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ABORTION AMENDMENTS

**House Bill 4599 as enrolled
Public Act 206 of 1999
Sponsor: Rep. Terry Geiger**

**House Bill 4600 as enrolled
Public Act 207 of 1999
Sponsor: Rep. Clark Bisbee**

**House Bill 4601 as enrolled
Public Act 208 of 1999
Sponsor: Rep. William J. O'Neill**

**House Committee: Regulatory Reform
Senate Committee: Families, Mental Health
and Human Services**

Second Analysis (1-13-00)

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. Legislation has been proposed to require physician offices to adhere to the same regulations that other clinics performing surgical procedures must follow if fifty percent or more of the patients served each year undergo an abortion.

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 information that physicians who perform abortions are required to report to the Department of Community Health. Currently, though physicians are required to report immediate complications from the abortion procedures, the term "complications" is not defined in the code. In an effort to clarify the types of abortion-related complications that should be reported, it has been recommended that the code be more specific and that this information be summarized in aggregate form and included in the department's annual statistical report on abortion.

THE CONTENT OF THE BILLS:

Currently, the private practice offices of certain health professionals are exempt from the definition of, and therefore requirements relating to, freestanding surgical outpatient facilities. In addition, the Department of Consumer and Industry Services is required to promulgate departmental rules to differentiate between a freestanding surgical outpatient facility and the private office of a practicing physician, dentist, podiatrist, or other private practice office. House Bill 4599 would amend the Public Health Code (MCL 333.20115 and 333.22224) to require the department to

House Bills 4599, 4600 and 4601 (1-13-00)

specify in the rules previously mentioned that a facility, which would include the private practice office of a physician, dentist, podiatrist, or other health professional, would be required to be licensed as a freestanding surgical outpatient facility if 50 percent or more of the patients served in a year underwent an abortion at the facility. "Abortion" is defined in the code (MCL 333.17015). [Note: The bill would leave in place a provision that exempts the office of a physician, dentist, podiatrist, or other private practice office, as well as a surgical outpatient facility owned by and operated as part of a hospital, from the definition of a "freestanding surgical outpatient facility", MCL 333.20104(5).]

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

House Bill 4600. Currently, the Public Health Code requires physicians who perform abortions to report certain information to the Department of Community Health (DCH) within seven days of the procedure. The bill would amend the code (MCL 333.2835) to require physicians, in addition to current reporting requirements, to include information on the method used before the abortion to confirm the pregnancy, and the method and source of payment for the abortion.

The code also 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 the 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 attention", and would include complications involving infection, hemorrhage, cervical laceration, or perforation of the uterus.

The code also currently requires the 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.

House Bill 4601. The bill would amend the Public Health Code (MCL 333.2837) to add a requirement that physicians be required to file a written report with the Department of Community Health when a patient suffers a physical complication or death that was a primary, secondary, or tertiary result of an abortion. Aggregate data from the reports on complications would have to be summarized and included in the department's annual statistical report on abortion. Individual reports, along with any copies, on complications that were submitted would have to be retained for five years by the department and then be destroyed. Further, the department would have to develop and distribute a standardized form for the report required under the bill. The form could not include the patient's name or address or any other information that could reasonably be expected to identify the patient. Finally, the standardized form would have to specify the time period within which the report would have to be transmitted (currently, within seven days from the date of the procedure).

House Bills 4600 and 4601 are tie-barred to each other.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, House Bill 4599, with its requirement that physician practices meeting certain criteria be licensed as freestanding surgical outpatient facilities, would result in an increase in state revenue given that affected facilities would be subject to a \$238 annual licensing fee. In addition, the state would incur additional costs related to the licensing of these facilities and to the rules promulgation process. The increase in revenue and costs to the state would depend on the number of facilities affected by the bill.

The agency reports that since House Bill 4600 would extend current law that requires physicians to report certain information to the Department of Community Health by adding new information to the list of what must be reported, the bill is expected to have no impact on state costs.

Similarly, the agency reports that the reporting provision in House Bill 4601 also would have no impact on state costs since it is simply adding new information to current reporting requirements already administered by the state. However, the agency reports that the Department of Community Health may experience an incremental increase in costs related to the analysis of the new information required by the bill. (1-12-00)

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 some report 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 in which 50 percent or more of the patients served each year undergo an abortion be regulated in the same way that other outpatient surgical facilities are. By including these physician practices as 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.

Response:

The legislation would both require the Department of Consumer and Industry Services to promulgate rules to differentiate between physician offices and freestanding surgical outpatient facilities (FSOF), and require that a physician practice that annually performs abortions for more than 50 percent of his or her patients be licensed as an FSOF. Apparently, the intent of the legislation is to catch those practices or clinics performing large numbers of abortions that have so far eluded licensure and tighter regulations. However, by leaving current provisions in statute that exempt physician practices from the definition of an FSOF, it would appear that House Bill 4599 would create a conflict that could subject the department to a lawsuit if the department were to attempt to license such a practice. Further, physicians do not currently report statistics to the department as to how many of their patients receive a particular procedure, creating additional implementation problems.

Against:

Under the Public Health Code, facilities must get certificate of need (CON) approval before offering certain medical services, buying certain types of equipment, or making certain types of improvements; the requirements are meant to keep health care affordable by eliminating unnecessary duplication of services (which can increase costs). Some people have expressed concern that if a physician's private practice had to be licensed as a freestanding surgical outpatient facility (FSOF), the office would have to go through the certificate of need (CON) process. Such a

requirement could increase costs significantly enough to drive some physicians out of business and deprive many women of a constitutionally-protected medical service.

Response:

House Bill 4599 as enrolled clearly states that a physician practice required under the bill to be licensed as a FSOF would not have to obtain a certificate of need.

Against:

House Bill 4599 would not allow abortion procedures to be counted towards the minimum annual number of surgical procedures that must be done in order to obtain a certificate of need for a freestanding surgical outpatient facility that wished to initiate, replace, or expand a covered clinical service consisting of surgical services.

Response:

Reportedly, few, if any, abortion procedures are currently included in a facility's count of surgical procedures performed in a year. Therefore, this provision would have little, if any, impact on current CON procedures.

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 license 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 perform abortions for more than 50 percent of their patients 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, as current administrative rules require, 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 contained in House Bill 4599, including the rules that would have to be republished, 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 would meet the criteria of House Bill 4599. Besides, the bill 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 previously were declared unconstitutional by a federal district court because they placed an undue

burden on a 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 in the departmental rules 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:

House Bill 4599 requires that any standards contained in the republished rules be consistent with the most recent U.S. Supreme Court decisions regarding state regulation 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 is 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.

For:

House Bill 4600 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 when 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 are 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 could verify, or not, that abortions carry few risks and are being performed safely in the state.

Against:

There is no medically necessary reason for doctors to report on how a woman chose to pay for an abortion, as House Bill 4600 would require. The method of payment or the source of the payment has 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.

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.