or sterilization based upon a finding of parentage. The bill does not appear to give judges discretion with respect to appropriate alternatives.

ALTERNATIVES

Preconception health has been identified as a priority need for states and for the nation by the Centers for Disease Control and Prevention and by the Association of State and Territorial Health Officers. Policies and evidence-based services are proposed to assist couples – women and men – to achieve optimal health before beginning a pregnancy. Case management is a proven approach to helping women who have had an infant to get off drugs or alcohol.

While almost 20 states have laws about the issue of maternal substance use, the incidence of the problem has not decreased. Criminalization of pregnant women has not been shown effective at reducing substance abuse problems; indeed, such efforts may frighten women away from needed treatment for themselves and their families. Instead, efforts could be directed at programs to educate, treatment facilities, early and accessible prenatal care programs. Home visiting programs for new families, treatment programs, and male involvement programs all impact positively on women who are pregnant or may become pregnant and could reduce their substance abuse, including alcohol. (Erin Linder, University of Illinois Law Review cited at: www.news.uiuc.edu/news/05/1108pregnant.html) (Drug Policy Alliance at www.drugpolicy.org).