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## FISCAL IMPACT REPORT

SPONSOR: Larranaga DATE TYPED: 2/18/03 HB 328

SHORT TITLE: Parental Notification Act SB \_\_\_\_\_

ANALYST: Dunbar

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
			See Narrative		

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 309, HB 344

### SOURCES OF INFORMATION

#### Responses Received From

Department of Health (DOH)  
 Health Policy Commission (HPC)  
 Administrative Office of the Courts (AOC)  
 Office of the Attorney General (AG)

### SUMMARY

#### Synopsis of Bill

This bill enacts a new law--the Parental Notification Act--which requires parental or guardian notification at least 48 hours before an abortion is performed on an unemancipated or a female of any age who has been declared incompetent and has had a guardian or conservator appointed. The only exception to the notification requirement is when the procedure is necessary to save the life of the patient.

The bill contains a judicial bypass procedure, which allows a court to direct that notification is not required upon a finding that the minor or incompetent woman is mature enough to make the decision, or that an abortion is in the patient's best interests. This bypass must be confidential and expedited, but no time limits are set. The bill also contains reporting requirements on the doctor who performs the procedure, and on the Department of Health to publish statistics on an

annual basis. The bill also makes the performance of an abortion in knowing or reckless disregard of the Act a crime--misdemeanor. Finally, it creates a civil cause of action that allows a parent or guardian wrongfully denied notice to sue a physician who performs an abortion without the requisite notice, and awards attorney fees to the prevailing party in certain circumstances.

### Significant Issues

The AOC reports that courts already take reasonable action to see that cases are adjudicated in the most expedited manner possible. Section 4(D) requires that the court assign some level of additional priority to this type of case to assure that a decision is reached as quickly as possible. Would adding an additional level of priority for these cases jeopardize the six-month rule for cases already on the court's docket?

This bill, if enacted, will add new hearings and require the district courts and the Court of Appeals to be accessible 24 hours a day, seven days a week. Section 4(D)

The Vital Statistics Act, 24-14-2 NMSA 1978, has already defined induced abortion as "the purposeful interruption of pregnancy with the intention other than to produce a live born infant." The Vital Statistics Act, 24-14-18 NMSA 1978, mandates that all abortions occurring in New Mexico be reported to the State Registrar, and that these reports be statistical reports used only for medical and health purposes and shall not be incorporated into the permanent statistical records of the system of vital records and health statistics. Additionally, reports shall not include the name or address of the patient and the DOH shall not release the name or address of the physician involved in the abortion

HB 328 would require the DOH to develop a form and distribute to every licensed and newly licensed physician in the State. This would require the DOH to receive continuously updated lists of all licensed physicians. There are over 5,000 licensed physicians in the State. The number of physicians who actually perform abortions is very small. The DOH would need to maintain continuous communication with Department of Regulation and Licensing. In addition, the DOH would need to produce a public report of abortions of minors that contains information that is not related to health.

DOH sites the following information relating to the public health and adolescent health issues:

- Current state law allows an adolescent to consent for an abortion without parental notification.
- Although abortion restrictions do reduce the number of abortions to teens they also result in a greater proportion of late term abortions.
- Most adolescents do consult their parents about issues of pregnancy and abortion.
- Parental notification laws do not increase the communication between parents and adolescents on the topic of abortion.
- Many minors who do not consult their parents about abortion have experienced family violence and are afraid that it will recur. Prominent medical associations support allowing adolescents to consent for abortion without parental notification
- The most damaging impact of mandatory parental notification laws is that they can delay and obstruct the access of pregnant adolescents to timely professional advice and medical care.
- The proposed court proceedings are detrimental to emotional well-being, because adolescents perceive such court proceedings as extremely burdensome, humiliating, and stressful.

Additionally, DOH notes that many health care providers agree on the need to increase and strengthen family involvement, and surveys show that the vast majority of teenagers who seek abortions do talk to their families. However, DOH states that not all teenagers can count on the support of their families in dealing with personal problems, and may not even feel safe in talking openly about those problems. Some health care providers will attest that parental consent laws expose an abused woman to even more abuse.

## **FISCAL IMPLICATIONS**

The AOC provided the following:

- Giving an additional level of priority to specific types of cases in an effort to reach an expedited adjudication will have a fiscal impact on a court's operation since other cases, perhaps of equal importance, may be delayed resulting in an increase in caseloads in the courts, thus requiring additional resources to handle the increase.
- Further, the administrative office of the courts has numerous different reports that it must provide to the department of health under the Act. The information required in this bill is presently not being collected and would require that a data system be established in order to provide the information to the department of health on an annual basis.
- In addition, there will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would 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.
- In order to provide 24-hour access, the Court of Appeals would have to set up an emergency telephone number and a workable procedure for contacting three judges (for a three-judge panel) on short notice. This procedure may require acquisition and maintenance of pagers and/or mobile telephones for the judges and appropriate staff. It would also require staff time to monitor the emergency telephones and possible overtime compensation for clerical and legal staff if they were required to open the court and its offices for filings or emergency hearings.
- The fiscal impact on the district courts would be similar but would only involve one judge and a court monitor.

Additional fiscal impact would be incurred by the administrative office of the courts, which would pay for court appointed guardians ad litem in cases where the pregnant female chose not to consent to the notification of her parent or guardian and she petitioned the district court for an order for an abortion without notification

HB 328 would require the DOH to provide administrative support for contacting physicians, the statistical compilation of physician reports, as well as coordination with the administrative offices of the courts in order to assemble an annual public report on adolescent abortion services. The bill does not currently include any budget to support the above-mentioned functions.

## ADMINISTRATIVE IMPLICATIONS

The AOC outlines the following administrative impact concerns relating to the bill:

- Requiring the New Mexico Court of Appeals and the state district courts to be accessible 24 hours a day, seven days a week, would have a great administrative impact. Currently, the Court of Appeals accepts cases for filing from 8:00 a.m. to 12:00 noon and from 1:00 p.m. to 5:00 p.m. on normal workdays, not including state holidays or weekends. The Court of Appeals now accepts filings in Santa Fe, Las Cruces and Albuquerque. In order to provide 24-hour access, the court would have to set up an emergency telephone number and a workable procedure for contacting three judges (for a three-judge panel) on short notice. This procedure may require acquisition and maintenance of pagers and/or mobile telephones for the judges and appropriate staff. It would also require staff time to monitor the emergency telephones and possible overtime compensation for clerical and legal staff if they were required to open the court and its offices for filings or emergency hearings.
- The impact on the district courts would be similar to the Court of Appeals. If the unemancipated minor or incapacitated person chose not to consent to the notification of her parent or guardian and she petitioned the district court for an order for an abortion without notice, the district court would need to have a judge and court monitor available to process and hear the case.
- If proceedings identified in this bill shall be given precedence over other pending matters before the court so that the court may reach an expedited decision without delay, there would be an administrative impact on the courts as a result of additional case priority given to these cases and an increase in caseload and/or in the amount of time necessary to dispose of this case type.
- Further, the administrative office of the courts has numerous different reports that it must provide to the department of health under the act. The information required by this bill is presently not being collected and would require that a data system be established in order to provide the information to the department of health on an annual basis.

Administrative impact to the DOH would be significant. HB 328 proposes yearly reporting of all physicians who perform abortions to the DOH and the production of an annual report that includes statistics from the administrative offices of the court. This bill would require a minimum of one FTE for collection and reporting of data and another FTE financial analyst to track non-reporting and associated fines, plus substantially increased postage and printing. Abortion statistics are presently reported annually in "Selected Health Statistic, as required by statute.

## CONFLICT

Conflicts with SB 309, which includes guardians and conservators with those to be notified. Conflicts with HB 344 in that the phrase "sixteen years of age or younger" has been added following the phrase "unemancipated minor." According to 24-7A-6.1 NMAC 1978, "Decisions for Unemancipated Minors", an unemancipated minor is defined in Part G as "a person at or under the age of fifteen." Therefore, HB344 would require the same parental notification requirements

as SB309 and HB328 for a larger, slightly older, population.

HB328 differs from HB344 and SB309 in that Section 4, Part A. (3) and Section 4, Parts B, C and D in HB328 are numbered as Section 5 in HB344 and SB309 without text variations other than insertion of a section title.

## TECHNICAL ISSUES

The following are concerns expressed by the Office of the Attorney General on the bill:

- The “medical emergency” exception dispensing with notice when the life of the patient is in danger is too narrowly drawn, and would render the Act unconstitutional. (See discussion below under Other Substantive Issues).
- The provision regarding notice to a guardian or conservator of an incompetent may be overbroad, and thus unconstitutional. (See discussion below under Other Substantive Issues).
- The judicial bypass procedures may not be specific enough to guarantee the expedited proceeding to which the unemancipated minor or incompetent is entitled, which would render the Act unconstitutional. (See discussion below under Other Substantive Issues).
- Under independent state grounds, the Act may be unconstitutional. (See discussion below under Other Substantive Issues.)
- Section 6. Reporting Requirements--Injunction--Attorney Fees, at page 6, line 3: "from" should be "for" and should read as follows: " and the numbers *for* whom each of the Subsections...."

The judiciary has concerns with unemancipated minors and incapacitated persons entering into court hearings without representation by legal counsel.

## OTHER SUBSTANTIVE ISSUES

Medical emergency exception. As drafted, the notification requirements do not apply upon a physician’s certification that an immediate abortion is necessary to prevent the death of the unemancipated or incompetent. 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). Minors as well as adults are entitled to the protections afforded by the constitution. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976); 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). The Act’s limitation to life-threatening conditions renders it 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 (4<sup>th</sup> 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 Rocky Mountain Serv. v. Owens, 287 F.3d 910 (10th Cir. (Colo) 2002), declaring unconstitutional requirement of parental notification before performing abortion on minor except when imminent death of minor, statute did not take into account instances when there is a health risk.

2. Incompetents. The term “incompetent” in the bill 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 the court order or which are specifically granted to the guardian in a court order. See NMSA 1978, § 45-5-301.1 (1989); see too § 45-5-209(E) re guardians of minors. Thus, to the extent this bill requires notification to a guardian or conservator in a situation where the “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. Lack of deadlines re judicial proceedings. Although the bill requires cases brought by unemancipated minors or incompetents seeking to bypass the notice requirements be “given precedence” at the trial court level, that the decision be issued “promptly and without delay”, and that an “expedited” appeal be available, the absence of any timetables or deadlines for trial court hearing, decision or appellate ruling has rendered similar provisions in other states unconstitutional under Bellotti. Glick v. McKay, 937 F.2d 434, 440-441(9<sup>th</sup> CA 1991); Planned Parenthood v. Lawall, 180 F.3d 1022 and 193 F.3d 1042 (9<sup>th</sup> CA, 1999); compare Memphis Planned Parenthood v. Sundquist, 175 F.3d 456 (6<sup>th</sup> CA, 1999) (upholding Tennessee notification statute containing deadlines for hearings and appeals).

4. Independent State Grounds. In addition to the mandates of the federal constitution, the New Mexico constitution may afford greater protections. Our supreme court so held in New Mexico Right to Choose/NARAL v. Johnson, 126 N.M. 788 (1998), in ruling that the Medicaid regulation restricting state funding of abortions for Medicaid-eligible women violated the Equal Rights Amendment of our state constitution. Although our courts have not been faced with analyzing the issues that arise in parental notice or consent statutes, courts in other states have. The Supreme Court of New Jersey recently found that the State’s interest in enforcing its parental notification statute, which is substantially similar to the Act contained in 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 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 the Act have not withstood judicial scrutiny of this nature. See In re T.W., 551 So. 2d 1186, 1195, 1196 (Fla. 1989) (declaring unconstitutional Florida’s consent with judicial bypass statute); see too American Academy of Pediatrics v. Lungren, 940 P.2d 797 (1997) (declaring California’s consent with judicial bypass statute unconstitutional solely on privacy grounds). Most recently, 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 neces-

sary to promote such an interest. State v. Planned Parenthood of Alaska, 35 P3d 30 (2001). Similarly, this bill, if enacted, may be found unconstitutional under the right to privacy, equal protection, due process or equal rights guarantees contained in the New Mexico Constitution.

The DOH does not license physicians and thus does not maintain list(s) of all licensed physicians. DOH maintains that it would be impossible to notify all physicians because there are some who practice in the state and who are not licensed, such as those employed by federal agencies. HB 328 law would require the DOH to contact physicians and the administrative offices of the courts in order to assemble an annual public report on adolescent abortion services. The DOH, Vital Records and Health Statistics currently collects data on induced terminations of pregnancy and reports such data annually for the Division of Reproductive Health at the Centers for Disease Control.

In 2001 there were 251 abortions performed on females age 16 and under. A large percentage of impregnated children 15 and under reported to have been impregnated due to incest.

DOH asserts that studies show that adolescents for the most part do consult parents on issues of pregnancy and when they don't consult a parent they consult another caring and concerned relative or responsible adult in their lives. A survey of 1519 unmarried pregnant minors in states where parental involvement is not mandatory found that 61% told one or both parents about their intent to have abortions. The younger the minor the more likely she was to do so (90% of 14 year olds, 74% of 16 year olds.) Among minors that did not involve a parent, virtually all involved at least one responsible adult other than clinic staff (such as another relative, teacher, counselor, professional or clergy). A study of inner city black, pregnant teens confirmed that 91% voluntarily consulted a parent or "parent surrogate".

Moreover, DOH supplies the following information:

- The American Academy of Pediatrics, the Society for Adolescent Medicine, the American Public Health Association, the American College of Obstetricians and Gynecologists, the American Medical Association have reached a consensus agreement that minors should not be compelled or required to involve their parents in their decisions to obtain abortions, although they should be encouraged to discuss their pregnancies with their parents and other responsible adults. It is the opinion of these organizations that, "mandating parental involvement does not achieve the intended benefit of promoting family communication, but does increase the risk of harm to the adolescent by delaying access to appropriate medical care."
- Adolescents who fear telling their parents about a pregnancy do so because they believe that the knowledge will damage their relationship with their parent, the fear that it will escalate family conflict and the desire to protect a vulnerable parent from stress and disappointment. Involuntary parental notification can precipitate a family crisis characterized by anger and rejection. One third of minors who do not inform parents already have experienced family violence and fear it will recur.
- Current data indicate that parental notification laws do not increase the likelihood that parents will be involved in adolescent's decisions about abortion. Percentages of minors who inform parents about their intent to have abortions are essentially the same in states with and without notification laws.

- Abortion restrictions affect the timing of abortions, resulting in more late term abortions. A study of adolescent pregnancies from 1974-1997 in states with parental involvement laws by the RAND Corporation revealed that parental notification laws increased the share of later term abortions by lowering the first trimester abortion rate. A study in Mississippi before and after the implementation of parental notification for abortion – showed an increase of 19% in the ratio of minors to adults who obtained their abortion after 12 weeks gestation.
- Fiscal impact to the state is related to an increased number of late term abortions that are costly and potentially threaten the health of the mother. In addition, there will be more unwanted children born to teen mothers. Studies show that a proportion of children born to adolescent mothers as a result of an unwanted pregnancy are less successful in school, more likely to be troubled or depressed, commit crimes and to have serious illnesses.

**BD/njw**