

MEDICINE BOARD[653]

Adopted and Filed

Rulemaking related to standards of practice for physicians who perform or induce abortions

The Board of Medicine hereby amends Chapter 13, “Standards of Practice and Principles of Medical Ethics,” Iowa Administrative Code.

Legal Authority for Rulemaking

This rulemaking is adopted under the authority provided in 2023 Iowa Acts, House File 732.

State or Federal Law Implemented

This rulemaking implements, in whole or in part, 2023 Iowa Acts, House File 732.

Purpose and Summary

This rule is directed by 2023 Iowa Acts, House File 732, to outline the standards of practice for physicians who perform or induce abortions, including the detection of a fetal heartbeat, exceptions, and discipline.

Public Comment and Changes to Rulemaking

Notice of Intended Action for this rulemaking was published in the Iowa Administrative Bulletin on December 13, 2023, as **ARC 7170C**.

A public hearing was held on January 4, 2024, at 10 a.m. at 6200 Park Avenue, Des Moines, Iowa. There were approximately 50 individuals in attendance at this hearing, and 10 individuals made an oral public comment. The Board additionally received 52 written public comments. Of the total 62 written and oral comments, 43 were generally opposed to 2023 Iowa Acts, House File 732; 18 provided technical feedback on the rules themselves; and 1 was supportive of the draft rules.

Public comments fell into the following categories:

The Board’s authority. Many commenters suggested that the Board either refuse to adopt a rule or adopt a rule that overrode the language of Iowa Code chapter 146E. The Board has no authority to do either.

Definitions. Many commenters requested that the Board amend the proposed rule to define particular terms. Several of these comments contended that the rule should use language that parallels that used by physicians in their practice. Many of these terms, however, are defined by statute; the Board has no authority to vary those definitions. Further, the Board declines to introduce uncertainty into either the law or the practice of medicine by using terms that may be under- or over-inclusive compared to the terms used in the statute.

In particular, the Board declines to adopt definitions of “fetal heartbeat,” “unborn child,” or “woman” that might vary from the statutory meaning. The statute furnishes the definitions for “fetal heartbeat” and “unborn child.” “Woman,” in the context of regulating abortion, has been understood since at least 1858 to encompass both adults and minors. As a matter of law, therefore, defining these terms in rule is unnecessary at best and, as described above, has the potential to mislead physicians into performing prohibited abortions. However, to clarify the scope of the rule and of Iowa Code chapter 146E for physicians, the Board hereby adopts a definition of “woman” with the intent to remind physicians of the meaning under the law and a definition of “unborn child” with the intent to remind physicians that the statutory definition includes both embryos and fetuses. The Board’s intent is to codify, rather than change, the definitions given and the meanings understood in Iowa Code chapter 146E.

The Board declined to expand the definitions related to rape and incest. Proposals related to the definition of incest generally contended that other persons in a woman’s household might be responsible

for a pregnancy and that the definition should be expanded to include those persons. The Board disagrees; the common understanding of the term requires that the perpetrator be related to the victim, not merely a member of the same household. Proposals related to the definition of rape generally contended that sex with a person who exercises influence over a woman should be included within the definition. The Board disagrees; as the elements of the crime of sexual assault confirm, the common understanding of the term does not include such relationships in many instances. The Board expresses no opinion on whether the conduct commenters seek to include in these definitions would, in a particular case, constitute rape under the definition as adopted.

The Board did, however, revise the definition of “the pregnancy is the result of a rape” to remove geographic restrictions on the covered conduct. This is because the Iowa Code’s prohibition on sexual assault applies only to conduct that occurred in Iowa. As proposed, therefore, the rape exception would apply only if the rape were perpetrated in Iowa. Iowa Code chapter 146E establishes an exception if a “pregnancy is the result of a rape,” not “pregnancy is the result of a rape perpetrated in Iowa.” To be consistent with this lack of a geographic restriction, the Board has adopted language specifying that as long as the conduct would constitute a violation of the listed statutes, it does not matter where the conduct occurred.

Method. Iowa Code chapter 146E requires that the physician conduct an “abdominal ultrasound, necessary to detect a fetal heartbeat[.]” The general understanding of “abdominal ultrasound” is an ultrasound of a person’s abdomen. This differs from what a physician or technician would understand if an “abdominal ultrasound” were ordered for a patient—an ultrasound of a particular area of the abdomen, through which it would not be possible to detect a fetal heartbeat. The Board therefore specifies that the physician must conduct a transabdominal pelvic ultrasound—the particular type of ultrasound that would typically be used to detect a fetal heartbeat.

Commenters noted that the standard medical practice to attempt to detect a fetal heartbeat early in a pregnancy would be a transvaginal ultrasound. However, the Board has no authority to change the requirement in Iowa Code chapter 146E that the physician conduct an “abdominal ultrasound.”

Sources of information. The Board revised the proposed rule to clarify that the physician must obtain the information required to determine whether an exception exists but need not do so with particular questions or from a particular source. As in the proposed rule, the physician must determine in good faith that the information is true, and as in the proposed rule, the physician may—but need not—require the source of the information to certify that the information is true. The rule retains the requirement that the physician document the information and its source in the woman’s medical records despite comments that doing so would not be standard practice. There are other instances when the law requires information or documentation to be kept in a patient’s medical record, and the Board’s ability to assess whether a physician made a good-faith effort to determine that an exception exists depends on its access to the information that the physician reviewed at the time. In addition, the rule continues to permit physicians to require information sources to attest to the information’s truth to reduce the chances that a charge against a physician becomes a contest of memories and credibility.

Fetal abnormality. Several commenters suggested that the Board specify types of conditions or diagnoses that would qualify for this exception. Others suggested that the Board outline requirements for such a finding. Because the determination of whether this exception applies must necessarily be made on a case-by-case basis, the Board declined to make a change based on these suggestions. The Board similarly disagrees that the statutory language regarding this exception is ambiguous or unclear and therefore adopted no definitions regarding the exception.

Discipline. The Board disagrees with comments on the language regarding physician discipline and has adopted that language as proposed. No other rule adopted by the Board specifies the range of penalties the Board may impose for a particular violation. No other rule allows a physician to assert good faith as a defense to a violation. And no other rule singles out a particular type of violation for special notice or publicity. The Board has declined to create exceptions here.

Adoption of Rulemaking

This rulemaking was adopted by the Board on February 15, 2024.

Fiscal Impact

This rulemaking has no fiscal impact to the State of Iowa.

Jobs Impact

After analysis and review of this rulemaking, no impact on jobs has been found.

Waivers

Any person who believes that the application of the discretionary provisions of this rulemaking would result in hardship or injustice to that person may petition the Board for a waiver of the discretionary provisions, if any, pursuant to 653—Chapter 3.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rulemaking by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rulemaking at its [regular monthly meeting](#) or at a special meeting. The Committee's meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

Effective Date

This rulemaking will become effective on April 24, 2024.

The following rulemaking action is adopted:

ITEM 1. Adopt the following **new** rule 653—13.17(135L,146A,146E,147,148,272C):

653—13.17(135L,146A,146E,147,148,272C) Standards of practice for physicians who perform or induce abortions—definitions—detection of fetal heartbeat—fetal heartbeat exceptions—discipline.

13.17(1) Standards of practice. This rule sets forth the standards of practice for physicians who perform or induce abortions. More information is contained in Iowa Code section 146E.2(5).

13.17(2) Definitions. As used in this rule or in Iowa Code chapter 146E:

“*Private health agency*” means any establishment, facility, organization, or other entity that is not owned by a federal, state, or local government that either is a health care provider or employs or provides the services of a health care provider. Establishments, facilities, organizations, or other entities that are health care providers include the following:

1. A hospital as defined in Iowa Code section 135B.1;
2. A health care facility as defined in Iowa Code section 135C.1;
3. A health facility as defined in Iowa Code section 135P.1; or
4. A similar entity that either is a health care provider or employs or provides the services of a health care provider.

“*Public health agency*” means any establishment; facility; organization; administrative division; or entity that is owned by a federal, state, or local government that either is a health care provider or employs or provides the services of a health care provider. Establishments, facilities, organizations, administrative divisions, or other entities that are health care providers include the following:

1. A hospital as defined in Iowa Code section 135B.1;
2. A health care facility as defined in Iowa Code section 135C.1;
3. A health facility as defined in Iowa Code section 135P.1; or

4. A similar entity that either is a health care provider or employs or provides the services of a health care provider.

“*Standard medical practice*” means the degree of skill, care, and diligence that a physician of the same medical specialty would employ in like circumstances. As applied to the method used to determine the presence of a fetal heartbeat for purposes of Iowa Code chapter 146E and this rule, “standard medical practice” includes employing the appropriate means of detection depending on the estimated gestational age of the unborn child and the condition of the woman and her pregnancy.

“*The pregnancy is the result of a rape*” means a circumstance in which the pregnancy is the result of conduct that would constitute an offense under Iowa Code section 709.2, 709.3, 709.4, or 709.4A when perpetrated against a female, regardless of where the conduct occurred.

“*The pregnancy is the result of incest*” means a circumstance in which a sex act occurs between closely related persons that involves a vaginal penetration that causes a pregnancy. The closely related persons must be related, either legitimately or illegitimately, as an ancestor, descendant, brother or sister of the whole or half blood, aunt, uncle, niece, or nephew. For purposes of this rule, a closely related person includes a stepparent, stepchild, or stepsibling, including siblings through adoption.

“*Unborn child*” means an individual organism of the species *Homo sapiens* from fertilization to live birth—that is, at all stages of development, including embryo and fetus.

“*Woman*” means a female individual regardless of her age.

13.17(3) Detection of fetal heartbeat. A physician who intends to perform or induce an abortion must determine via ultrasound whether the woman is carrying an unborn child with a detectable fetal heartbeat.

a. Obligation. The obligation under this rule requires a bona fide effort to detect a fetal heartbeat in the unborn child. This effort must be made in good faith and according to standard medical practice and reasonable medical judgment.

b. Method. The physician shall perform a transabdominal pelvic ultrasound on the woman to determine whether the unborn child has a detectable fetal heartbeat. This shall be performed in a manner consistent with standard medical practice, with real-time ultrasound equipment with a transducer of appropriate frequency. The equipment must be properly maintained and in proper functioning order.

13.17(4) Fetal heartbeat exceptions. The following applies to a physician who intends to perform or induce an abortion under a fetal heartbeat exception as defined in Iowa Code chapter 146E and this rule:

a. Incest or rape. For purposes of this rule, a pregnancy resulting from incest or rape may be reported within the appropriate time frame to a licensed physician whose services are retained for an abortion procedure.

(1) To determine whether the pregnancy is the result of incest, a physician who intends to perform or induce an abortion must use the following information:

1. Whether the sex act occurred between the woman and a closely related person, meaning, either legitimately or illegitimately, an ancestor, descendant, brother or sister of the whole or half blood, aunt, uncle, niece, or nephew, including a stepparent, stepchild, or stepsibling to include an adopted sibling.

2. The date the act occurred.

3. If initial reporting was to someone other than the physician who intends to perform or induce an abortion, the date the act was reported to a law enforcement agency, public health agency, private health agency, or family physician.

The physician who intends to perform or induce an abortion shall use this information to determine whether the fetal heartbeat exception for incest applies. This information does not prescribe the manner in which the physician is to obtain this information. This information and its source shall be documented in the woman’s medical records.

The physician who intends to perform or induce an abortion may rely on the information received upon a good-faith assessment that the information is true. The physician who intends to perform or induce an abortion may require the person providing the information to sign a certification form attesting that the information is true.

(2) To determine whether the pregnancy is the result of a rape, a physician who intends to perform or induce an abortion must use the following information:

1. The date the sex act that caused the pregnancy occurred.
2. The age of the woman seeking an abortion at the time of that sex act.
3. Whether the sex act constituted a rape.
4. Whether the rape was perpetrated against the woman seeking an abortion.
5. If initial reporting was to someone other than the physician who intends to perform or induce an abortion, the date the rape was reported to a law enforcement agency, public health agency, private health agency, or family physician.

The physician who intends to perform or induce an abortion shall use this information to determine whether the fetal heartbeat exception for rape applies. This rule does not prescribe the manner in which the physician is to obtain this information. This information and its source shall be documented in the woman's medical records.

The physician who intends to perform or induce an abortion may rely on the information received upon a good-faith assessment that the information is true. The physician who intends to perform or induce an abortion may require the person providing the information to sign a certification form attesting that the information is true.

b. Fetal abnormality. A certification from an attending physician that a fetus has a fetal abnormality that in the attending physician's reasonable medical judgment is incompatible with life must contain the following information:

- (1) The diagnosis of the abnormality;
- (2) The basis for the diagnosis, including the tests and procedures performed, the results of those tests and procedures, and why those results support the diagnosis; and
- (3) A description of why the abnormality is incompatible with life.

The diagnosis and the attending physician's conclusion must be reached in good faith following a bona fide effort, consistent with standard medical practice and reasonable medical judgment, to determine the health of the fetus. The certification must be signed by the attending physician. A physician who intends to perform or induce an abortion may rely in good faith on a certification from an attending physician if the physician who intends to perform or induce an abortion has a copy of the certification. The certification must be included in the woman's medical records by the physician who intends to perform or induce an abortion.

13.17(5) Discipline. Failure to comply with this rule or the requirements of Iowa Code chapter 146E may constitute grounds for discipline.

This rule is intended to implement Iowa Code chapter 146E.

[Filed 2/26/2024, effective 4/24/24]

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EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/20/24.