

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 997 (Delegate Metzgar)
Health and Government Operations

Equal Protection for Unborn Human Life Act

This bill generally prohibits “abortion” and subjects any person who provides or procures an abortion by any means or who intentionally destroys a living human zygote, embryo, or fetus for any reason to prosecution for murder or manslaughter, with a limited exception for medical providers. Accordingly, the bill repeals (1) the existing charge of murder or manslaughter for a *viable* fetus and related exceptions; (2) authorization for a woman to terminate a pregnancy without interference from the State, as specified; (3) the requirement that an abortion be performed by a licensed physician; and (4) the prohibition against a physician performing an abortion on an unmarried minor unless the physician first gives notices to a parent or guardian and related exceptions. The bill excludes the provision of any device, procedure, or drug to cause or attempt to cause an abortion from the family planning services that Medicaid must provide.

Fiscal Summary

State Effect: Medicaid general fund expenditures decrease by \$4.9 million in FY 2022, and \$6.5 million on an annualized basis thereafter. General and special fund expenditures for the Department of Budget and Management (DBM) decrease by an indeterminate amount beginning in FY 2022. However, the net effect on Medicaid and DBM expenditures and federal matching revenues is indeterminate, as discussed below. Minimal increase in general fund expenditures due to the bill’s expanded application of existing penalties.

Local Effect: Minimal increase in local revenues and expenditures due to the bill’s expanded application of existing penalties.

Small Business Effect: Meaningful.

Analysis

Bill Summary: “Abortion” means the intentional killing of an “unborn human being” by use or prescription of any procedure, instrument, or drug or any other substance, device, or means to cause or intend to cause the death of an unborn human being. “Unborn human being” means a living human zygote, embryo, or fetus, beginning the moment of fertilization upon the fusion of a human spermatozoon with a human ovum, or in the case of asexual reproduction, at the equivalent stage when a new human organism is present, and continuing until birth.

Intent and Acknowledgement of the General Assembly

The bill expresses the intent of the General Assembly, in accordance with its obligations under both the U.S. Constitution and the Maryland Constitution, to provide for the equal protection of all unborn human beings within the State, and to recognize that a living human child is a person and is entitled to the same protection of the laws of this State as any other human being.

The General Assembly acknowledges as void and of no effect any and all federal or State court opinions that would deprive an unborn human person of the unalienable right to life. Any federal regulation, executive order, or court decision that purports to supersede, stay, or overrule the provisions of the bill is in violation of the U.S. Constitution and the Maryland Constitution and is, therefore, null and void.

Requirements for State Officials

Each executive, legislative, and judicial officer in the State must use all lawful means to protect the life of each unborn human being within their jurisdiction. The Attorney General must monitor enforcement and direct State agencies to adhere to the requirements of the bill regardless of any contrary or conflicting federal court opinions. The State, its political subdivisions, and agents thereof may not enter an appearance, special or otherwise, in any federal suit challenging the bill.

Exception to Prosecution for Medical Professionals

If a pregnancy presents a clear and immediate or proximate threat to the life of the mother, a medical professional must use all means to exhaust all medical resources to save the lives of the woman and the embryo or fetus, treating both the mother and embryo or fetus as patients. The medical professional may not be subject to prosecution for murder or manslaughter of the embryo or fetus if the medical professional provides documentation of their efforts.

Current Law: In general, 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*. The Maryland Department of Health (MDH) 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.

Murder or Manslaughter of a Viable Fetus

With certain exceptions, a person may be prosecuted for the murder or manslaughter of a viable fetus. "Viable" is defined as the stage when, in the best medical judgment of the attending physician based on the particular facts of the case before the physician, there is a reasonable likelihood of the fetus's sustained survival outside the womb.

To be prosecuted for murder or manslaughter of a fetus, a person must have (1) intended to cause the death of the viable fetus; (2) intended to cause serious physical injury to the viable fetus; or (3) wantonly or recklessly disregarded the likelihood that the person's actions would cause the death of or serious physical injury to the viable fetus.

These statutory provisions do not (1) apply to or infringe on a woman's right to terminate a pregnancy under the Health-General Article; (2) subject a physician or other licensed medical professional to liability for fetal death that occurs in the course of administering lawful medical care; (3) apply to an act or failure to act of a pregnant woman with regard to her own fetus; or (4) confer personhood or any rights on the fetus.

First-degree murder is punishable by imprisonment for life, with or without the possibility of parole. Murder that is not in the first degree is considered second-degree murder. Violators are subject to a maximum penalty of imprisonment for 40 years.

Manslaughter is a common law offense. The meanings accorded to involuntary and voluntary manslaughter are judicially determined and based on case law. Manslaughter is distinguished from murder by the absence of malice aforethought, express or implied. The absence of intention to kill or to commit any unlawful act which might reasonably produce death or great bodily harm is generally the distinguishing factor between voluntary and involuntary manslaughter. A person who commits manslaughter is guilty of a felony and subject to maximum penalties of (1) imprisonment for 10 years or (2) imprisonment in a local correctional facility for 2 years and/or a fine of \$500.

Medicaid Coverage for Abortion

Women eligible for Medicaid solely due to a pregnancy do not currently qualify for a State-funded abortion. Additionally, language included in the federal budget since 1977, commonly referred to as the Hyde amendment, forbids the use of federal funds for abortions except in cases of life endangerment, rape, or incest.

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 fiscal 1999.

Specifically, a physician or surgeon must certify that, based on his or her professional opinion, the procedure is necessary due to one of the following conditions:

- continuation of the pregnancy is likely to result in the death of the woman;
- the woman is a victim of rape, sexual offense, or incest that has been reported to a law enforcement agency or a public health or social agency;
- it can be ascertained by the physician with a reasonable degree of medical certainty that the fetus is affected by genetic defect or serious deformity or abnormality;
- it can be ascertained by the physician with a reasonable degree of medical certainty that termination of pregnancy is medically necessary because there is a substantial risk that continuation of the pregnancy could have a serious and adverse effect on the woman's present or future physical health; or
- the physician or surgeon certifies in writing that in his or her professional judgment there exists medical evidence that continuation of the pregnancy is creating a serious effect on the woman's present mental health, and if carried to term there is a substantial risk of a serious or long-lasting effect on the woman's future mental health.

State Fiscal Effect:

Maryland Department of Health

MDH advises that Medicaid paid for 9,864 abortions in fiscal 2020 (based on claims through November 2020) at an average cost of \$660 per abortion for a total cost of \$6.5 million. Thus, general fund expenditures decrease by \$4.9 million in fiscal 2022 based on fiscal 2020 claims. This estimate reflects the bill's October 1, 2021 effective date. Based on fiscal 2020 claims, general fund expenditures decrease by \$6.5 million annually thereafter.

However, Medicaid has previously noted that any savings may be offset by an increase in costs for labor and delivery services provided to Medicaid eligible women to the extent that births increase as a result of the bill's prohibition on State funding of abortion procedures. The approximate average cost for labor and delivery services is currently \$15,000. Moreover, newborns born to Medicaid-eligible mothers are deemed automatically eligible for Medicaid benefits for their first year and typically retain eligibility for subsequent years. On average, Medicaid pays \$2,352 for health care per eligible child annually (50% general funds and 50% federal funds). The extent of any increase in expenditures cannot be reliably estimated at this time. Federal fund revenues increase accordingly.

Department of Budget and Management

DBM oversees the State Employee and Retiree Health and Welfare Benefits Program, a State-funded health benefit plan. In response to a similar bill, DBM advised that the bill's prohibition against obtaining or performing an abortion in the State will likely result in a significant decrease in the number of abortions covered under the program. Thus, to the extent that fewer abortions covered by the program occur, general and special fund expenditures for the program decrease. However, any potential reduction in general and special fund expenditures for the program cannot be reliably estimated as DBM has previously advised that it does not monitor claims data for abortion procedures.

To the extent that births increase among individuals covered by the State Employee and Retiree Health and Welfare Benefits Program due to the bill's prohibition on the use of State funds to pay for abortion procedures, there may be an offsetting increase in expenditures for labor and delivery costs and to cover additional dependents (75% general funds, 15% special funds, and 10% federal funds). The extent of any increase in expenditures cannot be reliably estimated at this time. Federal fund revenues increase accordingly.

Department of Public Safety and Correctional Services

General fund expenditures for the Department of Public Safety and Correctional Services increase minimally as a result of the bill's expanded application of current incarceration penalties due to more people being committed to State correctional facilities. The number of people convicted as a result of the bill is expected to be minimal.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at \$3,900 per month. Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the

sentence be served at a local facility or a State correctional facility. The State provides assistance to the counties for locally sentenced inmates and for (1) inmates who are sentenced to and awaiting transfer to the State correctional system; (2) sentenced inmates confined in a local detention center between 12 and 18 months; and (3) inmates who have been sentenced to the custody of the State but are confined in or who receive reentry or other prerelease programming and services from a local facility.

The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

Local Revenues: Revenues increase minimally as a result of the bill's expanded application of a current monetary penalty provision from cases heard in the circuit courts.

Local Expenditures: Expenditures increase minimally as a result of the bill's expanded application of a current incarceration penalty. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. *Per diem* operating costs of local detention facilities have ranged from approximately \$40 to \$170 per inmate in recent years.

Small Business Effect: Health care practices that offer abortion services are prohibited from doing so under the bill.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland Department of Health; Department of Legislative Services

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