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FISCAL IMPACT REPORT

ORIGINAL DATE 2/1/08

SPONSOR Boitano LAST UPDATED _____ HB _____

SHORT TITLE Use Of Controlled Substances While Pregnant SB 316

ANALYST Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$0.1	\$0.1		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General's Office (AGO)
 Children Youth and Families (CYFD)
 Corrections Department (CD)
 Department of Health (DOH)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

Senate Bill 316 the new crime of consumption of a controlled substance while pregnant when the person knows or should know that she is pregnant. The bill also makes it a crime to cause another person to consume a controlled substance when the person knows or should know that the other person is pregnant.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law and commenced prosecutions. 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

The AGO provided the following:

The issue of prosecuting a woman under the Child Abuse statute, for consuming a controlled substance while pregnant was raised in a case before the New Mexico Court of Appeals in *State v. Martinez*, 139 N.M. 741, 137 P.3d 1195 (Ct. App. 2006). In that case, the defendant was charged with felony child abuse for using cocaine during her pregnancy. The consumption of cocaine during the pregnancy resulted in serious health problems to the child after the child's birth.

The relevant portion of the child abuse statute, under which the defendant was prosecuted, stated that "abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be . . . placed in a situation that may endanger the child's life or health." The Court stated that a "child" is defined by the legislature as "a person who is less than eighteen years of age" and that a "person" is defined as "any human being or legal entity." The Court determined that the legislature has not included an unborn viable fetus within the meaning of "human being." The Court held, therefore, that the defendant could not be prosecuted under the child abuse statute because the "Legislature did not intend for a viable fetus to be included within the statutory definition of a child for the purposes of the child abuse statute."

The New Mexico Supreme Court declined to review the New Mexico Court of Appeals' decision.

CYFD notes that making the consumption of a controlled substance illegal is a growing development in the United States, and has resulted in prosecutions of the offense at levels from misdemeanor to felony in more than 24 states. Some states use these laws as precursors to seizing newborn infants at the time of birth, and/or older children during or after the pregnancy.

DOH provided the following:

The New Mexico Controlled Substances Act lists schedules I through V of Controlled Substances, which includes marijuana, cocaine and heroin, and also narcotics prescribed by medical professionals for the control of pain and for other medical problems. Women who use illegal drugs, or "street drugs," can have babies who are small, premature, or have other health problems, such as birth defects. According to a 2005 government survey, nearly 4 % of pregnant women use illicit drugs.

The Controlled Substances Act does not list alcohol or tobacco as controlled substances, although these substances are the most commonly used substances known to have potential for abuse and physical or psychological dependence and are known to have negative consequences for the infant when consumed by a woman during pregnancy. As written, SB316 does not distinguish between "street drugs" and narcotics prescribed by physicians to pregnant women to control pain.

Policymakers have grappled with numerous ways that society can address the problem of women's substance abuse during pregnancy. Policies in Brief series on Substance Abuse

During There are numerous ways in which states have responded to pregnant women's substance abuse. No state specifically criminalizes drug use during pregnancy. However, prosecutors have attempted to rely on a host of criminal laws already on the books to attack prenatal substance abuse. Only 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.

In a May 11, 2007 ruling in which the state of New Mexico argued that a pregnant woman addicted to drugs should be sent to jail as a felony child abuser, the New Mexico Supreme Court ruled that the state law expanding criminal child abuse laws to include drug use by pregnant women was unconstitutional.

If SB 316 is enacted, an unintended consequence may be to discourage women who use controlled substances illegally from seeking prenatal care. New Mexico's mandatory child abuse reporting laws applies to physicians, thus a drug addicted mother may forego seeking important health and social services during her pregnancy for fear of criminal charges. Further, because the bill will subject the pregnant offender to sentencing pursuant to 31-19-1 NMSA 1978, she will face a criminal sentence of up to one year in jail. This brings up the separation of mother from child and research shows that parental incarceration can negatively affect the emotional, behavioral, and psychological development of children.

Early prenatal health care can improve birth outcomes by identifying some 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.

SB316 will criminalize not only those who know they are pregnant and consume controlled substances, but also those who "should know that she is pregnant" or those who "should know that the other person is pregnant." This definition is problematic because it is nearly impossible for another person to define when one should know that she is pregnant. Many women do not know that they are pregnant until well into the pregnancy. There is a wide variety of "regularity" to a woman's cycle and each case will have different facts, which may present problems in prosecuting women.

Additionally, the Controlled Substances Law already criminalizes the illegal consumption of controlled substances.

ADMINISTRATIVE IMPLICATIONS

Normally, misdemeanor offenders are not sentenced to a CD facility. However, if a person is convicted of several misdemeanors, and is sentenced to serve them consecutively such that his prison sentence totals one year or more, then that person is sentenced to a CD prison. Under this bill, it is possible that one (the same) person could be found guilty of several misdemeanor offenses. While the number of offenders sentenced to CD for multiple misdemeanor convictions of this new crime is likely to be small, even one such offender impacts CD. Similarly, while most misdemeanor offenders are not supervised by CD on probation, some are. Accordingly, this bill could cause a minimal increase in CD's prison population and probation caseloads.

CD notes more prisoners and probationers means that current staff has to work harder to provide the same level of services to prisoners and probationers.

DW/mt