

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 139. ABORTION FACILITY REPORTING AND LICENSING

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §§139.1, 139.2, 139.4, 139.32, 139.53, 139.56, and 139.57 and new §139.9 and §139.40, concerning the regulation of abortion facilities.

BACKGROUND AND PURPOSE

Health and Safety Code, Chapter 245, Texas Abortion Facility Reporting and Licensing Act, requires certain abortion facilities to be licensed by the department. Health and Safety Code, Chapter 171, the Woman's Right to Know Act, details information to be given to a patient seeking an abortion. The Abortion Facility Reporting and Licensing rules in 25 Texas Administrative Code Chapter 139 implement Health and Safety Code, Chapters 171 and 245.

House Bill (HB) 2, 83rd Legislature, Second Called Session (2nd C.S.), 2013, amended Health and Safety Code, Chapter 171 by adding Health and Safety Code, §171.0031, which specifies requirements of admitting privileges of physicians who perform or induce abortions and requires specific information to be provided to the patient. Health and Safety Code, §245.011 mandates annual reporting to the department on each abortion that is performed in an abortion facility; HB 2 amended the data required to be reported. HB 2 also amended Health and Safety Code, §245.010(a), to require the minimum standards of abortion facilities to be equivalent to the minimum standards of ambulatory surgery centers in Chapter 135 of this title.

In developing these proposed rules, the department was guided by expressions of legislative intent that accompanied the enactment of HB 2, input of stakeholders, and public comments offered at the meetings of the State Health Services Advisory Council on August 28 and 29, 2013. In particular, the department was guided by the following legislative findings:

(1) substantial medical evidence recognizes that an unborn child is capable of experiencing pain by not later than 20 weeks after fertilization;

(2) the state has a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that these children are capable of feeling pain;

(3) the compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that an unborn child is capable of feeling pain is intended to be separate from and independent of the compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the other. . . .

Act of July 15, 2013, 83rd Leg., 2nd C.S., ch. ____, §1(a)(1) - (3).

The department also was guided by its understanding that the statutory changes enacted in HB 2 were intended by the Legislature to improve the safety of women who seek services from a licensed abortion facility, but particularly women who receive

surgical services at a licensed abortion facility. The department also understands that the Legislature determined that patient safety would be improved, in part, by ensuring that a patient of a licensed abortion facility is assured that (1) the physician who treats her or any patient at the facility is capable of attending to her care if she requires hospital care during or after receiving a service at the facility, and (2) the facility is prepared and qualified to meet potential complications resulting from a surgical procedure.

The department understands that the Legislature determined these objectives would principally be accomplished in three ways. First, the Legislature determined that each physician who provides care at a licensed abortion facility must maintain active admitting privileges at a hospital that is within 30 miles of the facility and provides obstetrical or gynecological services. Second, the Legislature concluded that a licensed abortion facility must be qualified to provide care that is "equivalent to" a licensed ambulatory surgical center. Third, the Legislature determined that these objectives would be better assured by submitting licensed abortion facilities to equivalent regulatory oversight.

The department relies on the Bill Analysis to HB 2 for these purposes:

--Women who choose to have an abortion should receive the same standard of care any other individual in Texas receives, regardless of the surgical procedure performed. HB 2 seeks to increase the health and safety of a woman who chooses to have an abortion by requiring a physician performing or inducing an abortion to have admitting privileges at a hospital and to provide certain information to the woman.

--In 1992, the Supreme Court ruled in *Casey v. Planned Parenthood* [sic] that states have the right to regulate abortion clinics. In 1997, Texas enforced increased regulations; however, today 38 licensed abortion facilities still operate at a second, lower standard for the most common surgical procedure in Texas performed solely on women. Six Texas abortion facilities meet the standard as ambulatory surgical facilities. In medical practice, Medicare is the national standard for insurance reimbursement. Abortion is an all cash (or limited credit card) business, so abortion facilities have not been subject to the same oversight as other surgical facilities.

HB 2 requires that the minimum standards for an abortion facility, on and after September 1, 2014, be equivalent to the minimum standards adopted under §243.010 (Minimum Standards) for ambulatory surgical centers.

Moving abortion clinics under the guidelines for ambulatory surgical centers will provide Texas women choosing abortion the highest standard of health care. Texas allows no other procedure to opt out of the accepted standard of care.

House Comm. on State Affairs, Bill Analysis, Tex. HB 2, 83rd Leg., 2nd C.S. (2013).

The department derives two principal understandings from these passages. First, the department understands that the Legislature was aware of the department's regulation of ambulatory surgical centers, including the operating standards adopted by the department in Chapter 135. Second, the department understands that the Legislature specifically determined that application of these standards would create the least burdensome set of minimum standards sufficient to improve the safety of patients at a licensed abortion facility.

HB 2 also amended Health and Safety Code, §245.010(a), to require the minimum standards of licensed abortion facilities to be "equivalent to" the minimum standards of ambulatory surgery centers. The phrase "equivalent to" is not defined by HB 2. However, in its common and ordinary meaning, the word "equivalent" is defined to mean, among other things, "equal, as in value, force, or meaning . . . having similar or identical effects" or "[b]eing essentially equal, all things considered." *The American Heritage Dictionary of the English Language*, 4th ed., (2006) at 604. Accordingly, the department believes that the Legislature intended that the minimum standards for a licensed abortion facility be at least equal to the standards applicable to a licensed ambulatory surgical center, either in content or in effect, and that any exceptions would result in a lesser standard of care for a patient of a licensed abortion facility and thus should not be granted.

SCOPE OF THE PROPOSED RULES

As noted in the Bill Analysis, the department understands that the Legislature determined that the health and safety of patients of licensed abortion facilities will be improved by "moving abortion clinics under the guidelines for ambulatory surgical centers." But rather than require all licensed abortion facilities to be licensed as ambulatory surgical centers, the Legislature instead directed the department to determine and adopt rules that ensure the minimum standards for licensed abortion facilities are "equivalent to" the minimum standards for ambulatory surgical centers.

The current minimum standards for licensed abortion facilities are codified in the following provisions of Chapter 139:

§139.4. Annual Reporting Requirements for All Abortions Performed.

§139.5. Additional Reporting Requirements for Physicians.

§139.8. Quality Assurance.

§139.41. Policy Development and Review.

§139.42. Delegation of Authority and Organizational Structure.

§139.43. Personnel Policies.

§139.44. Orientation, Training, and Demonstrated Competency.

§139.45. Personnel Records.

§139.46. Licensed Abortion Facility Staffing Requirements and Qualifications.

§139.47. Licensed Abortion Facility Administration.

§139.48. Physical and Environmental Requirements.

§139.49. Infection Control Standards.

§139.50. Disclosure Requirements.

§139.51. Patient Rights at the Facility.

§139.52. Patient Education/Information Services.

§139.53. Medical and Clinical Services.

§139.54. Health Care Services.

§139.55. Clinical Records.

§139.56. Emergency Services.

§139.57. Discharge and Follow-up Referrals.

§139.58. Reporting Requirements.

§139.59. Anesthesia Services.

§139.60. Other State and Federal Compliance Requirements.

The minimum standards for licensed ambulatory surgical centers are codified throughout Chapter 135 and address all aspects of the operation of a licensed ambulatory surgical center, including the construction, safety, and physical maintenance of the facility. The department therefore believes that the minimum standards for a licensed abortion facility that are relevant to surgical services must be equal to the standards that the department adopts for an ambulatory surgical center except in instances where the standards for an ambulatory surgical center are redundant of current requirements under Chapter 139 or in instances where Chapter 139 prescribes more stringent qualifications or safety requirements.

The department accordingly has determined that it is appropriate and necessary to examine all of the provisions of Chapter 135 to determine whether a licensed abortion facility should be required to meet an equivalent standard of Chapter 135. Where a requirement of Chapter 135 is relevant to a surgical service, the department considered it for adoption by reference into Chapter 139. By the same measure, where a provision of Chapter 135 did not pertain to either an operating, safety or qualification requirement, the equivalent provision of Chapter 135 was not adopted by reference into Chapter 139. For example, the provisions of Chapter 135 relating to fees for ambulatory surgical centers are not adopted by reference.

Similarly, some definitions or parts of definitions of terms that are codified in Chapter 135 were excluded from the proposed rules because the excluded language would have resulted either in redundancy, confusion, or the extension of exceptions that were applicable to certain licensed ambulatory surgical centers. Because the Legislature did not require licensed abortion facilities to become licensed as ambulatory surgical centers, the department does not understand the Legislature to have intended to extend these exceptions to an abortion facility licensed pursuant to Health and Safety Code, Chapter 245 or Chapter 139 unless it was previously licensed as an ambulatory surgical center under Health and Safety Code, Chapter 243 or Chapter 135 and otherwise qualified for such exceptions.

SEVERABILITY

The department also understands that the Legislature intended that the separate requirements of HB 2 remain in effect, even if one or more of the provisions, or application of those provisions, is determined to be invalid or unenforceable:

- [I]t is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other. If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone.

. . . .

- If any provision of this Act is found by any court to be unconstitutionally vague, then the applications of that provision that do

not present constitutional vagueness problems shall be severed and remain in force.

Act of July 15, 2013, 83rd Leg., 2nd C.S., ch. ____, §10(b), (d).

Accordingly, the department proposes language to ensure the severability of the requirements of these proposed rules consistent with such intent.

SECTION-BY-SECTION SUMMARY

The proposed rule changes implement HB 2 or were required to be modified because of statutory changes in HB 2.

The department recognizes that minimum standards for licensed abortion facilities are required by HB 2 to be equivalent to the minimum standards for ambulatory surgical centers as stated by Health and Safety Code, §243.010(a) for the following aspects of their operation:

- (1) the construction and design, including plumbing, heating, lighting, ventilation, and other design standards necessary to ensure the health and safety of patients;
- (2) the qualifications of the professional staff and other personnel;
- (3) the equipment essential to the health and welfare of the patients;
- (4) the sanitary and hygienic conditions within the center and its surroundings; and
- (5) a quality assurance program for patient care.

The proposed rule changes specifically address the following:

The amendment to §139.1 is proposed to clarify the purpose of the rules to include implementation of Woman's Right to Know Act, Health and Safety Code, Chapter 171.

The amendment to §139.2 omits the definition of "ambulatory surgical center" for clarification, and requires renumbering of the remaining definitions.

The amendment to §139.4 is proposed to reflect a change in data required by HB 2 to be reported annually to the department by abortion facilities.

New §139.9 is proposed to ensure the severability of the requirements of these proposed rules is consistent with the intent of the Legislature and language of HB 2.

Amendments to §139.32 are proposed to clarify the authority of the department to refuse, suspend or revoke a license for an abortion facility and adds the finding of noncompliance with Health and Safety Code, Chapter 171 as grounds for license probation, suspension or revocation.

New §139.40 is proposed to comply with HB 2, which establishes that the minimum standards for an abortion facility must be equivalent to the minimum standards of an ambulatory surgical center, by adopting by reference with certain changes for clarification the relevant rules for ambulatory surgical centers from Chapter 135. The department adopts by reference specific current ambulatory surgical center rules in order to ensure that the minimum standards governing licensed abortion facilities are equivalent to those of ambulatory surgical centers. The department finds that adopting the minimum standards for ambulatory surgical centers to licensed abortion facilities ensures compliance with HB 2 and provides the maximum guidance and consistency in the rules for regulated facilities.

25 TAC Chapter 135, Ambulatory Surgical Centers Rules.

Subchapter A. Operating Requirements for ASCs.

§135.1, Scope and Purpose, this rule was not adopted because a sufficient scope and purpose rule already exists in Chapter 139, and because HB 2 does not require the adoption of rules defining the scope and purpose of Chapter 139.

§135.2, Definitions, the following definitions were not adopted by reference.

(1) "Act," which referred to the Ambulatory Surgical Center Licensing Act, and not to the Texas Abortion Facility Licensing and Reporting Act.

(3) "administrator," is defined in more detail that requires higher qualification in §139.2(4) and §139.46(2). Furthermore, ambulatory surgical center rules that are adopted require a governing body (§135.4), and §135.6 describes in adequate detail the required administrative functions.

(4) "advance practice registered nurse," not adopted because Chapter 139 contains a definition of the same term which requires the nurse to have achieved approval by the Board of Nursing based on completion of an advanced higher education program, a standard not required in Chapter 135.

(5) "ASC," which is a term defined but not used in Chapter 139, and whose inclusion among adopted rules would have caused confusion. The definition also included portions limiting the length of patients stays within the facility that were felt to be inapplicable to licensed abortion facilities.

(8) "certified registered nurse anesthetist" is defined in exactly the same way in Chapter 139.

(9) "change of ownership" is defined the same in Chapter 139, with the exception that a requirement for the tax identification number to change in order to qualify as a change in ownership is not present in Chapter 139. This requirement does not fall within the minimum standards required by HB 2.

(11) "department" is defined in exactly the same way in Chapter 139.

(15) "licensed vocational nurse" is defined in exactly the same way in Chapter 139.

(17) "person" is defined in exactly the same way in Chapter 139.

(18) "physician" is defined in exactly the same way in Chapter 139.

(19) defines "premises" as a building where a patient receives outpatient surgical services. This was thought to be a source of potential confusion because medical abortions are not surgical procedures.

(20) "registered nurse" is defined in exactly the same way in Chapter 139.

The following definitions in §135.2 were adopted by reference because they are terms that were used or anticipated to be used in the ambulatory surgical center rules that were to be adopted, and are not terms whose meaning, without a definition, is clear to stakeholders. Thus, the following definitions are necessary for compliance with HB 2.

(2) Action plan--A written document that includes specific measures to correct identified problems or areas of concern; identifies strategies for implementing system improvements; and includes outcome measures to indicate the effectiveness of sys-

tem improvements in reducing, controlling or eliminating identified problem areas.

(6) Autologous blood units--Units of blood or blood products derived from the recipient.

(7) Available--Able to be physically present in the facility to assume responsibility for the delivery of patient care services within five minutes.

(10) Dentist--A person who is currently licensed under the laws of this state to practice dentistry.

(12) Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharge into any waters, including ground waters.

(13) Extended observation--The period of time that a patient remains in the facility following recovery from anesthesia and discharge from the postanesthesia care unit, during which additional comfort measures or observation may be provided.

(14) Health care practitioners (qualified medical personnel)--Individuals currently licensed under the laws of this state who are authorized to provide services in an ASC.

(16) Medicare-approved reference laboratory--A facility that has been certified and found eligible for Medicare reimbursement, and includes hospital laboratories which may be Joint Commission or American Osteopathic Association accredited or nonaccredited Medicare approved hospitals, and Medicare certified independent laboratories.

(21) Surgical technologist--A person who practices surgical technology as defined in Health and Safety Code, Chapter 259.

(22) Title XVIII--Title XVIII of the United States Social Security Act, 42 United States Code (USC), §§1395 et seq.

The following rules from Chapter 135, relating to ambulatory surgical centers, were adopted or not adopted for the reasons set out.

Section 135.3, Fees, was not adopted because HB 2 does not require the adoption of rules relating to licensure fees for licensed abortion facilities.

Section 135.4, Ambulatory Surgical Center (ASC) Operation, was adopted because it almost exclusively focuses on requiring a governing body for the facility and describing the functions of that body, which was thought to add more protection for the health and safety of women than the current rules for licensed abortion facilities, which require only a medical consultant and do not require a governing body.

Section 135.5, Patient Rights, was adopted because it directly affects patient care and contains rights that do not appear in a similarly titled licensed abortion facilities rule, §139.51.

Section 135.6, Administration, was adopted because it lays out the manner in which the governing body is to function by indicating some areas on which it is to focus. Chapter 139 contains no directly comparable rule.

Section 135.7, Quality of Care, was adopted as a supplement to §139.8 (Quality Assurance), the parallel rule in Chapter 139.

Section 135.8, Quality Assurance, was adopted as a supplement to §139.8 (Quality Assurance), the parallel rule in Chapter 139.

Section 135.9, Medical Records, was adopted as a supplement to §139.55 (Clinical Records), the parallel rule in Chapter 139. While §139.55 is more detailed, it does not contain, for instance, a requirement found in §135.9 that a "single person be designated to be in charge of medical records."

Section 135.10, Facilities and Environment, was adopted as a supplement to §139.48 (Physical and Environmental Requirements). For example, §135.10 contains more detailed provision concerning hazardous materials and emergency preparedness than §139.48.

Section 135.11, Anesthesia and Surgical Services, was adopted as a supplement to §139.54 and §139.59. For example, §135.11 addresses surgical services, which are not separately addressed in Chapter 139.

Section 135.11(b)(19) was not adopted because it conflicts with or at least confuses the provision of HB 2 Section 2 that requires a physician who performs an abortion to have admitting privileges at a hospital not further than 30 miles from the location where the abortion is performed or induced.

Section 135.12, Pharmaceuticals Services, was adopted because Chapter 139 has no similar provision concerning drugs except §139.60(a), which does not contain the same provisions as §135.12.

Section 135.13, Pathology and Medical Laboratory Services, was adopted because Chapter 139 has no similar provision, and pathology and medical laboratory services can improve patient health and safety. Therefore, HB 2 requires the adoption of §135.13 as a minimum standard to promote the health and safety of patients.

Section 135.14, Radiology Services, was adopted because Chapter 139 has no similar provision, and radiological services can improve patient health and safety. By adopting by reference the language of §135.14, it does not require a licensed abortion facility to provide such services except "when appropriate to meet the needs of the patients and adequately support" the facility's capabilities.

Section 135.15, Facility Staffing and Training, was adopted to supplement §139.46 (Licensed Abortion Facility Staffing Requirements and Qualifications) in order to make the rules for licensed abortion facilities "equivalent to" those of ASCs as required by HB 2.

Section 135.16, Teaching and Publication, was adopted because Chapter 139 contains no similar provision and in order to make the rules for licensed abortion facilities "equivalent to" those of ASCs as required by HB 2 in matters regarding minimum standards applicable to licensed abortion facility patients.

Section 135.17, Research Activities, was adopted because Chapter 139 contains no similar provision and in order to make the rules for licensed abortion facilities "equivalent to" those of ambulatory surgical centers as required by HB 2 in matters regarding minimum standards applicable to licensed abortion facility patients.

Section 135.18, Unlicensed Ambulatory Surgical Center, was not adopted because §139.3 has adequate provisions for dealing with unlicensed abortion facilities that are not exempted from licensure by Health and Safety Code, Chapter 245. HB 2 does not require the adoption of rules that provide standards and procedures for granting, denying, suspending, and revoking a license for licensed abortion facilities.

Section 135.19, Exemptions, was not adopted because the exemptions from licensure as an abortion facility are set forth in Health and Safety Code, §245.004. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for granting and denying a license.

Section 135.20, Initial Application and Issuance of License, was not adopted because §§139.21 - 139.25 cover application and issuance of licenses for licensed abortion facilities. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for granting or denying a license.

Section 135.21, Inspections, was not adopted because it only required inspections of licensed facilities every three years, whereas present §139.31 requires annual inspections of licensed abortion facilities. Thus, §135.21 is not directly related to minimum standards for the health and safety of patients of licensed abortion facilities, and, to the extent it may be considered to be related to those concerns, §139.31 provides greater protection by requiring more frequent (annual) inspections than the three-year minimum intervals prescribed by §135.21. Furthermore, HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for sanctioning a licensee.

Section 135.22, Renewal of License, was not adopted because §§139.21 - 139.25, especially §139.23, adequately address renewal of licenses for licensed abortion facilities. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for granting or denying a license and licensure fees.

Section 135.23, Conditions of Licensure, was not adopted because §§139.21 - 139.25 adequately address conditions of licensure for licensed abortion facilities. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for granting, denying, suspending, and revoking a license and licensure fees.

Section 135.24, Enforcement, was not adopted because §§139.31 - 139.33 adequately address enforcement issues. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for enforcement.

Section 135.25, Complaints, was not adopted because §139.31(c) adequately addresses complaints. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for handling complaints.

Section 135.26, Reporting Requirements, was adopted, because it adds additional requirements that protect the health and safety of patients, such as the obligation of the facility to report the transfer of a patient to a hospital and to report the development by a patient within 24 hours of discharge of a complication if they result in a patient's admission to a hospital. In contrast, §139.58 requires only the reporting of a woman's death from complications of an abortion.

Section 135.27, Patient Safety Program, was adopted because it requires the facilities to directly address patient safety, an issue to which no rule in Chapter 139 is entirely dedicated. For example, §135.27 requires facility management to coordinate all patient safety activities, while Chapter 139 does not.

Section 135.28, Confidentiality, was not adopted because more confidentiality is provided to abortion patients and licensed abortion facilities by existing rules in Chapter 139 than by this rule.

Section 135.29, Time Periods for Processing and Issuing a License, was not adopted because §§139.21 - 139.25 adequately address licensure of licensed abortion facilities. Both Chapters 135 and 139 provide a two-year interval for re-application and renewal of licenses. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for granting, denying, suspending, and revoking a license and licensure fees.

Subchapter B. Fire Prevention and Safety Requirements.

Section 135.41, Fire Prevention and Safety Requirements, was adopted because, except for some brief and general references in §139.48, Chapter 139 does not address fire prevention, does not require the appointment of a safety officer who is familiar with safety practices in healthcare facilities, and does not forbid the use of extension cords for permanent wiring. Section 135.41 provides for all three and has other safety requirements not found in Chapter 139.

Section 135.42, General Safety, was adopted because it contains detailed requirements for facilities concerning patient safety that do not appear in the present Chapter 139, which contains no rule exclusively devoted to patient safety. In contrast, §135.42 requires the appointment of a safety officer; requires safety policies and procedures for each department or service and that those policies and procedures be implemented and enforced; and requires an emergency communication system that operates on power independent of the facility's power source.

Section 135.43, Handling and Storage of Gases, Anesthetics, and Flammable Liquids, was adopted because it contains detailed requirements for facilities concerning handling and storage of gases, anesthetics, and flammable liquids that do not appear in the present Chapter 139, which contains no rule exclusively devoted to these matters.

Section 135.43 requires that facility premises be kept free from accumulations of combustible materials not necessary for immediate operation of the facility, a requirement not in Chapter 139. Section 135.43 also details precautions to be taken concerning flammable gases, nonflammable gases, alcohol-based hand rubs, and gasoline-powered equipment that are not found in Chapter 139.

Subchapter C. Physical Plant and Construction Requirements.

Section 135.51, Construction Requirements for an Existing Ambulatory Surgical Center, was adopted because HB 2, by citing to Health and Safety Code, §243.010, requires the adoption of rules for licensed abortion facilities that "must contain minimum standards . . . for (1) the construction and design, including plumbing, heating, lighting, ventilation, and other design standards necessary to ensure the health and safety of patients." Chapter 139 does not contain similarly detailed construction requirements.

The text of §135.51(a)(1) and a reference in (2) was not adopted by reference in order to eliminate a grandfathering provision in §135.51(a)(1) and a reference in §135.51(a)(2). Adoption of that subsection would have precluded application of the requirements in Subchapter C of Chapter 135 to existing licensed abortion facilities, in contradiction of the stated intent of HB 2.

Chapter 139 presently contains only one section that addresses "Physical and Environmental Requirements," §139.48. That section has approximately one page of general requirements, such as "A facility shall have a safe and sanitary environment, properly constructed, equipped, and maintained to protect the

health and safety of patients and staff at all times." Section 139.48 does not specify what constitutes proper construction for an existing licensed abortion facility, as does adopted §§135.51 - 135.56.

Section 135.52, Construction Requirements for a New Ambulatory Surgical Center, was adopted because HB 2 requires that the minimum standards for construction and design of licensed abortion facilities be "equivalent to" those for patients of ambulatory surgical centers.

Chapter 139 presently contains only one section that addresses "Physical and Environmental Requirements," §139.48. That section has approximately one page of general requirements, such as "A facility shall have a safe and sanitary environment, properly constructed, equipped, and maintained to protect the health and safety of patients and staff at all times." Section 139.48 does not specify what constitutes proper construction for a new licensed abortion facility, as does adopted §135.52.

Section 135.53, Elevators, Escalator, and Conveyors, was adopted because HB 2 requires that the minimum standards for construction and design of licensed abortion facilities be "equivalent to" those for patients of ambulatory surgical centers.

Chapter 139 presently contains only one section that addresses "Physical and Environmental Requirements," §139.48. That section does not contain requirements for elevators, escalators, or conveyors, as does adopted §135.53.

Section 135.54, Preparation, Submittal, Review and Approval of Plans, and Retention of Records, was adopted because HB 2 requires that the minimum standards for construction and design of licensed abortion facilities be "equivalent to" those for patients of ambulatory surgical centers. Chapter 139 does not contain requirements for preparation, submittal, review and approval of plans, and retention of records, as does adopted §135.54.

Section 135.55, Construction, Inspections, and Approval of Project, was adopted because HB 2 requires that the minimum standards for construction and design of licensed abortion facilities be "equivalent to" those for patients of ambulatory surgical centers.

Chapter 139 presently contains only one section that addresses "Physical and Environmental Requirements," §139.48. That section has approximately one page of general requirements, such as "A facility shall have a safe and sanitary environment, properly constructed, equipped, and maintained to protect the health and safety of patients and staff at all times." Chapter 139 contains no requirements for inspection and approval of construction projects, as does adopted §135.55.

Section 135.56, Construction Tables, was adopted because HB 2 requires that the minimum standards for construction and design of licensed abortion facilities be "equivalent to" those for ambulatory surgical centers. Chapter 139 does not contain tables or drawings of any kind that specify proper construction requirements, so it is not equivalent to rules for ambulatory surgical centers.

Amendments to §139.53 and §139.56 are proposed to specify the admitting privilege requirements of physicians who perform or induce abortions as required by HB 2.

Additional amendments to §139.56 and amendments to §139.57 are proposed to specify the information required by HB 2 to be given to the patient.

FISCAL NOTE

Renee Clack, Director, Health Care Quality Section, has determined that for each year of the first five years that the sections will be in effect, there will not be fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS AND ECONOMIC COSTS TO PERSONS

Ms. Clack has also determined that there may be an adverse economic impact on small businesses or micro-businesses and to persons who are required to comply with the sections as proposed. These costs may include, but are not limited to, architectural modifications such as new construction or renovation costs related to the requirement for an abortion facility to have a surgical suite, a pre-operative patient holding area, a post-operative recovery suite, and other physical plant and life safety code requirements. The cost to a licensed abortion facility or a person cannot be determined by the department due to the unique physical layouts and circumstances associated with each individual facility, and the significant number of variables that must be taken into consideration when comparing the new standards to existing abortion facilities.

It is estimated that approximately 25 currently licensed for-profit abortion facilities that are small or micro-businesses that may be affected by these requirements because they do not currently meet the standards required for ambulatory surgical centers. The cost to a small or micro-business licensed as an abortion facility or provider cannot accurately be projected by the department due to the unique physical layouts and circumstances associated with each small or micro-business licensed abortion facility, and the significant number of variables that must be taken into consideration when comparing the new standards to existing licensed abortion facilities.

Because HB 2 requires that all licensed abortion facilities meet standards equivalent to those set out in Health and Safety Code, §243.010 there are no legal alternatives to provide flexibility for small or micro-businesses for the department to consider. The express objective of the statute governing abortion facilities is to ensure that every licensed abortion facility in the state meet the same minimum health and safety standards for the protection of public health. Consequently, any variance from state law would not be consistent with the health, safety, and welfare of the state.

IMPACT ON LOCAL EMPLOYMENT

There is no anticipated impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Clack has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of adopting and enforcing these rules will be implementation of HB 2 for the purpose of enhanced protection of the health and safety of patients of licensed abortion facilities, by requiring that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards adopted under Health and Safety Code, §243.010 for ambulatory surgical centers.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure

and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Allison Hughes, Health Facilities Rules Coordinator, Health Care Quality Section, Division of Regulatory Services, Department of State Health Services, P.O. Box 149347, Mail Code 2822, Austin, Texas 78714-9347, (512) 834-6775 or by email to allison.hughes@dshs.state.tx.us. Please specify "Comments on abortion facility licensing rules" in the subject line. The department intends by this section to invite public comment on each of the standards that is incorporated by reference, as well as the amended abortion facility rules. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §§139.1, 139.2, 139.4, 139.9

STATUTORY AUTHORITY

The amendments and new rule are authorized by Health and Safety Code, Chapter 171, as amended by HB 2, concerning requirements for a physician who performs an abortion and the use of abortion-inducing drugs; by Health and Safety Code, §245.010, as amended by HB 2, concerning rules and minimum standards for the licensing and regulation of abortion facilities required to obtain a license under the chapter, clarification of the authority of the department to refuse, suspend or revoke a license for an abortion facility and add the finding of noncompliance with Health and Safety Code, Chapter 171, as grounds for license probation, suspension or revocation, and a change to the data required to be reported annually; and by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendments and new rule affect Government Code, Chapter 531; and Health and Safety Code, Chapters 171, 245 and 1001.

§139.1. Purpose and Scope.

(a) Purpose. The purpose of this chapter is to implement the Texas Abortion Facility Reporting and Licensing Act, Health and Safety Code, Chapter 245, which provides the Department of State

Health Services with the authority to establish rules governing the licensing and regulation of abortion facilities and to establish annual reporting requirements for each abortion performed. This chapter also implements the Woman's Right to Know Act, Health and Safety Code, Chapter 171.

(b) (No change.)

§139.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (7) (No change.)

~~[(8) Ambulatory surgical center--An ambulatory surgical center licensed under Health and Safety Code, Chapter 243.]~~

~~(8)~~ [(9)] Applicant--The owner of an abortion facility which is applying for a license under the Act. For the purpose of this chapter, the word "owner" includes nonprofit organization.

~~(9)~~ [(10)] Certified registered nurse anesthetist (CRNA)--A registered nurse who has current certification from the Council on Certification of Nurse Anesthetists and who is currently authorized to practice as an advanced practice registered nurse by the Texas Board of Nursing.

~~(10)~~ [(11)] Change of ownership--A sole proprietor who transfers all or part of the facility's ownership to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a facility owned by a partnership; or a corporate sale, transfer, reorganization, or merger of the corporation which owns the facility if sale, transfer, reorganization, or merger causes a change in the facility's ownership to another person or persons.

~~(11)~~ [(12)] Condition on discharge--A statement on the condition of the patient at the time of discharge.

~~(12)~~ [(13)] Critical item--All surgical instruments and objects that are introduced directly into the bloodstream or into other normally sterile areas of the body.

~~(13)~~ [(14)] Decontamination--The physical and chemical process that renders an inanimate object safe for further handling.

~~(14)~~ [(15)] Department--The Department of State Health Services.

~~(15)~~ [(16)] Director--The director of the Patient Quality Care Unit of the department or his or her designee.

~~(16)~~ [(17)] Disinfection--The destruction or removal of vegetative bacteria, fungi, and most viruses but not necessarily spores; the process does not remove all organisms but reduces them to a level that is not harmful to a person's health. There are three levels of disinfection:

(A) high-level disinfection--kills all organisms, except high levels of bacterial spores, and is effected with a chemical germicide cleared for marketing as a sterilant by the United States Food and Drug Administration;

(B) intermediate-level disinfection--kills mycobacteria, most viruses, and bacteria with a chemical germicide registered as a "tuberculocide" by the United States Environmental Protection Agency (EPA); and

(C) low-level disinfection--kills some viruses and bacteria with a chemical germicide registered as a hospital disinfectant by the EPA.

~~(17)~~ [(18)] Education and information staff--A professional or nonprofessional person who is trained to provide information

on abortion procedures, alternatives, informed consent, and family planning services.

(18) [(49)] Facility--A licensed abortion facility as defined in this section.

(19) [(20)] Fetus--An individual human organism from fertilization until birth.

(20) [(21)] Health care facility--Any type of facility or home and community support services agency licensed to provide health care in any state or is certified for Medicare (Title XVIII) or Medicaid (Title XIX) participation in any state.

(21) [(22)] Health care worker--Any person who furnishes health care services in a direct patient care situation under a license, certificate, or registration issued by the State of Texas or a person providing direct patient care in the course of a training or educational program.

(22) [(23)] Hospital--A facility that is licensed under the Texas Hospital Licensing Law, Health and Safety Code, Chapter 241, or if exempt from licensure, certified by the United States Department of Health and Human Services as in compliance with the conditions of participation for hospitals in Title XVIII, Social Security Act (42 United States Code, §§1395 et. seq.).

(23) [(24)] Immediate jeopardy to health and safety--A situation in which there is a high probability that serious harm or injury to patients could occur at any time or already has occurred and may well occur again, if patients are not protected effectively from the harm or if the threat is not removed.

(24) [(25)] Inspection--An on-site inspection by the department in which a standard-by-standard evaluation is conducted.

(25) [(26)] Licensed abortion facility--A place licensed by the department under Health and Safety Code, Chapter 245, where abortions are performed.

(26) [(27)] Licensed mental health practitioner--A person licensed in the State of Texas to provide counseling or psychotherapeutic services.

(27) [(28)] Licensed vocational nurse (LVN)--A person who is currently licensed by the Texas Board of Nursing as a licensed vocational nurse.

(28) [(29)] Licensee--A person or entity who is currently licensed as an abortion facility.

(29) [(30)] Medical abortion--The use of a medication or combination of medications to induce an abortion, with the purpose of terminating the pregnancy of a woman known to be pregnant. Medical abortion does not include forms of birth control.

(30) [(31)] Medical consultant--A physician who is designated to supervise the medical services of the facility.

(31) [(32)] Nonprofessional personnel--Personnel of the facility who are not licensed or certified under the laws of this state to provide a service and shall function under the delegated authority of a physician, registered nurse, or other licensed health professional who assumes responsibility for their performance in the licensed abortion facility.

(32) [(33)] Noncritical items--Items that come in contact with intact skin.

(33) [(34)] Notarized copy--A copy attached to a notarized affidavit which states that the attached copy(ies) are true and correct copies of the original documents.

(34) [(35)] Patient--A pregnant female on whom an abortion is performed, but shall in no event be construed to include a fetus.

(35) [(36)] Person--Any individual, firm, partnership, corporation, or association.

(36) [(37)] Physician--An individual licensed by the Texas Medical Board and authorized to practice medicine in the State of Texas.

(37) [(38)] Physician assistant--A person licensed as a physician assistant by the Texas Physician Assistant Board.

(38) [(39)] Plan of correction--A written strategy for correcting a licensing violation. The plan of correction shall be developed by the facility, and shall address the system(s) operation(s) of the facility as the system(s) operation(s) apply to the deficiency.

(39) [(40)] Post-procedure infection--An infection acquired at or during an admission to a facility; there shall be no evidence that the infection was present or incubating at the time of admission to the facility. Post-procedure infections and their complications that may occur after an abortion include, but are not limited to, endometritis and other infections of the female reproductive tract, laboratory-confirmed or clinical sepsis, septic pelvic thrombophlebitis, and disseminated intravascular coagulopathy.

(40) [(41)] Pregnant unemancipated minor certification form--The document prepared by the Department of State Health Services and used by physicians to certify the medical indications supporting the judgment for the immediate abortion of a pregnant minor.

(41) [(42)] Pre-inspection conference--A conference held with department staff and the applicant or his or her representative to review licensure standards, inspection documents, and provide consultation prior to the on-site licensure inspection.

(42) [(43)] Professional personnel--Patient care personnel of the facility currently licensed or certified under the laws of this state to use a title and provide the type of service for which they are licensed or certified.

(43) [(44)] Quality assurance--An ongoing, objective, and systematic process of monitoring, evaluating, and improving the appropriateness, and effectiveness of care.

(44) [(45)] Quality improvement--An organized, structured process that selectively identifies improvement projects to achieve improvements in products or services.

(45) [(46)] Registered nurse (RN)--A person who is currently licensed by the Texas Board of Nursing as a registered nurse.

(46) [(47)] Semicritical items--Items that come in contact with nonintact skin or mucous membranes. Semicritical items may include respiratory therapy equipment, anesthesia equipment, bronchoscopes, and thermometers.

(47) [(48)] Standards--Minimum requirements under the Act and this chapter.

(48) [(49)] Sterile field--The operative area of the body and anything that directly contacts this area.

(49) [(50)] Sterilization--The use of a physical or chemical procedure to destroy all microbial life, including bacterial endospores.

(50) [(51)] Supervision--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity that includes initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(51) [(52)] Surgical abortion--The use of instruments, aspiration, and/or suction to induce an abortion, with the purpose of terminating the pregnancy of a woman known to be pregnant.

(52) [(53)] Third trimester certification form--The document prepared by the Department of State Health Services and used by physicians to certify the medical indications supporting the judgment for the abortion of a viable fetus during the third trimester of pregnancy.

(53) [(54)] Third trimester--A gestational period of not less than 26 weeks (following last-menstrual period (LMP)).

(54) [(55)] Unemancipated minor--A minor who is unmarried and has not had the disabilities of minority removed under the Family Code, Chapter 31.

§139.4. Annual Reporting Requirements for All Abortions Performed.

(a) - (b) (No change.)

(c) The report must include:

(1) - (5) (No change.)

(6) the probable post-fertilization age of the unborn child [period of gestation] based on the best medical judgment of the attending physician at the time of the procedure;

(7) - (16) (No change.)

(d) - (h) (No change.)

§139.9. Severability.

(a) The 83rd Legislature, in enacting House Bill 2 during its Second Session (2013), confirmed its intent that the provisions and the applications of the Health and Safety Code relating to the licensure and operation of abortion facilities were intended to be separately enforceable, if any of these separate provisions or the application of those provisions was determined unconstitutional, invalid, or unenforceable.

(b) Consistent with the intent of the Legislature, the department intends, that with respect to the application of this chapter to each woman who seeks or obtains services from a facility licensed under this chapter, every provision, section, subsection, sentence, clause, phrase, or word in this chapter and each application of the provisions of this chapter remain severable from every other provision, section, subsection, sentence, clause, phrase, word, or application of this chapter.

(c) The department further intends that if the application of any provision of this chapter is determined by a court of competent jurisdiction to impose an impermissible or undue burden on any pregnant woman or group of pregnant women, the application of the chapter to those women will be severed from the remaining applications of the chapter that do not impose an undue burden, and those remaining applications of this chapter will remain in force and unaffected, consistent with the intent of the Legislature.

(d) Accordingly, to the extent that any parts or applications of this chapter or this section are enjoined, the department may enforce the parts and applications of this chapter that do not violate the Constitution or impose an undue burden on women seeking abortions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez

General Counsel

Department of State Health Services

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For further information, please call: (512) 776-6972



SUBCHAPTER C. ENFORCEMENT

25 TAC §139.32

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, Chapter 171, as amended by HB 2, concerning requirements for a physician who performs an abortion and the use of abortion-inducing drugs; by Health and Safety Code, §245.010, as amended by HB 2, concerning rules and minimum standards for the licensing and regulation of abortion facilities required to obtain a license under the chapter, clarification of the authority of the department to refuse, suspend or revoke a license for an abortion facility and add the finding of noncompliance with Health and Safety Code, Chapter 171, as grounds for license probation, suspension or revocation, and a change to the data required to be reported annually; and by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendment affects Government Code, Chapter 531; and Health and Safety Code, Chapters 171, 245 and 1001.

§139.32. License Denial, Suspension, Probation, or Revocation.

(a) - (b) (No change.)

(c) The department may deny a person a license or suspend or revoke an existing license on the grounds that the person has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the ownership or operation of a facility.

(1) - (2) (No change.)

(3) The following felonies and misdemeanors directly relate to the duties and responsibilities of the ownership or operation of a licensed abortion facility because these criminal offenses demonstrate impaired ability to own or operate a facility:

(A) a misdemeanor violation of Health and Safety Code, Chapter 171 or Chapter 245;

(B) - (G) (No change.)

(4) - (5) (No change.)

(d) - (j) (No change.)

(k) If the department finds that a licensed abortion facility is in repeated noncompliance with Health and Safety Code, Chapter 171 or Chapter 245, or rules adopted under this chapter, but the noncompliance does not in any way involve the health and safety of the public or an individual, the department may schedule the facility for probation rather than suspending or revoking the facility's license.

(l) The department may suspend or revoke the license of a licensed abortion facility that does not correct items that were in noncompliance or that does not comply with Health and Safety Code,

Chapter 171 or Chapter 245, or rules adopted under this chapter within the applicable probation period.

(m) - (r) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel

Department of State Health Services

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SUBCHAPTER D. MINIMUM STANDARDS FOR LICENSED ABORTION FACILITIES

25 TAC §§139.40, 139.53, 139.56, 139.57

STATUTORY AUTHORITY

The new rule and amendments are authorized by Health and Safety, Code Chapter 171, as amended by HB 2, concerning requirements for a physician who performs an abortion and the use of abortion-inducing drugs; by Health and Safety Code, §245.010, as amended by HB 2, concerning rules and minimum standards for the licensing and regulation of abortion facilities required to obtain a license under the chapter, clarification of the authority of the department to refuse, suspend or revoke a license for an abortion facility and add the finding of noncompliance with Health and Safety Code, Chapter 171, as grounds for license probation, suspension or revocation, and a change to the data required to be reported annually; and by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rule and amendments affect Government Code, Chapter 531; and Health and Safety Code, Chapters 171, 245 and 1001.

§139.40. Adoption by Reference of Ambulatory Surgical Centers Rules.

(a) Effective September 1, 2014, the department adopts by reference the following sections of Chapter 135 of this title (relating to Ambulatory Surgical Centers) that were in effect on January 1, 2014:

(1) Subchapter A (relating to Operating Requirements for Ambulatory Surgical Centers):

(A) The following definitions are incorporated by reference:

- (i) §135.2(2) (defining "Action plan");
- (ii) §135.2(6) (defining "Autologous blood units");
- (iii) §135.2(7) (defining "Available");
- (iv) §135.2(10) (defining "Dentist");

(v) §135.2(12) (defining "Disposal");

(vi) §135.2(13) (defining "Extended observation");

(vii) §135.2(14) (defining "Health care practitioners");

(viii) §135.2(16) (defining "Medicare");

(ix) §135.2(21) (defining "Surgical technologist");

(x) §135.2(22) (defining "Title XVIII");

(B) The following sections relating to ambulatory surgical centers operating requirements:

(i) §135.4 (relating to Ambulatory Surgical Center (ASC) Operation), except as specifically noted in subsection (d)(2) of this section;

(ii) §135.5 (relating to Patient Rights);

(iii) §135.6 (relating to Administration);

(iv) §135.7 (relating to Quality of Care);

(v) §135.8 (relating to Quality Assurance);

(vi) §135.9 (relating to Medical Records);

(vii) §135.10 (relating to Facilities and Environment);

(viii) §135.11(a) and (b)(1) - (18) (relating to Anesthesia and Surgical Services);

(ix) §135.12 (relating to Pharmaceutical Services);

(x) §135.13 (relating to Pathology and Medical Laboratory Services);

(xi) §135.14 (relating to Radiology Services);

(xii) §135.15 (relating to Facility Staffing and Training);

(xiii) §135.16 (relating to Teaching and Publication);

(xiv) §135.17 (relating to Research Activities);

(xv) §135.26 (relating to Reporting Requirements);

(xvi) §135.27 (relating to a Patient Safety Program);

(2) Subchapter B (relating to Fire Prevention and Safety Requirements):

(A) §135.41 (relating to Fire Prevention and Protection);

(B) §135.42 (relating to General Safety); and

(C) §135.43 (relating to Handling and Storage of Gases, Anesthetics, and Flammable Liquids); and

(3) Subchapter C (relating to Physical Plant and Construction Requirements):

(A) §135.51 (relating to Construction Requirements for an Existing Ambulatory Surgical Center), except as specifically noted in subsection (d)(3) of this section;

(B) §135.52 (relating to Construction Requirements for a New Ambulatory Surgical Center);

(C) §135.53 (relating to Elevators, Escalators, and Conveyors);

(D) §135.54 (relating to Preparation, Submittal, Review and Approval of Plans, and Retention of Records);

(E) §135.55 (relating to Construction, Inspections, and Approval of Project); and

(F) §135.56 (relating to Construction Tables).

(b) As required by §4 of House Bill 2, passed in the Second Session, 83rd Legislature, 2013, the department intends by this adoption of rules to impose minimum standards for the health and safety of a patient of a licensed abortion facility, and that those minimum standards be equivalent to the minimum standards adopted under Health and Safety Code, §243.010, for ambulatory surgical centers.

(c) The minimum standards adopted by reference under this section are not applicable to a licensed abortion facility before September 1, 2014.

(d) Interpretive conventions. For purposes of this chapter:

(1) The words "ambulatory surgical center" and "ASC" and their plural forms in the rules that are adopted by reference in subsection (a) of this section are understood to mean "licensed abortion facility" or "licensed abortion facilities," as appropriate, for purposes of this chapter.

(2) The text of §135.4(c)(11)(B) that reads "or all physicians performing surgery at the ASC shall have admitting privileges at a local hospital" is not adopted by reference into this chapter.

(3) The text of §135.51(a)(1) and the portion of the text of §135.51(a)(2) that reads, "In lieu of meeting the requirements in paragraph (1) of this subsection," are not adopted by reference into this chapter.

(e) If the application of any particular rule that is incorporated by reference from Chapter 135 of this title is found by a state or federal court to violate the Constitution or impose an "undue burden" on women seeking abortions, the department shall continue to enforce the remaining incorporated rules that do not violate the Constitution or impose an "undue burden" on women seeking abortions, and shall continue to enforce all rules incorporated by reference from Chapter 135 of this title against abortion facilities for whom the application of such rules does not violate the Constitution or impose an "undue burden" on women seeking abortions.

§139.53. Medical and Clinical Services.

(a) - (b) (No change.)

(c) Requirements of a physician. A physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that:

(1) is located not further than 30 miles from the location at which the abortion is performed or induced; and

(2) provides obstetrical or gynecological health care services.

§139.56. Emergency Services.

(a) A licensed abortion facility shall have a readily accessible written protocol for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital. The facility shall ensure that the physicians who practice at the facility:

(1) have active admitting privileges at a hospital that provides obstetrical or gynecological health care services and is located not further than 30 miles from the abortion facility; [or have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications.]

(2) provide the pregnant woman with:

(A) a telephone number by which the pregnant woman may reach the physician, or other health care personnel employed by the physician or the facility at which the abortion was performed or induced with access to the woman's relevant medical records, 24 hours a day to request assistance for any complications that arise from the performance or induction of the abortion or ask health-related questions regarding the abortion; and

(B) the name and telephone number of the nearest hospital to the home of the pregnant woman at which an emergency arising from the abortion would be treated.

(b) - (c) (No change.)

§139.57. Discharge and Follow-up Referrals.

(a) A licensed abortion facility shall develop and implement written discharge instructions which shall include:

(1) (No change.)

(2) a statement of the facility's plan to respond to the patient in the event the patient experiences any of the complications listed in the discharge instructions to include:

(A) a telephone number by which the patient may reach the physician, or other health care personnel employed by the physician or by the facility at which the abortion was performed or induced with access to the woman's relevant medical records, 24 hours a day to request assistance for any complications that arise from the performance or induction of the abortion or ask health-related questions regarding the abortion;

(B) the name and telephone number of the nearest hospital to the home of the patient at which an emergency arising from the abortion would be treated;

[(A) the mechanism by which the patient may contact the facility on a 24-hour basis by telephone answering machine or service, or by direct contact with an individual;]

[(B) the facility's requirement that every reasonable effort be made and documented to respond to the patient within 30 minutes of the patient's call;]

(C) - (D) (No change.)

(3) (No change.)

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa Hernandez

General Counsel

Department of State Health Services

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CHAPTER 416. MENTAL HEALTH
COMMUNITY-BASED SERVICES