



Health & Human Services Committee

**Tuesday, October 22, 2019
1:00 PM – 3:00 PM
Morris Hall (17 HOB)**

Meeting Packet

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Health & Human Services Committee

Start Date and Time: Tuesday, October 22, 2019 01:00 pm
End Date and Time: Tuesday, October 22, 2019 03:00 pm
Location: Morris Hall (17 HOB)
Duration: 2.00 hrs

Consideration of the following bill(s):

HB 265 Abortion by Grall
HB 267 Pub. Rec./Abortion by Grall

Pursuant to rule 7.11, the deadline for amendments to bills on the agenda by non-appointed members shall be 6:00 p.m., Monday, October 21, 2019.

By request of the Chair, all committee members are asked to have amendments to bills on the agenda submitted to staff by 6:00 p.m., Monday, October 21, 2019.

NOTICE FINALIZED on 10/15/2019 4:06PM by Dewees.Cheryl

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 265 Abortion
SPONSOR(S): Grall
TIED BILLS: HB 267 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Committee		McElroy	Calamas

SUMMARY ANALYSIS

The Parental Notice of Abortion Act (Act) requires a physician to notify a parent or legal guardian prior to performing or inducing an abortion. The notification must occur 48 hours before the abortion if actual notice is provided or 72 hours for constructive notice. The Act provides exemptions from the notification requirement for medical emergencies, parental waiver, when the disability of nonage has been removed, when the minor is a parent and when the minor has been granted a judicial waiver. The Act requires the court to have a record of the judicial waiver hearing and to appoint counsel for the minor. The Act was challenged and upheld in *Womancare of Orlando, Inc. v. Agwunobi*, 448 F.Supp.2d 1293 (N.D.Fla. 2005).

HB 265 adds a parental consent requirement to the current parental notification statute. The bill prohibits, with limited exceptions, a physician from performing an abortion on a minor unless the physician receives notarized, written parental consent or an order from a court waiving the parental consent requirement.

The bill exempts a minor from the parental consent requirement if the minor is exempt from the parental notification requirement. This includes exemptions for when the disability of nonage has been removed, medical emergencies, parental waiver and when the minor is a parent. The bill also provides an exemption for medical emergencies for circumstances where the minor has notified her parent or legal guardian but has not obtained parental consent.

The bill expands the Act's current judicial waiver provision for parental notification to include waiver of parental consent. The bill adds a requirement that the court must appoint counsel for the minor at least 24 hours prior to the judicial waiver hearing.

Current law requires any health care practitioner present when an infant is born alive during an attempted abortion to preserve the health and life of the infant with care appropriate for the gestational age of the infant. The infant must also be immediately transported and admitted to a hospital. A health care practitioner or any employee of a hospital, a physician's office, or an abortion clinic who has knowledge of a violation of these requirements must report the violation to the Department of Health. The bill increases the penalty for violating these requirements from a first degree misdemeanor to a third degree felony, punishable by up to five years in prison and a \$5,000 fine.

The bill includes a severability clause.

The bill may have an insignificant, negative fiscal impact on the Department of Health and the Agency for Health Care Administration, which current resources are adequate to absorb.

The bill has no fiscal impact on local governments.

The bill provides an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Federal Law on Abortion

In 1973, the foundation of modern abortion jurisprudence, *Roe v. Wade*¹, was decided by the U.S. Supreme Court. Using strict scrutiny, the Court determined that a woman's right to an abortion is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Further, the Court reasoned that state regulation limiting the exercise of this right must be justified by a compelling state interest, and must be narrowly drawn.² In 1992, the fundamental holding of *Roe* was upheld by the U.S. Supreme Court in *Planned Parenthood v. Casey*.³

Undue Burden

In *Planned Parenthood v. Casey*, the U.S. Supreme Court (Supreme Court) established the undue burden standard for determining whether a law places an impermissible obstacle to a woman's right to an abortion. The Court held that health regulations which impose undue burdens on the right to abortion are invalid.⁴ State regulation imposes an "undue burden" on a woman's decision to have an abortion if it has the purpose or effect of placing a substantial obstacle in the path of the woman who seeks the abortion of a nonviable fetus.⁵ However, the court opined, not every law which makes the right to an abortion more difficult to exercise is an infringement of that right.⁶

Parental Notification and Consent

The Supreme Court has consistently recognized the important role parents have in counseling their minor children considering abortion. In review of a parental consent statute the Supreme Court said:⁷

There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

The Supreme Court further explained:

The tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth

¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² *Id.*

³ *Casey*, 505 U.S. 833 (1992).

⁴ *Id.* at 878.

⁵ *Id.* at 877.

⁶ *Id.* at 873.

⁷ *Bellotti v. Baird*, 443 U.S. 622, 640-41 (1979) (Quoting Justice Stewart concurring in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 at 91(1976)).

and maturity that make eventual participation in a free society meaningful and rewarding.

To this end the Supreme Court has held that states can impose more restrictions on the right of minors to obtain abortions than they can impose on the rights of adults based upon:⁸

- The peculiar vulnerability of children;
- Children's inability to make critical decisions in an informed, mature manner; and,
- The importance of the parental role in child rearing.

Parental rights in this area are not unfettered. The Supreme Court has held that parents may not exercise "an absolute, and possibly arbitrary, veto" over a minor's decision to terminate her pregnancy.⁹ Parental consent statutes must contain a judicial bypass procedure to prevent a parent or legal guardian from having an absolute veto power over a minor's abortion decision.¹⁰ In *Bellotti v. Baird*, the Supreme Court struck down a statute requiring a minor to obtain the consent of both parents before having an abortion, subject to a judicial bypass provision, because the statute's judicial bypass provision was too restrictive.¹¹ The Supreme Court explained that in order to be constitutional, a parental consent statute must contain a bypass provision that:¹²

- Allows the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently;
- Allows the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests;
- Ensures the minor's anonymity; and
- Provides for expeditious bypass procedures.

Since the *Bellotti* opinion, the Supreme Court has reviewed parental notification statutes on four occasions.¹³ In its review of parental notification statutes the Supreme Court has specifically declined to decide whether the judicial bypass procedures of parental consent statutes must be present in parental notification statutes.¹⁴ Instead the Supreme Court has upheld such statutes reasoning that a parental notification statute that includes a judicial bypass provision sufficient to satisfy a parental consent statute, must necessarily be sufficient for a parental notification statute since mere notification does not afford anyone a veto power over a minor's abortion decision.¹⁵

Florida Abortion Law

Right to Abortion

The Florida Constitution, as interpreted by Florida courts, affords greater privacy rights than those provided by the U.S. Constitution. While the federal Constitution traditionally shields enumerated and implied individual liberties from state or federal intrusion, the U.S. Supreme Court has noted that state constitutions may provide greater protections.¹⁶ Unlike the U.S. Constitution, Article I, s. 23 of the Florida Constitution contains an express right to privacy:

⁸ *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

⁹ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74-75 (1976).

¹⁰ *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510-511 (1990);

¹¹ *Bellotti v. Baird*, 443 U.S. 622 (1979).

¹² *Id.* at 643-44.

¹³ *H.L. v. Matheson*, 450 U.S. 398, 407 (1981); *Lambert v. Wicklund*, 520 U.S. 292 (1997); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); and *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

¹⁴ *Akron*, *supra* at 510; *Wicklund*, *supra* at 295.

¹⁵ *Id.*

¹⁶ *Pruneyard Shopping Center v. Robins*, 100 S.Ct. 2035, 2040 (1980), cited in *In re T.W.*, 551 So.2d 1186, 1191 (Fla. 1989).

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

The Florida Supreme Court opined in *In re T.W.* that this section provides greater privacy rights than those implied by the U.S. Constitution.¹⁷

The Florida Supreme Court has recognized Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."¹⁸ In *In re T.W.*, the Florida Supreme Court ruled that:¹⁹

[P]rior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests.... Under our Florida Constitution, the state's interest becomes compelling upon viability.... Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical procedures.

The court recognized that after viability, the state can regulate abortion in the interest of the unborn child if the mother's health is not in jeopardy.²⁰

Parental Consent

In 1988, the Legislature passed a parental consent statute which established the requirements for a minor to obtain an abortion.²¹ The law prohibited an unmarried woman under the age of 18 from obtaining an abortion unless she had parental consent or judicial waiver of the consent requirement.²² The statute did not provide any exemptions from this requirement apart from judicial waiver.

A court could grant a waiver based upon a showing:²³

- That the minor is sufficiently mature to give informed consent;
- That it is in the minor's best interest, even if the minor isn't sufficiently mature to give informed consent.
- That a parent unreasonably withheld consent;
- The minor's fear of physical or emotional abuse if her parent were requested to consent; or
- Any good cause shown.

A court was required to enter its order within 48 hours of the minor filing her petition and could enter its order *ex parte*.²⁴ A record of the judicial waiver hearing was not required nor was a court required to appoint counsel to an indigent minor.

In 1989, the parental consent statute was held unconstitutional by the Florida Supreme Court.²⁵ The state must prove the statute furthers a compelling state interest through the least intrusive means when

¹⁷ Id. at 1191-1192.

¹⁸ Id. at 1192.

¹⁹ Id. at 1193.

²⁰ Id. at 1194.

²¹ Section 390.001(4), F.S. (1988).

²² Id.

²³ Id.

²⁴ Id.

privacy rights are at issue.²⁶ The Florida Supreme Court found that a compelling state interest was not present because parental consent is not required when a minor seeks medical treatment related to her pregnancy or for her child and when a minor places her child up for adoption.²⁷

The Florida Supreme Court also found that the 1989 parental consent statute was not the least intrusive means to accomplish the state's interest based upon deficiencies in the judicial waiver provision and failure to provide an exception for medical emergencies. The judicial waiver provision did not require the court to appoint counsel for indigent minor. The Florida Supreme Court found that appointment of counsel was required in matters where a minor's fundamental privacy right can be deprived.²⁸ The provision also did not require a record of the judicial waiver hearing. The Florida Supreme Court found that without a record appellate review is meaningless, stating "Without a record, the appellate court will be unable to determine whether the denial was lawful or was simply based on the trial judge's moral, religious, or political beliefs".²⁹

Parental Notice

In 1999, the Legislature passed the "Parental Notice of Abortion Act." The act required a physician performing or inducing an abortion on a minor to provide the minor's parent or legal guardian at least 48 hours notice.³⁰ The act provided for limited exceptions, the most substantial of which were in the case of a medical emergency and when the notice requirement was waived by a judge.³¹ The act was enjoined before it was ever enforced and was subsequently held unconstitutional by the Florida Supreme Court.³² The Florida Supreme Court relied exclusively on the express right to privacy provision found in the Florida Constitution to invalidate the act.³³

In 2004, Florida voters approved an amendment to the Florida Constitution to authorize the Legislature to create a parental notification statute notwithstanding the express right to privacy constitutional provision. Article X, Section 22, FL. Const. provides:

Parental notice of termination of a minor's pregnancy.--The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

In 2005, the Legislature passed a revised version of the parental notification statute to implement the new constitutional amendment. The 2005 Parental Notification Act (Act) was challenged and upheld based in part on the fact that it satisfied the *Belotti* requirements.³⁴

The Act requires, with limited exceptions, a physician to notify the parent or legal guardian before performing an abortion on a minor.³⁵ The notification must occur 48 hours before the abortion if actual

²⁵ *In re T.W.*, 551 So.2d 1186, 1191 (Fla. 1989).

²⁶ *Id.* citing (*Winfield v. Division of Pari-Mutual Wagering*, 477 So.2d 544 (Fla. 1985)).

²⁷ *In Re T.W.*, 551 So.2d 1186 (Fla. 1989).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Section 390.01115(3)(a), F.S. (1999).

³¹ Section 390.01115(3)(b), F.S. (1999).

³² *North Florida Women's Health and Counseling Services v. State*, 866 So.2d 612 (Fla. 2003).

³³ *Id.* at 640.

³⁴ *Womancare of Orlando, Inc. v. Agwunobi*, 448 F.Supp.2d 1293 (N.D.Fla. 2005).

³⁵ Section 390.01114(3), F.S. The Act was amended in 2011 adding various requirements related to notice, medical emergencies and judicial waiver of parental consent (2011-227, L.O.F.).

notice³⁶ is provided or 72 hours if constructive notice³⁷ is provided. If actual notice is provided by telephone, it must be followed up with written confirmation by the physician and mailed to the last known address of the parent or legal guardian. Parental notification is not required in limited circumstances.³⁸

- **Medical Emergency** - In the physician's good-faith clinical judgment, a medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirement.³⁹
- **Parental Waiver** - The waiver must be notarized, contain a specific waiver of the right of the parent or legal guardian to notice of the minor's termination of pregnancy and be dated no more than 30 days before the abortion;
- **Disability of Nonage Removed** - The minor is or has been married or has had the disability of nonage removed;
- **Minor is a Parent** - The minor has a minor dependent child; or
- **Judicial Waiver** - The minor has successfully petitioned a circuit court for a waiver of the notice requirement.

Minors may petition the court for judicial waiver of the parental notice requirements under the Act. A court is required to notify the minor that she has a right to court-appointed counsel upon request and at no cost.⁴⁰ A court has 3 business days to issue a ruling on a judicial waiver petition.⁴¹ If a court does not rule within 3 business days, the minor may immediately petition the chief judge of the circuit who must ensure that a hearing is held within 48 hours of receipt of the minor's petition to the chief judge.⁴² The chief judge then must also ensure that an order is entered within 24 hours of the hearing.⁴³

A court may grant a waiver of parental notice requirements if the court finds:⁴⁴

- By clear and convincing evidence,⁴⁵ that the minor is sufficiently mature to decide whether to terminate her pregnancy;
- By clear and convincing evidence, that the notification of a parent or guardian is not in the best interest of the petitioner; or
- By a preponderance of the evidence,⁴⁶ that there is evidence of child abuse or sexual abuse of the petitioner by one or both of her parents or her guardian.

³⁶Actual notice is notice that is given directly, in person or by telephone, to a parent or legal guardian of a minor, by a physician, at least 48 hours before the inducement or performance of a termination of pregnancy, and documented in the minor's files. Section 390.01114(2)(a), F.S.

³⁷ Constructive notice is notice that is given in writing, signed by the physician, and mailed at least 72 hours before the inducement or performance of the termination of pregnancy, to the last known address of the parent or legal guardian of the minor, by first-class mail and by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian. Section 390.01114(2)(c), F.S.

³⁸ Section 390.01114(3)(b), F.S.

³⁹ In medical emergencies, a physician may proceed with the abortion but must make reasonable attempts, without endangering the minor, to contact the parent or legal guardian and document reasons for the medical necessity in the patient's medical records. If the parent or legal guardian has not been notified within 24 hours after the abortion, the physician must provide notice in writing, including details of the medical emergency and any additional risks to the minor, to the last known address of the parent or legal guardian of the minor. Section 390.01114(3)(b), F.S.

⁴⁰ Section 390.01114(4)(a), F.S.

⁴¹ Section 390.01114(4)(b), F.S.

⁴² Id.

⁴³ Id.

⁴⁴ Section 390.01114(4)(d), F.S.

⁴⁵ Clear and convincing evidence is an intermediate level of proof, higher than a preponderance of the evidence but less than beyond a reasonable doubt, requiring that the evidence is credible; the memories of the witnesses are clear and without confusion; and the sum total of the evidence is of sufficient weight to convince the trier of fact without hesitancy. *In re Hawkins*, 151 So.3d 1200 (Fla. 2014).

⁴⁶ A preponderance of the evidence means the greater weight of the evidence or evidence that more likely than not tends to prove a certain proposition. *Gross v. Lyons*, 763 So.2d 276, 280m ftnt 1, (Fla. 2000).

A court must consider several factors in determining whether to grant a petition based upon the maturity of a minor including the minor's:⁴⁷

- Age;
- Overall intelligence;
- Emotional development and stability;
- Credibility and demeanor as a witness;
- Ability to accept responsibility;
- Ability to assess both the immediate and long-range consequences of the minor's choices; and
- Ability to understand and explain the medical risks of the abortion and to apply that understanding to her decision.

Additionally, a court must determine whether there may be any undue influence by another on the minor's decision to have an abortion.⁴⁸

The Act requires a court that conducts a judicial waiver proceeding to:⁴⁹

- Provide for a written transcript of all testimony and proceedings; and
- Issue a final written order containing factual findings and legal conclusions supporting its decision, including factual findings and legal conclusions relating to the maturity of the minor.

Minors have the right to an expedited appeal of a denial of a petition for a judicial waiver under the Act. An appellate court must rule within 7 days after receipt of the appeal.⁵⁰ An appeal that is remanded back to the circuit court must be ruled upon by the circuit court rule within 3 business days.⁵¹

The Act also requires the Supreme Court, through the Office of the State Courts Administrator, to report annually to the Governor, the Senate and the House of Representatives on the number of petitions filed, the manner of their disposal and the reason for any such petition that was granted.⁵² In 2017, minors filed 224 petitions for waiver of which 205 were granted⁵³ and in 2018, minors filed 193 petitions of which 182 were granted.⁵⁴

Abortion Regulation

In Florida, abortion is defined as the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.⁵⁵ An abortion must be performed by a physician⁵⁶ licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing allopathic or osteopathic medicine in the employment of the United States.⁵⁷

⁴⁷ Section 390.01114(4)(c), F.S.

⁴⁸ Id.

⁴⁹ Section 390.01114(4)(e), F.S.

⁵⁰ Id.

⁵¹ Id.

⁵² Section 390.01114(6), F.S.

⁵³ Office of the State Courts Administrator, *Parental Notice of Abortion Act, Petitions Filed and Disposed by Circuit and County, January through December 2017* (January 2018).

⁵⁴ Office of the State Courts Administrator, *Parental Notice of Abortion Act, Petitions Filed and Disposed by Circuit and County, January through December 2018* (January 2019).

⁵⁵ Section 390.011(1), F.S.

⁵⁶ Section 390.011(2), F.S.

⁵⁷ Section 390.011(8), F.S.

All abortion clinics and physicians performing abortions are subject to the following requirements:

- An abortion may only be performed in a validly licensed hospital, abortion clinic, or in a physician's office;⁵⁸
- An abortion clinic must be operated by a person with a valid and current license;⁵⁹
- A third trimester abortion may only be performed in a hospital;⁶⁰
- Proper medical care must be given and used for a fetus when an abortion is performed during viability;⁶¹
- Experimentation on a fetus is prohibited;⁶²
- Except when there is a medical emergency, an abortion may only be performed after a patient has given voluntary and written informed consent;⁶³
- Consent includes verification of the fetal age via ultrasound imaging;⁶⁴
- Fetal remains are to be disposed of in a sanitary and appropriate manner;⁶⁵ and
- Partial-birth abortions are prohibited.

DOH and AHCA have authority to take licensure action against practitioners and clinics, respectively, which violate licensure statutes or rules.⁶⁶ Additionally, any person who willfully performs, or actively participates in, an abortion in violation of these requirements commits a third degree felony and commits a second degree felony if the woman dies.⁶⁷

Infants Born Alive

In 2013, the Legislature established protections for infants born alive due to a failed abortion.⁶⁸ Section 390.0111, F.S., provides that an infant be born alive during or immediately after an attempted abortion is entitled to the same rights, powers and privileges as any other child born in the course of a natural birth. The law requires that any health care practitioner present must humanely exercise the same degree of professional skill, care and diligence to preserve the health and life of the infant with care appropriate for the gestational age of the infant. In addition, the infant must be immediately transported and admitted to a hospital. It is a first degree misdemeanor offense⁶⁹ for violation of any of these requirements.

Criminal Punishment Code

Felony offenses subject to the Criminal Punishment Code⁷⁰ are listed in a single offense severity ranking chart, which uses 10 offense levels to rank felonies from least severe (1) to most severe (10). Each felony offense is assigned to a level according to the severity of the offense, commensurate with the harm or potential for harm to the community that is caused by the offense, as determined by

⁵⁸ Section 797.03 (1), F.S.

⁵⁹ Section 797.03 (2), F.S.

⁶⁰ Section 797.03(3), F.S. The violation of any of these provisions results in a second degree misdemeanor.

⁶¹ Section 390.0111(4), F.S.

⁶² Section 390.0111(6), F.S.

⁶³ Section 390.0111(3), F.S. A physician violating this provision is subject to disciplinary action.

⁶⁴ Section 390.0111(3)(a)1.b., F.S.

⁶⁵ Section 390.0111(8), F.S. A person who improperly disposes of fetal remains commits a second degree misdemeanor.

⁶⁶ Section 390.018, F.S.

⁶⁷ Section 390.0111(10), F.S.

⁶⁸ "Born alive" means the complete expulsion or extraction from the mother of a human infant, at any stage of development, who, after such expulsion or extraction, breathes or has a beating heart, or definite and voluntary movement of muscles, regardless of whether the umbilical cord has been cut and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, Cesarean section, induced abortion, or other method. S. 390.011(4), F.S.

⁶⁹ A first degree misdemeanor is punishable by confinement in a county jail for up to one year, a fine of up to \$1000, or both. Sections 775.082 and 775.083, F.S.

⁷⁰ All felony offenses, other than capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code. Section 921.002, F.S.

statute.⁷¹ If an offense is unlisted on the offense severity ranking chart, the Criminal Punishment Code provides a ranking based on felony level.⁷² For example, an unranked third degree felony is a level one.⁷³

A person's primary offense, any other current offenses, and prior offenses are scored using the points designated for the offense severity level of each offense.⁷⁴ A person may also accumulate points for factors such as victim injury points, community sanction violation points, and certain sentencing multipliers.⁷⁵ The final calculation, following the scoresheet formula, determines the lowest permissible sentence that the trial court may impose, absent a valid reason for departure.⁷⁶

If a person scores more than 44 points, the lowest permissible sentence is a specified term of months in state prison, determined by a formula.⁷⁷ If a person scores 44 points or fewer, the court may impose a nonprison sanction, such as a county jail sentence, probation, or community control.⁷⁸

Effect of Proposed Changes

Parental Consent

HB 265 adds a parental consent requirement to the current parental notification statute. The bill prohibits a physician from performing or inducing an abortion unless the physician has complied with the Act's parental notice and consent requirements.

The bill prohibits, with limited exceptions, a physician from performing an abortion on a minor unless the physician receives parental consent or an order from a court waiving the parental consent requirement. A parental consent must be notarized by the parent or legal guardian who must provide documentation to the physician that he or she is the parent or legal guardian of the minor seeking the abortion. The physician must execute an affidavit that the minor and the parent or legal guardian presented evidence that a reasonable person would believe as sufficient to prove identity. This affidavit must be placed in the minor's medical records.

The bill exempts minors from the parental consent requirement if the minor is exempt from the parental notification requirement. This includes exemptions for when the disability of nonage has been removed, medical emergencies, parental waiver and when the minor is a parent. However, if the basis for the exemption from parental notification is the written waiver of the parent or legal guardian, the waiver must also expressly state that the parent or guardian waives his or her right to consent to an abortion of the minor. The 1989 parental consent statute did not include exemptions for medical emergencies and for when the minor was a parent. The Florida Supreme Court in *In Re T.W.* cited the lack of a medical emergency provision as one of the deficiencies in the 1989 parental consent statute.

The bill also provides an exemption for medical emergencies if in the physician's good-faith clinical judgment, a medical emergency exists and there is insufficient time for the attending physician to comply with the consent requirement. The bill requires the physician to notify the parent or legal guardian, in person or by telephone, within 24 hours of performing the abortion, including the detail of the medical emergency. The physician must also provide this notification to the parent or legal guardian by first-class mail or by certified mail, return receipt requested, with delivery restricted to the parent or

⁷¹ Section 921.0022, F.S.

⁷² Section 921.0023, F.S.

⁷³ Id.

⁷⁴ Sections 921.0022 and 921.0024, F.S.

⁷⁵ Section 921.0024(2), F.S.

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Id.

legal guardian. This medical emergency exemption is for circumstances where the minor has notified her parent or guardian but has not obtained consent.

The bill expands the current judicial waiver procedure for notification to include waiver of parental consent. Under current law a court is required to notify the minor that she has a right to court-appointed counsel upon request and at no cost. The bill adds an additional requirement that the court must appoint counsel for the minor at least 24 hours prior to the judicial waiver hearing. The Florida Supreme Court in *In Re T.W.* cited the failure to require appointment of counsel to the minor as one of the fatal deficiencies of the 1989 parental consent statute.

The bill maintains the requirement in current law that a court must consider several factors in determining whether to grant a petition based upon the maturity of a minor including the minor's:⁷⁹

- Age;
- Overall intelligence;
- Emotional development and stability;
- Credibility and demeanor as a witness;
- Ability to accept responsibility;
- Ability to assess both the immediate and long-range consequences of the minor's choices; and
- Ability to understand and explain the medical risks of the abortion and to apply that understanding to her decision.

The bill also maintains the requirement in current law that a court that conduct a judicial waiver of parental consent proceeding to:

- Provide for a written transcript of all testimony and proceedings; and
- Issue a final written order containing factual findings and legal conclusions supporting its decision, including factual findings and legal conclusions relating to the maturity of the minor.

The Florida Supreme Court in *In Re T.W.* cited the failure to require the court to create a record of the waiver hearing as one of the fatal deficiencies of the 1989 parental consent statute.

Infants Born Alive

The bill also increase the penalty for violating the requirements of the infants born alive provisions of s. 390.0111, F.S., from a first degree misdemeanor to a third degree felony, punishable by up to five years in prison and a \$5,000 fine. The bill does not rank the offense on the Criminal Punishment Code Offense Severity Ranking Chart; therefore, it is ranked a level one as an unranked third degree felony.

This aligns the penalties for the violation of the Infants Born Alive provision with the general penalties for the violation of any of the requirements of s. 390.0111, F.S.

The bill includes a severability clause.

The bill provides an effective date of July 1, 2020.

B. SECTION DIRECTORY:

Section 1: Amends s. 390.0111, F.S., relating to termination of pregnancies.

Section 2: Amends s. 390.01114, F.S., relating to the Parental Notice of Abortion Act.

Section 3: Amends s. 27.511, F.S.; relating to the office of criminal conflict and civil regional counsel.

Section 4: Creates a severability clause.

Section 5: Provides an effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an insignificant, negative fiscal impact on the Department of Health and the Agency for Health Care Administration for the enforcement of the bill's provisions, which current resources are adequate to absorb. The bill may have an insignificant positive impact on the number of prison beds by creating a new felony offense.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have an insignificant positive impact on the number of jail beds by creating a new criminal offense.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

The bill's provisions may implicate the privacy rights established in Article I, s. 23, FL Const.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
 2 An act relating to abortion; amending s. 390.0111,
 3 F.S.; reclassifying a criminal offense for a specified
 4 violation; amending s. 390.01114, F.S.; requiring a
 5 physician to obtain notarized written consent of a
 6 minor's parent or legal guardian before inducing or
 7 performing a termination of a pregnancy on the minor;
 8 providing exceptions to such consent requirement;
 9 providing criminal penalties; revising provisions
 10 relating to the procedures for judicial waiver to
 11 conform to changes made by the act; amending s.
 12 27.511, F.S.; conforming a provision to changes made
 13 by the act; providing severability; providing an
 14 effective date.

15
 16 Be It Enacted by the Legislature of the State of Florida:

17
 18 Section 1. Paragraph (e) of subsection (12) of section
 19 390.0111, Florida Statutes, is amended to read:

20 390.0111 Termination of pregnancies.—

21 (12) INFANTS BORN ALIVE.—

22 (e) A person who violates this subsection commits a felony
 23 of the third ~~misdemeanor of the first~~ degree, punishable as
 24 provided in s. 775.082, ~~or~~ s. 775.083, or s. 775.084. This
 25 subsection shall not be construed as a specific provision of law

26 relating to a particular subject matter that would preclude
27 prosecution of a more general offense, regardless of the
28 penalty.

29 Section 2. Subsections (3), (4), (5), and (6) of section
30 390.01114, Florida Statutes, are renumbered as subsections (4),
31 (6), (7), and (8), respectively, subsection (1), paragraph (b)
32 of present subsection (3), and present subsections (4), (5), and
33 (6) are amended, and new subsections (3) and (5) are added to
34 that section, to read:

35 390.01114 Parental Notice of and Consent for Abortion
36 Act.—

37 (1) SHORT TITLE.—This section may be cited as the
38 "Parental Notice of and Consent for Abortion Act."

39 (3) TERMINATION OF THE PREGNANCY OF A MINOR.—A physician
40 may not perform or induce the termination of a pregnancy of a
41 minor unless the physician has complied with the notice and
42 consent requirements of this section.

43 (4) ~~(3)~~ NOTIFICATION REQUIRED.—

44 (b) Notice is not required if:

45 1. In the physician's good faith clinical judgment, a
46 medical emergency exists and there is insufficient time for the
47 attending physician to comply with the notification
48 requirements. If a medical emergency exists, the physician shall
49 make reasonable attempts, whenever possible, without endangering
50 the minor, to contact the parent or legal guardian, and may

51 proceed, but must document reasons for the medical necessity in
52 the patient's medical records. The physician shall provide
53 notice directly, in person or by telephone, to the parent or
54 legal guardian, including details of the medical emergency and
55 any additional risks to the minor. If the parent or legal
56 guardian has not been notified within 24 hours after the
57 termination of the pregnancy, the physician shall provide notice
58 in writing, including details of the medical emergency and any
59 additional risks to the minor, signed by the physician, to the
60 last known address of the parent or legal guardian of the minor,
61 by first-class mail and by certified mail, return receipt
62 requested, with delivery restricted to the parent or legal
63 guardian;

64 2. Notice is waived in writing by the person who is
65 entitled to notice and such waiver is notarized, dated not more
66 than 30 days before the termination of pregnancy, and contains a
67 specific waiver of the right of the parent or legal guardian to
68 notice of the minor's termination of pregnancy;

69 3. Notice is waived by the minor who is or has been
70 married or has had the disability of nonage removed under s.
71 743.015 or a similar statute of another state;

72 4. Notice is waived by the patient because the patient has
73 a minor child dependent on her; or

74 5. Notice is waived under subsection (6) ~~(4)~~.

75 (5) PARENTAL CONSENT REQUIRED.—

76 (a) A physician must obtain written consent from a parent
 77 or legal guardian before performing or inducing the termination
 78 of a pregnancy of a minor.

79 1. The consenting parent or legal guardian shall provide
 80 to the physician a copy of a government-issued proof of
 81 identification and written documentation establishing that he or
 82 she is the lawful parent or legal guardian of the minor. The
 83 parent or legal guardian shall certify in a signed, dated,
 84 notarized statement, initialed on each page, that he or she
 85 consents to the termination of a pregnancy of the minor, and
 86 must include the following: "I certify that I, (insert name of
 87 parent or legal guardian), am the parent or legal guardian of
 88 (insert name of minor) and give consent for (insert name of
 89 physician) to perform or induce a termination of pregnancy. I
 90 understand that any person who knowingly makes a fraudulent
 91 statement in this regard commits a felony."

92 2. The physician shall keep a copy of the proof of
 93 identification of the parent or legal guardian and the certified
 94 statement in the medical file of the minor for 5 years after the
 95 minor reaches the age of 18 years, but in no event less than 7
 96 years.

97 3. A physician receiving parental consent under this
 98 section shall execute for inclusion in the medical record of the
 99 minor an affidavit stating: "I, (insert name of physician),
 100 certify that according to my best information and belief, a

101 reasonable person under similar circumstances would rely on the
102 information presented by both the minor and her parent or legal
103 guardian as sufficient evidence of identity."

104 (b) Parental consent is not required if:

105 1. Notification is not required under subparagraphs

106 (4) (b)1. and 3.-5.;

107 2. Notification is not required under subparagraph

108 (4) (b)2., and the waiver contains a specific waiver of a parent
109 or legal guardian to consent to the minor's termination of
110 pregnancy and the parent or legal guardian provides a copy of a
111 government-issued proof of identification and written
112 documentation establishing that he or she is the lawful parent
113 or legal guardian of the minor;

114 3. Consent is waived under subsection (6); or

115 4. In the physician's good faith clinical judgment, a
116 medical emergency exists and there is insufficient time for the
117 attending physician to comply with the consent requirement. If a
118 medical emergency exists, the physician shall make reasonable
119 attempts, whenever possible, without endangering the minor, to
120 contact the parent or legal guardian of the minor, and may
121 proceed, but must document reasons for the medical necessity in
122 the patient's medical records. The physician shall inform the
123 parent or legal guardian, in person or by telephone, within 24
124 hours after the termination of the pregnancy of the minor,
125 including details of the medical emergency that necessitated the

126 termination of the pregnancy without the parent's or legal
127 guardian's consent. The physician shall also provide this
128 information in writing to the parent or legal guardian at his or
129 her last known address, by first-class mail or by certified
130 mail, return receipt requested, with delivery restricted to the
131 parent or legal guardian.

132 (c)1. A physician who intentionally or recklessly performs
133 or induces, or attempts to perform or induce, a termination of a
134 pregnancy of a minor without obtaining the required consent
135 pursuant to this subsection commits a felony of the third
136 degree, punishable as provided in s. 775.082, s. 775.083, or s.
137 775.084. A penalty may not be assessed against the minor upon
138 whom a termination of pregnancy is performed or induced or upon
139 whom a termination of pregnancy is attempted to be performed or
140 induced.

141 2. It is a defense to prosecution that a minor
142 misrepresented her age or identity to a physician by displaying
143 a driver license or identification card issued by the state or
144 another state that indicated that the minor was over 18 years of
145 age and that the appearance of the minor was such that a
146 reasonably prudent person would believe that the minor was not
147 under the age of 18 years. The defense does not apply if the
148 physician is shown to have had independent knowledge of the
149 minor's actual age or identity or failed to use due diligence in
150 determining the minor's age or identity.

151 (6)-(4) PROCEDURE FOR JUDICIAL WAIVER ~~OF NOTICE~~.—

152 (a) A minor may petition any circuit court in which the
153 minor resides for a waiver of the ~~notice~~ requirements of this
154 section subsection (3) and may participate in proceedings on her
155 own behalf. The petition may be filed under a pseudonym or
156 through the use of initials, as provided by court rule. The
157 petition must include a statement that the petitioner is
158 pregnant and the requirements of this section have ~~notice has~~
159 not been waived. The court shall advise the minor that she has a
160 right to court-appointed counsel ~~and shall provide her with~~
161 ~~counsel upon her request~~ at no cost to the minor. The court
162 shall, upon request, provide counsel for the minor at least 24
163 hours before the court proceeding.

164 (b)1. Court proceedings under this section subsection must
165 be given precedence over other pending matters to the extent
166 necessary to ensure that the court reaches a decision promptly.
167 The court shall rule, and issue written findings of fact and
168 conclusions of law, within 3 business days after the petition is
169 filed, except that the 3-business-day limitation may be extended
170 at the request of the minor. If the court fails to rule within
171 the 3-business-day period and an extension has not been
172 requested, the minor may immediately petition for a hearing upon
173 the expiration of the 3-business-day period to the chief judge
174 of the circuit, who must ensure a hearing is held within 48
175 hours after receipt of the minor's petition and an order is

176 entered within 24 hours after the hearing.

177 2. If the circuit court does not grant judicial waiver of
178 the requirements of this section ~~notice~~, the minor has the right
179 to appeal. An appellate court must rule within 7 days after
180 receipt of appeal, but a ruling may be remanded with further
181 instruction for a ruling within 3 business days after the
182 remand. The reason for overturning a ruling on appeal must be
183 based on abuse of discretion by the court and may not be based
184 on the weight of the evidence presented to the circuit court
185 since the proceeding is a nonadversarial proceeding.

186 (c) If the court finds, by clear and convincing evidence,
187 that the minor is sufficiently mature to decide whether to
188 terminate her pregnancy, the court shall issue an order
189 authorizing the minor to consent to the performance or
190 inducement of a termination of the pregnancy ~~without the~~
191 ~~notification of a parent or guardian~~. If the court does not make
192 the finding specified in this paragraph or paragraph (d), it
193 must dismiss the petition. Factors the court shall consider
194 include:

- 195 1. The minor's:
- 196 a. Age.
- 197 b. Overall intelligence.
- 198 c. Emotional development and stability.
- 199 d. Credibility and demeanor as a witness.
- 200 e. Ability to accept responsibility.

201 f. Ability to assess both the immediate and long-range
 202 consequences of the minor's choices.

203 g. Ability to understand and explain the medical risks of
 204 terminating her pregnancy and to apply that understanding to her
 205 decision.

206 2. Whether there may be any undue influence by another on
 207 the minor's decision to have an abortion.

208 (d) If the court finds, by a preponderance of the
 209 evidence, that the petitioner is the victim of child abuse or
 210 sexual abuse inflicted by one or both of her parents or her
 211 guardian, or by clear and convincing evidence that the
 212 requirements of this section are ~~notification of a parent or~~
 213 ~~guardian is~~ not in the best interest of the petitioner, the
 214 court shall issue an order authorizing the minor to consent to
 215 the performance or inducement of a termination of the pregnancy
 216 ~~without the notification of a parent or guardian~~. The best-
 217 interest standard does not include financial best interest or
 218 financial considerations or the potential financial impact on
 219 the minor or the minor's family if the minor does not terminate
 220 the pregnancy. If the court finds evidence of child abuse or
 221 sexual abuse of the minor petitioner by any person, the court
 222 shall report the evidence of child abuse or sexual abuse of the
 223 petitioner, as provided in s. 39.201. If the court does not make
 224 the finding specified in this paragraph or paragraph (c), it
 225 must dismiss the petition.

226 (e) A court that conducts proceedings under this section
227 shall:

228 1. Provide for a written transcript of all testimony and
229 proceedings;

230 2. Issue a final written order containing factual findings
231 and legal conclusions supporting its decision, including factual
232 findings and legal conclusions relating to the maturity of the
233 minor as provided under paragraph (c); and

234 3. Order that a confidential record be maintained, as
235 required under s. 390.01116.

236 (f) All hearings under this section, including appeals,
237 shall remain confidential and closed to the public, as provided
238 by court rule.

239 (g) An expedited appeal shall be made available, as the
240 Supreme Court provides by rule, to any minor to whom the circuit
241 court denies a waiver of the requirements of this section
242 ~~notice~~. An order authorizing a termination of pregnancy under
243 this subsection ~~without notice~~ is not subject to appeal.

244 (h) Filing fees or court costs may not be required of any
245 pregnant minor who petitions a court for a waiver of the
246 requirements of this section ~~parental notification under this~~
247 ~~subsection~~ at either the trial or the appellate level.

248 (i) A county is not obligated to pay the salaries, costs,
249 or expenses of any counsel appointed by the court under this
250 subsection.

251 (7) ~~(5)~~ PROCEEDINGS.—The Supreme Court is requested to
252 adopt rules and forms for petitions to ensure that proceedings
253 under subsection (6) ~~(4)~~ are handled expeditiously and in a
254 manner consistent with this act. The Supreme Court is also
255 requested to adopt rules to ensure that the hearings protect the
256 minor's confidentiality and the confidentiality of the
257 proceedings.

258 (8) ~~(6)~~ REPORT.—The Supreme Court, through the Office of
259 the State Courts Administrator, shall report by February 1 of
260 each year to the Governor, the President of the Senate, and the
261 Speaker of the House of Representatives on the number of
262 petitions filed under subsection (6) ~~(4)~~ for the preceding year,
263 and the timing and manner of disposal of such petitions by each
264 circuit court. For each petition resulting in a waiver of the
265 requirements of this section ~~notice~~, the reason for the waiver
266 shall be included in the report.

267 Section 3. Paragraph (a) of subsection (6) of section
268 27.511, Florida Statutes, is amended to read:

269 27.511 Offices of criminal conflict and civil regional
270 counsel; legislative intent; qualifications; appointment;
271 duties.—

272 (6) (a) The office of criminal conflict and civil regional
273 counsel has primary responsibility for representing persons
274 entitled to court-appointed counsel under the Federal or State
275 Constitution or as authorized by general law in civil



276 proceedings, including, but not limited to, proceedings under s.
277 393.12 and chapters 39, 392, 397, 415, 743, 744, and 984 and
278 proceedings to terminate parental rights under chapter 63.
279 Private court-appointed counsel eligible under s. 27.40 have
280 primary responsibility for representing minors who request
281 counsel under s. 390.01114, the Parental Notice of and Consent
282 for Abortion Act; however, the office of criminal conflict and
283 civil regional counsel may represent a minor under that section
284 if the court finds that no private court-appointed attorney is
285 available.

286 Section 4. If any provision of this act or its application
287 to any person or circumstance is held invalid, the invalidity
288 does not affect other provisions or applications of the act
289 which can be given effect without the invalid provision or its
290 application, and to this end the provisions of this act are
291 severable.

292 Section 5. This act shall take effect July 1, 2020.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 267 Pub. Rec./Abortion
SPONSOR(S): Grall
TIED BILLS: HB 265 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Committee		McElroy 	Calamas 

SUMMARY ANALYSIS

HB 267 prohibits, with limited exceptions, a physician from performing an abortion on a minor unless the physician receives notarized, written parental consent or an order from a court waiving the parental consent requirement.

This bill, which is linked to HB 265, expands an existing public record exemption for any information that can be used to identify a minor petitioning a circuit court for a judicial waiver of parental notification for an abortion to exempt the same information when a minor petitions a circuit court for judicial waiver of parental consent for an abortion.

The bill provides for repeal of the exemption for judicial waiver of parental consent on October 2, 2025, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides that if the parental consent exemption is not saved from repeal, then the statute reverts to that in existence on June 30, 2020, thereby preserving the exemption for judicial waiver of parental notification.

The bill also provides a public necessity statement as required by the State Constitution.

The bill has no fiscal impact on state or local governments.

The bill will become effective on the same date that HB 265 or similar legislation takes effect.

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access government records and meetings. The public may inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.¹ The public also has a right to have notice of and access to meetings of any collegial public body of the executive branch of state government or of any local government.² The Legislature's meetings must also be open and noticed to the public, unless there is an exception provided for by the Constitution.³

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act⁴ guarantees every person's right to inspect and copy any state or local government public record.⁵ The Sunshine Law⁶ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be noticed and open to the public.⁷

The Legislature, however, may create an exemption to public record or open meetings requirements.⁸ An exemption must specifically state the public necessity justifying the exemption⁹ and must be tailored to accomplish the stated purpose of the law.¹⁰ There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act and also confidential.

Exempt Records

If a record is exempt, the specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., s. 286.011, F.S., or article I, section 24 of the Florida Constitution. If records are only exempt from the Public Records Act and not confidential, the exemption does not

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(b).

³ *Id.*

⁴ Chapter 119, F.S.

⁵ Section 119.011(12), F.S., defines "public record" as all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. Section 119.011(2), F.S. defines "agency" as any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency. The Public Records Act does not apply to legislative or judicial records, *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992), however, the Legislature's records are public pursuant to section 11.0431, F.S.

⁶ Section 286.011, F.S.

⁷ Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provide that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

⁸ FLA. CONST., art. I, s. 24(c).

⁹ *Id.*

¹⁰ *Id.*

prohibit the showing of such information, but simply exempts them from the mandatory disclosure requirements in s. 119.07(1)(a), F.S.¹¹

Confidential Records

The term "confidential" is not defined in the Public Records Act; however, it is used in Article I, s. 24 of the Florida Constitution, which provides that every person has the right to inspect or copy any public record, except with respect to records exempted or specifically made confidential by the Constitution. If information is made confidential in the statutes, the information is not subject to inspection by the public and may be released only to those persons and entities designated in the statute.¹²

Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public record or open meetings exemptions.¹³ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁴

The OGSR provides that a public record or open meeting exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.¹⁵ An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;
- It protects sensitive personal information, the release of which would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt; or
- It protects trade or business secrets.¹⁶

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.¹⁷

Judicial Waiver of Parental Notice

The Parental Notice of Abortion Act (Act) requires a physician to notify a parent or legal guardian prior to performing or inducing an abortion. The Act provides that a minor may petition the circuit court where she resides for a waiver of the notice requirements.¹⁸ To initiate the process, she may file the petition under a pseudonym or by using her initials as provided by court rule. The petition must contain a statement that the petitioner is pregnant and notice has not been waived. The court must advise the

¹¹ See, *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991), rev. denied, 589 So. 2d 289 (Fla. 1991), in which the court observed that pursuant to s. 119.07(3)(d), F.S., [now s. 119.071(2)(c), F.S.] "active criminal investigative information" was exempt from the requirement that public records be made available for public inspection. However, as stated by the court, "the exemption does not prohibit the showing of such information." *Id.* at 686.

¹² *WFTV, Inc. v. School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004), rev. denied, 892 So. 2d 1015 (Fla. 2004). See also, 04-09 Fla Op. Att'y Gen. (2004) and 86-97 Fla Op. Att'y Gen. (1986).

¹³ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System. Section 119.15(2), F.S.

¹⁴ Section 119.15(3), F.S.

¹⁵ Section 119.15(6)(b), F.S.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Section 390.01114(4)(a), F.S.

petitioner that she has a right to a court-appointed counsel and must provide her with counsel, if she requests, at no cost to the minor.¹⁹

Judicial waiver proceedings must be given precedence over other pending matters to the extent necessary to ensure the court reaches a decision promptly.²⁰ Once a petition is filed, the court must rule and issue written findings of fact and conclusions of law within three business days. This time period may be extended at the request of the minor.²¹ If the court fails to rule within three business days, the minor may immediately petition for a hearing to the chief judge, who must ensure a hearing is held within 48 hours after the petition; an order must be entered within 24 hours after the hearing.²²

If the circuit court decides by clear and convincing evidence that the minor is sufficiently mature to decide whether to terminate her pregnancy, the court must issue an order authorizing the minor to consent to the abortion without the notification of a parent or guardian.²³ If the court finds the minor does not possess the requisite maturity to make the determination, the court must dismiss the petition.²⁴ If the court determines by a preponderance of the evidence that the minor is a victim of child abuse or sexual abuse inflicted by her parent or guardian, or if the court determines by clear and convincing evidence that the notification of a parent or guardian is not in the minor's best interest, the court must issue an order authorizing the minor to consent to the abortion without notification of a parent or guardian.²⁵ In 2018, 193 petitions for judicial bypass were filed.²⁶

Public Record Exemption for Judicial Bypass Proceedings

Current law provides a public record exemption for judicial records pertaining to parental notification bypass proceedings. Specifically, any information held by a circuit court or appellate court which could be used to identify the minor is confidential and exempt²⁷ from public disclosure.

HB 265 - Judicial Waiver of Consent

HB 265, to which this bill is linked, prohibits, with limited exceptions, a physician from performing an abortion on a minor unless the physician receives notarized, written parental consent or an order from a court waiving the parental consent requirement. HB 265 allows a minor to petition for a judicial waiver of parental consent in the identical manner in which a minor currently petitions for a judicial waiver of parental notification. As such, a minor faces the same potential harm when seeking a judicial waiver of parental consent as she does when seeking a judicial waiver of parental notification.

Effect of Proposed Changes

This bill expands the existing public records exemption for judicial records pertaining to parental notification bypass proceedings to include judicial records pertaining to parental consent bypass proceedings. Specifically, any information held by a circuit court or appellate court which could be used to identify the minor is confidential and exempt from public disclosure.

¹⁹ Id.

²⁰ Section 390.01114(4)(b)1., F.S.

²¹ Id.

²² Id.

²³ Section 390.01114(4)(c), F.S.

²⁴ Id.

²⁵ Section 390.01114(4)(d), F.S.

²⁶ Florida Office of the State Courts Administrator, *Parental Notice of Abortion Act, Petitions Filed and Disposed by Circuit and County, January through December 2018* (January 2019).

²⁷ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2025, unless saved from repeal through reenactment by the Legislature. It also provides that if the parental consent exemption is not saved from repeal, then the statute reverts to that in existence on June 30, 2020, thereby preserving the exemption for judicial waiver of parental notification.

The bill provides a public necessity statement as required by the State Constitution, which states:

The information contained in these records is of a sensitive, personal nature regarding a minor petitioner, release of which could harm the reputation of the pregnant minor, as well as jeopardize her safety. Disclosure of this information could jeopardize the safety of the pregnant minor in instances when child abuse or child sexual abuse against her is present by exposing her to further acts of abuse from an abuser who, if the information was not held confidential, could learn of her pregnancy, her plans to obtain an abortion, and her petition to the court.

The bill takes effect on the same date that HB 265 or similar legislation takes effect, if such legislation is adopted in the same legislative session.

B. SECTION DIRECTORY:

Section 1: Amends s. 390.01116, F.S., relating to public records exemptions; minors seeking waiver of notice requirements.

Section 2: Provides a public necessity statement.

Section 3: Provides a contingent effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill expands a new public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands a new public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands a public record exemption for judicial records pertaining to parental consent bypass proceedings, which does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

HB 267

2020

1 A bill to be entitled
2 An act relating to public records; amending s.
3 390.01116; expanding an existing public records
4 exemption to include information that could identify a
5 pregnant minor which is contained in a record held by
6 the court relating to the pregnant minor's petition to
7 waive consent requirements to obtain an abortion;
8 providing for future legislative review and repeal of
9 the expanded exemption under the Open Government
10 Sunset Review Act; providing for reversion of
11 specified language if the exemption is not saved from
12 repeal; providing a statement of public necessity;
13 providing a contingent effective date.

14
15 Be It Enacted by the Legislature of the State of Florida:

16
17 Section 1. Section 390.01116, Florida Statutes, is amended
18 to read:

19 390.01116 Public records exemptions; minors seeking waiver
20 of notice and consent requirements.--Any information that can be
21 used to identify a minor petitioning a circuit court for a
22 judicial waiver, as provided in s. 390.01114, of the ~~notice~~
23 requirements under the Parental Notice of and Consent for
24 Abortion Act is:

25 (1) Confidential and exempt from s. 24(a), Art. I of the

26 State Constitution if held by a circuit court or an appellate
27 court.

28 (2) Confidential and exempt from s. 119.07(1) and s.
29 24(a), Art. I of the State Constitution if held by the office of
30 criminal conflict and civil regional counsel or the Justice
31 Administrative Commission.

32
33 The expansion of the public records exemption under this section
34 to include information that could identify a pregnant minor
35 under 18 years of age which is contained in a record held by the
36 court relating to the pregnant minor's petition to waive consent
37 requirements to obtain an abortion is subject to the Open
38 Government Sunset Review Act in accordance with s. 119.15 and
39 shall stand repealed on October 2, 2025, unless reviewed and
40 saved from repeal through reenactment by the Legislature. If the
41 expansion of the exemption is not saved from repeal, this
42 section shall revert to that in existence on June 30, 2020,
43 except that any amendments to such text other than by this act
44 shall be preserved and continue to operate to the extent that
45 such amendments are not dependent upon the portions of text
46 which expire pursuant to this section.

47 Section 2. The Legislature finds that it is a public
48 necessity to keep confidential and exempt from public disclosure
49 information contained in a court record which could be used to
50 identify a pregnant minor who petitions the court for a waiver

51 from the statutory requirement that a parent or legal guardian
52 give consent before the pregnant minor may obtain an abortion.
53 The information contained in such records is of a sensitive,
54 personal nature regarding a minor petitioner, release of which
55 could harm the reputation of the pregnant minor, as well as
56 jeopardize her safety. Disclosure of this information could
57 jeopardize the safety of the pregnant minor in instances when
58 child abuse or child sexual abuse against her is present by
59 exposing her to further acts of abuse from an abuser who, if the
60 information was not held confidential, could learn of her
61 pregnancy, her plans to obtain an abortion, and her petition to
62 the court.

63 Section 3. This act shall take effect on the same date
64 that HB 265 or similar legislation takes effect, if such
65 legislation is adopted in the same legislative session or an
66 extension thereof and becomes a law.