

# A Second Dose of Bad Medicine

## *Nebraska's Suspect Abortion "Reversal" Law Implementation Fraught with Concerns*



FLICKR CREATIVE COMMONS

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To learn more about how LB 209 would be implemented, the ACLU of Nebraska sent an open records request to NDHHS.

What our request uncovered leaves us even more concerned.  
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For over 50 years in Nebraska, the ACLU has worked in courts, legislatures, and communities to protect the constitutional and individual rights of all people. With a nationwide network of offices and millions of members and supporters, we take up the toughest civil liberties fights. Beyond one person, party, or side — we the people dare to create a more perfect union.

In 2019 the Nebraska Legislature passed a biased counseling law that requires doctors to tell their patients that medication abortion could be stopped mid-way through the process. This type of suspect law has been passed in other states.<sup>1</sup> The ACLU of Nebraska has carefully explored the implementation of these laws in our sister states and published that research in 2019.<sup>2</sup> Abortion “reversal” is not backed by science and now there is a growing concern that attempting “reversal” is dangerous.<sup>3</sup> Further, similar laws are facing costly civil rights litigation that has blocked them from going into effect.<sup>4</sup>

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1 **ACLU** Nebraska

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## Records Request

The ACLU of Nebraska sought correspondence and documentation from NDHHS related to efforts to determine what information would be published as required by LB 209.

Hundreds of pages of returned documents added new good governance concerns.

The records request and responses are available on file at the ACLU of Nebraska and available upon request.

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In addition to requiring doctors tell patients about the possibility of “reversal”, the Nebraska law also requires the Nebraska Department of Health and Human Services (NDHHS) to post language on its website about “reversal” and provide contact information for a “medical professional who can help her continue her pregnancy after taking mifepristone.”<sup>5</sup>

In order to learn more about how LB 209 would be implemented, the ACLU of Nebraska sent an open records request to NDHHS. We already knew that LB 209 was not grounded in evidence-based medicine, but what our request uncovered leaves us even more concerned about additional aspects of good governance. These concerns include a lack of transparency about costs, a lack of thoughtful research and analysis about how to implement the substance of the law, and a decision to implement the law outside of the Administrative Procedures Act.

- An estimated \$75,000 of implementation costs were not included in the bill's fiscal note.<sup>6</sup>
- NDHHS leadership wrote to program staff that including an anti-choice abortion reversal helpline “has been agreed to” without indications of who has agreed or the policy reasons for the agreement.<sup>7</sup>
- NDHHS developed a survey to send to medical providers to find those who would participate in abortion “reversal”, but never sent it out to Nebraska providers.<sup>8</sup>
- NDHHS elected not to utilize the Nebraska Administrative Procedure Act and failed to promulgate new rules and regulations potentially violating the act.<sup>9</sup> As such, no rules were developed regarding what contact information or other materials would be published on the website despite Nebraskans relying on this information. No rules were developed regarding the reporting form for uses of “abortion reversal” despite statutory language requiring NDHHS to keep these reports “pursuant to such rules and regulations as established by the department.”<sup>10</sup> No public process was provided for stakeholders to weigh in on these critical matters.

Our open records request shines a harsh light on the concerning implementation of this suspect legislation. We already knew that LB 209 was just the latest in a long line of attacks from politicians to insert themselves into the deeply personal abortion decision. Abortion “reversal” laws seek to confuse and shame women who have already made a decision to end their pregnancy, undermine patient health, implicate serious first amendment concerns, and the response to our records request tells us that legislating without science can also eliminate the transparency and sound procedure central to effective governance in Nebraska.

The time is right to repeal LB 209 via LB 872 in the 2020 legislative session to protect women’s health, restore medical ethics, and mitigate the risks to Nebraska taxpayers for costly, lengthy civil rights litigation.

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<sup>1</sup> See, e.g., S.B. 341, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019); Idaho Code Ann. § 18-609; S.B. 50, 2019 Gen. Assemb., Reg. Sess. (Ky. 2019); H.B. 1336, 66th Leg. Assemb., Sess. (N.D. 2019); S.B. 614, 2019 Leg., Reg. Sess. (Ok. 2019); S.D. Codified Laws § 34-23A-10.1; Utah Code Ann. § 76-7-305.5.

<sup>2</sup> Scout Richters, *Bad Medicine: States Force Doctors to Refer Abortion Patients to Google*, ACLU OF NEBRASKA (June 2019), [https://www.aclunebraska.org/sites/default/files/field\\_documents/abortion\\_reversal\\_report.pdf](https://www.aclunebraska.org/sites/default/files/field_documents/abortion_reversal_report.pdf)

<sup>3</sup> See Mara Gordon, *Safety Problems Lead To Early End For Study Of “Abortion Pill Reversal,”* NPR.org (Dec. 5, 2019), <https://www.npr.org/sections/health-shots/2019/12/05/785262221/safety-problems-lead-to-early-end-for-study-of-abortion-pill-reversal>.

<sup>4</sup> See *AMA v. Stenehjem*, 2019 U.S. Dist. LEXIS 153824 (D. N.D. Sept. 10, 2019); *Planned Parenthood Ariz., Inc. v. Brnovich*, 172 F. Supp. 3d 1075 (D. Ariz. 2016).

<sup>5</sup> L.B. 209, 106th Leg., 1st Sess. (Neb. 2019), <https://nebraskalegislature.gov/FloorDocs/106/PDF/Final/LB209.pdf>.

<sup>6</sup> Appendix 1.

<sup>7</sup> Appendix 2.

<sup>8</sup> Emails on file and available upon request.

<sup>9</sup> Appendix 3.

<sup>10</sup> See L.B. 209, *supra* note 5.

DHHS Public Records

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From: Miller, Mark  
Sent: Tuesday, April 30, 2019 12:42 PM  
To: Qu, Ming  
Cc: Singleton, Janis; Fosler, Russ; Loving, Sean  
Subject: RE: AM1524 filed on LB209

It is difficult to determine. The way this is written, it appears to be a new reporting form and not a modification of the existing one. It appears they want to track each pregnancy that used mifepristone and then track what attempts were done to stop the abortion. This is also a Vital Records issue since it would be a new reporting form for them. They are also amending 28-345 with a lot of the same language that is required for abortions in 28-343. Since this appears to be a new form, a new event added to our electronic system is \$40,000 plus development costs and the cost of developing and printing a new form. A new report would also need to be developed based on what was reported and also data entry costs. I would estimate the overall cost to be in the \$75,000 range plus the extra cost added to the system's maintenance contract. We will need time to develop the form and add it to the electronic system.

15                    2. on page 8, after line 18, ins  
16                    "(7) (a) The Department of Health  
17                    a reporting form which shall be used  
18                    at continuing a woman's pregnancy afl  
19                    in this section performed in this  
20                    following items:  
21                    (i) The age of the pregnant woman

Mark Miller  
Department of Health & Human Services  
Office of Health Statistics/Vital Records  
1033 O Street, Suite 130  
Lincoln, NE 68509  
Phone 402-471-0355  
Fax 402-742-2338

**Pyle, Mark**

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**From:** Botelho, Bo  
**Sent:** Thursday, May 30, 2019 1:34 PM  
**To:** Pyle, Mark  
**Subject:** RE: LB209 Implementation

We should include the hot line. It has been agreed to.

After you and your team meet and develop a plan bring it to me to review. Yes we will need to advise PRO. I don't want our program to get tangled with legislative negotiations.

**Bo Botelho** | *Chief Operating Officer & General Counsel*  
**Nebraska Department of Health and Human Services**  
OFFICE: 402-471-1668

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**From:** Pyle, Mark  
**Sent:** Thursday, May 30, 2019 1:30 PM  
**To:** Botelho, Bo <Bo.Botelho@nebraska.gov>  
**Subject:** LB209 Implementation

Bo,

I am meeting with staff needed for implantation of LB209 (abortion reversal) requirements tomorrow. We will cancel this meeting if bill doesn't pass. Do you recall anything we have promised GPRO would be included in this implementation, such as inclusion of the hot-line unicameral keeps referring to? Program staff would rather not use the hot-line but if we need to include hot-line number on the website as a resource we will certainly do it. If we are to implement we want to do this right.

Mark

**Mark E. Pyle** | *Deputy Director*  
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**Nebraska Department of Health and Human Services**  
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**Wedekind, Tina**

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**From:** Newmyer, Ashley  
**Sent:** Friday, June 21, 2019 9:02 AM  
**To:** Fosler, Russ  
**Subject:** RE: Implementation of LB 209

Please disregard, Darrell spoke with Teresa and they have changed their position. They believe we do NOT have to promulgate the form through rule and reg to implement this legislation.

Sorry for the confusion,

**Ashley Newmyer** | *Deputy Director*  
PUBLIC HEALTH

**Nebraska Department of Health and Human Services**  
OFFICE: 402-471-3489

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**From:** Newmyer, Ashley  
**Sent:** Thursday, June 20, 2019 3:29 PM  
**To:** Fosler, Russ <Russ.Fosler@nebraska.gov>  
**Subject:** Implementation of LB 209

Hi Russ,

I double checked with Legal and we do have to promulgate a reporting for implementation of LB 209.

In looking at the executive order progress, it didn't look like Title 174 NAC 8 was included in that review or that any changes were being made to that chapter. I'm not sure how they will have us proceed but I wanted to make you aware so that you could let staff know.

Thank you!

**Ashley Newmyer** | *Deputy Director*  
PUBLIC HEALTH

**Nebraska Department of Health and Human Services**  
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