House
Legislative
Analysis
Section

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ABORTION AMENDMENTS

House Bill 4599 with committee amendment
Sponsor: Rep. Terry Geiger

House Bill 4600 as introduced
Sponsor: Rep. Clark Bisbee

House Bill 4601 as introduced
Sponsor: Rep. William J. O'Neill

Committee: Regulatory Reform
First Analysis (5-27-99)

THE APPARENT PROBLEM:

Under current law, freestanding abortion clinics are regulated as freestanding surgical outpatient facilities (FSOF), but physician, dentist, podiatrist, or other private practice offices that offer one or more surgical procedures do not have to be licensed as an FSOF, nor do outpatient surgical facilities that are owned or operated as part of a hospital. According to statistics compiled by the Department of Community Health, two-thirds of the almost 30,000 abortions performed in Michigan in 1997 were performed in physician offices. It has been proposed that legislation be offered to require those physician offices and hospital outpatient surgical facilities that perform more than 50 abortions a year to adhere to the same regulations that other clinics performing surgical procedures must follow.

An additional issue concerning freestanding surgical outpatient clinics is in regards to a number of departmental rules that were ruled unconstitutional by a federal district court in 1984 [*Birth Control Centers, Inc*. v. *Reizen*, 743 F.2d 352 (1984)]. The rules covered topics ranging from the interior construction of the facilities, to access to ambulances and hospital emergency rooms and presence of a physician on-site through the postoperative period of a patient's stay. It has been noted that since the time of the court's decision, the legal climate concerning abortion facilities has changed, and so has the prevailing law. It has been proposed to require the Department of Consumer and Industry Services to republish the stricken rules within the guidelines of current case law.

In a separate but related matter, concerns have arisen over the time frame in which physicians who perform abortions must report certain required information to the Department of Community Health. According to one of the bill sponsors, some physicians have said that it is difficult to meet the seven-day reporting requirement due to busy schedules or to procedures being performed close to weekends and holidays. In addition, though physicians are required to report immediate physical complications from the abortion procedures, not all complications are evident within that time frame, nor are women experiencing complications always able to see a physician within seven days of the abortion. Therefore, statistics compiled by the department may not be accurate in regards to the number of complications experienced by women having abortions. It has been recommended that the time-frame for doctors to file the required reports be extended.

THE CONTENT OF THE BILLS:

House Bill 4599 would amend the Public Health Code (MCL 333.20104) to specify that a freestanding surgical outpatient facility owned by and operated as part of a hospital or the private practice office of a physician, dentist, podiatrist, or other health professional would be considered a freestanding surgical outpatient facility if more than 50 abortions were performed in the facility or private practice office in a calendar year. Currently, hospital surgical outpatient facilities and the private practice office of the health professionals listed above are exempt from the definition of, and therefore requirements relating

to, freestanding surgical outpatient facilities. "Abortion" is defined in the code (MCL 333.17015).

The bill would also require the Department of Consumer and Industry Services to republish several rules that had been declared unconstitutional by violating or interfering with a woman's right to an abortion or not related to a legitimate state interest by a previous federal court of appeals decision [*Birth Control Centers, Inc.* v. *Reizen*, 743 F.2d 352 (1984)] pertaining to freestanding surgical outpatient facilities that perform more than 50 abortions a year. The new rules would have to conform to the most recent United States Supreme Court decisions regarding state regulation of abortions. The department would have discretion to modify or waive individual rules regarding construction or equipment standards for those facilities already in existence and operation on the bill's effective date as long as the health and safety of patients and employees were adequately preserved.

House Bills 4600 and 4601 would amend the Public Health Code to require physicians to report complications arising from abortion procedures to the Department of Community Health and to a local health department. Specifically, the bills would do the following:

Currently, the Public Health Code requires physicians who perform abortions to report certain information to the Department of Community Health within seven days of the procedure. House Bill 4600 would amend the code (MCL 333.2835 and 333.2837) to extend the reporting time to between 30 days and 60 days from the date of the procedure. The bill would also add to the list of information that must be reported by requiring physicians to include information on the type of diagnostic or genetic testing or screening related to the health of the fetus that had been performed on the woman or fetus by the physician or other licensed health professional before the abortion.

The code currently requires physicians to provide information in the report pertaining to immediate complications of the abortion procedure; this provision would be rewritten to specify that the information in the report would have to include a physical complication or death that resulted from the abortion and that was observed by the physician or reported to the physician or to his or her agent before the report was transmitted to the director of DCH. "Physical complication" would be defined as "a physical condition occurring during or after an abortion that, under generally accepted standards of medical practice, requires medical treatment", and would include complications involving infection, hemorrhage, cervical laceration, or perforation of the uterus.

The code also currently requires DCH to summarize the aggregate information gathered from the individual abortion procedures into an annual statistical report. The bill would specify that the department would have to include a summary of the following aggregate information in the report: 1) the period of gestation in 4-week intervals from 5 weeks through 28 weeks; 2) abortions performed on women aged 17 and under; and 3) physical complications reported under the bill.

Finally, the bill would require the DCH to promulgate rules that would require a physician to report information to the local health department about his or her patient who had a physical complication or death that was a primary, secondary, or tertiary result of an abortion. The new rules would have to amend the form currently used by the department for health professionals to report venereal diseases under R 325.173 of the Michigan Administrative Code to include reporting on abortion complications. The rules would also have to specify that the name or address of any patient who was the subject of a report, or any other information that could lead to the disclosure of the patient's identity, could not be included in the report. The department would also have to summarize the reports transmitted to the local health departments in its annual statistical report on abortions. The individual reports, along with any copies, would have to be destroyed five years after the reports were received.

House Bill 4601 would similarly amend the Public Health Code (MCL 333.2837) to add a requirement that physicians be required by administrative rule to file a written report with the local public health departments when a patient suffers a physical complication or death from an abortion. The bill is identical to section 333.2837 of House Bill 4600 except that it identifies the form under R 325.173 that would be amended by departmental rule in order to incorporate the new reporting standards as a form for reporting "serious communicable diseases" rather than "venereal disease", as stated in the previously-described bill.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

Nearly 30,000 abortions a year are performed in Michigan. In fact, abortion is the number one surgical procedure performed on women of childbearing age. Of these abortions, more than two-thirds are performed in offices that are not regulated as outpatient surgical facilities. Some are performed in traditional doctors' offices, where other businesses are located in facilities that resemble a warehouse more than a medical clinic. These facilities are neither regulated by the state nor are they inspected. Yet, in anecdotal testimony, women who have had procedures performed at these facilities, who have worked at these facilities, or who have visited these facilities have reported seeing such things as dried blood on the floor, less than sanitary conditions, cockroaches on the ceiling of the procedure room, cobwebs in corners, and unprofessional or unconcerned staff. Some of these offices are reported not to have basic first aid or emergency equipment, such as crash carts or oxygen tanks, available on site. Apparently, it is not uncommon for the doctor performing the abortions to leave the premises before all the patients are out of the recovery area. Reportedly, at least one doctor currently performing abortions is under indictment by the attorney general. Though emergencies do not happen very often, facilities should be prepared nonetheless, because even early-stage abortions carry a risk of bleeding, damage to the cervix, and infections. Late term abortions carry the possibility of more serious complications, including death. In fact, the 1997 statistics released by the Department of Community Health record one death in Michigan from an abortion.

This lack of regulation has left many patients wondering who to turn to for help and who will watch out for them. House Bill 4599 would address these concerns by requiring physician practices and hospital surgical outpatient facilities that perform more than 50 abortions a year to be regulated in the same way that other outpatient surgical facilities are. By including these physician practices in the definition of freestanding surgical outpatient facilities (FSOF), the practices would have to abide by the same reporting standards and annual inspections, as well as emergency equipment and procedures, required of clinics. In this way, those practices that are offering substandard and unsafe care can be weeded out. Proponents of the bill see it as neither pro-life nor pro-choice, but being about a woman's health and safety.

Since abortion is a medical procedure protected by the Constitution, laws should be adopted to ensure that it is performed in the safest manner, and in the safest environment, possible.

Against:

House Bill 4599 is not needed. About 1.5 million abortions are performed in the U.S. each year, with just under 30,000 being done in Michigan. According to the Kaiser Foundation, 0.3 deaths occur per 100,000 abortions, with major complications occurring in less than one percent. The 1997 statistical report issued by the Department of Community Health showed just 32 complications out of 29,528 abortions (less than .10 percent) and that maternal death from abortions occurred less frequently than from pregnancies (less than 1 in 100,000 vs. 8 out of 100,000). Even a 1987 report by then Surgeon General C. Everett Koop, M.D., as summarized in written testimony by Planned Parenthood, concluded that abortion did not pose a physical risk to the pregnant woman, nor did it pose medical disadvantages such as a greater risk of infertility, miscarriage, low birth weight in subsequent pregnancies, or other reproductive problems. In short, the data supports that abortion is a safe medical procedure, and that Michigan has an excellent safety record.

As to the anecdotal testimony cited above, even though some of the facilities or physician practices performing abortions are not licensed as FSOFs, the physicians are still licensed by the state, and therefore, if reported to the Office of Health Services--the licensing division of the Department of Consumer and Industry Services--they are subject to license sanctions and revocation for not following standard medical protocols. Lastly, if the impetus of the bill is to protect consumers from surgical procedures performed in facilities not licensed as FSOFs, then why doesn't the bill attempt to address all the surgical procedures that also carry risks of bleeding, infection, and death performed by physicians such as cosmetic surgery, oral surgery, and foot surgery? Without applying this type of regulation across the board for comparable types of procedures, opponents of the bill feel it is just another attempt to construct barriers for physicians providing and women seeking a constitutionally protected medical procedure.

Against:

Treating physician practices that do more than 50 abortions a year as freestanding surgical outpatient facilities (FSOF) would place many unnecessary requirements on those practices. There simply is no need for these practices to have backup generators, nor to have anesthesiologists since first trimester procedures generally do not require anesthesia of any kind, and second trimester procedures use anesthetic protocols that can be administered by any licensed physician. Still other provisions would place requirements on the width of hallways, spacing between beds in recovery areas, and so on, which would serve no purpose other than placing an undue burden on physicians providing a legal medical service.

Response:

The requirements of the Public Health Code and departmental rules pertaining to FSOFs are in place to ensure the safety of surgical procedures by setting standards for equipment, interior construction, sterilization protocols, and proper staffing, among other things. Many abortion clinics in the state already are licensed as FSOFs; therefore, the bill should not prove overly burdensome on practices that do more than 50 procedures a year. Besides, a committee amendment would give the Department of Consumer and Industry Services discretion to waive or modify individual rules regarding construction or equipment standards for currently existing practices as long as the health and safety of the patients and employees are preserved.

Against:

House Bill 4599 requires the Department of Consumer and Industry Services to republish departmental rules that were declared unconstitutional by a federal district court because they placed an undue burden on the woman's right to choose an abortion. In *Birth Control Centers, Inc*. v *Reizen*, the court found that a number of the rules were so restrictive in nature that they had a significant impact on a woman's right to abortion, where other provisions were struck down because they had no relation to a legitimate state interest. According to information supplied by the National Organization for Women, similar provisions in legislation in other states have also been declared unconstitutional "because they raise the cost of providing abortion services to the point where women no longer have access to this legal medical procedure." Thus, this provision would only serve to decrease access to abortion services.

Response:

The bill requires that any standards contained in the republished rules would have to be consistent with the most recent U.S. Supreme Court decisions regarding state regulations of abortion clinics. It is unlikely, therefore, that the rules would be verbatim to the rules that were struck down by the *Reizen* decision. However, according to some proponents of the bill, the legal landscape has changed since *Reizen*, meaning that some of the provisions that were ruled unconstitutional in 1984 may stand the constitutional test today based on more recent U.S. Supreme Court cases such as *Planned Parenthood* v *Casey*.

According to a representative of the Department of Consumer and Industry Services, it would be unlikely that the rules would be republished in exactly the same form as before. Though it is undecided at this time how the department would address the legislative intent of the provision, or the wording of the revised rules, the process most likely would include discussions with the Office of the Attorney General, abortion lawyers, and other interested parties to get input, as well as taking a close look at subsequent Supreme Court cases.

Against:

By including physician offices doing more than 50 abortions a year in the definition of freestanding surgical outpatient facility, House Bill 4599 would place these offices under the Certificate of Need process. The Certificate of Need process is a lengthy, cumbersome, and often very costly process by which facilities must get CON approval before offering certain medical services, buying certain types of equipment, or making certain types of improvements, and is meant to keep health care affordable by eliminating unnecessary duplication of services (which can increase costs). It would be inappropriate to put these types of physician offices under the CON requirements; by doing so, the cost to operate a practice would serve to drive some physicians out of business, as would the CON requirement of doing a minimum of 1,200 procedures annually to even get initial CON approval, thus depriving many women of a constitutionally-protected medical service. Further, there is some question about the impact of including hospital-owned and -operated clinics in the definition of freestanding surgical outpatient facilities; these hospital surgical departments have heretofore been excluded from this definition.

For:

Some physicians have reported difficulty complying with the code's requirement that certain information be reported to the Department of Community Health within seven days of an abortion procedure due to busy schedules, holidays, weekends, and so on. House Bill 4600 would address this concern by extending the time frame in which physicians must file the required report. Under the bill, physicians would have at least 30 days before a report had to be filed. This expanded reporting time would also provide for greater accuracy of determining the number of complications associated with abortion procedures. Currently, only immediate complications are reported, but some complications may not show up within the seven-day period or a woman may not be able to get an appointment to see her physician before the seven days have passed. Expanding the reporting time-frame to between 30 and 60 days would relieve pressure on busy physicians, and would also help more accurately identify medical problems that are directly related to an abortion procedure.

Further, the bill includes a requirement that in its annual statistical report, the Department of Community Health include the aggregate statistics of the gestational period of aborted fetuses in 4-week intervals from 5 weeks through 28 weeks, the number of minors who got abortions, and the physical complications reported. This information is already collected by the department; therefore, no undue burden should be placed on the department as the bill is merely requiring that statistics relating to these three topics be summarized separately. Such information could be helpful to many groups, as well as to the department. For instance, the department awards grants to many agencies and projects working to reduce teen pregnancy. Though the department already collects data on the ages of women having abortions, it could be helpful for these groups in assessing the effectiveness of their programs to have quick access to the number of minors having abortions, as many of these groups operate programs in middle schools and high schools. Also, since there is anecdotal reports of abortion complications that do not seem to line up with the statistically reported incidents, it would be helpful to have a separate summary of abortion complications that can be looked at and which can verify, or not, that abortions carry few risks and are being performed safely in the state.

Against:

House Bills 4600 and 4601 contain a provision requiring physicians to file a report regarding physical complications and deaths associated with abortions with the local public health departments on forms for communicable diseases. This provision should be changed to allow physicians to use a more simple form that would be sent directly to the Department of Community Health. It would make more sense to send the reports directly to the department since the department must include the information in its annual statistical report, and would save local health departments some time and money that would otherwise be spent in gathering and forwarding the reports to DCH.

Against:

House Bill 4600 would require physicians to report on diagnostic or genetic tests or screens that had been performed on a woman or a fetus relating to the health of a fetus. As written, this language is so broad as to include virtually any procedure or test, including blood tests, that were diagnostic in nature. Perhaps a definition of "genetic testing" would serve to narrow the scope of which types of tests need to be reported. Further, this provision could interfere with the package of bills on genetic testing that is currently pending before the Senate.

Response:

Since the section of law that the bill is amending already has strict confidentiality requirements in place, the provision on reporting genetic tests done prior to an abortion should not conflict with provisions in the Senate bills, though there might be some interaction between the bills. For example, Senate Bill 593 requires informed consent before genetic testing. The passage of House Bill 4600 might mean that physicians would have to inform patients about to undergo testing that the type of test performed would be reported to the Department of Community Health. However, under current Public Health Code requirements, information on the abortion reports that are sent to the department cannot contain any personally identifying information.

Against:

There is no medically necessary reason for doctors to report on what, if any, genetic tests or screens a woman had undergone prior to choosing an abortion as House Bill 4600 would require. The reasons why a woman may choose an abortion have nothing to do with whether abortions are being performed safely in the state, and could not shed light on how to make them safer. Therefore, to include such a provision sounds more like doing research on abortions via state law, rather than collecting data that could be used to

increase the safety of a procedure as the bill is promoted as doing.

POSITIONS:

The Michigan Family Forum supports the bills. (5-25-99)

Right to Life of Michigan supports the bills. (5-25-99)

The Michigan State Medical Society is currently reviewing the legislation. (5-26-99)

The Michigan Health and Hospital Association has no formal position at this time, but has expressed a concern regarding the potential impact of House Bill 4599 on hospital surgical departments. (5-26-99)

The Michigan Osteopathic Association has no formal position at this time, but is continuing to study the bills for possible ramifications for osteopathic physicians. (5-26-99)

The American Civil Liberties Union (ACLU) opposes the bills. (5-25-99)

The National Organization for Women (NOW)/Michigan Chapter opposes the bills. (5-25-99)

Planned Parenthood/Affiliates of Michigan opposes the bills. (5-25-99)

Analyst: S. Stutzky

■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.