

Representative Raymond P. Ward proposes the following substitute bill:

DOWN SYNDROME NONDISCRIMINATION ABORTION ACT

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Karianne Lisonbee

Senate Sponsor: Curtis S. Bramble

LONG TITLE

General Description:

This bill prohibits the abortion of an unborn child because of Down syndrome and requires the Division of Services for People with Disabilities provide services to individuals with Down syndrome who are waiting for services.

Highlighted Provisions:

This bill:

- ▶ defines "Down syndrome";
- ▶ requires the Division of Services for People with Disabilities to provide services to individuals with Down syndrome who are waiting for services;
- ▶ requires a physician to provide certain information to a pregnant woman when a prenatal screening or diagnostic test indicates that the pregnant woman's unborn child has or may have Down syndrome;
- ▶ prohibits a person from performing, inducing, or attempting to perform or induce an abortion on a pregnant woman who is seeking the abortion because an unborn child has, or may have, Down syndrome;
- ▶ requires the pathology report to provide information about whether an aborted child had or may have had Down syndrome;
- ▶ requires a physician who performed an abortion to affirm that the physician did not



26 have knowledge that the pregnant woman sought the abortion because the unborn child had or
27 may have had Down syndrome; and

28 ▶ makes technical changes.

29 **Money Appropriated in this Bill:**

30 This bill appropriates in fiscal year 2019:

31 ▶ to the Department of Human Services -- Division of Services for People with
32 Disabilities -- Community Supports Waiver as an ongoing appropriation:

33 • from the General Fund, \$1,883,600; and

34 • from Revenue Transfers, \$4,401,800.

35 **Other Special Clauses:**

36 None

37 **Utah Code Sections Affected:**

38 AMENDS:

39 **63I-1-262**, as last amended by Laws of Utah 2017, Chapter 459

40 **76-7-301**, as last amended by Laws of Utah 2010, Chapter 13

41 **76-7-302**, as last amended by Laws of Utah 2010, Chapter 13

42 **76-7-309**, as enacted by Laws of Utah 1974, Chapter 33

43 **76-7-310**, as enacted by Laws of Utah 1974, Chapter 33

44 **76-7-313**, as last amended by Laws of Utah 2010, Chapter 314

45 **76-7-317**, as enacted by Laws of Utah 1974, Chapter 33

46 ENACTS:

47 **62A-5-111**, Utah Code Annotated 1953



49 *Be it enacted by the Legislature of the state of Utah:*

50 Section 1. Section **62A-5-111** is enacted to read:

51 **62A-5-111. Services for Individuals with Down syndrome.**

52 (1) As used in this part, "Down syndrome" means a genetic condition associated with
53 an extra chromosome 21, in whole or in part, or an effective trisomy for chromosome 21.

54 (2) Notwithstanding Subsection 62A-5-102(4), the division shall provide the services
55 described in Subsection 62A-5-102(2) to all individuals who:

56 (a) are waiting for division services under Subsection 62A-5-102(4); and

57 (b) have been diagnosed with Down syndrome.

58 Section 2. Section **63I-1-262** is amended to read:

59 **63I-1-262. Repeal dates, Title 62A.**

60 (1) Section 62A-4a-213 is repealed July 1, 2019.

61 (2) Section 62A-4a-202.9 is repealed December 31, 2019.

62 (3) Section 62A-5-111 is repealed December 31, 2018.

63 [~~(3)~~] (4) Subsection 62A-15-1101(5) is repealed July 1, 2018.

64 Section 3. Section **76-7-301** is amended to read:

65 **76-7-301. Definitions.**

66 As used in this part:

67 (1) (a) "Abortion" means:

68 (i) the intentional termination or attempted termination of human pregnancy after
69 implantation of a fertilized ovum through a medical procedure carried out by a physician or
70 through a substance used under the direction of a physician;

71 (ii) the intentional killing or attempted killing of a live unborn child through a medical
72 procedure carried out by a physician or through a substance used under the direction of a
73 physician; or

74 (iii) the intentional causing or attempted causing of a miscarriage through a medical
75 procedure carried out by a physician or through a substance used under the direction of a
76 physician.

77 (b) "Abortion" does not include:

78 (i) removal of a dead unborn child;

79 (ii) removal of an ectopic pregnancy; or

80 (iii) the killing or attempted killing of an unborn child without the consent of the
81 pregnant woman, unless:

82 (A) the killing or attempted killing is done through a medical procedure carried out by
83 a physician or through a substance used under the direction of a physician; and

84 (B) the physician is unable to obtain the consent due to a medical emergency.

85 (2) "Down syndrome" means a genetic condition associated with an extra chromosome
86 21, in whole or in part, or an effective trisomy for chromosome 21.

87 [~~(5)~~] (3) "Hospital" means:

88 (a) a general hospital licensed by the Department of Health according to Title 26,
89 Chapter 21, Health Care Facility Licensing and Inspection Act; and

90 (b) a clinic or other medical facility to the extent that such clinic or other medical
91 facility is certified by the Department of Health as providing equipment and personnel
92 sufficient in quantity and quality to provide the same degree of safety to the pregnant woman
93 and the unborn child as would be provided for the particular medical procedures undertaken by
94 a general hospital licensed by the Department of Health.

95 [~~2~~] (4) "Medical emergency" means that condition which, on the basis of the
96 physician's good faith clinical judgment, so threatens the life of a pregnant woman as to
97 necessitate the immediate abortion of her pregnancy to avert her death, or for which a delay
98 will create serious risk of substantial and irreversible impairment of major bodily function.

99 [~~3~~] (5) (a) "Partial birth abortion" means an abortion in which the person performing
100 the abortion:

101 (i) deliberately and intentionally vaginally delivers a living fetus until, in the case of a
102 head first presentation, the entire fetal head is outside the body of the mother, or, in the case of
103 breech presentation, any part of the fetal trunk past the navel is outside the body of the mother,
104 for the purpose of performing an overt act that the person knows will kill the partially delivered
105 living fetus; and

106 (ii) performs the overt act, other than completion of delivery, that kills the partially
107 living fetus.

108 (b) "Partial birth abortion" does not include the dilation and evacuation procedure
109 involving dismemberment prior to removal, the suction curettage procedure, or the suction
110 aspiration procedure for abortion.

111 [~~4~~] (6) "Physician" means:

112 (a) a medical doctor licensed to practice medicine and surgery under Title 58, Chapter
113 67, Utah Medical Practice Act;

114 (b) an osteopathic physician licensed to practice osteopathic medicine under Title 58,
115 Chapter 68, Utah Osteopathic Medical Practice Act; or

116 (c) a physician employed by the federal government who has qualifications similar to a
117 person described in Subsection [~~4~~] (6)(a) or (b).

118 Section 4. Section **76-7-302** is amended to read:

119 **76-7-302. Circumstances under which abortion authorized.**

120 (1) As used in this section, "viable" means that the unborn child has reached a stage of
121 fetal development when the unborn child is potentially able to live outside the womb, as
122 determined by the attending physician to a reasonable degree of medical certainty.

123 (2) An abortion may be performed in this state only by a physician.

124 (3) An abortion may be performed in this state only under the following circumstances:

125 (a) except as provided in Subsection 76-7-310(3), the unborn child is not viable; or

126 (b) the unborn child is viable, if:

127 (i) the abortion is necessary to avert:

128 (A) the death of the woman on whom the abortion is performed; or

129 (B) a serious risk of substantial and irreversible impairment of a major bodily function
130 of the woman on whom the abortion is performed;

131 (ii) two physicians who practice maternal fetal medicine concur, in writing, in the
132 patient's medical record that the fetus has a defect that is uniformly diagnosable and uniformly
133 lethal; or

134 (iii) (A) the woman is pregnant as a result of:

135 (I) rape, as described in Section 76-5-402;

136 (II) rape of a child, as described in Section 76-5-402.1; or

137 (III) incest, as described in Subsection 76-5-406(10) or Section 76-7-102; and

138 (B) before the abortion is performed, the physician who performs the abortion:

139 (I) verifies that the incident described in Subsection (3)(b)(iii)(A) has been reported to
140 law enforcement; and

141 (II) complies with the requirements of Section 62A-4a-403.

142 Section 5. Section 76-7-309 is amended to read:

143 **76-7-309. Pathologist's report.**

144 Any human tissue removed during an abortion shall be submitted to a pathologist who
145 shall make a report, including~~[- but not limited to whether there was a pregnancy, and if~~
146 ~~possible,-]~~ whether:

147 (1) the pregnancy was aborted by evacuating the uterus~~[-];~~ and

148 (2) a medical record indicates that, through a prenatal screening or other diagnostic
149 test, the aborted fetus had or may have had Down syndrome.

150 Section 6. Section 76-7-310 is amended to read:

151 **76-7-310. Experimentation with unborn children prohibited -- Testing for genetic**
152 **defects -- Providing test results -- Prohibition of abortion due to Down syndrome.**

153 (1) Live unborn children may not be used for experimentation, but when advisable, in
154 the best medical judgment of [the] a physician, may be tested for genetic defects.

155 (2) The result of any prenatal screening or diagnostic test that indicates that an unborn
156 child has or may have Down syndrome shall be delivered to the pregnant woman:

157 (a) by a licensed prenatal health care provider at an in-person consultation or a
158 telemedicine or telephone conference;

159 (b) with contact information for a state or national Down syndrome parents' group; and

160 (c) with a referral to a physician or other specialist who is knowledgeable about
161 providing medical care to a child with Down syndrome.

162 (3) A person may not intentionally perform or attempt to perform an abortion if that
163 person has knowledge that the pregnant woman is seeking the abortion because:

164 (a) the unborn child has been diagnosed with Down syndrome; or

165 (b) the pregnant woman believes that the unborn child may have Down syndrome.

166 (4) A person who performs an abortion described in Subsection (3) is guilty of a class
167 A misdemeanor.

168 (5) A pregnant woman upon whom an abortion is performed in violation of this section
169 may not be prosecuted for violating or conspiring to violate this section.

170 Section 7. Section 76-7-313 is amended to read:

171 **76-7-313. Physician's report to Department of Health.**

172 (1) In order for the state Department of Health to maintain necessary statistical
173 information and ensure enforcement of the provisions of this part, any physician performing an
174 abortion must obtain and record in writing:

175 (a) the age, marital status, and county of residence of the woman on whom the abortion
176 was performed;

177 (b) the number of previous abortions performed on the woman described in Subsection
178 (1)(a);

179 (c) the hospital or other facility where the abortion was performed;

180 (d) the weight in grams of the unborn child aborted, if it is possible to ascertain;

181 (e) the pathological description of the unborn child;
182 (f) the given menstrual age of the unborn child;
183 (g) the measurements of the unborn child, if possible to ascertain; and
184 (h) the medical procedure used to abort the unborn child.

185 (2) Each physician who performs an abortion shall provide the following to the
186 Department of Health within 30 days after the day on which the abortion is performed:

187 (a) the information described in Subsection (1);
188 (b) a copy of the pathologist's report described in Section 76-7-309;
189 (c) an affidavit indicating whether:
190 (i) ~~[that]~~ the required consent was obtained pursuant to Sections 76-7-305, 76-7-305.5,
191 and 76-7-305.6; and
192 ~~[(ii) described in Subsection 76-7-305.6(4), if applicable, and]~~
193 (ii) at the time the physician performed the abortion, the physician had any knowledge
194 that the pregnant woman sought the abortion because the unborn child had or may have had
195 Down syndrome;
196 (d) a certificate indicating:
197 (i) whether the unborn child was or was not viable, as defined in Subsection
198 76-7-302(1), at the time of the abortion; and
199 (ii) if the unborn child was viable, as defined in Subsection 76-7-302(1), at the time of
200 the abortion, the reason for the abortion[-]; and
201 (e) the affidavit described in Subsection 76-7-305.6(4), if applicable.

202 (3) All information supplied to the Department of Health shall be confidential and
203 privileged pursuant to Title 26, Chapter 25, Confidential Information Release.

204 Section 8. Section 76-7-317 is amended to read:
205 **76-7-317. Severability clause.**
206 If any ~~[one or more]~~ provision, section, subsection, sentence, clause, phrase, or word of
207 this part or the application thereof to any person or circumstance is found to be
208 unconstitutional, the same is ~~[hereby declared to be]~~ severable and the balance of this part shall
209 remain effective notwithstanding such unconstitutionality. The Legislature hereby declares that
210 it would have passed this part, and each provision, section, subsection, sentence, clause, phrase
211 or word thereof, irrespective of the fact that any one or more provision, section, subsection,

212 sentence, clause, phrase, or word be declared unconstitutional.

213 Section 9. **Appropriation.**

214 The following sums of money are appropriated for the fiscal year beginning July 1,
 215 2018, and ending June 30, 2019. These are additions to amounts previously appropriated for
 216 fiscal year 2019. Under the terms and conditions of Title 63J, Chapter 1, Budgetary Procedures
 217 Act, the Legislature appropriates the following sums of money from the funds or accounts
 218 indicated for the use and support of the government of the state of Utah.

219 ITEM 1

220 To Department of Human Services--Division of Services for People with Disabilities

221 From General Fund \$1,883,600

222 From Revenue Transfers \$4,401,800

223 Schedule of Programs:

224 Community Supports Waiver \$6,285,400

225 Under Section [63J-1-603](#) the Legislature intends that appropriations provided under this
 226 section not lapse at the close of fiscal year 2019. The use of any nonlapsing funds is limited to
 227 the purpose described in Section [62A-5-111](#).

Legislative Review Note

The Utah Legislature's Joint Rule 4-2-402 requires legislative general counsel to place a legislative review note on legislation. The Legislative Management Committee has further directed legislative general counsel to include legal analysis in the legislative review note only if legislative general counsel determines there is a high probability that a court would declare the legislation to be unconstitutional under the Utah Constitution, the United States Constitution, or both. As explained in the legal analysis below, legislative general counsel has determined, based on applicable state and federal constitutional language and current interpretations of that language in state and federal court case law, that this legislation has a high probability of being declared unconstitutional by a court.

This bill prohibits the abortion of an unborn child if the pregnant mother's sole reason for seeking the abortion is because the unborn child has or may have Down syndrome.

The U.S. Supreme Court has recognized the competing interests of the state's desire to "protect . . . the life of the fetus that may become a child" and a mother's right "to choose to have an abortion." Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992). Analyzing these competing interests, the Court determined that "viability" is "the point at which the balance of interests tips." Id. at 861. Accordingly, "viability marks the earliest point at which the State's interest in

fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." Id. at 860. Prior to a fetus's viability, outside of the womb, "[a] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy." Id. at 879; see also Roe v. Wade, 410 U.S. 113, 163–65 (1973); Gonzales v. Carhart, 550 U.S. 124, 146 (2007); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2299, 195 L. Ed. 2d 665 (2016), as revised (June 27, 2016). Since Roe was decided in 1973 and was reaffirmed by Casey in 1992, "circuit courts have consistently held that any type of outright ban on pre-viability abortions is unconstitutional." Planned Parenthood of Indiana and Kentucky v. Commissioner, No. 1:16-cv-00763-TWP-DML, 2017 WL 4224750, at *6 (S.D. Ind. Sept. 22, 2017) (holding that prior to viability, a State cannot restrict a woman from exercising her right to choose an abortion, regardless of the reason for her choice).

The United States District Court for the Southern District of Indiana adjudicated a constitutional challenge of an Indiana statute that created a similar abortion ban to the ban proposed by this legislation. Id. at *1. That court determined that Roe and its progeny create a "categorical" right for a pregnant woman to obtain an abortion prior to the fetus's viability, regardless of whether the woman exercises that right because she does not want a baby or because she wants a baby but not a particular baby. Id. at *7. At this time, no court has held to the contrary.

Assuming a court follows and applies the United States Supreme Court holdings and reasoning from Roe and its progeny, there is a high probability that the court would find the proposed legislation unconstitutional because the legislation violates current case law establishing a woman's constitutional right to a nontherapeutic previability abortion.

Office of Legislative Research and General Counsel