

ABORTION-RELATED AMENDMENTS

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House Bill 5711 (Substitute H-1)
Sponsor: Rep. Bruce R. Rendon
Committee: Health Policy

Complete to 7-16-12

A SUMMARY OF HOUSE BILL 5711 AS PASSED BY THE HOUSE

The bill would amend various sections of the Public Health Code to address matters related to the performance of abortions. The bill covers the following topics:

- Requirements regarding the disposition of a dead fetus and of fetal remains.
- A mandatory physical examination to be personally performed on a women by a physician prior to the diagnosing and prescribing of a "medical abortion," where that term is defined as an abortion procedure that utilizes a prescription drug or drugs including, mifepristone, misoprostol, or ulipristal acetate. Other methods of examination, such as by an internet web camera ("telemedicine"), would be prohibited.
- Mandatory personal liability coverage of at least \$1 million for physicians who perform six or more abortions a month and fall under certain other criteria.
- The required licensing of facilities, including private practice offices, as freestanding surgical outpatient facilities if they advertise outpatient abortion services and perform six or more abortions per month.
- (In the previous two paragraphs, the term "abortion" means the intentional use of an instrument, drug, or other substance or device to terminate a woman's pregnancy, with certain exceptions.)
- Screenings for coercion-to-abort and domestic violence by physicians and others when patients first present at a facility for the purpose of obtaining an abortion.

[Note: Similar provisions to those in House Bill 5711 regarding the disposition of a dead fetus and fetal remains are also found in Senate Bills 25 and 54 of the current session. Those bills have passed the Senate and are in the House Committee on Health Policy.]

Similar provisions to those in House Bill 5711 regarding coercion-to-abort and domestic violence screening are found in House Bills 5134 and 5182. Those bills have passed the House and have been reported to the full Senate by the Senate Judiciary Committee.

House Bill 4799 also deals with that subject but amends the Michigan Penal Code to create criminal penalties. That bill has passed the House and has been reported to the full Senate by the Senate Judiciary Committee.]

A more detailed description of the bill follows.

Disposition of Dead Fetus

- If a dead fetus that has completed at least 20 weeks of gestation is delivered *in an institution*, the individual in charge (or an authorized representative) must prepare and file the fetal death report and make arrangements for the final disposition of the dead fetus in accordance with Section 2848, unless the parents, or parent if the mother is unmarried, expressly requests the responsibility of final disposition, and that disposition does not conflict with any state or federal law, rule, or regulation.
- If a dead fetus that has completed at least 20 weeks of gestation is delivered *outside an institution*, the physician in attendance must file the fetal death report. If a physician becomes aware of a fetal death or miscarriage that has occurred outside an institution, the physician must inform the parents, or parent if the mother is unmarried, that state law requires them to authorize the final disposition of the dead fetus or fetal remains and that they have a right under state law to determine the final disposition of the dead fetus.
- If a miscarriage occurs outside an institution and a health professional is present or is immediately aware of the miscarriage, then the health professional must inform the parents/parent that they have a right under state law to determine the final disposition of the fetal remains.
- [The term "miscarriage" is defined as the spontaneous expulsion of a nonviable fetus that has completed less than 20 weeks of gestation.]

Disposition of Fetal Remains

- The term "fetal remains" is defined in the bill to refer to a dead fetus or part of a dead fetus that has completed at least 10 weeks of gestation or has reached the state of development that, upon visual inspection, the head, torso, or extremities appear to be supported by skeletal or cartilaginous structures. (The term does not include the umbilical cord or placenta.)
- All fetal remains resulting from abortions must be disposed of by means lawful for other dead bodies, including burial, cremation, or interment. Unless the mother has provided written consent for research on the remains, a physician who performs an abortion must arrange for the final disposition. If the remains are disposed of by cremation, they must be incinerated separately from any other medical waste. However, this would not prohibit the simultaneous cremation of fetal remains with products of conception or other fetal remains resulting from abortions. (The term "products of conception" is defined as any tissues or fluids, placenta, umbilical cord, or other uterine contents resulting from a pregnancy. The term does not include a fetus or fetal body parts.)
- (This does not require a physician to discuss the final disposition of fetal remains with the mother prior to performing the abortion, nor does it require a physician to

obtain authorization from the mother for the final disposition of the fetal remains upon completion of the abortion.)

Funeral Directors: Dead Fetus and Fetal Remains

- Section 2848 of the Public Health Code requires that funeral directors obtain authorization for final disposition of dead bodies. Under the bill, unless the mother has provided written consent for research on the dead fetus, before final disposition of a dead fetus or before final disposition of fetal remains from a miscarriage, the funeral director (or person assuming responsibility) must obtain from the parents an authorization for final disposition. The authorization could allow for final disposition to be by a funeral director, the individual in charge of the institution where the fetus was delivered or miscarried, or an institution or agency authorized to accept donated bodies, fetuses, or fetal remains. (The underlined portions are the new language in this section; the remainder is current law.) The bill newly specifies that the funeral director, individual in charge of the institution, or other person making final the final disposition must take into account the express wishes of the parent/parents if those wishes do not conflict with any state or federal law, rule, or regulation.

No Religious Service or Ceremony Required

- The bill specifies that it does not require a religious service or ceremony as part of the final disposition of fetal remains.

Violations of Fetal Remains Requirements

- A person who violates Part 28 of the Code (Vital Records) by failing to dispose of fetal remains resulting from an abortion or by failing to obtain the proper authorization for final disposition of a dead body is responsible for a state civil infraction and may be ordered to pay a civil fine of up to \$1,000 per violation.
- A person who suffers injury or damages as a result of a violation by a person could bring a civil cause of action against that person to secure actual damages, including damages for emotional distress, or other appropriate relief.

Personal Physical Examination by Physician before "Medical Abortion"

- A physician could not diagnose and prescribe a medical abortion for a patient without first personally performing a physical examination of the patient. A physician could not use other means, such as an internet web camera, to diagnose and prescribe a medical abortion. (As noted earlier, the term "medical abortion" refers to an abortion procedure that utilizes a prescription drug or drugs, including mifepristone, misoprostol, or ulipristal acetate. This appears to cover both what are generally known as the "abortion pill" and the "morning-after" pill.)

- Under the bill, a physician must obtain the informed consent of a patient in the manner prescribed under Sec.17015 to perform a medical abortion. The physician must be physically present at the location of the medical abortion and at the time any prescription drug is dispensed or administered during a medical abortion. The prescribing physician must provide direct supervision of dispensing or administering of a prescription drug during a medical abortion. An individual under the direct supervision of the prescribing physician who is qualified by education and training (under the PHC) could dispense or administer the prescription drug during a medical abortion.
- A physician could not give, sell, dispense, administer, otherwise provide, or prescribe a prescription drug to an individual for the purpose of inducing an abortion in the individual unless the physician satisfies all the criteria established by federal law or guideline that a physician must satisfy in order to give, sell, dispense, administer, otherwise provide, or prescribe a prescription drug for inducing an abortion.
- The bill specifies that this section does not create a right to abortion.

Professional Liability Coverage

- A physician who performs six or more abortions per month and meets any of several other listed criteria must maintain professional liability coverage of at least \$1 million, or provide equivalent security as determined by the Department of Licensing and Regulatory Affairs, for the purpose of compensating a woman suffering from abortion complications caused by gross negligence or malpractice. The criteria are:
 - (1) has been found liable for damages in two or more civil lawsuits in the preceding seven years related to harm caused by abortions he or she performed;
 - (2) the disciplinary subcommittee has imposed one or more sanctions against his/her license for unprofessional, unethical, or negligent conduct in the preceding seven years; or
 - (3) operates, or has supervisory authority over, an office or facility where abortions are performed and that office or facility was found during a follow-up inspection to be noncompliant with health and safety requirements after previous inspections had formally identified the compliance failures and the corrective actions needed.
- If a disciplinary subcommittee finds that a physician is in violation of the paragraph above, it shall immediately limit the physician's license to prohibit the physician from performing abortions until the physician is in compliance.

Licensing as Freestanding Surgical Outpatient Facility

- The Department of Licensing and Regulatory Affairs would be required to specify in rules that a facility, including a private practice office, must be licensed under Article 17 of the Health Code as a freestanding surgical outpatient facility if that facility advertises outpatient abortion services and performs six or more abortions per month. Such a facility would not require a certificate of need to be granted a license.

(Currently, under this section of the Health Code this licensing requirement applies to a facility, including a private practice office, where 50% or more of the patients served annually undergo an abortion.)

Coercion to Abort and Domestic Violence Screening

- The bill would amend sections of the Public Health Code that deal with abortion informed consent requirements in order to require a physician or qualified person assisting the physician to do coercion-to-abort and domestic violence screening, and would require the Department of Community Health to produce information, screening tools, and protocols related to coercion-to-abort and domestic violence.
- At the time a patient first presents at a private office, freestanding surgical outpatient facility, or other facility or clinic in which abortions are performed for the purpose of obtaining an abortion, the physician or other qualified person assisting the physician, would have to orally screen the patient for coercion-to-abort using the screening tools developed by the Department of Community Health.
- If a patient discloses that she is the victim of domestic violence that does not include coercion to abort, the physician or qualified person assisting the physician would be required to follow the protocols developed by the department under Section 17015(11) of the Code.
- If a patient under 18 years old discloses domestic violence or coercion to abort by an individual responsible for the health or welfare of the minor, the physician or qualified person assisting would have to report that fact to a local child protective services office.
- A private office, freestanding surgical outpatient facility, or other facility or clinic in which abortions are performed must post a notice stating that it is illegal for anyone to coerce a woman into seeking an abortion. The notice would have to be posted in a conspicuous place in an area of the facility that is accessible to patients, employees, and visitors. Publications containing information about violence against women would also have to be made available in an area accessible to patients, employees, and visitors.

- A physician, as part of the informed consent process, would have to confirm with a patient seeking an abortion that the mandatory coercion-to-abort and domestic violence screening had been performed. The physician or person assisting the physician, not less than 24 hours before that physician performs an abortion, must provide the patient with a physical copy of a prescreening summary on the prevention of coercion to abort.
- The Department of Community Health, after considering the standards and recommendations of the Joint Commission on Accreditation of Healthcare Organizations, the Michigan Domestic Violence Prevention and Treatment Board, the Michigan Coalition Against Domestic and Sexual Violence or a successor organization, and the American Medical Association, would have to:
 - Develop, draft, and print (or make available in printable format), in nontechnical English, Arabic, and Spanish, a notice that is required to be posted in facilities and clinics. The notice would have to be at least 8.5 inches by 14 inches and be printed in at least 44-point type and must contain at a minimum all of the following: (1) a statement that it is illegal under Michigan law to coerce a woman to have an abortion; (2) a statement that help is available if a woman is being threatened or intimidated; physically, emotionally, or sexually harmed; or feels afraid for any reason; and (3) the telephone number of at least one domestic violence hotline and one sexual assault hotline.
 - Develop, draft, and print (or make available in printable format), in nontechnical English, Arabic, and Spanish, a prescreening summary on prevention of coercion to abort that, at a minimum, contains the information listed in the paragraph above, and notifies the patient that an oral screening for coercion to abort will be conducted before she gives written consent to obtain an abortion.
 - Develop, draft, and print screening and training tools and accompanying training materials to be used by a physician or a qualified person assisting the physician while performing the required coercion-to-abort screening. The screening tools would have to instruct the physician or person assisting the physician to do, at a minimum, all of the following:
 - Orally inform the patient that coercion to abort is illegal and is grounds for a civil action, but clarifying that discussions about pregnancy options, including personal or intensely emotional expressions about those options, are not necessarily coercion to abort and illegal.
 - Orally ask the patient if her husband, parents, siblings, relatives, or employer, the father or putative father of the fetus, the parents of the father or putative father of the fetus, or any other individual has engaged in coercion to abort and coerced her into seeking an abortion.

-- Orally ask the patient if an individual is taking harmful actions against her, including intimidating her, threatening her, physically hurting her, or forcing her to engage in sexual activities against her wishes.

-- Document the findings from the coercion-to-abort screening in the patient's medical record.

- Develop, draft, and print protocols and accompanying training materials to be utilized by a physician or a qualified person assisting a physician if a patient discloses coercion to abort or that domestic violence is occurring, or both, during the coercion-to-abort screening. The protocols would need to instruct the physician or qualified person assisting the physician to do, at a minimum, all the following:

-- Follow the screening requirements of Section 17015a (as amended by House Bill 5711), as applicable.

-- Assess the patient's current level of danger.

-- Explore safety options with the patient.

-- Provide referral information to the patient regarding law enforcement and domestic violence and sexual assault support organizations.

-- Document any referrals in the patient's medical record.

FISCAL IMPACT:

Community Health

HB 5711 as passed by the House would establish additional requirements for the Department of Community Health (DCH) to develop and maintain new protocols, screening and training tools, notices for public posting and other information for providers and the public related to the Informed Consent for Abortion Law and website. These responsibilities will require a modest amount of staff time and related costs annually to develop and maintain.

Related to the responsibility for final disposition of fetal remains, the bill may have a fiscal impact on public facilities and providers. Any civil fine revenue collected from violators related to the disposal of fetal remains would be provided to public and county law libraries pursuant to the Revised Judicature Act.

Licensing and Regulatory Affairs

HB 5711 would have a significant fiscal impact on the Bureau of Health Systems (BHS) within the Department of Licensing and Regulatory Affairs (LARA) to the extent that

additional abortion providers would require licensure as freestanding outpatient surgical facilities (FSOF).

Under the Public Health Code (1978 PA 368), the BHS is required to inspect FSOFs annually to ensure compliance with applicable state laws and rules. Currently, healthcare facilities, including private practice offices, which annually provide abortion services for at least 50% of their patients require licensure as a FSOF. There are currently four abortion providers licensed as FSOFs. Under HB 5711, healthcare facilities, including private practices, which advertise abortion services and perform at least six abortions per month, including the prescribing of drugs to induce abortion or prevent ovulation, would require licensure as a FSOF.

Based on induced abortion data from DCH, the BHS estimates that an additional sixteen abortion providers in the state would require licensure as a FSOF under HB 5711. The current fee per license for FSOFs is \$238 annually which is insufficient to cover the full expenses of licensure and inspection of FSOFs. Currently these fees generate \$28,560 annually while the expense of licensing and inspecting FSOFs is approximately \$201,500. Sixteen additional FSOFs would generate an additional \$3,808 which would be inadequate to support the additional expenses of licensure and inspection.¹

HB 5711 would also have an indeterminate fiscal impact on the Bureau of Health Professions (BHP) within LARA to the extent that the BHP would be required to determine whether an abortion provider meeting certain criteria maintains professional liability insurance of \$1,000,000. Under current law, physicians are not required to maintain professional liability insurance in order to obtain licensure in the state.

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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.

¹ In the FY 2012-13 omnibus budget, the Legislature appropriated an addition \$530,000 of GF/GP revenue for the inspection of FSOFs under existing statutory requirements. This amount coincides with the amount recommended in BHS' Sec. 731 fee report for additional funding to inspect all FSOFs. However, the BHS also recommends triennial, rather than annual, inspections. This amount was calculated to support the expenses of triennial inspections. It would, therefore, have to be approximately tripled to support annual inspections, with additional funds needed to implement HB 5711.