

CLARIFY ABORTION INFORMED CONSENT

House Bill 5548 as passed by the House Second Analysis (8-9-00)

Sponsor: Rep. Janet Kukuk
Committee: Family and Children Services

THE APPARENT PROBLEM:

Public Act 133 of 1993 amended the Public Health Code to require physicians or qualified assistants to supply a patient with certain information regarding pregnancy and abortion procedures, including medically accurate depictions and descriptions of a fetus, at least 24 hours before performing an abortion, except in cases of medical emergency. PA 133 was subsequently challenged in *Mahaffey v Attorney General*, 222 Mich App 325 (1977), on the grounds that it violated the Michigan Constitution. The appellate court held that the informed consent law did not violate due process protections, and so did not violate the state constitution. A leave to appeal to the Michigan Supreme Court was denied. [456 Mich 948 (1998)]. A second lawsuit was filed in federal court, *Northland Family Planning Clinic, Inc., et al. v John Engler* (Docket no. 94-75351), contesting the law's federal constitutionality. The federal lawsuit was settled in June of 1999 and PA 133 took effect September 15, 1999.

Included in the settlement stipulation was an agreement that the written materials required by PA 133 to be given to each patient seeking an abortion could be made available by any available method of delivery, as long as it was delivered 24 hours before the abortion was performed. The stipulation settlement specifies that "any available method of delivery" includes, but is not limited to, United States Postal Service mail and express mail, courier services, private mail and express mail services, transmissions via fax, and e-mail.

In the months since PA 133 has been implemented, it has come to the attention that some clinics that offer abortion services have posted information on the Internet, and have stated that a verification of receiving the posted information at least 24 hours prior to an abortion would satisfy the law's requirements. However, some of the websites also include statements that question the accuracy of the state-approved materials, insinuate that the informed consent law was created to impede access to abortion, and suggest that the state-approved materials are intended to use guilt or

fear to change a woman's mind. To supporters of the informed consent law, this practice by a few clinics is seen as violating the spirit of the federal settlement stipulation. Since the settlement stipulation also included language stating that the Michigan legislature was not prevented from adopting future amendments to PA 133, legislation has been proposed to modify the settlement stipulation to address the issue of providing the required materials to patients.

THE CONTENT OF THE BILL:

Public Act 133 of 1993 amended the Public Health Code to require physicians to provide patients with certain information regarding pregnancy and abortion procedures at least 24 hours prior to performing an abortion. (The law was challenged on constitutional grounds. A state lawsuit was settled when the Michigan Supreme Court refused to overturn a court of appeals ruling upholding the law under the state constitution. The law was also challenged in a federal lawsuit, alleging it to be unconstitutional under the U.S. Constitution. The federal lawsuit was settled before going to trial when the plaintiffs and the attorney general reached a settlement agreement. This agreement allowed the law to go into effect in September, 1999.)

House Bill 5548 would amend the Public Health Code to make changes in the 1993 legislation. It would, in effect, modify the settlement agreement referred to above. The bill would make the following changes:

- Current law requires a physician or a qualified person assisting the physician to "present to the patient" certain information. (The settlement agreement that allowed the 1993 law to go into effect provides that the requirement to "present" or "provide" the written materials would be satisfied by any available method of delivery at least 24 hours before the abortion is performed, including, but not limited to, U.S. mail and express mail, courier services, private mail and express

mail services, facsimile transmission and electronic mail.) The bill would instead require a physician or qualified person to “provide the patient with a physical copy” of the information, and would define that phrase to mean giving the patient a copy in person, by registered mail, or by parcel delivery service that requires the recipient to sign for delivery.

The bill would further specify that the requirement to provide information to a pregnant patient before an abortion is performed could not be fulfilled by the patient accessing an Internet website other than a website developed and maintained by the Department of Community Health. A patient who was considering an abortion could review the required information via the department’s website. The department would have to assure that a confirmation form could be printed by the patient from the website that would verify the time and date the information was reviewed. A confirmation form printed from the website would be valid for 14 days from the date and time printed on the form. A patient would have to submit the confirmation form to the physician or qualified person to be included in her medical record.

Though the definition of the phrase “provide the patient with a physical copy” would not specifically list the department maintained and operated Internet website, the bill would specify that the requirements of distributing the written materials could be fulfilled by a patient accessing the website and receiving a printed, confirmation form that showed that the information had been reviewed at least 24 hours prior to the patient having an abortion performed. Further, the website could not require a patient to supply any information. The department would be prohibited from tracking, compiling, or otherwise keeping a record of information that would identify a patient who accessed the website.

- Part of the required information to be given to a patient before an abortion is the probable gestational age of the fetus the patient is carrying. Current law defines the “probable gestational age of the fetus” as meaning the gestational age of the fetus at the time an abortion is planned to be performed, “as determined by the attending physician”. The bill would delete reference to “as determined by the attending physician”.

- Current law specifies that the information is to be presented to the patient preceded by an explanation that “the patient has the option to review or not review the depiction and description”. The bill would delete this provision.

- Current law requires the physician to provide certain information to the patient before performing an abortion, including the physician’s name, the patient’s right to refuse or withdraw her consent to the abortion at any time, and specific risks to the patient of the procedure or of continuing the pregnancy. Under the bill, the physician would have to provide this information “personally and in the presence of the patient”.

- The bill would prohibit a physician from requiring or obtaining payment for a service provided to a patient who has inquired about an abortion or scheduled an abortion until after the expiration of the 24-hour required waiting period and until after the patient has signed the required acknowledgment and consent form.

- The bill would amend the language that requires the Department of Community Health to produce the required information that is presented to abortion patients. Under current law, the department is to produce “medically accurate depictions of the development of a human fetus which reflect the actual size of the fetus at 4-week intervals from the fourth week through the twenty-eighth week of gestation”. The bill would amend this provision to allow the use of illustrations or photographs, in addition to “depictions”. It would also require the material to “indicate by scale” the actual size of the fetus, and to do so at 2-week intervals, rather than 4-week intervals. In addition, the bill would delete language that requires the department to make use of curriculum materials from the Michigan Model for Comprehensive School Health Education for the required information.

- In a provision of current law requiring that the information identify the physical complications associated with each abortion procedure, the bill would specify that such complications include current published data regarding any scientifically significant relationship between abortion and increased risk of breast cancer.

- The bill would eliminate a provision that requires the Department of Community Health to approve substantially similar consent forms and alternative written summaries regarding medical procedures and potential risks and complications. The bill would also specify that the department could not develop written summaries for abortion procedures that utilize a medication that has not been FDA-approved for use in the U.S. in performing abortions.

- The Department of Community Health contracts with local health departments to provide various health

services, including pregnancy testing. Current law requires the local health departments to confirm pregnancies, determine the probable gestational stage of the fetus, and provide patients with the written information regarding pregnancy and abortion procedures. The bill would eliminate the requirement to provide the written materials and determine the gestational stage of the fetus. Local health departments could still perform pregnancy tests to confirm a pregnancy. However, local health departments would not have to confirm a pregnancy or determine the probable gestational stage of the fetus if this had already been done for the patient.

MCL 333.17015

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill's requirement for the Department of Community Health (DCH) to post the required abortion materials and confirmation form on its website could increase the department's costs by a modest amount. A cost could be incurred in both expanding the department's current website to include the required information and also in the ongoing maintenance of the material. Further, the agency reports that the bill would create a modest savings for the department by eliminating the requirement that local health departments provide the described printed materials to pregnant women seeking to confirm a pregnancy prior to obtaining an abortion. This would reduce the volume of materials that DCH would have to print and distribute. (8-2-00)

ARGUMENTS:

For:

Public Act 133 of 1993, known as the informed consent law, was intended to supply women with accurate information regarding pregnancy, fetal development, and abortion procedures so that a woman could indeed make an "informed" choice. Materials approved by the Department of Community Health for distribution, whether in printed form or via the Internet, are required to be medically accurate, and depictions of fetal development must be actual size.

Since the time that Public Act 133 has gone into effect, though, some clinics that have posted information on Internet websites have also included statements that bring into question the accuracy, intent, and slant of the department-approved materials, suggesting instead that the clinics' information is better, unbiased, and more accurate. In addition, some of these sites contain

information that could be misleading. For instance, due in part to differences in computer monitor sizes, software capabilities, and so on, some of the websites cannot provide true-size depictions of a developing fetus at the different gestational stages. However, only a minority of the sites examined posted a disclaimer notifying the viewer that the depiction was not the actual size of the fetus.

To ensure that women receive accurate information, the bill would specify that providing the patient with a physical copy of the required materials would mean giving a copy of the materials in person; by registered mail, return receipt requested; or by parcel delivery service that requires the recipient to provide a signature in order to receive delivery of a parcel. Though not included in the definition of providing the materials, the bill would provide that downloading information from an Internet website developed, operated, and maintained by the Department of Community Health would satisfy the requirements of the act.

The bill would not prohibit clinics or other groups from posting information pertaining to abortions on the Internet, but only the department-approved materials on the Internet and the confirmation form printed from the website could be used to satisfy the requirements for receiving written materials. The bill, therefore, would modify the settlement stipulation to better capture the spirit of the law.

For:

There are reports that some clinics have been using the 24-hour waiting period to "extort" down payments for a planned abortion. Reportedly, one clinic asks women to come in for their counseling session, pick up the information packet, have a pregnancy test to confirm the pregnancy, and then charges up to \$150 to secure an appointment time for the abortion. It has been reported that some of the women have been denied refunds of these down payments when they decided not to go ahead with the abortions. The bill would remedy this situation by prohibiting the collection of any fees from a patient until after the 24-hour waiting period has expired and the patient has signed the acknowledgment and consent form.

For:

Currently, physicians may refer patients to local health departments for free or low-cost pregnancy tests to confirm a pregnancy and to pick up the required written materials. However, many local health departments feel that the requirement to distribute the informational packets puts them in violation of federal family

planning laws, which prohibit them from handing out abortion materials. The bill would remove this requirement, requiring only that local health departments continue to provide pregnancy tests to confirm pregnancies.

For:

The bill would also add to the body of information currently required under the act to be given to patients. For example, the bill would allow illustrations and photographs in addition to depictions to show the development of a fetus. Instead of showing these depictions in four-week intervals, they would have to be shown in two-week intervals to better represent the actual size of the fetus at the time the patient was gathering information regarding an abortion. Further, the information would have to include current published data regarding any scientifically significant relationship between abortion and increased risk of breast cancer. Several studies have indicated a possible correlation between induced abortions and an increased risk of developing breast cancer. Such information is important to know, especially if breast cancer runs in a woman's family.

Against:

Many see the bill as another attempt to erect barriers to a woman's access to a legal medical procedure. The agreed-to settlement stipulation allows the required abortion materials to be delivered by "any available means", which include electronic transmissions. Since abortion is only available in 20 of the state's 83 counties, many women, particularly in rural areas, have to drive great distances in order to obtain an abortion. Being able to access the mandated information via fax, e-mail, and on the Internet is seen as a way to mitigate some of the hardship women in rural areas face in trying to comply with the law. The bill, however, would not allow e-mail or fax transmissions, and only a Department of Community Health website would be authorized to deliver both the required materials and the valid confirmation form necessary to prove the materials had been received 24 hours before the procedure. Though allowing use of the department's website is a step in the right direction, other components of the bill remain problematic.

First, some women in rural areas may have greater access to a fax machine than to a computer and printer; therefore, transmission by facsimile, which is allowed under the settlement stipulation, should be included in the list of allowable methods of delivery. In some situations, a fax or e-mail could afford more confidentiality than a delivery by mail. Secondly, there is at present no clinically, scientifically, supported

research to show a definite connection between induced abortions and breast cancer. To place such a requirement in law at this time is misleading and can only be construed as a scare tactic, for the mere mention of there being such a connection can be sufficient for some to believe that there is a connection.

Another concern is the bill's requirement that only the physician could provide his or her name, inform the patient that she could withdraw her consent at any time, and provide information on the risks associated with an abortion or continuing with a pregnancy, as opposed to allowing qualified staff members to present this information. This is not an efficient or appropriate use of a physician's time. Further, there are costs involved in distributing the informational packets, as well as in providing staff time for counseling. Doctors often charge for consultations on other types of medical procedures, so it does not make sense to prohibit physicians or clinics from even recouping reasonable costs. Prohibiting a physician from receiving any payment for counseling services prior to the expiration of the waiting period and obtaining a signed consent form could result in some clinics and doctor's offices no longer providing counseling services or distributing the informational packets. Therefore, the bill could result in making it more difficult for women to obtain access to information deemed important to an informed choice.

POSITIONS:

Right to Life of Michigan supports the bill. (7-28-00)

Planned Parenthood Affiliates of Michigan opposes the bill. (7-27-00)

The National Organization for Women, Michigan Conference opposes the bill. (7-27-00)

The American Civil Liberties Union (ACLU) opposes the bill. (7-27-00)

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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.