

Legislative Analysis



INFORMED CONSENT LAW: REQUIRE ULTRASOUND

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House Bill 4446 (Substitute H-1)
Sponsor: Rep. David Robertson
Committee: Health Policy

First Analysis (5-11-05)

BRIEF SUMMARY: The bill would require physicians to perform an ultrasound on a patient and provide her with an opportunity to view the ultrasound image before performing an abortion.

FISCAL IMPACT: A fiscal analysis is in process.

THE APPARENT PROBLEM:

The Public Health Code requires a physician to obtain a patient's written, freely given, and informed consent before performing an abortion, except in the case of a medical emergency. As part of the requirement that the patient's consent be informed, a physician must provide a patient who chooses to have an abortion with certain information at least 24 hours before performing the procedure, including medically accurate depictions and descriptions of a fetus and the specific procedure to be performed.

The law currently does not require a woman to receive an ultrasound examination prior to an abortion. Reportedly, many abortion providers do perform an ultrasound immediately before the procedure. Stories have surfaced, however, from women who have had abortions, women who have called crisis pregnancy centers about their experiences at abortion clinics, and women who have talked to abortion clinic workers that some clinics and physicians refuse to let patients view the active ultrasound image of their fetus during the ultrasound procedure or discourage them from doing so.

Some people feel this practice goes against the spirit of the informed consent law, which aims to ensure that a woman considering having an abortion receives medically accurate information before the procedure is performed. Some believe that requiring a physician to perform an ultrasound before an abortion procedure and ensuring that the woman has an opportunity to view the ultrasound will provide essential additional medical information for use in making an informed decision. Legislation is being offered to include this in the information required to be provided within the 24-hour informed consent time period.

THE CONTENT OF THE BILL:

House Bill 4446 would amend the Public Health Code to require a physician, at least 24 hours before performing an abortion on a patient, to perform an ultrasound on that

patient, provide her with an opportunity to view the active ultrasound image of the fetus, and offer to provide her with a physical picture of the ultrasound image of the fetus.

MCL 333.17015

ARGUMENTS:

For:

Under Michigan's informed consent law, a woman must receive certain medically accurate information 24 hours before undergoing an abortion procedure. The packet of information required to be reviewed is available at clinics providing abortions and also on the Department of Community Health website. Some people believe that information from an ultrasound examination would be an invaluable addition. Reportedly, most if not all abortion providers utilize an ultrasound to determine gestational age and may use it to guide them in the performance of the procedure. Yet, according to testimony offered before the House Health Policy Committee, abortion providers do not always offer to let the woman view the ultrasound image. In fact, some women reportedly were discouraged from viewing the image by clinic workers while other women were refused even when they asked to see the image; they said ultrasound screens were deliberately turned away from their view.

The bill would address this concern by requiring a physician, at least 24 hours before performing an abortion, to perform an ultrasound exam and allow the woman to view the active ultrasound image of the fetus or offer to provide a physical picture (similar to a photograph) of the image. A woman would not have to view the image if she chose not to. Since most if not all providers already conduct an ultrasound examination as part of the abortion procedure, the bill should not have a negative economic impact on providers. Proponents say that such a change to the informed consent law would be beneficial for many reasons, including the following.

** Some clinics perform abortions on the basis of the results of a urine test alone. These tests can give false positives. There is anecdotal testimony to suggest that women, in some circumstances, have been given an abortion when there was no pregnancy. Requiring an ultrasound will give additional verification that the woman is pregnant and protect the health of a woman by ensuring she is not given an unnecessary procedure.

** For some women, seeing an active ultrasound helped them to make the appropriate choice for their situation. Some may be so overwhelmed by an unintended or unplanned pregnancy that their immediate thoughts may be centered on getting out of the crisis and not on which overall decision is best for them. Seeing the ultrasound image has given some women pause to think, to connect with the fetus, and to make the decision best for them.

** Some women who were denied the opportunity to view the ultrasound prior to their abortion procedure have reported going into a depression afterwards, suffering post traumatic stress disorder, and experiencing lingering remorse. In some circumstances, these events were triggered when they viewed an ultrasound image during a subsequent

pregnancy or saw another woman's ultrasound picture of her fetus. Though some admitted not knowing whether viewing an ultrasound at the time would have altered the decision they made, all felt that important information was kept from them, and therefore their decision was not truly "informed." The bill could prevent some women from experiencing post-abortion distress.

** The bill fits with the intent of the informed consent law, which is to ensure that women receive accurate medical information. Physicians often show patients x-rays and ultrasound images of their broken bones or tumors about to be removed. There is no difference between that and giving a woman the chance to view an image of the fetus before the abortion procedure.

** A picture of the actual fetus a woman is carrying is more personal and more "accurate" than a drawing or a picture such as those in medical textbooks. And, according to committee testimony, seeing the fetus move can have a powerful impact as well. For some, the information provided by seeing the actual fetus is an important component of the decision-making process.

Against:

Critics say that the bill is unlikely to survive a constitutional challenge. By including the ultrasound examination within the 24-hour consent period, the bill would require women to make two trips to an abortion provider – one for the ultrasound exam and a second one (at least 24 hours later) for the abortion procedure. Under state and federal case law, two visits would constitute an undue obstruction, especially considering that the overwhelming majority of Michigan counties have no abortion providers, and reportedly there are no abortion providers north of Saginaw. The bill therefore would pose an even greater hardship on lower income women and women in rural areas. The informed consent law was upheld primarily because the information required to be received 24 hours before the procedure can be picked up at a clinic, sent through the mail, faxed, or viewed online on the Department of Community Health's website – thus requiring only one appointment. Perhaps the bill could be amended to require the ultrasound and the opportunity to view the image be provided on the same day as the scheduled abortion, but prior to the procedure and prior to giving final consent to the procedure.

Response:

If the bill were amended to allow the ultrasound and viewing to be done on the same day the abortion is scheduled but prior to the procedure and prior to giving final consent, it would be important that the woman not feel pressure to give consent because "everything is ready" for the procedure.

Also, the health code prohibits a physician from collecting payment for medical services provided to or planned for a patient prior to the expiration of the 24-hour informed consent period, but he or she can require payment in full any time after that time, including payment in full before the abortion procedure is performed. This would mean full payment before the ultrasound examination, too. Clear guidelines or requirements that providers refund the amount paid if a woman changed her mind as a result of viewing the ultrasound, minus a reasonable charge for the ultrasound, may be needed so

that the woman doesn't feel unduly pressured to go ahead with the abortion since it was already paid for.

Against:

Rather than legislating medical care, the state should do more to prevent unintended pregnancies in the first place. For example, it could be helpful, as part of the information that must be provided to a woman before an abortion, to provide information on family planning that includes all FDA-approved methods of contraception (including natural family planning). Also of benefit would be a list of family planning providers that receive state or federal funding to provide such services.

A proactive approach that would improve access to health care and family planning, expand insurance coverage of contraceptives, and increase education to adolescents about making responsible decisions, including comprehensive abstinence plus education, will do more for reducing unintended pregnancies and abortions than efforts that could be construed as having emotional overtones or creating obstacles to a legal procedure.

Response:

Current law does not restrict family planning clinics and abortion providers from giving clients information on all FDA-approved methods of contraception. Why should legislation be needed to require those offering family planning services to give comprehensive information? They should be providing this information as a normal and expected component of the services they provide.

Against:

Critics say the bill is problematic for the following reasons.

** It is redundant. Women already are given medically accurate depictions of a fetus at the same or similar gestational age in the packet of information that is required to be reviewed during the 24-hour informed consent period.

** The bill would require ultrasounds to be performed before every abortion procedure, regardless of gestational age. However, at the very earliest stages (the first few weeks), a technician cannot get an ultrasound image by an abdominal examination. Would the bill require the provider to do a transvaginal ultrasound, which is a more invasive and expensive procedure, during the first two months? Furthermore, it isn't until eight weeks and later that the embryo becomes a fetus and takes on a more human appearance. Therefore, an ultrasound image viewed prior to eight weeks would have little to no increased informational value over the depictions already required to be provided.

** The bill would interfere with the doctor/patient relationship by requiring a medical procedure that may not be necessary. It should be a patient's needs and not legislation that dictates whether or not a medical procedure be performed.

** Requiring a woman to make two trips to an abortion provider could pose confidentiality problems. It could be harder for a woman to keep her decision confidential if she had to ask for two days off work, arrange transportation twice, and so on.

** Adding a second doctor visit would result in delaying the performance of an abortion. Research reveals that delays do not result in a reduction in the number of abortions performed in the state; delays only result in abortions being performed at later stages. The bill could thus increase costs for abortions and increase the health risks to women, as early term abortions are not only less expensive, but have fewer health risks to the woman.

** It is not clear who would actually pay for the ultrasound if a woman decided not to go through with the abortion after the ultrasound examination, especially if the bill continued to require the ultrasound be performed 24 hours prior to the abortion. Currently, a physician or clinic is prohibited under current health code provisions from charging a fee for any medical services (which is defined to include ultrasounds), whether provided or planned, until after the 24-hour period expired. It would be a financial hardship for providers if they had to absorb the cost of the examinations, and it would be a financial hardship for low income women if a clinic had to charge them. In addition, whether performed 24 hours before or just prior to the procedure, a woman who decided not to follow through with the abortion may find that her health insurer refused to cover the cost on the basis that the ultrasound was no longer medically necessary.

POSITIONS:

A representative of Operation Outcry testified in support. (5-3-05)

A representative of Right to Life Michigan testified in support. (5-3-05)

Flint Area Right to Life supports the bill. (5-2-05)

A representative of the Michigan Catholic Conference testified in support of the bill. (5-3-05)

The American College of Obstetricians and Gynecologists – Michigan Section opposes the bill. (5-3-05)

The National Council of Jewish Women opposes the bill. (5-3-05)

Michigan NOW opposes the bill. (5-3-05)

Planned Parenthood Advocates of Michigan opposes the bill. (5-3-05)

A representative of MARAL Pro-Choice testified in opposition to the bill. (5-3-05)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.