

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

Senate Bill 456

(Senators Reilly and Jacobs)

Finance

Pain-Capable Unborn Child Protection Act

This bill prohibits, except in specified circumstances, the performance or inducement of an abortion (1) unless a determination as to the probable age of the unborn child is made by a specified physician and/or (2) if the unborn child has a probable postfertilization age of 20 weeks or more. The bill also establishes reporting requirements for physicians as well as for the Department of Health and Mental Hygiene (DHMH) and establishes specified civil actions and various penalties and disciplinary requirements. DHMH must adopt regulations to implement the bill by January 1, 2014.

Fiscal Summary

State Effect: General fund expenditures increase by at least \$306,000 in FY 2014, which reflects one-time costs associated with the development and implementation of an electronic data system as well as ongoing costs associated with the hiring of one full-time research statistician to produce the required statistical report for DHMH. Maryland Medical Assistance Program (Medicaid) expenditures (50% general funds, 50% federal funds) decrease under the bill to the extent that fewer abortions are performed; federal fund revenues decrease correspondingly. Future year expenditures reflect elimination of one-time-only costs, ongoing system maintenance, annualization, and inflation. The bill's penalty provisions are not expected to materially affect State finances.

(in dollars)	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018
FF Revenue	(-)	(-)	(-)	(-)	(-)
GF Expenditure	\$306,000	\$106,300	\$109,500	\$112,900	\$116,400
GF/FF Exp.	(-)	(-)	(-)	(-)	(-)
Net Effect	(\$306,000)	(\$106,300)	(\$109,500)	(\$112,900)	(\$116,400)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: The bill's penalties related to various penalties and civil actions are not expected to materially affect local government finances.

Small Business Effect: Potential increase in litigation costs for small providers against whom civil actions are brought under the bill.

Analysis

Bill Summary:

Findings of the General Assembly

The bill specifies a number of findings of the General Assembly regarding the experience of painful stimuli by an unborn child. In addition, the bill specifies that the General Assembly finds that (1) it is the duty of the State to assert a compelling State interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain and (2) the State's compelling interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain is intended to be separate from and independent of the State's compelling interest in protecting the lives of unborn children from the stage of viability, and neither State interest is intended to replace the other.

Limitations on Abortions

Except in the case of a medical emergency (as defined by the bill), an abortion may not be performed or induced – or be attempted to be performed or induced – unless the physician (1) has determined the probable postfertilization age of the unborn child or (2) is relying on such a determination made by another physician. In making such a determination, the physician is required to make inquiries of the pregnant woman and perform specified examinations and tests.

Unless, in the reasonable medical judgment of a physician, the pregnant woman has a medical emergency, a physician may not perform or induce – or attempt to perform or induce – an abortion on a pregnant woman if the unborn child has a probable postfertilization age of 20 weeks or more, as determined by a physician. When an abortion is performed or induced in the case of a medical emergency, the physician must terminate the pregnancy in the manner that provides the best opportunity for the unborn child to survive – unless that method would pose a greater risk of the death of, or substantial and irreversible impairment (not including psychological or emotional conditions) of a major bodily function of, the pregnant woman, as specified by the bill.

Physician Reporting Requirements

A physician who performs or induces an abortion must submit to DHMH a report, on a form and schedule required by the department, that includes specified information related to (1) the postfertilization age of the unborn child; (2) the method of abortion performed or induced; (3) the use, if any, of an intrafetal injection; (4) the pregnant woman's age and race; and (5) if the probable postfertilization age was determined to be 20 or more weeks, the physician's basis for specified determinations. Regulations adopted by DHMH must require a physician to report on all abortions performed or induced on and after the first calendar month following the date the regulations are adopted.

A report made by a physician must include a unique medical record identifying number but may not include the pregnant woman's name, address, or any other personal identifying information. On request, such a report must be made available on a court order or to the Attorney General or a State's Attorney pursuant to a criminal or civil investigation; otherwise, such a report must be confidential and unavailable for public inspection.

A physician who fails to submit the required report within 30 days after the reporting deadline is subject to a civil penalty of \$1,000 for each 30-day period (or portion thereof) that the report is overdue. In addition, a physician who fails to file a report (or knowingly files an incomplete report) more than six months after June 30 of the reporting year may, in an action brought by DHMH, be directed by a court to submit a complete report within a period stated by court order (or be subject to civil contempt). A willful failure by any physician to submit a complete report in accordance with a court order – or to conform to any requirement of the bill, other than late filing of a report – must be deemed “unprofessional conduct” under the Health Occupations Article. Moreover, a physician may not willfully falsify a report required under the bill; a physician who violates this provision is guilty of a misdemeanor and, on conviction, is subject to a fine of up to \$1,000.

DHMH Reporting Requirements

By June 30 of each year, DHMH must issue a public report providing statistics compiled from reports submitted by physicians, as specified by the bill. The report may not include personal identifying information of any pregnant woman on whom an abortion was performed, induced, or attempted.

Civil Actions Established

A woman on whom an abortion is performed, induced, or attempted – or the father of the unborn child who was the subject of an abortion performed in violation of the bill – may

bring a civil action against the person who performed or induced the abortion in intentional or reckless violation of the bill for compensatory and punitive damages.

A woman on whom an abortion was performed or induced (or attempted) in violation of the bill, the woman's parent or guardian, the woman's spouse or sibling, the woman's current or former licensed health care provider, DHMH, the Attorney General, or the appropriate State's Attorney may apply to the appropriate court for a temporary or permanent injunction to restrain the person that performed, induced, or attempted the abortion (1) whether or not an adequate remedy at law exists; (2) in addition to other remedies provided by law; and (3) notwithstanding any other law. Reasonable attorney's fees may be awarded, as specified by the bill.

In a civil action or criminal proceeding brought under the bill, the court must determine whether the anonymity of a woman on whom an abortion has been performed, induced, or attempted must be preserved from public disclosure (if she does not consent to disclosure). A court that finds that a woman's anonymity should be preserved must take specified actions to safeguard the woman's identity from public disclosure, including issuing a gag order to the parties, witnesses, and counsel. Each gag order issued under these provisions must be accompanied by a written finding, as specified by the bill. In addition, if the woman refuses to consent to disclosure of her name in a court proceeding under the bill, any person who brings an action under the bill is required to use a pseudonym. However, this provision may not be construed to authorize the concealment of the identity of the plaintiff or a witness from the defendant or the defendant's attorney.

Miscellaneous Provisions

If some or all of the bill's provisions are restrained or enjoined by judicial order, all other provisions of law regulating or restricting abortion must be enforced as though the restrained or enjoined provisions had not been adopted (except that, whenever the restraining order or injunction is stayed or dissolved or otherwise ceases to have effect, the affected provisions must have full force and effect).

The bill may not be construed to repeal specified other applicable provisions of State law regulating or restricting abortion.

Current Law: The State may not interfere with a woman's decision to end a pregnancy before the fetus is viable or at any time during a woman's pregnancy if the procedure is necessary to protect the life or health of the woman or the fetus is affected by a genetic defect or serious deformity or abnormality. A viable fetus is one that has a reasonable likelihood of surviving outside of the womb.

If an abortion is provided, it must be performed by a licensed physician. A physician is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion made in good faith and in the physician's best medical judgment following accepted standards of medical practice.

Background: In 2008, 1.2 million American women obtained abortions, producing a rate of 19.6 abortions per 1,000 women of reproductive age. (This represents a 1% increase since 2005, when the abortion rate was 19.4 abortions per 1,000 women.) In Maryland in 2008, 34,290 women obtained abortions at a rate of 29 abortions per 1,000 women of reproductive age. (This represents an 8% decrease in abortions performed in Maryland since 2000, when the rate was 31.5 abortions per 1,000 women.) However, 87% of U.S. counties had no abortion provider in 2008 and one-third of American women lived in these counties. Therefore, it is likely that some women who received abortions in Maryland were from other states, while some Maryland residents received abortions in other states. For this reason, the Maryland rate may not accurately reflect the abortion rate of State residents.

In 2008, there were 34 abortion providers in Maryland. This represents a 17% decline from 2005, when there were 41 abortion providers. Approximately 4% of abortions performed in Maryland are provided at hospitals.

State Fiscal Effect: Given the trend toward utilizing electronic rather than paper records, DHMH advises that it is likely to require the relevant data to be submitted by physicians electronically. DHMH further advises that it must hire two full-time permanent employees to implement the bill: one full-time research statistician to review data submitted and produce the required statistical report and one full-time administrative officer to assist physicians in their submission of the required data. The Department of Legislative Services (DLS) concurs that permanent staff is needed to review data submitted and produce the required report but advises that the extent to which physicians are likely to require assistance in submitting the required data is unknown. DLS further advises that the research statistician may be able to assist with the provision of any necessary assistance. Thus, this estimate reflects the minimum additional staff necessary to implement the bill; actual expenditures may vary to the extent that physicians require assistance in complying with the bill's reporting requirements.

Accordingly, general fund expenditures increase by at least \$305,983 in fiscal 2014, which accounts for the bill's October 1, 2013 effective date. This estimate reflects \$250,000 in one-time costs associated with the development and implementation of an electronic data system as well as the cost of hiring one full-time research statistician to produce the required report. It includes a salary, fringe benefits, other one-time start-up costs, and ongoing operating expenses.

Research Statistician	1
Salary and Fringe Benefits	\$48,012
Electronic Data System	250,000
Other Operating Expenses	<u>7,971</u>
Total FY 2014 Expenditures	\$305,983

Future year expenditures reflect a full salary with annual increases and employee turnover, ongoing operating expenses (including contractual services associated with maintaining the electronic data system), and annual increases in ongoing operating expenses.

Language attached to the Medicaid budget since the late 1970s authorizes the use of State funds to pay for an abortion if a physician or surgeon certifies that the procedure is necessary. In fiscal 2012, Medicaid paid for 5,861 abortions. DLS advises that Medicaid expenditures (50% general funds, 50% federal funds) decrease under the bill to the extent that fewer abortions are performed and, therefore, funded by Medicaid. The exact amount of any decrease depends on the proportion of Medicaid-funded abortions that would be prohibited under the bill and cannot be reliably estimated at this time. Federal fund revenues decrease correspondingly to reflect the decrease in federal matching funds received.

The bill's disciplinary requirements can be handled with existing resources. The bill's provisions related to civil actions and various penalties are not expected to materially affect caseloads and/or government finances.

Additional Information

Prior Introductions: None.

Cross File: HB 1312 (Delegate Parrott, *et al.*) - Health and Government Operations.

Information Source(s): Guttmacher Institute, Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Office of the Attorney General, State's Attorneys' Association, Department of Legislative Services

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mc/ljm

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