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FISCAL IMPACT REPORT

ORIGINAL DATE 2/1/19

SPONSOR SJC LAST UPDATED _____ HB _____

SHORT TITLE Correctional Facility Lactation Policies SB 124/SJCS

ANALYST Edwards

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to Senate Bill 192

SOURCES OF INFORMATION

LFC Files

Responses Received From (on initial bill)

Department of Health (DOH)

New Mexico Corrections Department (NMCD)

Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

Senate Bill 124 enacts a new statutory section to require every correctional facility (private or public jail, prison or other detention facility), by January 1, 2020, to develop and implement an breastfeeding and lactation policy for female inmates based on current accepted best practices. The policy is required to include provisions for:

- Human milk expression with access to an electric breast pump, milk storage, and transport or disposal;
- Continuation of medication-assisted addiction treatment;
- Breastfeeding in county and municipal detention facilities that can accommodate skin-to-skin contact visits and in all facilities operated by the corrections department and children, youth and families department; and,
- Medically appropriate support and care related to cessation of lactation or weaning.

FISCAL IMPLICATIONS

NMCD already has a lactation pilot project policy which covers many of the required elements designated in the bill, so formalizing the policy would not be difficult or expensive. Further, NMCD already has multi-user electric breast pumps available in its female facilities, and could obtain a manual pump through the Women, Infants, and Children (WIC) program if needed. Any patient specific supplies related to the use of electric breast pumps are also already available, and the costs to restock those supplies are minimal.

The costs associated with the implementation of a formal policy and staff training for all employees who work with pregnant or lactating inmates will also likely be minimal. NMCD might also have to incur some cost associated with storing the gathered breast milk in a proper refrigerator until retrieved by the family member or designated person or until the milk can be properly shipped.

The bill would also appear to allow, or at least not prohibit, the NMCD from requiring the lactating prisoner or her family to pay the costs of safely shipping the retrieved breast milk to the family, in the event that the inmate or her family chooses not to come to the facility to pick up the female inmate's collected breast milk on a daily or regular basis. Shipping the milk through the mail or a delivery service might be expensive for the inmate or her family. If the bill intends for the NMCD to pay for shipping, there is no appropriation to cover this cost. Most female offenders would likely have a family member retrieve it from the prison rather than wait for it to arrive via mail.

If the bill is passed, the NMCD would also need to consult with its medical vendor or other medical personnel regarding best practices regarding breastfeeding toddlers and infants, and there would be some minimal to moderate costs associated with this consultation.

NMCD explained in response to the original bill that the overall fiscal impact of the bill is still likely to be moderate; however, the bill exposes the department and the state to significant losses of funding and likely litigation, as further discussed below in the Other Substantive Issues section, because of the loss of federal funding associated with violations of the Prison Rape Elimination Act and lawsuits stemming from the storage of breast milk.

The Bernalillo County Metropolitan Detention Center (MDC) implemented a similar policy in April of 2018 which has been utilized by five inmates so far. MDC stated the total cost to run the program was about \$11.2 thousand per inmate when it first began, including all needed equipment and indirect costs like correctional officer escorts and education. Now the county's medical provider, Centurion (the same medical provider used by NMCD), covers the costs as part of MDC's contract with them.

SIGNIFICANT ISSUES

NMCD submitted the following analysis of the original bill:

No lactation policy, no matter how well written, will prevent NMCD from being exposed to liability for certain events, such as when the inmate or her family alleges that the baby was harmed because the stored, refrigerated milk given to the baby was tainted or kept too warm, etc.

NMCD is already involved in litigation in state court, First Judicial District, regarding whether or not NMCD inmates have a state constitutional right to live breastfeed in prison, and whether or not Medication Assisted Treatment (“MAT”), such as the use of suboxone, for lactating inmates is required for lactating inmates (with an opioid dependency or addiction) within the walls of a prison. In the preliminary injunction entered by court, the NMCD must allow lactating inmates in the lactation pilot project to live breastfeed during visits, but allows the NMCD to cover the inmate’s breasts in the visitation room during the breastfeeding process. It is noteworthy that only [one] female offender has live breastfed her baby since the injunction was entered, and that offender was removed and terminated from the lactation program pursuant to the NMCD’s pilot project policy for testing positive for an un-prescribed substance or medication (suboxone). Other lactating inmates have chosen to pump and store milk.

However, the court’s preliminary ruling also allows the NMCD to remove (pursuant to its pilot project policy) any lactating inmate from the lactation program if she tests positive for suboxone or other un-prescribed medications, meaning that no MAT is required for the lactating inmates inside the prison. The NMCD’s medical vendor takes the position that MAT is neither medically necessary nor the standard of care for postpartum inmates in a correctional setting. If this bill passes and is construed to require MAT within prisons, the NMCD may have to secure a new medical vendor through a RFP process which will provide MAT in prison for lactating inmates. It is unknown if any of the limited number of prison inmate medical services providers contractors would ever take the position that MAT is medically necessary or the standard of care in a correctional setting.

There is no final decision yet in the litigation. The NMCD would appeal any final ruling that held that the New Mexico Constitution requires in-prison MAT for lactating inmates or live breastfeeding during visitation or at other times. The department’s position is that allowing its inmates, including lactating inmates who came to prison with opioid or other drug dependency, to utilize MAT jeopardizes prison safety and security by introducing highly sought after drugs such as suboxone into the prisons, enables illegal drug use, enables the selling or bartering of these drugs in prison as a means to control other inmates, and increases the likelihood of disturbances in prison due to inmates acting out under the influence of drugs or engaging in fights with other inmates or staff surrounding the selling, bartering or use of these drugs. Again, the department’s inmate medical services provider does not utilize MAT, but does utilize around the clock drug rehabilitation services, along with dietary supplements and other pain medications which are not opioids or suboxone, to humanely assist the inmates in the detoxification process. Significantly, if a lactating inmate becomes at risk for progression to more serious levels of withdrawal, that inmate is sent by the NMCD contractor or medical provider to a local hospital for assessment, monitoring and treatment until such time as the inmate can come back to prison and function without suboxone or other MAT-related drugs. The above-described protocols utilized by the NMCD’s medical services vendor regarding this issue comply with all relevant American Corrections Association (“ACA”) standards, and all of NMCD’s prisons are ACA accredited.

The Department’s position is that live breastfeeding during visitation or at other times causes safety and security issues because contraband could be passed under the blanket or cover used to cover the inmate’s breasts during breast feeding, and would cause tension or unrest for other inmates and visitors if the lactating inmate is allowed to publicly display her breasts with no cover or blanket over her breasts while breastfeeding her baby. Litigation is likely to

result if these tensions result in injuries to staff or inmates, and as mentioned above is also likely to ensue if an infant is harmed or killed by what would be alleged to be the poisoning, tainting, or improper storage or refrigeration of the breast milk by the NMCD. Additionally, live breastfeeding makes compliance with the Prison Rape Elimination Act (PREA) difficult if not impossible, as the PREA would require the use of a female correctional officer to supervise or monitor the breastfeeding, and there is not always a female officer on duty during visitation. It would be a violation of PREA for any male officer viewing the visitation in real time or later viewing a recording of it as part of their job duties (such as looking for the passage of contraband from visitors to inmates), as PREA prevents male correctional officers from viewing the bodily functions of female inmates. Breast feeding is a bodily function. The state could lose its federal funding related to the PREA if the federal government determines that the NMCD has violated this law by allowing male correctional officers to observe or supervise female inmates during the breast feeding process in real time or subsequently during any review of visitation room camera footage.

This bill's requirements that the policy contain a provision mandating MAT for lactating inmates (presumably within the walls of the prison) is inconsistent with the medical standard of care in correctional settings, and its requirements for a policy provision mandating live breastfeeding during visits or at other times are inconsistent with prison safety and security in addition to certain mandates of the PREA.

Previous analysis for Senate Bill 293 from the 2017 legislative session included the following:

“The Department of Health (DOH) states the positive health effects of breastfeeding are well recognized as breast milk is uniquely suited to the human infant's nutritional needs with properties that protect against a host of illnesses and diseases for both mothers and children. Breastfeeding has been recommended by numerous prominent organizations of health professionals because breastfeeding provides many important health, psychosocial, economic, and environmental benefits. Organizations such as the American Academy of Pediatrics all recommend that infants be breastfed for at least 12 months and be exclusively breastfed for the first 6 months.”

DOH also stated “the U.S. Surgeon General's 2011 Call to Action to Support Breastfeeding, Appendix B, lists the excess health risks associated with not breastfeeding, which include ear infections, eczema, diarrhea, vomiting, respiratory hospitalizations including asthma, childhood obesity, type 2 diabetes, leukemia and sudden infant death syndrome for full-term infants; necrotizing enterocolitis for pre-term infants; and breast and ovarian cancer for mothers.”

Further analysis from DOH explained “a Committee Opinion on Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females, issued by the American College of Obstetricians and Gynecologists (ACOG) and reaffirmed in 2016, recommends that federal and state governments adopt policies to support provision of perinatal care for pregnant and postpartum incarcerated women and adolescents. In addition, ACOG recommends that incarcerated mothers who wish to breastfeed be allowed to either breastfeed their infants or express milk for delivery to the infant. If the mother expresses her milk, accommodations should be made for freezing, storing, and transporting the milk. If it is not an option for mother and child to be together, correctional facilities should have provisions for 1) visiting infants and 2) to allow for women in facilities without prison nurseries to maintain their milk supply. Safety and security are of utmost importance, and protocols should be established that mirror other types of

tissue collection and transport. Although maintaining adequate safety is critical, correctional officers do not need to routinely be present in the room while the prisoner is either in the room breastfeeding or expressing breast milk.”

DOH also submitted the following analysis on the original bill:

Breastfeeding remains the preferred method of nourishment for all children, this is in part because non-breastfed children have a 2.6 times higher chance of experiencing abuse than breastfed children. (Strathearn L, Mamun AA, Najman JM, & O’Callaghan MJ. 2009. Does breastfeeding protect against substantiated child abuse and neglect? A 15-year cohort study. *Pediatrics*, 123(2), 483–93.).

A 2009 New York Correction Law allows a mother of a nursing child to be accompanied by her child if she is committed to a correctional facility at the time she is breastfeeding. This law also permits a child born to a committed mother to return with the mother to the correctional facility. The child may remain with the mother until one year of age if the woman is physically capable of caring for the child. (2009 N.Y. Laws, Chap. 411; SB 1290)

A 2012 study examined the breastfeeding knowledge, beliefs, and experiences of pregnant women incarcerated in New York City jails. Findings showed that breastfeeding is valued by incarcerated pregnant women and has the potential to contribute to their psychosocial well-being and self-worth as a mother. Three main themes emerged from women's collective stories about wanting to breastfeed and the challenges that they experienced. First, incarceration removes women from their familiar social and cultural context, which creates uncertainty in their breastfeeding plans. Second, incarceration and the separation from their high-risk lifestyle makes women want a new start in motherhood. Third, being pregnant and planning to breastfeed represent a new start in motherhood and gives women the opportunity to redefine their maternal identity and roles. Understanding the breastfeeding experiences and views of women at high risk for poor pregnancy outcomes and inadequate newborn childcare during periods of incarceration in local jails is important for guiding breastfeeding promotion activities in this transient and vulnerable population. Implications from the findings will be useful to correctional facilities and community providers in planning more definitive studies in similar incarcerated populations (BIRTH 39:2 June 2012)

ALTERNATIVES

NMCD states an alternative would be to “not pass the bill; or pass the bill without the requirements that the policy require live breastfeeding or MAT within the prisons and by adding language specifically stating that the breast pumping can be stopped due to legitimate prison safety and security concerns such as a prison disturbance or a lockdown.”

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to Senate Bill 192, providing for judicial discretion to release inmates who are pregnant or lactating.

TE/sb