

ONE HUNDRED FIRST LEGISLATURE - SECOND SESSION - 2010

COMMITTEE STATEMENT

LB594

Hearing Date: Thursday March 05, 2009
Committee On: Judiciary
Introducer: Dierks
One Liner: Adopt the Women's Health Protection Act governing abortion and provide a civil remedy for failure to comply with the act

Roll Call Vote - Final Committee Action:

Advanced to General File with amendment(s)

Vote Results:

Aye:	5	Senators Ashford, Christensen, Coash, Lathrop, Lautenbaugh
Nay:		
Absent:		
Present Not Voting:	3	Senators Council, McGill, Rogert

Proponents:

Sen. Cap Dierks
Aaron Stratman
Justine Kyker
Greg Schleppenbach
Al Riskowski
Dave Bydalek
Julie Schmit-Albin

Representing:

Introducer
Catholic Social Services
self
Nebraska Catholic Conference
Nebraska Family Council
Family First
Nebraska Right to Life

Opponents:

Lisa Crockett
Rosemary Esseks
Sara Juster

Representing:

self
Nebraska Psychological Association
NE Methodist Health System; NE Methodist Hospital;
Methodist Physicians Clinic
Family Planning Council of Nebraska
self
Nebraska Medical Association
ACLU Nebraska
Planned Parenthood of NE/Council Bluffs
Planned Parenthood of NE/Council Bluffs

Deborah Bunn

Molly Esseks

David Buntain

Laurel Marsh

Bobbie Kierstead

Christine Funk

Neutral:

Representing:

Summary of purpose and/or changes:

Legislative Bill 594 would enact the Women's Health Protection Act.

Section 1 would name the Act.

Section 2 would state the purpose of the Act.

Section 3 would establish definitions pertaining to the Act including: abortion, abortion provider, complications associated with abortion, emergency situation, negligible risk, patient, risk factor associated with abortion and self-induced abortion.

Section 4 would establish new requirements to be met before an abortion can be performed and before a patient can be referred for an abortion, except in an emergency situation. It is an act of malpractice or professional negligence to perform an abortion or refer a patient for an abortion unless:

1. Before the provider performs or refers for an abortion, a physician, psychiatrist, psychologist, mental health practitioner, physician assistant, registered nurse, or social worker licensed under the Uniform Credentialing Act has:
 - a. Evaluated the patient to identify any compulsion to consent to the abortion;
 - b. Evaluated the patient to identify risk factors associated with abortion;
 - c. Informed the patient and physician of results in writing, including checklist of positive and negative results for each risk factor and provided the written certification that the patient understands and appreciates the significance of the risk factors and is seeking the abortion without compulsion and
 - d. Retained a copy of evaluation results in patient's permanent record.
2. If risk factors were identified, the patient was informed of the following:
 - a. Each complication associated with each identified risk factor;
 - b. Any quantifiable risk rate whenever relevant data exists.

Section 5 would provide a remedy for the intentional, knowing, or negligent failure to comply with the Act. Damages available to the patient or her survivors would include: \$10,000 for each failure to screen for a risk factor and for each failure to inform; actual damages; reasonable attorney's fees and costs as well as recovery for wrongful death if by preponderance of the evidence, the physician knew or should have known that consent was not fully informed or voluntary.

Section 6 would provide that any civil action under the Act must be commenced in accordance with statute section 44-2828, which establishes the statute of limitations for such actions at within two years of the alleged act or omission upon which the civil action is based. If the cause of action is not discovered and could not be reasonably discovered within such two-year period, the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier, but not more than ten years after the date of alleged act or omission.

Section 7 would require an abortion provider who performs an abortion on minor provide information required under section 4 of the Act to the patient's parent or guardian or the provider would bear the burden of proving patient was capable of independently evaluating the information.

Section 8 would require the patient to be provided with the information required under the Act at least 24 hours before scheduled abortion, except in case of an emergency situation or the abortion provider would bear the burden of proving the patient had sufficient reflection time, given her age, maturity, emotional state and mental capacity to comprehend and consider the information.

Section 9 would regulate civil actions under the Act as follows:

1. The failure to comply with requirements set forth in section 4 of the Act creates rebuttable presumption that the patient would not have had the abortion;
2. The absence of physical injury shall not preclude noneconomic damages;
3. Physicians are not automatically disqualified from serving as an expert if he or she does not perform elective abortions;
4. Any physician advertising services in NE is deemed to be transacting business in the state and shall be subject to the requirements of the Act;
5. The failure to comply with requirements set forth in section 4 of the Act creates presumption the negligence was willful or wanton unless the defendant proves by a preponderance of the evidence that a lesser mental state in fact applied;
6. Any waiver of liability for malpractice or professional negligence is void and unenforceable;
7. An affirmative defense exists to an allegation of inadequate exposure if the defendant omitted contested information

because statistically significant surveys show that less than 5 % of patients consider the contested information relevant to the abortion decision and

8. The patient or her survivors have a cause of action for reckless endangerment against any person other than a licensed physician or pharmacist who attempts or completes an abortion or aids or abets a self-induced abortion. Proof of injury is not required to recover for wrongful death and the minimum award for damages shall be \$850,000 plus reasonable costs and attorney's fees.

9. Each violation of the Act entitles the patient or her survivors to \$10,000 for each failure to screen and each failure to inform plus actual damages and reasonable attorney's fees and costs.

Section 10 would provide that the statute of limitations for filing suit under the Act will be tolled during the period for which any portion of the Act is enjoined and subsequently upheld and for two years thereafter.

Section 11 would provide a severability clause.

Explanation of amendments:

Committee Amendment AM 1699 to LB 594 would replace green copy of the bill. The amendment would incorporate the provisions of the Act into existing statute as follows:

Section 1 would add language to the existing legislative findings in statute section 28-325 regarding abortion to declare the following:

- Current screening and counseling is not adequate to protect the health needs of women;
- Clarifying minimum standard for preabortion screening and counseling is practical way to protect well being of women and ensure providers are aware of patient's risk profile; and
- Women's health can be protected by providing a cause of action against nonphysicians performing illegal abortions or encouraging self-abortions.

Section 2 would add definitions to existing definitions in statute section 28-326 related to abortion including: complications associated with abortion, negligible risk, risk factor associated with abortion and self induced abortion.

Section 3 would add provisions to the existing informed consent requirements in statute section 28-327 to require the following before consent to an abortion can be considered voluntary and informed, except in an emergency situation:

- At least 1 hour before the abortion, a physician, psychiatrist, psychologist, mental health practitioner, physician assistant, registered nurse, or social worker licensed under Uniform Credentialing Act must have:
 - o Evaluated the woman to identify perceived feeling pressured or coerced into seeking or consenting to abortion;
 - o Evaluated the woman to identify risk factors associated with abortion;
 - o Informed the woman and physician of results in writing, including checklist of positive and negative results for each risk factor and the written certification of the woman and the licensed person that the woman was informed of the risk factors;
 - o Retained copy of evaluation results in woman's permanent record;
 - If risk factors were identified, the woman was informed of the following:
 - o Each complication associated with each identified risk factor;
 - o Any quantifiable risk rate whenever relevant data exists;
 - The physician performing the abortion has formed a reasonable medical judgment, documented in permanent record that:
 - o The preponderance of statistically validated medical studies demonstrates that the woman's risk factors are negligible risks;
 - o Continuance of the pregnancy would involve risk of injury greater than the abortion; or
 - o Continuance of the pregnancy would involve less risk of injury than the abortion.

Section 4 would provide that any waiver of evaluations and notices is void and unenforceable.

Section 5 would provide remedies for the intentional, knowing, or negligent failure to comply with informed consent.

Available damages would include reasonable costs and attorney's fees as well as recovery for wrongful death if by preponderance of the evidence the physician knew or should have known that consent was not fully informed or voluntary.

Section 6 would provide that any civil action under the Act must be commenced in accordance with statute section 44-2828, which establishes the statute of limitations for such actions at within two years of the alleged act or omission upon which the civil action is based. If the cause of action is not discovered and could not be reasonably discovered within such two-year period, the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier, but not more than ten years after the date of alleged act or omission.

Section 7 would require an abortion provider who performs an abortion on minor provide information required under section 3 to the patient's parent or guardian or the provider would bear the burden of proving patient was capable of independently evaluating the information.

Section 8 would require the woman to be provided with the information required under the Act at least 24 hours before scheduled abortion, except in case of an emergency situation or the abortion provider would bear the burden of proving the woman had sufficient reflection time, given her age, maturity, emotional state and mental capacity to comprehend and consider the information.

Section 9 would regulate civil actions arising under section 28-327 as follows:

10. The failure to comply with requirements set forth in section 28-327 creates rebuttable presumption that the patient would not have had the abortion;

11. The absence of physical injury shall not preclude noneconomic damages;

12. Physicians are not automatically disqualified from serving as an expert if he or she does not perform elective abortions;

13. Any physician advertising services in NE is deemed to be transacting business in the state and shall be subject to the requirements of section 28-327;

14. An affirmative defense exists to an allegation of inadequate exposure if the defendant omitted contested information because statistically significant surveys show that less than 5 % of women consider the contested information relevant to the abortion decision and

15. The woman or her survivors have a cause of action for reckless endangerment against any person other than a licensed physician or pharmacist who attempts or completes an abortion or aids or abets a self-induced abortion. Proof of injury is not required to recover reasonable costs and attorney's fees for wrongful death.

Section 10 would provide that the statute of limitations for filing suit will be tolled during the period for which any portion of the Women's Health Protection Act is enjoined and subsequently upheld and for two years thereafter. Clarifies that the informed consent statute is not defining a standard of care for any medical procedure except induced abortion. Clarifies that violation of the new informed consent requirements under this bill is not grounds for criminal or disciplinary action.

Section 11 would harmonize language in statute with the bill.

Section 12 would harmonize language in statute with the bill.

Section 13 would provide a severability clause.

Brad Ashford, Chairperson