

## HB0205S01 compared with HB0205

~~text~~ shows text that was in HB0205 but was deleted in HB0205S01.

Inserted text shows text that was not in HB0205 but was inserted into HB0205S01.

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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

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#### 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;

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- ▶ 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 have knowledge that the pregnant woman sought the abortion because the unborn child had or may have had Down syndrome; and
- ▶ makes technical changes.

### Money Appropriated in this Bill:

~~{None}~~ This bill appropriates in fiscal year 2019:

- ▶ to the Department of Human Services -- Division of Services for People with Disabilities -- Community Supports Waiver as an ongoing appropriation:
  - from the General Fund, \$1,883,600; and
  - from Revenue Transfers, \$4,401,800.

### Other Special Clauses:

None

### Utah Code Sections Affected:

AMENDS:

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

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

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

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

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

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

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

### ENACTS:

62A-5-111, Utah Code Annotated 1953

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

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

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

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

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

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

(b) have been diagnosed with Down syndrome.

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

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

(1) Section 62A-4a-213 is repealed July 1, 2019.

(2) Section 62A-4a-202.9 is repealed December 31, 2019.

(3) Section 62A-5-111 is repealed December 31, 2018.

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

Section ~~(1)~~3. Section **76-7-301** is amended to read:

### **76-7-301. Definitions.**

As used in this part:

(1) (a) "Abortion" means:

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

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

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

(b) "Abortion" does not include:

(i) removal of a dead unborn child;

(ii) removal of an ectopic pregnancy; or

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) a medical doctor licensed to practice medicine and surgery under Title 58, Chapter

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67, Utah Medical Practice Act;

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

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

Section ~~{2}~~4. Section **76-7-302** is amended to read:

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

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

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

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

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

(b) the unborn child is viable, if:

(i) the abortion is necessary to avert:

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

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

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

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

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

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

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

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

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

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

Section ~~{3}~~5. Section **76-7-309** is amended to read:

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

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

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

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

Section ~~{4}~~6. Section 76-7-310 is amended to read:

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

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

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

(a) by a ~~{physician}~~licensed prenatal health care provider at an in-person consultation or a ~~{scheduled}~~telemedicine or telephone conference;

(b) with contact information for a state or national Down syndrome parents' ~~{groups}~~group; and

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

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

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

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

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

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

Section ~~{5}~~7. Section 76-7-313 is amended to read:

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

(1) In order for the state Department of Health to maintain necessary statistical information and ensure enforcement of the provisions of this part, any physician performing an

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abortion must obtain and record in writing:

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

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

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

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

(e) the pathological description of the unborn child;

(f) the given menstrual age of the unborn child;

(g) the measurements of the unborn child, if possible to ascertain; and

(h) the medical procedure used to abort the unborn child.

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

(a) the information described in Subsection (1);

(b) a copy of the pathologist's report described in Section 76-7-309;

(c) an affidavit indicating whether:

(i) ~~[that]~~ the required consent was obtained pursuant to Sections 76-7-305, 76-7-305.5, and 76-7-305.6; and

~~[(ii) described in Subsection 76-7-305.6(4), if applicable; and]~~

(ii) at the time the physician performed the abortion, the physician had any knowledge that the pregnant woman sought the abortion because the unborn child had or may have had Down syndrome;

(d) a certificate indicating:

(i) whether the unborn child was or was not viable, as defined in Subsection 76-7-302(1), at the time of the abortion; and

(ii) if the unborn child was viable, as defined in Subsection 76-7-302(1), at the time of the abortion, the reason for the abortion~~[;]~~; and

(e) the affidavit described in Subsection 76-7-305.6(4), if applicable.

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

Section ~~6~~8. Section **76-7-317** is amended to read:

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### 76-7-317. Severability clause.

If any [~~one or more~~] provision, section, subsection, sentence, clause, phrase, or word of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is [~~hereby declared to be~~] severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. The Legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional.

### Section 9. Appropriation.

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

#### ITEM 1

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

From General Fund \$1,883,600

From Revenue Transfers \$4,401,800

#### Schedule of Programs:

Community Supports Waiver \$6,285,400

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

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### 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



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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~~ 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**