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FISCAL IMPACT REPORT

2/13/15
ORIGINAL DATE 2/26/15
LAST UPDATED 3/7/15 **HB** 390/aHRPAC/HFI#1

SPONSOR Herrell

SHORT TITLE Late-Term Abortion Ban **SB** _____

ANALYST A. Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI				

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with HRPAC Substitute for HB391 and Relates to SB437

SOURCES OF INFORMATION

LFC Files

Responses Received From

Children, Youth and Families Department (CYFD)
 New Mexico Medical Board (MB)
 Department of Health (DOH)
 Administrative Office of the Courts (AOC)

No Responses From

University of New Mexico Hospital (UNMH)

SUMMARY

Synopsis of HFI#1

House Floor amendment 1 to House Regulatory and Public Affairs Committee amendment to House Bill 390 removes references to pharmacist.

Synopsis of HRPAC Amendment

House Regulatory and Public Affairs Committee amendment for House Bill 390 adds “reasonable medical judgment” and “viable” to the definitions and adds an emergency clause making the effective date immediately.

Synopsis of the Original Bill

House Bill 390 changes the Partial Birth Abortion Ban in several ways:

1. Expands prohibition to include a ban on late-term abortions.
2. Late-term abortion is defined as an abortion performed on a viable fetus after twenty or more weeks of gestation. Viability is defined as the 20th week of pregnancy. The physician must determine under accepted obstetrical and neonatal standards if the fetus is “viable” before performing the procedure
3. Proscribes civil penalties for a physician who performs a late-term abortion of not less than \$5,000 fine and not less than one year revocation or suspension of the physician medical license. The NM Medical Board and NM Osteopathic Board are mandated to enforce the provisions of this section regarding discipline of the physician. In effect HB 390 repeals the Criminal Abortion Statute by removing previous exceptions (“justified medical termination”) allowing for abortion when death to the woman, grave impairment would result to the physical or mental health of woman, where child would “probably have a grave” physical or mental defect or where pregnancy resulted because of rape. HB 390 deletes the need for a special hospital board committee as these exceptions would no longer require their review.
4. Adds pharmacists to those who may object on moral, religious or personal conviction to participate in medical procedures or the dispensing of medication to will result in abortion. It also adds medical facilities to those entities that may refuse to admit a patient for the purpose of performing an abortion.

FISCAL IMPLICATIONS

AOC states that the fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions and the imposition of civil fines, appeals from the same and legal challenges to the constitutionality of the provisions of HB 390a.

SIGNIFICANT ISSUES

The Medical Board reports the following issues:

Page 6, lines 10-23, Section B, lines 17-23, is redundant to what the New Mexico medical board already does, although it limits the Board’s decision-making powers in regards to discipline. When reports or complaints are received, including for such issues as characterized in this section, the medical board investigates and then determines the appropriate penalty as that relates to licensure and/or fines. Type and degree of action taken under this section is already the responsibility of the NMMB, and this section would disallow the Board from determining the type of licensure action taken in the event of a violation, as it is charged to do already.

The DOH states the following with regard to the HRPAC amendment to HB390:

- Defines viability, and so may expand the class of prohibited abortions to include those circumstances in which a fetus would not otherwise be independently viable, but where a physician has determined that there is a likelihood that the fetus is able to survive outside the womb by the use of artificial life support.
- Further requires that a physician performing a permitted late term abortion must “take all reasonable steps” to preserve the life and health of a legal late term abortion fetus, and requires that the physician utilize reasonable medical judgment to determine whether

preserving the life or physical health of the pregnant woman provides for the necessity of a late term abortion.

- Replaces the term “opinion” with “reasonable medical judgment” making any determination under the situation controlled by that term less subjective and more objective. Also, the definition of “viable” potentially expands the scope of that class of fetus to include those who could survive with life support measures applied.
- Removes the presumption of viability for a fetus in the twentieth week of the pregnancy and beyond, making a non-viability determination more like during that period. Finally, it removes considerations of non-physical health of the mother when evaluating the effect of a late-term abortion on the mother.

According to AOC, Section 30-5A-5 NMSA 1978 provides a fourth degree felony penalty for performance of a partial-birth abortion, in violation of the Section 30-5A-3 NMSA 1978 prohibition. Section 30-5A-7 NMSA 1978, in contrast, provides a civil penalty and the revocation or suspension of a license to practice medicine for a physician found to have knowingly violated the Section 30-5A-6 NMSA 1978 prohibition against late-term abortions. While HB 390a’s Section 30-5A-7(B) provides for the enforcement of the imposition of the civil penalty and the revocation of a license, the bill does not contain an appeal provision specific to the Act, nor make reference to any existing appeal provision currently in statute.

As noted by the Guttmacher Institute’s Brief on “State Policies on Later Abortions,” (Attached)

In its landmark 1973 abortion cases, the U.S. Supreme Court held that a woman’s right to an abortion is not absolute and that states may restrict or ban abortions after fetal viability, provided that their policies meet certain requirements. In these and subsequent decisions, the Court has held that

- even after fetal viability, states may not prohibit abortions “necessary to preserve the life or health” of the woman;
- “health” in this context includes physical and mental health;
- only the physician, in the course of evaluating the specific circumstances of an individual case, can define what constitutes “health” and when a fetus is viable; and
- states may not require additional physicians to confirm the attending physician’s judgment that the woman’s life or health is at risk in cases of medical emergency.

Although the vast majority of states restrict later-term abortions, many of these restrictions have been struck down. Most often, courts have voided the limitations because they do not contain a health exception; contain an unacceptably narrow health exception; or do not permit a physician to determine viability in each individual case, but rather rely on a rigid construct based on specific weeks of gestation or trimester.

AOC further opines that The portion of HB 390 permitting a pharmacist or person under the direction of a pharmacist to refuse to dispense drugs that result in the termination of pregnancy, as well as permitting hospital and medical facility employees who, should they object to abortion

on moral, religious or personal conviction grounds, to refuse to participate in medical procedures, including the dispensing of medication that will result in the termination of pregnancy, will likely face legal challenges, as well.

According to the National Conference on State Legislatures, six states (Arizona, Arkansas, Georgia, Idaho, Mississippi, and South Dakota) have passed laws allowing a pharmacist to refuse to dispense emergency contraception drugs. Illinois passed an emergency rule that requires a pharmacist to dispense FDA approved contraception. Colorado, Florida, Illinois, Maine and Tennessee have broad refusal clauses that do not specifically mention pharmacists. California pharmacists have a duty to dispense prescriptions and can only refuse to dispense a prescription, including contraceptives, when their employer approves the refusal and the woman can still access her prescription in a timely manner. New Jersey’s law prohibits pharmacists for refusing to fill prescriptions solely on moral, religious or ethical grounds. Washington’s law allows pharmacists to dispense emergency contraception without a prescription through collaborative practice agreement and state-approved protocol. Washington and Wisconsin laws requires that emergency rooms provide information about emergency contraception upon request as well as dispense it upon request.

PERFORMANCE IMPLICATIONS

This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

As specified in HB 390, Section 6, 30-5A-7 (page 6, lines 7-23) there is a conflict between what the New Mexico medical board does in investigation, determination of accountability, and fines and license action that are all built into the medical board act and rules, and what the material presented in Section 6 of HB 390 is describing under “Civil Penalty”.

Relates to SB 437.

OTHER SUBSTANTIVE ISSUES

AOC opines that even if the HB 390 restrictions on abortions pass constitutional muster, they will likely face legal challenges in the courts.

ABS/aml/je