

HB 595-FN - AS INTRODUCED

2015 SESSION

15-0258
01/04

HOUSE BILL **595-FN**

AN ACT relative to banning abortion after viability.

SPONSORS: Rep. Murphy, Hills 7; Rep. D. McGuire, Merr 21; Rep. Itse, Rock 10;
Rep. Tamburello, Rock 5; Rep. Souza, Hills 43; Rep. Kappler, Rock 3; Rep. Notter,
Hills 21

COMMITTEE: Judiciary

ANALYSIS

This bill establishes the viable unborn child protection act which prevents abortions beyond 21 weeks and 5 days gestation.

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Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.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 Fifteen

AN ACT relative to banning abortion after viability.

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

1 1 Statement of Findings.

2 I. Children have been born as early as 21 weeks and 5 days gestation and lived healthy,
3 fulfilling lives.

4 II. It is the purpose of the state of New Hampshire to assert a compelling state interest in
5 protecting the lives of viable unborn children.

6 2 New Chapter; Viable Unborn Child Protection Act. Amend RSA by inserting after chapter
7 132-A the following new chapter:

8 CHAPTER 132-B

9 VIABLE UNBORN CHILD PROTECTION ACT

10 132-B:1 Title. This chapter shall be known and may be cited as the Viable Unborn Child
11 Protection Act.

12 132-B:2 Definitions. In this chapter:

13 I. "Abortion" means the use or prescription of any instrument, medicine, drug, or other
14 substance or device to terminate the pregnancy of a woman known to be pregnant with an intention
15 other than to increase the probability of a live birth, or to preserve the life or health of the child after
16 live birth.

17 II. "Attempt to perform or induce an abortion" means an act, or an omission of a statutorily
18 required act, that, under the circumstances as the actor believes them to be, constitutes a substantial
19 step in a course of conduct planned to culminate in the performance or induction of an abortion in
20 this state in violation of this chapter;

21 III. "Department" means the department of health and human services.

22 IV. "Fertilization" means the fusion of a human spermatozoon with a human ovum;

23 V. "Medical emergency" means a condition which, in reasonable medical judgment, so
24 complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of
25 her pregnancy to avert her death or for which a delay will create a serious risk of substantial and
26 irreversible physical impairment of a major bodily function. No condition shall be deemed a medical
27 emergency if based on a claim or diagnosis that the woman will engage in conduct which would
28 result in her death or in substantial and irreversible physical impairment of a major bodily function;

29 VI. "Postfertilization age" means the age of the unborn child as calculated from the
30 fertilization of the human ovum;

31 VII. "Reasonable medical judgment" means a medical judgment that would be made by a

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1 reasonably prudent physician, knowledgeable about the case and the treatment possibilities with
2 respect to the medical conditions involved;

3 VIII. "Physician" means any person licensed to practice medicine or osteopathic medicine
4 under RSA 329;

5 IX. "Probable postfertilization age of the unborn child" means what, in reasonable medical
6 judgment, will with reasonable probability be the postfertilization age of the unborn child at the time
7 the abortion is planned to be performed;

8 X. "Unborn child" or "fetus" each mean an individual organism of the species homo sapiens
9 from fertilization until live birth;

10 XI. "Woman" means a female human being whether or not she has reached the age of
11 majority.

12 132-B:3 Determination of Postfertilization Age.

13 I. Except in the case of a medical emergency which prevents compliance with this section, no
14 abortion shall be performed, induced, or attempted to be performed or induced unless the physician
15 performing or inducing it has first made a determination of the probable postfertilization age of the
16 unborn child or relied upon such a determination made by another physician. In making such a
17 determination, a physician shall make such inquiries of the woman and perform or cause to be
18 performed such medical examinations and tests as a reasonably prudent physician, knowledgeable
19 about the case and the medical conditions involved, would consider necessary to perform in making
20 an accurate diagnosis with respect to postfertilization age.

21 II. Failure by any physician to conform to any requirement of this section constitutes
22 unprofessional conduct under RSA 329.

23 132-B:4 Abortion Prohibited. No person shall perform or induce or attempt to perform or induce
24 an abortion upon a woman when it has been determined, by the physician performing or inducing
25 the abortion or by another physician upon whose determination that physician relies, that the
26 probable postfertilization age of the woman's unborn child is more than 21 weeks and 5 days unless,
27 in reasonable medical judgment:

28 I. She has a condition which so complicates her medical condition as to necessitate the
29 abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible
30 physical impairment of a major bodily function; or

31 II. It is necessary to preserve the life of an unborn child. No such condition shall be deemed
32 to exist if it is based on a claim or diagnosis that the woman will engage in conduct which would
33 result in her death or in substantial and irreversible physical impairment of a major bodily function.
34 In such a case, the physician shall terminate the pregnancy in the manner which, in reasonable
35 medical judgment, provides the best opportunity for the unborn child to survive, unless, in
36 reasonable medical judgment, termination of the pregnancy in that manner would pose a greater
37 risk either of the death of the pregnant woman or of the substantial and irreversible physical

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1 impairment of a major bodily function of the woman than would another available method. No such
2 greater risk shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage
3 in conduct which would result in her death or in substantial and irreversible physical impairment of
4 a major bodily function.

5 132-B:5 Report Required.

6 I. Any physician who performs, induces, or attempts to perform or induce an abortion shall
7 report to the department only if an abortion is performed in accordance with RSA 132-B:4, I or II in
8 accordance with rules adopted pursuant to RSA 541-A as follows:

9 (a) The probable postfertilization age determined and the method and basis of the
10 determination.

11 (b) The basis of the determination that a medical emergency existed.

12 (c) The basis of the determination that the pregnant woman had a condition which so
13 complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death
14 or to avert serious risk of substantial and irreversible physical impairment of a major bodily
15 function, or the basis of the determination that it was necessary to preserve the life of an unborn
16 child.

17 (d) The method used for the abortion and whether the method of abortion used was one
18 that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive
19 or, if such a method was not used, the basis of the determination that termination of the pregnancy
20 in that manner would pose a greater risk either of the death of the pregnant woman or of the
21 substantial and irreversible physical impairment of a major bodily function of the woman than would
22 other available methods.

23 II. By June 30 of each year, the department shall issue a public report providing statistics
24 for the previous calendar year compiled from all of the reports covering that year submitted in
25 accordance with this section for each of the items listed in paragraph I. Each such report shall also
26 provide the statistics for all previous calendar years, adjusted to reflect any additional information
27 from late or corrected reports. The department shall ensure that none of the information included in
28 the public reports could reasonably lead to the identification of any pregnant woman upon whom an
29 abortion was performed.

30 III. Any physician who fails to submit a report within 30 days following the due date shall be
31 subject to a late fee of \$500 for each additional 30-day period or portion of a 30-day period the report
32 is overdue. Any physician required to report in accordance with this chapter who has not submitted
33 a report, or has submitted only an incomplete report, more than one year following the due date, may
34 be ordered by a court of competent jurisdiction to submit a complete report within a time period
35 stated by the court order or be subject to civil contempt. Failure by any physician to conform to any
36 requirement of this section, other than late filing of a report, constitutes unprofessional conduct
37 pursuant to RSA 329. Failure by any physician to submit a complete report in accordance with a

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1 court order constitutes unprofessional conduct pursuant to RSA 329. Intentional or reckless
2 falsification of any report required under this section shall be a class A misdemeanor.

3 132-B:6 Rulemaking. The commissioner of the department shall adopt rules, pursuant to
4 RSA 541-A, relative to:

5 I. A schedule of reports due under RSA 132-B:5.

6 II. Content and format of all forms required under this chapter.

7 132-B:7 Penalty. Any person who intentionally or recklessly performs or attempts to perform an
8 abortion in violation of RSA 132-B:4 of this act shall be guilty of a class B felony. No penalty shall be
9 assessed against the woman upon whom the abortion is performed or attempted to be performed.

10 132-B:8 Actions.

11 I. Any woman upon whom an abortion has been performed in violation of this chapter or the
12 father of the unborn child who was the subject of such an abortion may maintain an action against
13 the person who performed the abortion in an intentional or a reckless violation of this chapter for
14 actual damages. Any woman upon whom an abortion has been attempted in violation of this chapter
15 may maintain an action against the person who attempted to perform the abortion in an intentional
16 or a reckless violation of this chapter for actual damages.

17 II. A cause of action for injunctive relief against any person who has intentionally violated
18 this chapter may be maintained by the woman upon whom an abortion was performed or attempted
19 to be performed in violation of this chapter, any person who is the spouse, parent, sibling, or
20 guardian of, or a current or former licensed health care provider of, the woman upon whom an
21 abortion has been performed or attempted to be performed in violation of this chapter, by a county
22 attorney with appropriate jurisdiction, or by the attorney general. The injunction shall prevent the
23 abortion provider from performing further abortions in violation of this chapter in this state.

24 III. If judgment is rendered in favor of the plaintiff in an action described in this section, the
25 court shall also render judgment for reasonable attorney's fees in favor of the plaintiff against the
26 defendant.

27 IV. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's
28 suit was frivolous and brought in bad faith, the court shall also render judgment for reasonable
29 attorney's fees in favor of the defendant against the plaintiff.

30 V. No damages or attorney's fees shall be assessed against the woman upon whom an
31 abortion was performed or attempted to be performed except as provided in paragraph IV.

32 132-B:9 Public Disclosure. In every civil or criminal proceeding or action brought under this
33 chapter, the court shall determine whether the anonymity of any woman upon whom an abortion has
34 been performed or attempted shall be preserved from public disclosure if she does not give her
35 consent to such disclosure. The court, upon motion or sua sponte, shall make such a ruling and,
36 upon determining that her anonymity should be preserved, shall issue orders to the parties,
37 witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from

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1 courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure.
2 Each such order shall be accompanied by specific written findings explaining why the anonymity of
3 the woman should be preserved from public disclosure, why the order is essential to that end, how
4 the order is narrowly tailored to serve that interest, and why no reasonable, less restrictive
5 alternative exists. In the absence of written consent of the woman upon whom an abortion has been
6 performed or attempted, anyone, other than a public official, who brings an action under RSA 132-
7 B:8 shall do so under a pseudonym. This section shall not be construed to conceal the identity of the
8 plaintiff or of witnesses from the defendant or from attorneys for the defendant.

9 132-B:10 Severability. If any provision of this chapter or the application thereof to any person
10 or circumstance is held invalid, the invalidity does not affect other provisions or application of the
11 chapter which can be given effect without the invalid provisions or application, and to this end the
12 provisions of this chapter are severable.

13 3 Effective Date. This act shall take effect January 1, 2016.

HB 595-FN FISCAL NOTE

AN ACT relative to banning abortion after viability.

FISCAL IMPACT:

The Departments of Health and Human Services, Justice, and Corrections, Judicial Branch, and New Hampshire Association of Counties state this bill, **as introduced**, will increase state revenue and expenditures by an indeterminable amount in FY 2016 and each year thereafter. There will be no fiscal impact on county and local revenue or expenditures.

METHODOLOGY:

The Department of Health and Human Services states this bill requires that no person shall perform or induce or attempt to perform or induce an abortion upon a woman when it has been determined that the probable post fertilization age of the woman's unborn child is beyond 21 weeks and 5 days, unless there is a medical emergency as defined in the bill. The Department's responsibilities in the bill include:

- Receive reports from physicians on a schedule in accordance with rules adopted pursuant to RSA 541-A. Such rules shall provide the content and format of forms required and any other matter necessary to implement this chapter.
- Issue public reports by June 30th of each year providing statistics for the previous calendar year compiled from the reports received from physicians. Reports shall include statistics from previous years adjusted to reflect late or corrected reports.
- Ensure that none of the information included in the public reports could reasonably lead to the identification of any woman upon whom an abortion was performed.

The Department assumes there would be initial time spent to design the forms, create and test a Microsoft Access database, and to train personnel in accurate methods of data entry. The Department as estimates it would incur the following costs carrying out its responsibilities included in the bill:

	FY 2016*	FY 2017	FY 2018	FY 2019
Executive Secretary LG 11 (15% of time for data entry and assisting with reports)	\$2,037	\$4,226	\$4,381	\$4,560
15% of Benefits for Executive Secretary	\$1,573	\$3,176	\$3,206	\$3,242
Planning Analyst LG 24 (4% of time spent on reporting)	\$909	\$1,900	\$1,983	\$2,070

4% of Benefits	\$490	\$997	\$1,013	\$1,032
Allocated Share of Current Expense	\$55	\$110	\$110	\$110
Allocated Share of Equipment	\$193	0	0	0
Allocated Share of Office Space	\$209	\$436	\$443	\$455
Allocated Share of Analyst's Travel	\$20	\$40	\$40	\$40
Total Estimated Cost:	\$5,486	\$10,885	\$11,176	\$11,509
*FY 2016 reflects ½ year expenditures as the effective date is January 1, 2016.				

The Department of Justice states the criminal offense created by this bill would typically be prosecuted by a county attorney's office. There would be some fiscal impact to the Department in instances when an appeal is taken to the Supreme Court. The Department states a violation of the bill may also trigger a complaint before the applicable medical licensing board. The Department of Justice, Civil Bureau would provide legal counseling to board. In addition, the Administrative Prosecutions Unit would investigate and prosecute complaints filed before a licensing board for violations under the bill. The services of an assistant attorney general, an investigator and a paralegal would be needed to prosecute administrative violations. Finally, the Department states the Civil Bureau would assist the Department of Health and Human Services with its obligations in the bill. The Department cannot estimate the number of possible appeals to the Supreme Court, the number of administrative violations, or the amount of legal assistance that may be provided to Department of Health and Human Services and therefore cannot determine the fiscal impact of the bill.

The Department of Corrections states this bill establishes a new felony and will result in additional operational costs if individuals are sentenced to incarceration for violating the proposed law. The Department of Corrections states it is not able to determine the fiscal impact of this bill because it does not have sufficient detail to predict the number of individuals who would be subject to this legislation. The Department of Corrections states the average annual cost of incarcerating an individual in the general prison population for the fiscal year ending June 30, 2014 was \$35,071. The cost to supervise an individual by the Department's division of field services for the fiscal year ending June 30, 2014 was \$608.

The Judicial Branch states the proposed bill would enact RSA Chapter 132-B entitled the Viable Unborn Child Protection Act. The Branch indicates several sections of the bill would result in a potential fiscal impact to the Branch:

- RSA 132-B:3, II and 132-B:5, III provide for professional disciplinary actions against a doctor who fails to comply with the sections.
- Proposed section RSA 132-B:5, III, provides for civil contempt proceedings against a physician who fails to file the required reports for more than a year following the due

date. The same section provides for a class A misdemeanor for intentional or reckless falsification of any report required.

- RSA 132-B:7 provides that recklessly performing or attempting to perform an abortion in violation of the statute is a class B felony.
- RSA 132-B:8,I provides for damage actions regarding abortions performed or attempted in violation of the statute.
- RSA 132-B:8, II provides for injunctions against any person who has intentionally violated the statute.

The Branch states professional disciplinary actions against physicians could be appealed to the Supreme Court. The Supreme Court has discretionary review of such appeals. It is not known how many disciplinary actions may be appealed or if the appeals would be accepted for full appellate review, more limited review, or declined. Civil contempt proceeding would be classified as complex equity cases in the superior court. The Branch has no information on how many such action would be filed, but does have information on the estimated average cost. The estimated cost of an average complex equity case in superior court will be \$699 in FY 2016 and \$728 in FY 2017. The Branch does not have information on the possible number of class A misdemeanors, but indicates the estimated average cost of an average class A misdemeanor in the district division of the circuit court will be \$69 in FY 2016 and \$71 in FY 2017. With respect to the class B felonies, the Branch states the average cost of a class B felony in the superior court will be \$438 in FY 2016 and \$452 in FY 2017. The Branch states damages actions for violation of RSA 132-B:8,I would be classified as complex civil cases. The estimated average cost of a complex civil case in the superior court will be \$707 in FY 2016 and \$728 in FY 2017. Concerning injunctions against any person who has intentionally violated the statute, such cases would also be classified as complex equity cases in the superior court at an average cost of \$699 in FY 2016 and \$728 in FY 2017. The Branch states the above average cost estimates for FY 2016 and FY 2017 do not include the cost of any appeals that may be taken following trial and are based on data that is more than nine years old in most cases, and over seven years old for clerical time in the superior court, and does not reflect changes to the courts over that same period of time or the impact these changes may have on processing the various case types.

The Judicial Council and New Hampshire Association of Counties state this bill will have no fiscal impact.