

State of South Dakota

EIGHTY-SEVENTH SESSION
LEGISLATIVE ASSEMBLY, 2012

385T0712

HOUSE JUDICIARY ENGROSSED NO. **HB 1254** 2/8/2012

Introduced by: Representatives Hunt, Brunner, Cronin, Greenfield, Haggar, Hansen (Jon), Hubbel, Jensen, Kloucek, Miller, Nelson (Stace), Olson (Betty), Sly, Stricherz, Van Gerpen, and Wick and Senators Kraus, Brown, Heineman, Hunhoff (Jean), Krebs, and Schlekeway

1 FOR AN ACT ENTITLED, An Act to revise certain provisions pertaining to the decision of a
2 pregnant mother considering termination of her relationship with her child by an abortion,
3 to establish certain procedures to insure that such decisions are voluntary, uncoerced, and
4 informed, and to revise certain causes of action for professional negligence relating to
5 performance of an abortion.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

7 Section 1. That § 34-23A-53 be amended to read as follows:

8 34-23A-53. Terms as used in §§ 34-23A-53 to 34-23A-62, inclusive, mean:

9 (1) "Pregnancy help center," any entity whether it be a form of corporation, partnership,
10 or proprietorship, whether it is for profit, or nonprofit, that has as one of its principal
11 missions to provide education, counseling, and other assistance to help a pregnant
12 mother maintain her relationship with her unborn child and care for her unborn child,
13 which entity has a medical director who is licensed to practice medicine in the State



1 of South Dakota, or that it has a collaborative agreement with a physician licensed
2 in South Dakota to practice medicine to whom women can be referred, which entity
3 does not perform abortions and is not affiliated with any physician or entity that
4 performs abortions, and does not now refer pregnant mothers for abortions, and has
5 not referred any pregnant mother for abortions for the three-year period immediately
6 preceding July 1, 2011, and which are in compliance with the requirements of section
7 8 of this Act;

8 (2) ~~"Risk factor associated with abortion," any factor, including any physical,~~
9 ~~psychological, emotional, demographic, or situational factor, for which there is a~~
10 ~~statistical association with an increased risk of one or more complications associated~~
11 ~~with legal abortion, such that there is a less than five percent probability that the~~
12 ~~statistical association is due to sampling error. To be recognized as a risk factor~~
13 ~~associated with legal abortion, the statistical information must have been published~~
14 ~~in the English language, after 1972, in at least one peer-reviewed journal indexed by~~
15 ~~the search services maintained by the United States National Library of Medicine~~
16 ~~(PubMed or MEDLINE, or any replacement services subsequently established by the~~
17 ~~National Library) or in at least one peer-reviewed journal indexed by any search~~
18 ~~service maintained by the American Psychological Association (PsycINFO, or any~~
19 ~~replacement service) and the date of first publication must be not less than twelve~~
20 ~~months before the date of the initial consultation described in § 34-23A-56;~~

21 (3) ~~"Complications associated with abortion," any adverse physical, psychological, or~~
22 ~~emotional reaction, for which there is a statistical association with legal abortion,~~
23 ~~such that there is a less than five percent probability that the statistical association is~~
24 ~~due to sampling error. To be recognized as a complication associated with legal~~

1 ~~abortion, the statistical information must have been published in the English~~
2 ~~language, after 1972, in at least one peer-reviewed journal indexed by the search~~
3 ~~services maintained by the United States National Library of Medicine (PubMed or~~
4 ~~MEDLINE, or any replacement services subsequently established by the National~~
5 ~~Library) or in at least one peer-reviewed journal indexed by any search service~~
6 ~~maintained by the American Psychological Association (PsycINFO, or any~~
7 ~~replacement service) and the date of first publication must be not less than twelve~~
8 ~~months before the date of the initial consultation described in § 34-23A-56;~~

- 9 (4) ~~"Coercion," exists if the pregnant mother has a desire to carry her unborn child and~~
10 ~~give birth, but is induced, influenced, or persuaded to submit to an abortion by~~
11 ~~another person or persons against her desire. Such inducement, influence, or~~
12 ~~persuasion may be by use of, or threat of, force, or may be by pressure or intimidation~~
13 ~~effected through psychological means, particularly by a person who has a relationship~~
14 ~~with the pregnant mother that gives that person influence over the pregnant mother~~
15 ~~is induced to consent to an abortion by any other person under circumstances, or in~~
16 ~~such a manner, which deprives her from making a free decision or exercising her free~~
17 ~~will.~~

18 Section 2. That § 34-23A-56 be amended to read as follows:

19 34-23A-56. No surgical or medical abortion may be scheduled except by a licensed
20 physician and only after the physician physically and personally meets with the pregnant mother,
21 consults with her, and performs an assessment of her medical and personal circumstances. Only
22 after the physician completes the consultation and assessment complying with the provisions
23 of §§ 34-23A-53 to 34-23A-62, inclusive, may the physician schedule a surgical or medical
24 abortion, but in no instance may the physician schedule such surgical or medical abortion to take

1 place in less than seventy-two hours from the completion of such consultation and assessment
2 except in a medical emergency as set forth in § 34-23A-10.1 and subdivision 34-23A-1(5). No
3 physician may have the pregnant mother sign a consent for the abortion on the day of this initial
4 consultation. No physician may take a signed consent from the pregnant mother unless the
5 pregnant mother is in the physical presence of the physician and except on the day the abortion
6 is scheduled, and only after complying with the provisions of §§ 34-23A-53 to 34-23A-62,
7 inclusive, as they pertain to the initial consultation, and only after complying with the provisions
8 of subdivisions 34-23A-10.1(1) and (2). During the initial consultation between the physician
9 and the pregnant mother, prior to scheduling a surgical or medical abortion, the physician shall:

10 (1) Do an assessment of the pregnant mother's circumstances to make a reasonable
11 determination whether the pregnant mother's decision to submit to an abortion is the
12 result of any coercion, ~~subtle or otherwise~~ or pressure from other persons. In
13 conducting that assessment, the physician shall obtain from the pregnant mother the
14 age or approximate age of the father of the unborn child, and the physician shall
15 ~~determine~~ consider whether any disparity in ~~the~~ age between the mother and father
16 is a factor ~~in creating an~~ when determining whether the pregnant mother has been
17 subjected to pressure, undue influence, or coercion;

18 (2) Provide the written disclosure required by subdivision 34-23A-10.1(1) and discuss
19 them with her to determine that she understands them;

20 (3) Provide the pregnant mother with the names, addresses, and telephone numbers of
21 all pregnancy help centers that are registered with the South Dakota Department of
22 Health pursuant to §§ 34-23A-53 to 34-23A-62, inclusive, and provide her with
23 written instructions that set forth the following:

24 (a) That prior to the day of any scheduled abortion the pregnant mother must have

1 a consultation at a pregnancy help center at which the pregnancy help center
2 shall inform her about what education, counseling, and other assistance is
3 available to help the pregnant mother keep and care for her child, and have a
4 private interview to discuss her circumstances that may subject her decision
5 to coercion;

6 (b) That prior to signing a consent to an abortion, the physician shall first obtain
7 from the pregnant mother, a written statement that she obtained a consultation
8 with a pregnancy help center, which sets forth the name and address of the
9 pregnancy help center, the date and time of the consultation, and the name of
10 the counselor at the pregnancy help center with whom she consulted;

11 (4) Conduct an assessment of the pregnant mother's health and circumstances to
12 determine if any of the following preexisting risk factors associated with ~~abortion~~
13 adverse psychological outcomes following an abortion are present in her case;
14 completing a form which for each factor reports whether the factor is present or not;

15 (a) Coercion;

16 (b) Pressure from others to have an abortion;

17 (c) The pregnant mother views an abortion to be in conflict with her personal or
18 religious values;

19 (d) The pregnant mother is ambivalent about her decision to have an abortion, or
20 finds the decision of whether to have an abortion difficult and she has a high
21 degree of decisional distress;

22 (e) That the pregnant mother has a commitment to the pregnancy or prefers to
23 carry the child to term;

24 (f) The pregnant mother has a medical history that includes a pre-abortion mental

1 health or psychiatric problem; and

2 (g) The pregnant mother is twenty-two years old or younger.

3 The physician making the assessment shall record in the pregnant mother's medical
4 records, on a form created for such purpose, each of the risk factors associated with
5 adverse psychological outcomes following an abortion listed in this subdivision that
6 are present in her case and which are not present in her case;

7 (5) ~~Discuss with the pregnant mother the results of the assessment for risk factors,~~
8 ~~reviewing with her the form and its reports with regard to each factor listed~~ The
9 physician shall identify for the pregnant mother and explain each of the risk factors
10 associated with adverse psychological outcomes following an abortion listed in
11 subdivision (4) which are present in her case;

12 (6) ~~In the event that any risk factor is determined to be present, discuss with the pregnant~~
13 ~~mother, in such manner and detail as is appropriate so that the physician can certify~~
14 ~~that the physician has made a reasonable determination that the mother understands~~
15 ~~the information, all material information about any complications associated with the~~
16 ~~risk factor, and to the extent available all information about the rate at which those~~
17 ~~complications occurs both in the general population and in the population of persons~~
18 ~~with the risk factor~~ The physician shall advise the pregnant mother of each risk factor
19 associated with adverse psychological outcomes following an abortion listed in
20 subdivision 34-23A-56(4) which the physician determines are present in her case and
21 shall discuss with the pregnant mother, in such a manner and detail as is appropriate,
22 so that the physician can certify that the physician has made a reasonable
23 determination that the pregnant mother understands the information imparted, all
24 material information about the risk of adverse psychological outcomes known to be

1 associated with each of the risk factors found to be present;

2 (7) In the event that no risk factor is determined to be present, the physician shall include
3 in the patient's records a statement that the physician has discussed the information
4 required by the other parts of this section and that the physician has made a
5 reasonable determination that the mother understands the information in question;

6 (8) Records of the assessments, forms, disclosures, and instructions performed and given
7 pursuant to this section shall be prepared by the physician and maintained as a
8 permanent part of the pregnant mother's medical records.

9 Section 3. That § 34-23A-57 be amended to read as follows:

10 34-23A-57. On the day on which the abortion is scheduled, no physician may take a consent
11 for an abortion nor may the physician perform an abortion, unless ~~the physician has fully~~
12 ~~complied with~~ the provisions of §§ 34-23A-53 to 34-23A-62, inclusive, have been met, and the
13 physician first obtains from the pregnant mother, a written, signed statement setting forth all
14 information required by subsection 34-23A-56(3)(b). The written statement signed by the
15 pregnant mother shall be maintained as a permanent part of the pregnant mother's medical
16 records. Only the physician who meets with and consults with the pregnant mother pursuant to
17 § 34-23A-56 can take her consent and perform her abortion unless serious unforeseen
18 circumstances prevent that physician from taking the consent and performing the abortion.

19 Section 4. That chapter 34-23A be amended by adding thereto a NEW SECTION to read
20 as follows:

21 On or before January 2, 2013, each pregnancy help center which has been placed on the
22 registry of pregnancy help centers maintained by the Department of Health before January 1,
23 2012, as a condition to remain on the state registry of pregnancy help centers, shall submit a
24 supplemental affidavit that certifies that:

1 (1) It has available either on staff, or pursuant to a collaborative agreement, a licensed
2 counselor, or licensed psychologist, or licensed certified social worker, or licensed
3 nurse, or licensed marriage and family therapist, or physician, to provide the
4 counseling related to the assessment for coercion and the associated imparting of
5 information described in §§ 34-23A-53 to 34-23A-62, inclusive; and

6 (2) It shall strictly adhere to the confidentiality requirements set forth in §§ 34-23A-53
7 to 34-23A-62, inclusive.

8 Section 5. That chapter 34-23A be amended by adding thereto a NEW SECTION to read
9 as follows:

10 Any pregnancy help center which has been placed on the registry of pregnancy help centers
11 maintained by the Department of Health before January 1, 2012, shall remain on the registry of
12 the Department of Health and is eligible to provide the counseling and interviews described in
13 §§ 34-23A-53 to 34-23A-62 for pregnancy help centers until January 1, 2013. Thereafter, each
14 pregnancy help center shall remain on the state registry of the Department of Health and
15 maintain its eligibility to provide the counseling and interviews by submitting to the Department
16 of Health the supplemental affidavit provided for in section 4 of this Act.

17 Section 6. That chapter 34-23A be amended by adding thereto a NEW SECTION to read
18 as follows:

19 Any pregnancy help center which has not been placed on the registry of pregnancy help
20 centers maintained by the Department of Health before January 1, 2012, which submits a written
21 request or application to be listed on the state registry of pregnancy help centers, in order to be
22 included on the registry, shall submit to the Department of Health an affidavit that certifies all
23 of the information required by § 34-23A-58 as well as the information required by section 4 of
24 this Act.

1 Section 7. That § 34-23A-59 be amended to read as follows:

2 34-23A-59. A pregnancy help center ~~consulted by a pregnant mother considering consenting~~
3 ~~to an abortion, as a result of the provisions of §§ 34-23A-53 to 34-23A-62, inclusive,~~
4 consultation required by this Act shall be implemented as follows:

5 (1) The pregnancy help center shall be permitted to interview the pregnant mother to
6 determine whether the pregnant mother has been subject to any coercion to have an
7 abortion, or is being pressured into having an abortion, and shall be permitted to
8 inform the pregnant mother in writing or orally, or both, what counseling, education,
9 and assistance that is available to the pregnant mother to help her maintain her
10 relationship with her unborn child and help her care for the child both through the
11 pregnancy help center or any other organization, faith-based program, or
12 governmental program. The pregnancy help center may, if it deems it appropriate,
13 discuss matters pertaining to adoption;

14 (2) During the consultation interviews provided for by §§ 34-23A-53 to 34-23A-62,
15 inclusive, ~~the~~ no pregnancy help centers, their agents and employees center, its agents
16 or employees, may ~~not~~ discuss with ~~the~~ any pregnant mothers mother religion or
17 religious beliefs, either of the mother or the counselor, unless the pregnant mother
18 consents in writing. ~~The pregnancy help center may, if it deems it appropriate,~~
19 ~~discuss matters pertaining to adoption.;~~

20 (3) The pregnancy help center is under no obligation to communicate with the abortion
21 provider in any way, and is under no obligation to submit any written or other form
22 of confirmation that the pregnant mother consulted with the pregnancy help center.
23 The pregnancy help center may voluntarily provide a written statement of assessment
24 to the abortion provider, whose name the woman shall give to the pregnancy help

1 center, if the pregnancy help center obtains information that indicates that the
2 pregnant mother has been subjected to coercion or that her decision to consider an
3 abortion is otherwise not voluntary or not informed. The physician shall make the
4 physician's own independent determination whether or not a pregnant mother's
5 consent to have an abortion is voluntary, uncoerced, and informed before having the
6 pregnant mother sign a consent to an abortion. The physician shall review and
7 consider any information provided by the pregnancy help center as one source of
8 information, which in no way binds the physician, who shall make an independent
9 determination consistent with the provisions of §§ 34-23A-53 to 34-23A-62,
10 inclusive, the common law requirements, and accepted medical standards;

11 (4) Any written statement or summary of assessment prepared by the pregnancy help
12 center as a result of counseling of a pregnant mother as a result of the procedures
13 created by §§ 34-23A-53 to 34-23A-62, inclusive, may be forwarded by the
14 pregnancy help center, in its discretion, to the abortion physician. If forwarded to the
15 physician, the written statement or summary of assessment shall be maintained as a
16 permanent part of the pregnant mother's medical records. Other than forwarding such
17 documents to the abortion physician, no information obtained by the pregnancy help
18 center from the pregnant mother may be released, without the written signed consent
19 of the pregnant mother or unless the release is in accordance with federal, state, or
20 local law.

21 Nothing in §§ 34-23A-53 to 34-23A-62, inclusive, may be construed to impose any duties
22 or liability upon a pregnancy help center.

23 Section 8. That chapter 34-23A be amended by adding thereto a NEW SECTION to read
24 as follows:

1 Any pregnancy help center listed on the Department of Health registry of pregnancy help
2 centers prior to January 1, 2012, shall, beginning on January 1, 2013, have available either on
3 staff or pursuant to a collaborative agreement, a licensed counselor, or licensed psychologist,
4 or licensed nurse, or licensed marriage and family therapist, or a licensed physician to meet
5 privately with the pregnant mother to provide the counseling and meeting required by this Act.

6 Any pregnancy help center placed on the state registry on or after January 1, 2012, shall have
7 one or more such licensed professionals available on staff or pursuant to collaborative
8 agreement for such purposes beginning on January 1, 2012.

9 Section 9. That chapter 34-23A be amended by adding thereto a NEW SECTION to read
10 as follows:

11 Any person who knowingly and intentionally releases any information obtained during any
12 consultations resulting from this Act, under circumstances not in accord with the confidentiality
13 provisions required by this Act, is guilty of a Class 2 misdemeanor. Such a conviction of a Class
14 2 misdemeanor shall be reported to any agency or board responsible for licensing or certifying
15 the persons who conducted the counseling required by this Act.

16 Section 10. That § 34-23A-61 be amended to read as follows:

17 34-23A-61. In any civil action presenting a claim arising from a failure to comply with any
18 of the provisions of this chapter, the following shall apply:

19 (1) The failure to comply with the requirements of this chapter relative to obtaining
20 consent for the abortion shall create a rebuttable presumption that if the pregnant
21 mother had been informed or assessed in accordance with the requirements of this
22 chapter, she would have decided not to undergo the abortion;

23 (2) If the trier of fact determines that the abortion was the result of coercion, and it is
24 determined that if the physician acted prudently, the physician would have learned

1 of the coercion, there is a nonrebuttable presumption that the mother would not have
2 consented to the abortion if the physician had complied with the provisions of §§ 34-
3 23A-53 to 34-23A-62, inclusive;

4 (3) If evidence is presented by a defendant to rebut the presumption set forth in
5 subdivision (1), then the finder of fact shall determine whether this particular mother,
6 if she had been given all of the information a reasonably prudent patient in her
7 circumstance would consider significant, as well as all information required by
8 §§ 34-23A-53 to 34-23A-62, inclusive, to be disclosed, would have consented to the
9 abortion or declined to consent to the abortion based upon her personal background
10 and personality, her physical and psychological condition, and her personal
11 philosophical, religious, ethical, and moral beliefs;

12 (4) The pregnant mother has a right to rely upon the abortion doctor as her source of
13 information, and has no duty to seek any other source of information, other than from
14 a pregnancy help center as referenced in §§ 34-23A-56 and 34-23A-57, prior to
15 signing a consent to an abortion;

16 (5) No patient or other person responsible for making decisions relative to the patient's
17 care may waive the requirements of this chapter, and any verbal or written waiver of
18 liability for malpractice or professional negligence arising from any failure to comply
19 with the requirements of this chapter is void and unenforceable.