HB 603

Department of Legislative Services

Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 603 (Delegate Afzali, *et al.*)
Health and Government Operations

Pain-Capable Unborn Child Protection Act

This bill requires a qualified physician to determine the probable age of an unborn child before performing or inducing an abortion except in specified circumstances. If the unborn child has a probable postfertilization age of 20 weeks or more, the physician is prohibited from performing or inducing an abortion except in specified circumstances. 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, civil penalties, disciplinary consequences, and criminal penalties for physicians who violate the bill. DHMH must adopt regulations to implement the bill by January 1, 2017.

Fiscal Summary

State Effect: General fund expenditures increase by $306,000 in FY 2017, 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. General fund expenditures for Medicaid decrease under the bill to the extent that fewer abortions are performed. Department of Budget and Management (DBM) expenditures also decrease (75% general funds, 25% special funds) to the extent fewer abortions are performed under the State Employee and Retiree Health and Welfare Benefits Program. Future year expenditures reflect elimination of one-time-only costs, ongoing system maintenance, annualization, and inflation. Revenues are not affected. The bill's penalty provisions are not expected to materially affect State finances.

(in dollars)	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
Revenues	$0	$0	$0	$0	$0
GF Expenditure	306,000	104,400	107,500	110,800	114,200
GF/SF Exp.	(-)	(-)	(-)	(-)	(-)
Net Effect	($306,000)	($104,400)	($107,500)	($110,800)	($114,200)

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

Local Effect: The bill's provisions related to civil actions are not expected to materially affect local government operations or finances.

Small Business Effect: Potential meaningful for physicians whose practices currently encompass abortions at 20 weeks or more postfertilization. Litigation costs may increase for physicians against whom civil actions are brought under the bill.

Analysis

Bill Summary:

Findings of the General Assembly

The bill lists a number of findings from the General Assembly regarding the experience of painful stimuli by an unborn child. Among other points, the bill states that (1) medical evidence indicates that unborn children are capable of experiencing pain by 20 weeks postfertilization; (2) 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; (3) this compelling interest 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 (4) 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), a physician may not perform, induce, or attempt an abortion unless the physician (1) determines the probable postfertilization age of the unborn child or (2) relies 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.

Further, unless – in the reasonable medical judgment of a physician – the pregnant woman has a medical emergency, a physician may not perform, induce, or attempt 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.

The bill defines "postfertilization age" as the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

Physician Reporting Requirements

A physician who performs, induces, or attempts an abortion must submit a report to DHMH, on a form and schedule required by the department, that includes specified information related to (1) the postfertilization age of the unborn child and how the physician determined the age; (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 of medical emergency. DHMH must adopt regulations by January 1, 2017, that 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.

Physician reports 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, these reports 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, reports are confidential and unavailable for public inspection.

A physician who fails to submit a 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. Additionally, if a physician fails to file a report more than six months after June 30 of the reporting year, or knowingly files a false report, DHMH may bring an action in the appropriate court of jurisdiction to direct the physician to either submit a complete report or be subject to civil contempt. A willful failure by any physician to submit a complete report – whether or not in accordance with a court order (or to conform to any reporting requirement, other than late filing) – 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.

Department of Health and Mental Hygiene Reporting Requirements

By June 30 of each year, DHMH must issue a public report providing statistics compiled from the 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.

Additionally, a woman on whom an abortion was performed, 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. This new cause of action is available (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 woman's anonymity must be preserved from public disclosure (if she does not consent to disclosure). The court must take specified actions to safeguard the woman's identity from public disclosure, if it finds that her anonymity must be preserved, 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, any person who brings an action under the bill is required to use a pseudonym. However, this provision may not be construed to authorize 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 if the fetus is affected by a genetic defect or serious deformity or abnormality. This is consistent with the U.S. Supreme

Court's holding in *Roe v. Wade*, 410 U.S. 113 (1973). A viable fetus is one that has a reasonable likelihood of surviving outside of the womb. DHMH may adopt regulations consistent with established medical practice if they are necessary and the least intrusive method to protect the life and health of the woman.

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 using accepted standards of medical practice.

Background: According to the Guttmacher Institute, medical professionals customarily date a pregnancy from the first day of the woman's last menstrual period, because it is an easier date for a woman to pinpoint; fertilization usually takes place two weeks after the first day of a woman's last menstrual period. The normal gestational length of a pregnancy is 40 weeks from the beginning of a woman's last menstrual period, or about 38 weeks postfertilization. The Guttmacher Institute reports that, as of March 2016, 12 states ban abortions past 20 weeks postfertilization or the equivalent 22 weeks after the woman's last menstrual period on the grounds that the fetus can feel pain: Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Nebraska, North Dakota, Oklahoma, Texas, West Virginia, and Wisconsin.

State laws that institute a 20-week abortion ban have been contested in court. In 2013, the U.S. Court of Appeals for the Ninth Circuit struck down an Arizona law that is similar to the bill. The Arizona law banned abortions past 20 weeks postfertilization except in a medical emergency. The Ninth Circuit also struck down a similar Idaho law in 2015.

In 2013 and 2015, the U.S. House of Representatives passed the Pain-Capable Unborn Child Protection Act, which had nearly identical legislative findings and declarations of constitutional authority for enactment as the bill. The federal legislation would have banned abortions at or beyond 20 weeks after fertilization, except in specific instances such as medical emergencies and pregnancies resulting from rape or incest.

In 2011, 1.1 million American women obtained abortions, producing a rate of 16.9 abortions per 1,000 women of reproductive age. (This represents a decrease since 2008, when the abortion rate was 19.4 abortions per 1,000 women.) In Maryland in 2011, 34,260 women obtained abortions at a rate of 28.6 abortions per 1,000 women of reproductive age. (The rate remains unchanged since 2008, when the rate was 28.7 abortions per 1,000 women.) However, 89% of U.S. counties had no abortion clinic in 2011, and 38% 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 2011, there were 34 abortion providers in Maryland. (The number has remained the same since 2008.)

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 are needed to review data submitted and to 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 $306,002 in fiscal 2017, which accounts for the bill's October 1, 2016 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.

Position	1.0
Salaries and Fringe Benefits	$51,187
Electronic Data System	250,000
Operating Expenses	4,815
Total FY 2017 State Expenditures	**$306,002**

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.

Women eligible for Medicaid solely due to a pregnancy do not currently qualify for a State-funded abortion. Additionally, based on language in the federal budget, federal funds may not be used for an abortion unless the life of the woman is endangered. Language attached to the Medicaid budget since the late 1970s authorizes the use of State funds to pay for abortions under specific circumstances. Similar language has been attached to the appropriation for the Maryland Children's Health Program since its advent in fiscal 1999. According to information obtained from DHMH, in fiscal 2015, 6,866 abortions were funded through Medicaid. This reflects the number of claims Medicaid received through

August 2015; the actual number of abortions may be slightly higher, as providers have 12 months to bill Medicaid for a service. None of these abortions was eligible for federal matching funds (no abortions were performed under the specified federal exception).

Therefore, DLS advises that general fund expenditures for Medicaid decrease under the bill to the extent that fewer abortions are performed and, therefore, funded by Medicaid. Similarly, DBM general fund and special fund expenditures also decrease to the extent fewer abortions are performed under the State Employee and Retiree Health and Welfare Benefits Program. The exact amount of any decrease depends on the proportion of abortions that would be prohibited under the bill and cannot be reliably estimated at this time.

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: HB 492 of 2015 received a hearing in the House Health and Government Operations Committee, but no further action was taken. HB 283 of 2014 also received a hearing in the House Health and Government Operations Committee, but no further action was taken. Its cross file, SB 34, received a hearing in the Senate Finance Committee, but no further action was taken. Additionally, HB 1312 of 2013 and its cross file, SB 456, also received hearings in the House Health and Government Operations Committee and the Senate Finance Committee, respectively, but no further action was taken on either bill.

Cross File: SB 749 (Senator Ready, *et al.*) - Finance.

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

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kb/ljm

Analysis by: Sasika Subramaniam

Direct Inquiries to:
(410) 946-5510
(301) 970-5510