

HB 1501-FN – AS INTRODUCED

2014 SESSION

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HOUSE BILL ***1501-FN***

AN ACT requiring licensing of outpatient abortion facilities.

SPONSORS: Rep. Souza, Hills 43; Rep. LeBrun, Hills 32; Rep. Peterson, Hills 21; Rep. Notter, Hills 21; Rep. Cebrowski, Hills 7; Rep. Kappler, Rock 3; Rep. Baldasaro, Rock 5; Rep. Itse, Rock 10; Rep. Groen, Straf 10; Rep. Hoell, Merr 23

COMMITTEE: Health, Human Services and Elderly Affairs

ANALYSIS

This bill requires licensing of outpatient abortion facilities by the department of health and human services.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears [~~in brackets and struck through.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Fourteen

AN ACT requiring licensing of outpatient abortion facilities.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Findings and Purposes.

2 I. The general court finds that:

3 (a) Abortion is an invasive, surgical procedure that can lead to numerous and serious
4 medical complications. Potential complications for first trimester abortions include, among others,
5 bleeding, hemorrhage, infection, uterine perforation, blood clots, cervical tears, incomplete abortion
6 (retained tissue), failure to actually terminate the pregnancy, free fluid in the abdomen, acute
7 abdomen, missed ectopic pregnancies, cardiac arrest, sepsis, respiratory arrest, reactions to
8 anesthesia, fertility problems, emotional problems, and even death.

9 (b) “The medical, emotional, and psychological consequences of an abortion are serious
10 and can be lasting” H.L. v. Matheson, 450 U.S. 398, 411 (1981).

11 (c) The state of New Hampshire “has legitimate interests from the outset of pregnancy in
12 protecting the health of women.” Planned Parenthood of Southeastern Pennsylvania v. Casey, 505
13 U.S. 833, 847 (1992).

14 (d) Since the Supreme Court’s decision in Roe v. Wade, courts have recognized that for
15 the purposes of regulation, abortion services are rationally distinct from other routine medical
16 services, because of the “particular gravitas of the moral, psychological, and familial aspects of the
17 abortion decision.” Greenville Women’s Clinic v. Bryant, 222 F.3d 157, 173 (4th Cir. 2000), cert.
18 denied, 531 U.S. 1191 (2001).

19 II. Based on the fact that New Hampshire provides safeguards for women’s health through
20 the licensing of hospitals, ambulatory surgical centers, walk-in care centers, birthing clinics, and
21 other facilities providing medical services, it is the purpose of this act to further protect women’s
22 health by the licensing of abortion clinics.

23 2 New Chapter; Licensure of Outpatient Abortion Clinics. Amend RSA by inserting after
24 chapter 126-X the following new chapter:

25 CHAPTER 126-Y

26 LICENSURE OF OUTPATIENT ABORTION CLINICS

27 126-Y:1 Women’s Health Protection Act. This chapter shall be known as the “women’s health
28 protection act.”

29 126-Y:2 Definitions. In this chapter:

30 I. “Abortion” means the act of using or prescribing any instrument, machine, or device with
31 the intent to terminate a woman’s pregnancy for reasons other than to increase the probability of a

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1 live birth, to preserve the life or health of the child after live birth, to terminate an ectopic
2 pregnancy, or to remove a dead fetus. Abortion does not include birth control devices or oral
3 contraceptives.

4 II. “Abortion clinic” means a facility, other than an accredited hospital, in which 5 or more
5 first trimester abortions in any month or any second or third trimester abortions are performed.

6 III. “Born alive” with respect to a member of the species *Homo sapiens*, means the complete
7 expulsion or extraction from his or her mother of that member, at any stage of development, who
8 after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or
9 definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and
10 regardless of whether the expulsion or extraction occurs as a result of natural or induced labor,
11 cesarean section, or induced abortion.

12 IV. “Commissioner” means the commissioner of the department of health and human
13 services.

14 V. “Conception” and “fertilization” each mean the fusion of the human spermatozoon with a
15 human ovum.

16 VI. “Department” means the department of health and human services.

17 VII. “Gestation” means the time that has elapsed since the first day of the woman’s last
18 menstrual period.

19 VIII. “Licensee” means an individual, a partnership, an association, a limited liability
20 company, or a corporation authorized by the department to operate an abortion clinic.

21 IX. “Physician” means a person licensed under RSA 329.

22 126-Y:3 Licensure Requirements.

23 I. All abortion clinics shall be licensed by the department. Any existing abortion clinic shall
24 make application for license within 90 days.

25 II. An application for a license shall be made to the department on forms provided by it and
26 shall contain such information as the department reasonably requires, which may include
27 affirmative evidence of the ability to comply with this chapter and the rules adopted pursuant to this
28 chapter.

29 III. Following receipt of an application for licensure, the department shall issue a license, if
30 the applicant and the facility meet the requirements established by this chapter, for a period of one
31 year. A temporary or provisional license may be issued to an abortion clinic for a period of 6 months
32 in cases where sufficient compliance with this chapter requires an extension of time, if a disapproval
33 has not been received from any other state or local agency otherwise authorized to inspect such
34 facilities. The failure to comply shall not be detrimental to the health and safety of the public.

35 IV. A license shall apply only to the location and licensee stated on the application, and such
36 license, once issued, shall not be transferable from one place to another or from one person to

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1 another. If the location of the facility is changed, the license shall be automatically revoked. A new
2 application form shall be completed prior to all license renewals.

3 V. An application for a license or renewal to operate an abortion clinic shall be accompanied
4 by a fee of \$100.

5 VI. A license issued under this chapter shall be for a period of one year from the date of
6 issuance unless sooner revoked, shall be on a form prescribed by the department, and may be
7 renewed annually upon application and payment of the license fee as in the case of procurement of
8 the original license.

9 VII. The commissioner may deny, suspend, revoke, or refuse to renew a license in any case
10 in which it finds that there has been a substantial failure of the applicant or licensee to comply with
11 the requirements of this chapter or the rules adopted pursuant to this chapter. In such case, the
12 commissioner shall furnish the person, applicant, or licensee 30 days' notice specifying reasons for
13 the action.

14 VIII. Any person, applicant, or licensee aggrieved by the action of the commissioner in
15 denying, suspending, revoking, or refusing to renew a license may appeal the commissioner's action
16 in accordance with RSA 541.

17 IX. Any person, applicant, or licensee aggrieved by the action of the department may, within
18 30 days after notification of such action, appeal to the supreme court.

19 X. The department shall establish minimum standards and administrative rules for the
20 licensing and operation of abortion clinics.

21 126-Y:4 Inspections and Investigations.

22 I. The commissioner shall establish policies and procedures for conducting pre-licensure and
23 re-licensure inspections of abortion clinics. Prior to issuing or reissuing a license, the department
24 shall conduct an on-site inspection to ensure compliance with this chapter.

25 II. The commissioner shall also establish policies and procedures for conducting inspections
26 and investigations pursuant to complaints received by the department and made against any
27 abortion clinic. The department shall receive, record, and dispose of complaints in accordance with
28 rules adopted pursuant to RSA 541-A.

29 126-Y:5 Rulemaking.

30 I. The commissioner shall adopt rules, pursuant to RSA 541-A. At a minimum these rules
31 shall include:

32 (a) Adequate private space that is specifically designated for interviewing, counseling,
33 and medical evaluations.

34 (b) Dressing rooms for staff and patients.

35 (c) Appropriate lavatory areas.

36 (d) Areas for pre-procedure hand washing.

37 (e) Private procedure rooms.

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- 1 (f) Adequate lighting and ventilation for abortion procedures.
2 (g) Surgical or gynecologic examination tables and other fixed equipment.
3 (h) Post-procedure recovery rooms that are supervised, staffed, and equipped to meet the
4 patients' needs.
5 (i) Emergency exits to accommodate a stretcher or gurney.
6 (j) Areas for cleaning and sterilizing instruments.
7 (k) Adequate areas for the secure storage of medical records and necessary equipment
8 and supplies.
9 (l) The display in the abortion clinic, in a place that is conspicuous to all patients, of the
10 clinic's current license issued by the department.

11 II. The commissioner shall adopt rules, pursuant to RSA 541-A, to prescribe abortion clinic
12 supplies and equipment standards, including supplies and equipment that are required to be
13 immediately available for use in an emergency. At a minimum these rules shall:

14 (a) Prescribe required equipment and supplies, including medications, required for the
15 conduct, in an appropriate fashion, of any abortion procedure that the medical staff of the clinic
16 anticipates performing and for monitoring the progress of each patient throughout the procedure and
17 recovery period.

18 (b) Require that the number or amount of equipment and supplies at the clinic is
19 adequate at all times to assure sufficient quantities of clean and sterilized durable equipment and
20 supplies to meet the needs of each patient.

21 (c) Prescribe required equipment, supplies, and medications that shall be available and
22 ready for immediate use in an emergency and requirements for written protocols and procedures to
23 be followed by staff in an emergency, such as the loss of electrical power.

24 (d) Prescribe required equipment and supplies for required laboratory tests and
25 requirements for protocols to calibrate and maintain laboratory equipment at the abortion clinic or
26 operated by clinic staff

27 (e) Require ultrasound equipment in all abortion clinics.

28 (f) Require that all equipment is safe for the patient and the staff, meets applicable
29 federal standards, and is checked annually to ensure safety and appropriate calibration.

30 III. The commissioner shall adopt rules, pursuant to RSA 541-A, relating to abortion clinic
31 personnel. At a minimum these rules shall require that:

32 (a) The abortion clinic designate a medical director of the abortion clinic who is licensed
33 to practice medicine and surgery in the state of New Hampshire.

34 (b) Physicians performing surgery are licensed to practice medicine and surgery in the
35 state of New Hampshire, demonstrate competence in the procedure involved, and are acceptable to
36 the medical director of the abortion clinic.

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1 (c) A physician with admitting privileges at an accredited hospital in this state is
2 available.

3 (d) If a physician is not present, a registered nurse, nurse practitioner, licensed practical
4 nurse, or physician's assistant is present and remains at the clinic where abortions are performed to
5 provide postoperative monitoring and care until each patient who had an abortion that day is
6 discharged.

7 (e) Surgical assistants receive training in counseling, patient advocacy, and the specific
8 responsibilities of the services the surgical assistants provide.

9 (f) Volunteers receive training in the specific responsibilities of the services the
10 volunteers provide, including counseling and patient advocacy, as provided in the rules adopted by
11 the commissioner for different types of volunteers based on their responsibilities.

12 IV. The commissioner shall adopt rules, pursuant to RSA 541-A, relating to the medical
13 screening and evaluation of each abortion clinic patient. At a minimum these rules shall require:

14 (a) A medical history including the following:

- 15 (1) Reported allergies to medications, antiseptic solutions, or latex.
- 16 (2) Obstetric and gynecologic history.
- 17 (3) Past surgeries.
- 18 (4) Current medications.

19 (b) A physical examination including a bimanual examination estimating uterine size
20 and palpation of the adnexa.

21 (c) The appropriate laboratory tests including:

- 22 (1) For an abortion in which an ultrasound examination is not performed before the
23 abortion procedure, urine or blood tests for pregnancy performed before the abortion procedure.
- 24 (2) A test for anemia.
- 25 (3) Rh typing, unless reliable written documentation of blood type is available.
- 26 (4) Other tests as indicated from the physical examination.

27 (d) An ultrasound evaluation for all patients who elect to have an abortion after
28 12 weeks gestation. The rules shall require that if a person who is not a physician performs an
29 ultrasound examination, that person shall have documented evidence that the person completed a
30 course in the operation of ultrasound equipment. The physician or other health care professional
31 shall review, at the request of the patient, the ultrasound evaluation results with the patient before
32 the abortion procedure is performed, including the probable gestational age of the unborn child.

33 (e) That the physician is responsible for estimating the gestational age of the unborn
34 child based on the ultrasound examination and obstetric standards in keeping with established
35 standards of care regarding the estimation of fetal age as defined in rule and shall write the estimate
36 in the patient's medical history. The physician shall keep original prints of each ultrasound
37 examination of a patient in the patient's medical history file.

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1 V. The commissioner shall adopt rules, pursuant to RSA 541-A, relating to the abortion
2 procedure. At a minimum these rules shall require:

3 (a) That medical personnel is available to all patients throughout the abortion
4 procedure.

5 (b) Standards for the safe conduct of abortion procedures that conform to obstetric
6 standards in keeping with established standards of care regarding the estimation of fetal age as
7 defined in rule.

8 (c) Appropriate use of local anesthesia, analgesia, and sedation if ordered by the
9 physician.

10 (d) The use of appropriate precautions, such as the establishment of intravenous access
11 at least for patients undergoing second or third trimester abortions.

12 (e) The use of appropriate monitoring of the vital signs and other defined signs and
13 markers of the patient's status throughout the abortion procedure and during the recovery period
14 until the patient's condition is deemed to be stable in the recovery room.

15 VI. The commissioner shall adopt rules, pursuant to RSA 541-A, that prescribe minimum
16 recovery room standards. At a minimum these rules shall require that:

17 (a) Immediate postprocedure care consists of observation in a supervised recovery room
18 for as long as the patient's condition warrants.

19 (b) The clinic arrange hospitalization if any complication beyond the management
20 capability of the staff occurs or is suspected.

21 (c) A licensed health professional who is trained in the management of the recovery area
22 and is capable of providing basic cardiopulmonary resuscitation and related emergency procedures
23 remains on the premises of the abortion clinic until all patients are discharged.

24 (d) A physician with admitting privileges at an accredited hospital in this state remains
25 on the premises of the abortion clinic until all patients are stable and are ready to leave the recovery
26 room and to facilitate the transfer of emergency cases if hospitalization of the patient or child born
27 alive is necessary. A physician shall sign the discharge order and be readily accessible and available
28 until the last patient is discharged.

29 (e) A physician discusses RhO(d) immune globulin with each patient for whom it is
30 indicated and assures it is offered to the patient in the immediate postoperative period or that it will
31 be available to her within 72 hours after completion of the abortion procedure. If the patient refuses,
32 a refusal form approved by the department shall be signed by the patient and a witness and included
33 in the medical record.

34 (f) Written instructions with regard to post abortion coitus, signs of possible problems,
35 and general aftercare are given to each patient. Each patient shall have specific instructions
36 regarding access to medical care for complications, including a telephone number to call for medical
37 emergencies.

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1 (g) There is a specified minimum length of time that a patient remains in the recovery
2 room by type of abortion procedure and duration of gestation.

3 (h) The physician assures that a licensed health professional from the abortion clinic
4 makes a good faith effort to contact the patient by telephone, with the patient's consent, within 24
5 hours after surgery to assess the patient's recovery.

6 (i) Equipment and services are located in the recovery room to provide appropriate
7 emergency resuscitative and life support procedures pending the transfer of the patient or child born
8 alive to the hospital.

9 VII. The commissioner shall adopt rules, pursuant to RSA 541-A, that prescribe standards
10 for follow-up care. At a minimum these rules shall require that:

11 (a) A postabortion medical visit is offered and, if requested, scheduled for 2 to 3 weeks
12 after the abortion, including a medical examination and a review of the results of all laboratory tests.

13 (b) A urine pregnancy test is obtained at the time of the follow-up visit to rule out
14 continuing pregnancy. If a continuing pregnancy is suspected, the patient shall be evaluated and a
15 physician who performs abortions shall be consulted.

16 VIII. The commissioner shall adopt rules, pursuant to RSA 541-A, to prescribe minimum
17 abortion clinic incident reporting. At a minimum these rules shall require that:

18 (a) The abortion clinic records each incident resulting in a patient's or child born alive's
19 serious injury occurring at an abortion clinic and shall report them in writing to the department
20 within 10 days after the incident. For the purposes of this paragraph, "serious injury" means an
21 injury that occurs at an abortion clinic and that creates a serious risk of substantial impairment of a
22 major body organ or function.

23 (b) If a patient's death occurs, other than the death of an unborn child properly reported
24 pursuant to law, the abortion clinic reports it to the department not later than the next department
25 work day.

26 (c) Incident reports are filed with the department and appropriate professional
27 regulatory boards.

28 126-Y:6 Confidentiality.

29 I. The department shall not release personally identifiable patient or physician information.

30 II. The rules adopted by the commissioner pursuant to RSA 126-Y:5 shall not limit the
31 ability of a physician or other health professional to advise a patient on any health issue.

32 126-Y:7 Criminal Penalties.

33 I. Whoever operates an abortion clinic without a valid license issued by the department shall
34 be guilty of a class A misdemeanor.

35 II. Any person who intentionally, knowingly, or recklessly violates this chapter or any rules
36 adopted under this chapter shall be guilty of a class A misdemeanor.

37 126-Y:8 Civil Penalties and Fines.

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1 I. Any violation of this chapter or any rules adopted under this chapter may be subject to a
2 civil penalty or fine up to \$250. Each day of violation constitutes a separate violation for purposes of
3 assessing civil penalties or fines. In deciding whether and to what extent to impose fines, the
4 department shall consider the following factors:

5 (a) Gravity of the violation, including the probability that death or serious physical harm
6 to a patient or individual will result or has resulted;

7 (b) Size of the population at risk as a consequence of the violation;

8 (c) Severity and scope of the actual or potential harm;

9 (d) Extent to which the provisions of the applicable statutes or regulations were violated;

10 (e) Any indications of good faith exercised by licensee;

11 (f) The duration, frequency, and relevance of any previous violations committed by the
12 licensee; and

13 (g) Financial benefit to the licensee of committing or continuing the violation.

14 II. The department of justice may institute a legal action to enforce collection of any civil
15 penalties or fines levied pursuant to this chapter.

16 126-Y:9 Injunctive Remedies. In addition to any other penalty provided by law, whenever in the
17 judgment of the commissioner, any person has engaged, or is about to engage, in any acts or
18 practices which constitute, or will constitute, a violation of this chapter, or any rule and regulation
19 adopted under the provision of this chapter, the commissioner shall make application to any court of
20 competent jurisdiction for an order enjoining such acts and practices, and upon a showing by the
21 commissioner that such person has engaged, or is about to engage, in any such acts or practices, an
22 injunction, restraining order, or such other order as may be appropriate shall be granted by such
23 court without bond.

24 126-Y:10 Construction. Nothing in this chapter shall be construed as creating or recognizing a
25 right to abortion. It is not the intention of this law to make lawful an abortion that is currently
26 unlawful.

27 126-Y:11 Right of Intervention. The general court, by joint resolution, may appoint one or more
28 of its members who sponsored or cosponsored this chapter in his or her official capacity, to intervene
29 as a matter of right in any case in which the constitutionality of this chapter is challenged.

30 126-Y:12 Severability. If any provision of this chapter or the application thereof to any person
31 or circumstance is held invalid, the invalidity does not affect other provisions or applications of the
32 chapter which can be given effect without the invalid provisions or applications, and to this end the
33 provisions of this chapter are severable.

34 3 Effective Date. This act shall take effect January 1, 2015.

HB 1501-FN - FISCAL NOTE

AN ACT requiring licensing of outpatient abortion facilities.

FISCAL IMPACT:

The Departments of Health and Human Services and Justice, the Judicial Branch, and the Association of Counties state this bill, **as introduced**, will increase state revenue, and state and county expenditures by an indeterminable amount in FY 2015 and each year thereafter. There will be no fiscal impact on county and local revenue, or local expenditures.

METHODOLOGY:

The Department of Health and Human Services (DHHS), states this bill would establish a new licensing category defined as a facility, other than an accredited hospital, in which five or more first trimester abortions are performed in any month or in which any number of second or third trimester abortions are performed. The Department states abortions that are not performed in a hospital are typically performed in outpatient clinics or physicians' offices. The Department indicates the Health Facility Licensing Unit currently does not license physicians' offices or outpatient clinics other than Non-emergency Walk-in Care Centers. The Department assumes, based on the definition of abortion clinic in the bill, physicians' offices would be considered abortion clinics if five or more first trimester abortions are performed in any month or any second or third trimester abortions are performed in such offices. The Department states the bill will have a fiscal impact since the licensing unit would inspect additional facilities and physicians' offices which are currently exempt from licensure. In addition, the Department would be required to develop and implement a new administrative rule for the licensure of abortion clinics. The Department does not have information on how many physicians' offices and related facilities would be subject to licensure and is not able to estimate the fiscal impact.

The Department of Justice states this bill establishes a new licensing requirement for abortion clinics, authorizes rulemaking, and creates criminal and civil penalties. The Department has identified the following potential costs:

- If the DHHS requires assistance with rulemaking, approximately 500 hours of time of an assistant attorney general in the Civil Bureau would be required;
- There would be some fiscal impact to the Department in instances when an enforcement action by the DHHS is appealed;
- The Department is authorized to enforce the collection of any civil penalties or fines;

- The bill authorizes the DHHS to seek injunctive relief in a court, however such remedies are typically sought by the Department of Justice and not state agencies;
- Although the criminal violations would typically be prosecuted by the county prosecutor, there would be some fiscal impact to the Department if an appeal is taken to the Supreme Court; and
- It is also possible that allegations of violations would generate complaints before a professional licensing board. If the Administrative Prosecutions Unit investigates and prosecutes such a complaint, the services of an assistant attorney general, an investigator and a paralegal would be required.

The Department cannot determine the fiscal impact since it has no way to determine the potential the number of cases, appeals, or complaints before a professional licensing board.

The Judicial Branch states there are four provisions of the bill that would have a fiscal impact on the Branch.

- Appeals of DHHS decisions to the Supreme Court. The Supreme Court would have discretionary review of these appeals and may accept the appeal for full appellate review, a more limited review, or decline the appeal;
- The bill provides for class A misdemeanors for operating an abortion clinic without a license and for violations of the chapter or any rules adopted pursuant to it. The Branch states the estimated cost of an average class A misdemeanor case in the district division of the circuit court will be \$66.17 in FY 2015, and \$67.64 in FY 2016 and each year thereafter. These numbers do not consider the cost of possible appeals. The Branch states the case cost estimates are based on data that is more than eight years old and does not reflect the changes to the courts over that same period of time or the impact these changes may have on the processing of these types of cases. The Branch has no information to estimate how many charges would be brought as a result of the changes contained in the bill to determine the fiscal impact on expenditures;
- Collection actions by the Department of Justice to collect fines and civil penalties; and
- Injunction actions by the Department of Justice.

The Branch does not have the information necessary to project the possible number of cases, appeals, collection actions, or injunction actions and is not able to estimate the fiscal impact.

The New Hampshire Association of Counties states, to the extent more individuals are charged, convicted, and sentenced to incarceration in a county correctional facility, the counties may have increased expenditures. The Association is unable to determine the number of individuals who might be charged, convicted or incarcerated as a result of this bill to determine an exact

fiscal impact. The average annual cost to incarcerate an individual in a county correctional facility is approximately \$35,000. There is no impact on county revenue.