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| <b>LFC Requester:</b> | <b>Mercer-Garcia, Rachel</b> |
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**AGENCY BILL ANALYSIS  
2024 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:**

**AgencyAnalysis.nmlegis.gov**

*{Analysis must be uploaded as a PDF}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:  
**Original**     **Amendment**    \_\_\_\_\_  
**Correction**    \_\_\_\_\_ **Substitute**    \_\_\_\_\_

**Date** 1-21-2024  
**Bill No:** HB 103

**Sponsor:** Stefani Lord and Harlan Vincent  
**Short Title:** CHILD EXPOSURE TO  
CONTROLLED SUBSTANCE

**Agency Name and Code**    AOC 218  
**Number:** \_\_\_\_\_  
**Person Writing**    Twila A. Hoon Witz  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

| Appropriation |           | Recurring or Nonrecurring | Fund Affected |
|---------------|-----------|---------------------------|---------------|
| FY24          | FY25      |                           |               |
| None          | 7,000,000 | Nonrecurring              | General       |
|               |           |                           |               |

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

| Estimated Revenue |      |      | Recurring or Nonrecurring | Fund Affected |
|-------------------|------|------|---------------------------|---------------|
| FY24              | FY25 | FY26 |                           |               |
| None              | None | None | N/A                       | N/A           |
|                   |      |      |                           |               |

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

|              | <b>FY24</b> | <b>FY25</b> | <b>FY26</b> | <b>3 Year<br/>Total Cost</b> | <b>Recurring or<br/>Nonrecurring</b> | <b>Fund<br/>Affected</b> |
|--------------|-------------|-------------|-------------|------------------------------|--------------------------------------|--------------------------|
| <b>Total</b> | Unknown     | Unknown     | Unknown     | Unknown                      | N/A                                  | N/A                      |

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis:

HB 103 seeks to amend Sec. 30-6-1 (D) to add a fourth (4) section in the enumerated description of abuse of a child that would make it child abuse to expose a child to either a Schedule I controlled substance or a Schedule II controlled substance and the child tests positive at birth.

- The Schedule I section includes controlled substances, pursuant to the Controlled Substance Act, including opiates, opiate derivatives, hallucinogens, stimulants, and depressants that have no legitimate medical use.
- The Schedule II section includes any controlled substances, pursuant to the Controlled Substance Act, including any potentially addictive substance that is used or manufactured contrary to current accepted medical use, unless the child tests positive as a result of the mother’s lawful intake of such substance as prescribed.

HB103 adds to Sec. 30-6-1 (I) and (J), language stating: “It shall be no defense to the crime of child abuse that the defendant did not know that a child was present, a child could be found, a child resided on the premises or a vehicle contained a child.”

- Section (I) currently states that “evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance shall be deemed prima facie evidence of abuse of the child.
- Section J currently states that “evidence that demonstrates that a child has been knowingly and intentionally exposed to the use of Methamphetamine shall be deemed prima facie evidence of abuse of the child)

HB 103 would add a new section to the Abuse and Neglect Act which would establish that:

- (A) a newborn child in a hospital setting shall not be taken into temporary protective custody without a court order that includes findings that an emergency situation exists and that the newborn child is seriously endangered. But a newborn child may be detained in a hospital by law enforcement upon the recommendation

of the health care authority department, CYFD, a physician, a registered nurse, a licensed practical nurse, or a physician assistant while a court order is being pursued but the newborn child must be released if the court order is denied.

- (B) a newborn child who is not in hospital shall not be taken into temporary protective custody for longer than twenty-four hours without a court order that includes findings that an emergency situation exists and that the newborn is seriously endangered.
- (C) Temporary custody of a newborn child, without a court order, may occur when:
  - the newborn child is identified by a physician, registered nurse, licensed practical nurse, or physician assistant engaged in the admission, care, or treatment of patients as being affected by substance abuse or demonstrating withdrawal symptoms from prenatal drug exposure; or
  - the newborn is subject to an environment exposing the newborn to a laboratory for manufacturing controlled substances.
- HB 103 also establishes that the temporary custody shall not be deemed an arrest nor constitute a police record; and
- A newborn is defined as a child less than seventy-two hours old.
- HB 103 HB 103 requests a total appropriation of 7,000,000. 3,000,000 is for CYFD, 3,000,000 for AOC, and 1,000,000 for the corrections department, to carry out this bill.
  - The bill provides no guidance on the utilization of the appropriation beyond ‘to carry out the purposes of this act.’

## FISCAL IMPLICATIONS

The 7,000,000 appropriation assigns the additional funds to CYFD, AOC, and the corrections department to carry out the purposes of this act. **Section 3 appropriates 3,000,000 to AOC, however the AOC does not play a role in testing, investigating, or treating children who are exposed to substances. Nor does AOC provide counsel for those charged with criminal offenses or for representing children or parents in proceedings under the Abuse and Neglect Act resulting from newborn children being taken into custody.** An increase in cases would necessitate additional judiciary costs including additional docket time, additional judges or hearing officers, increasing available treatment court options, and resources for handling additional appellate matters due to criminal appeals and challenges regarding disparate impact as well as appeals for disregarding the Comprehensive Recovery and Addiction Act (CARA) and the plan of care process under 32A-3A-13. **The appropriation request does not appear to be appropriately assigned to AOC and lacks guidance on how AOC would expend the appropriation.**

The appropriation does not assign any funds to the Offices of the District Attorney, the Law Offices of the Public Defender Office, or the Office of Family Representation and Advocacy but it does assign 3,000,000 to CYFD and 1,000,000 to the Department of Corrections. For additional criminal prosecutions both the prosecution and defense will need additional resources. For additional Abuse and Neglect cases, in addition to CYFD, the Office of Family Representation and Advocacy which is responsible for providing children and parents with legal representation, will need additional resources. In addition to fiscally impacting the District

Attorney's Office, the Children Youth and Families Department, the Law Offices of the Public Defender, and the Office of Family Representation and Advocacy, it would also raise the number of placements in foster care, also contained within CYFD's budget, which would also create additional fiscal impact.

## **SIGNIFICANT ISSUES**

HB 103, by seeking to both criminalize substance use by pregnant persons and encourage the removal of newborns who are born drug-affected, would discourage pregnant people from seeking prenatal care and treatment for substance use disorders. It may also discourage medically attended births and increase complications for pregnant persons and newborns. The chilling effect that would result from HB 103 would increase risks for pregnant persons and infants and lessen opportunities for treatment for pregnant persons as well as timely treatment for exposed infants. "Early identification and treatment of women with substance use disorders and/or dependence is a critical component of preconception and prenatal care and is important for supporting healthy birth outcomes." See Criminalization of Pregnant Women with Substance Use Disorders, AWHONN Position Statement [https://www.jognn.org/article/S0884-2175\(15\)31770-6/fulltext](https://www.jognn.org/article/S0884-2175(15)31770-6/fulltext) .

### **A. HB 103 proposed amendment to Section 30-6-1, Subsections (I) and (J) would disrupt the burden of proof and create strict liability crimes:**

The language HB 103 adds to Sec. 30-6-1, Subsections (I) and (J) disregards the burden which requires in Subsection (I) evidence demonstrating the child has been knowingly, intentionally or negligently (placed), or in Subsection (J) evidence that demonstrates the child has knowingly and intentionally, (placed) in the situation made illegal by the statute. An evidence presumption, such as prima facie, does not change the prosecution's burden to establish the essential elements of the crime, and the presumption must not undermine the jury's responsibility at trial. Additionally, the changes to Subsections (I) and (J) appear to seek the creation of a strict liability crime and remove any burden to prove knowledge, intent, or with Subsection (I) negligence.

### **B. The proposed new section of the Children's Code is redundant to the law already established.**

HB 103 does not explicitly or implicitly recognize New Mexico's current laws established in the 2019 enactment by the New Mexico Legislature of New Mexico's Comprehensive Recovery and Addiction Act (CARA). CARA, utilizing the federal Comprehensive Addiction Recover Act goal of keeping mom and baby together with supportive services, helps fund prevention, education, harm reduction, treatment, and recovery services for pregnant people. Specifically, New Mexico's CARA focuses on supportive care for pregnant people affected by substance use and the coordination of services and support for the parents and family of newborns affected by substance exposure before birth.

The development and enactment of CARA followed the amendment to the federal Child Abuse Prevention and Treatment Act (CAPTA) which required all state child welfare agencies to ensure every baby born exposed to substances receives a plan of care and that data be reported to the federal agency. During the development of the plan, based upon reports of disparate and discriminatory impact (especially on women of color), New Mexico went beyond reporting and included changes and training to address systemic inequity and provide a less stigmatizing, equitable plan. The steps undertaken and the ultimate law enacted were explored in depth by a task force that included healthcare providers, insurance care coordinators, state agency representatives, and other stakeholders who worked on a plan from 2017 until the bill's passing.

CARA requires hospitals to create plans of care which are then sent to CYFD and the Dept. of Health. Significantly the legislation stated, “substance use in pregnancy should not, by itself, be considered a reason for a mandatory child abuse report.” This non-punitive approach to addressing substance use in pregnancy is grounded in the recognition that supportive assistance during pregnancy is more effective and that punitive approaches lead to disparate results impacting BIPOC pregnant persons. (see <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755302>) and See also ([https://sitefinitystorage.blob.core.windows.net/sitefinity-production-blobs/docs/default-source/advocacy/2022-pps-on-advancing-racial-justice-in-health-care-through-adm---final.pdf?sfvrsn=3ba5e94f\\_3](https://sitefinitystorage.blob.core.windows.net/sitefinity-production-blobs/docs/default-source/advocacy/2022-pps-on-advancing-racial-justice-in-health-care-through-adm---final.pdf?sfvrsn=3ba5e94f_3))

### **C. The proposed new section of the Children’s Code conflicts with existing statutory language regarding temporary custody.**

HB 103, Section 2, in creating a new section regarding newborns creates language which would conflict with existing statutory language regarding temporary custody. Sec. 32A-4-6, NMSA 1978, establishes how a child may be held or taken into custody. Language in section A of HB 103 stating a newborn shall not be taken into temporary protective custody without a court order (other than when the authorized medical provider identifies the child as affected by substance abuse or withdrawal symptoms) would contradict Sec 32A-4-6 which holds law enforcement, irrespective of if the child is a newborn, may hold or take into custody a child where the officer has reasonable grounds to believe that the child is abused or neglected and that there is an immediate threat to the child’s safety (although the law enforcement officer must contact the department to conduct an on-site safety assessment regarding the appropriateness [of custody] or there must be either abandonment, great bodily harm to the child, great bodily harm or death to the child’s sibling, unavailability of CYFD to make a timely assessment, or the child is at imminent risk of abuse.)

### **PERFORMANCE IMPLICATIONS**

HB 103 would impact CYFD and New Mexico as a whole by impacting the effectiveness of encouraging the treatment of pregnant persons and open disclosure of substance use concerning neonatal or newborn healthcare.

HB 103 would significantly increase the number of filings in abuse and neglect proceedings and significantly increase felony criminal charges.

### **ADMINISTRATIVE IMPLICATIONS**

An increase in cases and legal challenges to proceedings brought under HB 103 would impact workloads and case filings.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB 103, Section 2 may conflict with sections of the Indian Family Protection Act Sec. 32A-28-7, NMSA, 1978.

HB 103 conflicts with Sec. 32A-3A-13 plan of care portion of the Family Services Act

## **TECHNICAL ISSUES**

HB 103 would face evidentiary and constitutional challenges in implementation in criminal law and in child welfare matters.

## **OTHER SUBSTANTIVE ISSUES**

HB 103 would result in disparate treatment of pregnant persons with substance use disorder and create a penalty class that does not impact other individuals with substance use disorder as well as from those pregnant persons who use alcohol or other unenumerated substances which may also create maternal and neonatal complications. As addressed in the American Journal of Obstetrics and Gynecology by Schemph A.H. and Strobino D.M. ([https://www.ajog.org/article/S0002-9378\(08\)02198-4/pdf](https://www.ajog.org/article/S0002-9378(08)02198-4/pdf) ) the threat of incarceration is an ineffective strategy for reducing substance abuse.

HB 103 disregards the Comprehensive Recovery and Addiction Act (CARA) and the plan of care process created pursuant to 32A-3A-13 as detailed in NM ADC 8.10.5.10 Roles and Responsibilities of Different Entities Involved with the Plan of Care

## **ALTERNATIVES**

None identified

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

There should be no significant consequences if this bill is not enacted as there are already laws and programs in place that seek to alleviate substance use disorder in pregnant persons and the neonatal complications attendant to illegal substances and other substance use in pregnancy.

## **AMENDMENTS**

None Identified