F I S C A L I M P A C T R E P O R T

SPONSOR Baldonado **ORIGINAL DATE** 02/09/12 **LAST UPDATED** **HB** 51

SHORT TITLE Parental Notification Rights Act **SB**

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	$0.0	$100.4*	$100.4*	$200.8*	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)
*****See Fiscal Implications for AOC data and explanation of anticipated expenses.

Duplicates SB 157 (except for title)

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Attorney General's Office (AGO)
Medical Board (MB)
Human Services Department (HSD)
Miners Hospital (MH)
Children, Youth & Families Department (CYFD)

SUMMARY

Synopsis of Bill

House Bill 51 enacts the Parental Notification Rights Act. The Act requires notice to a parent or guardian at least 48 hours before an abortion is performed on an unemancipated minor or a female of any age who has been declared incompetent and has had a guardian or conservator appointed. It provides for an exception when the procedure is necessary to save the life of the patient and there is insufficient time to provide the required notice.

The bill contains a judicial bypass procedure, during which the female is entitled to court appointed counsel and the court may appoint a guardian ad litem as well. In the bypass procedure, a court may determine that notification is not required upon finding that the minor or incompetent woman is mature enough to make the decision, or that an abortion is in her best interest. This bypass procedure and any appeal therefrom must be confidential and handled on an expedited basis.

HB 51 also authorizes civil actions by persons wrongfully denied notice and establishes misdemeanor penalties for knowing or reckless violations of the Act, establishes annual reporting requirements for physicians, the courts, and the Department of Health, and repeals the criminal abortion statute (NMSA 1978, section 30-5-3).

The bill contains a severability clause and an effective date of July 1, 2012.

FISCAL IMPLICATIONS

The AOC reports that HB51 would have a fiscal impact upon the judiciary. According to information provided by the Department of Health, 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% did not tell one or both parents about their intent to have abortions. Assuming the results are similar in New Mexico, the AOC estimates that the district court caseload would increase by approximately113 cases statewide. The average cost per case for all necessary court staff would be approximately $482. The AOC also estimates 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% of the cases are appealed to the Court of Appeals, the AOC estimates the average cost per case to 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.

In addition, the AOC points out that the bill requires that court staff and attorneys be available 24 hours a day 7 days a week. It notes that while larger courts may be able to rotate staff to be available nights and weekends, smaller courts would be required to pay "stand-by" pay, at $1.25 per hour, to ensure staff's availability if necessary. The AOC estimates that this would increase individual court's costs for these hearings by about 8% (although the number of courts impacted in this manner is not specified). Finally, the AOC reports there would also be costs associated with opening buildings and providing for security for courts that have to be opened after hours (which costs are not quantified). The figures in the table above reflect the total estimated amount for the district and appellate court cases described above.

In the event that the Act becomes law and there is a legal challenge, there would be an additional unquantified fiscal impact on the courts and the AGO.

SIGNIFICANT ISSUES

The CYFD comments:

> Notification and consent laws help pregnant teens and legally declared incompetent adults get support and guidance from their parents/guardians in this important decision. According to the Guttmacher Institute, as of January 1, 2012, 37 states require parental involvement in a minor's decision to have an abortion. Thirty-six states that require parental involvement have an alternative process for minors seeking an abortion that involve a judicial bypass procedure. Thirty-three states permit a minor to have an abortion in a medical emergency and fifteen states permit a minor to obtain an abortion in cases of abuse, assault, incest or neglect.

Currently, the Vital Statistic Act mandates that all abortions occurring in New Mexico be reported to the State Registrar for statistical purposes and not be part of the permanent records of the vital records system. Reports do not include the name and address of the patient or attending physicians. In 2009, there were 370 abortions performed in New Mexico on females less than 18 years of age. Thirty-seven of those were on females less than 15 years of age. Studies show that most adolescents consult parents on issues of pregnancy and when they do not consult a parent, they consult another interested adult.

The HSD points out that currently in the Medicaid program, parental consent is required for an abortion to be performed on an unemancipated minor for cases not involving life endangerment, rape or incest. This consent can be bypassed when the practitioner determines that the minor is capable of making her own decision concerning abortion. The Medicaid program currently pays for state-funded abortions and, when certain circumstances are met, federally funded abortions.

The AGO identifies three significant legal issues:

1. The "medical emergency" exception (Section 4A) dispensing with notice only when the life of the patient is in danger likely would be found by the courts under existing case law precedent to be too narrowly drawn, which would render the Act unconstitutional. (See discussion below under Other Substantive Issues.)

2. The provision regarding notice to a guardian or conservator of an incompetent (Section 3A) may be overbroad, and thus unconstitutional. (See discussion below under Other Substantive Issues).

3. Under independent New Mexico state constitutional grounds, separate and apart from the U. S. Constitution, the Act may be held unconstitutional. (See discussion below under Other Substantive Issues.)

ADMINISTRATIVE IMPLICATIONS

State law currently requires physicians to submit reports of induced abortions for statistical purposes. NMSA 1978, section 24-14-18.

Courts are typically open to the public from 8am to 5pm Monday through Friday. Although judges are available to issue bench warrants during non-business hours, which activity does not require full evidentiary hearings, as would be required under the Act.

Existing Medicaid program regulations would need to be changed.

DUPLICATION

HB 51 is a duplicate of SB 157 in all but the title of the act: in SB 571, it is the Parental Notification Act.

TECHNICAL ISSUES

1. The bill defines "fetus" as "….from fertilization until birth", page 2, line 1, but there are legal and widely used contraceptives that act after fertilization but before implantation.

2. If the intent of the bill is to exclude ectopic pregnancies (which could result in the death of the patient), the bill should be clarified to include that exclusion.

OTHER SUBSTANTIVE ISSUES

The AGO provides this more detailed explanation of the significant legal issues it has identified:

1. Medical emergency exception.

   In 1973, the United States Supreme Court determined that statutes regulating abortions must allow, based on medical judgment, abortions not only when a woman's life is at risk, but also when her health is at risk. Roe v. Wade, 410 U.S. 113 (1973); reaffirmed in the context of parental consent and notification acts in Planned Parenthood v. Casey, 505 U.S. 833, 880 (1992); see too Ayotte v. Planned Parenthood of New England, 546 U.S. 320, 126 S.Ct. 961 at 967, reaffirming that States cannot restrict access to abortions that are "necessary, in appropriate medical judgment, for preservation of the life or health" of the female patient. Minors as well as adults are entitled to the protections afforded by the U.S. Constitution. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1967); Belotti v. Baird, 443 U.S. 622 (1979); see also Hodgson v. Minnesota, 497 U.S. 417 (1990) (declaring unconstitutional a two-parent notification requirement for a minor's abortion without judicial bypass).

   Therefore, the proposed Parental Notification Rights Act's limited exception that is restricted to only when "necessary to prevent the pregnant female's death", as opposed to consideration for her health as well, appears under settled existing case law precedent to be unconstitutional. See Planned Parenthood v. Neely, 804 F.Supp. 1210 (D.C. Ariz. 1992), declaring unconstitutional a consent statute that did not contain an exception when health was threatened; see also Planned Parenthood of Blue Ridge v. Camblos, 155 F.3d 352 (4th CA 1998), upholding a notification statute that allowed abortions on minors without notification when to wait for notification would pose a serious health risk; and see also Planned Parenthood of Rock Mountain Serv. v. Owens, 287 F.3d 910 (10th Cir. (Colo.) 2002), declaring unconstitutional a requirement of parental notification before performing abortion on a minor except when finding imminent death of the minor, holding the statute did not take into account instances when there is a health risk.

2. Incompetency.

   The term "incompetency" used in the Act is not defined. Under the New Mexico Probate Code, which contains the statutory mechanism for appointing conservators and guardians for individuals who are determined to be incapacitated, such a person retains all legal and civil rights except those expressly limited by court order or which are specifically granted to the guardian in a court order. See NMSA 1978, § 45-35-301.1 (1989); see too § 45-5-209(E) regarding guardians of minors. Thus, to the extent this bill requires notification to a guardian or conservator in a situation where an "incompetent" individual retains the right to make this decision, the bill conflicts with that statute, and may also violate that person's rights under both the federal and state constitutions.

3. Independent State Grounds.

   In addition to the individual rights provided in the federal U. S. constitution, the New Mexico state constitution has been interpreted by the N. M. Supreme Court to afford even greater protections. Our Supreme Court so held in New Mexico Right to Choose/NARAL v. Johnson, 126 N.M. 788 (1998), when it ruled that the Medicaid regulation restricting state funding of abortions for Medicaid-eligible women violated the Equal Rights Amendment of our state constitution.

   Although our New Mexico courts have not been faced with analyzing the issues that arise in parental notice or consent statutes, courts in other states have. In 2000, the New Jersey Supreme Court found that the State's interest in enforcing its parental notification statute, which is substantially similar to this bill, failed to override the substantial intrusion it imposed on a young woman's fundamental right to abortion and was unconstitutional under the equal protection guarantee contained in its state constitution (because it imposed no corresponding limitation on a minor who seeks medical and surgical care otherwise related to her pregnancy). Planned Parenthood of Central New Jersey v. Farmer, 762 A.2d 620 (2000).

   Other jurisdictions have recognized that a minor's right to privacy is fundamental, and because it is implicated in parental consent statutes, the state must be able to satisfy a strict scrutiny review by demonstrating a compelling state interest that imposes the least restrictive means available. Consent statutes containing provisions similar to HB 51 have not withstood judicial scrutiny of this nature. See In re T.W., 551 So. 2d 1186, 1195, 1196 (Fla. 1989); see too American Pediatrics v. Lungren, 940 P.2d 797 (1997) (declaring California's consent with judicial bypass statute unconstitutional solely on privacy grounds). See also, State v. Planned Parenthood of Alaska, 35 P.3d 30 (2001), where the Alaska Supreme Court directed the lower court to conduct an evidentiary hearing to determine whether, under the Alaska Constitution's guarantee of privacy, the state has a compelling interest in enforcing its parental consent statute, and, if so, whether that statute contains the least restrictive means necessary to promote such an interest.

MD/lj:svb