

# CRS Report for Congress

## Requiring Parental Involvement in a Pregnant Minor's Abortion Decision: State Laws and Recent Developments

Updated January 9, 2007

Jon O. Shimabukuro  
Legislative Attorney  
American Law Division

Tara Alexandra Rainson  
Law Librarian  
Knowledge Service Group



Prepared for Members and  
Committees of Congress

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## Summary

State laws that require parental involvement in a pregnant minor's abortion decision have gained greater visibility in light of recent attempts by Congress to criminalize the interstate transport of a minor to obtain an abortion. At least forty-three states have enacted statutes that require a minor to seek either parental notification or parental consent before obtaining an abortion. This report discusses the validity of state parental involvement laws in the context of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *Ayotte v. Planned Parenthood of Northern New England*, and other U.S. Supreme Court cases that address a minor's right to choose whether to terminate her pregnancy. The report reviews the various state parental involvement law provisions, such as judicial bypass procedures and exceptions for medical emergencies. The report also highlights recent federal parental involvement legislation and provides a survey of current state parental involvement laws.

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# Requiring Parental Involvement in a Pregnant Minor's Abortion Decision: State Laws and Recent Developments

## Introduction

State laws that require parental involvement in a pregnant minor's abortion decision have gained greater visibility in light of recent attempts by Congress to criminalize the interstate transport of a minor to obtain an abortion.<sup>1</sup> At least forty-three states have enacted statutes that require a minor to seek either parental notification or parental consent before obtaining an abortion. This report discusses the validity of state parental involvement laws in the context of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *Ayotte v. Planned Parenthood of Northern New England*, and other U.S. Supreme Court cases that address a minor's right to choose whether to terminate her pregnancy.

In *Casey*, the Court upheld the right of a woman to choose whether to terminate her pregnancy, but permitted certain restrictions on a minor's ability to obtain an abortion, such as state parental consent requirements.<sup>2</sup> In *Ayotte*, the Court reiterated that a state may require parental involvement in a pregnant minor's abortion decision.<sup>3</sup>

In addition to examining the relevant abortion decisions, this report reviews common state parental involvement law provisions, such as judicial bypass procedures and exceptions for medical emergencies. The report also highlights recent federal parental involvement legislation and provides a survey of current state parental involvement laws.

## ***Planned Parenthood of Southeastern Pennsylvania v. Casey and Ayotte v. Planned Parenthood of Northern New England***

In *Roe v. Wade*, the U.S. Supreme Court held that a woman has a constitutional right to choose whether to terminate her pregnancy.<sup>4</sup> The Court in later cases has affirmed the basic right to an abortion, but also permitted restrictions on a woman's

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<sup>1</sup> See S. 403, 109<sup>th</sup> Cong. (2005); H.R. 748, 109<sup>th</sup> Cong. (2005).

<sup>2</sup> 505 U.S. 833 (1992).

<sup>3</sup> 126 S.Ct. 961 (2006).

<sup>4</sup> *Roe v. Wade*, 410 U.S. 113 (1973). For additional information on abortion, see CRS Report RL33467, *Abortion: Legislative Response*, by Karen J. Lewis and Jon O. Shimabukuro.

access to an abortion. *Casey* established that a state may require parental involvement in a pregnant minor's abortion decision if the involvement does not unduly burden the minor's right to choose whether to obtain an abortion. In that 1992 case, the Court considered a constitutional challenge to five provisions of the Pennsylvania Abortion Control Act of 1982. One provision required a pregnant minor seeking an abortion to obtain consent from one parent or guardian before the procedure.<sup>5</sup> The Court upheld the parental consent provision and also affirmed that a state law that banned abortion completely would be unconstitutional. In its holding, the Court shifted away from the trimester-based strict scrutiny standard of judicial review it used in *Roe* and articulated a new "undue burden" analysis. Courts will now invalidate a state-imposed abortion restriction if it imposes an "undue burden" on a woman's right to obtain an abortion.<sup>6</sup> Applying the new standard, the *Casey* Court held that the parental consent provision did not unduly burden a pregnant minor's right to obtain an abortion because it included exceptions in the event of a medical emergency and when the minor demonstrates to a court that parental consent is not in her best interests.<sup>7</sup>

In January 2006, the Court reiterated the validity of state laws that place certain restrictions on a pregnant minor's right to obtain an abortion. In *Ayotte*, the Court considered a constitutional challenge to a state statute requiring parental notification before a minor may obtain an abortion. The plaintiffs argued that the New Hampshire Parental Notification Prior to Abortion Act violates the right of a woman to obtain an abortion because it does not contain an exception to allow a pregnant minor to obtain an abortion without parental notification when the procedure is necessary to preserve the minor's health. In writing for an unanimous Court, Justice O'Connor stated explicitly that the holding did not revisit Court precedent regarding abortion.<sup>8</sup> Rather, the Court addressed the relatively narrow issue of remedies. It held that only certain applications of the act would violate a woman's constitutional right to an abortion, and remanded the case with orders for the lower courts to consider whether the act could be interpreted in a manner consistent with the judicial

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<sup>5</sup> The other provisions required spousal consent, a 24-hour waiting period, the pregnant woman's informed consent before she could obtain an abortion, and certain reporting for facilities that provide abortions. The plurality upheld the informed consent, waiting period, and reporting requirement provisions, finding that they did not impose undue burdens. It struck down the spousal consent provision, however, holding that it gave husbands too much control over their wives and could contribute to spousal abuse, thus imposing an undue burden on a woman's abortion decision.

<sup>6</sup> The plurality opinion defined "undue burden" as a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. *Casey* was not the first judicial instance in which the Supreme Court held that a state cannot place a parental involvement restriction on a minor's right to obtain an abortion so that her parent or parents have absolute veto power over the decision. In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), the Court held that a state may not require the consent of parent or guardian of a pregnant minor seeking an abortion if such consent will unduly burden the minor's right to seek an abortion.

<sup>7</sup> *Casey*, 505 U.S. at 899.

<sup>8</sup> *Ayotte*, 126 S. Ct. at 965.

precedent that a state may not restrict access to an abortion when the health of the woman seeking the abortion is at issue.

Despite its narrow holding, the Court in *Ayotte* expressly affirmed two legal propositions relating to pregnant minors' access to abortions: states have the right to require parental involvement in a minor's abortion decision, and a state may not restrict access to an abortion that is necessary to protect the life or health of a woman seeking an abortion.<sup>9</sup>

## Parental Notification and Parental Consent

Fourteen state parental involvement statutes require the consent of one parent before a pregnant minor may obtain an abortion, while twelve state statutes require only that the minor notify one or both parents that she intends to obtain an abortion. As discussed, the Court has held that a state law that requires parental involvement in a minor's abortion decision is unconstitutional if it unduly burdens the minor's right to terminate her pregnancy.

Several Court cases preceding *Casey* and *Ayotte* expressly established that a state parental involvement statute that permits a parent to unilaterally prohibit a minor from obtaining an abortion would be unconstitutional. In *Planned Parenthood of Central Missouri v. Danforth*, the Court held that a state parental involvement statute must provide an alternate procedure for a minor to obtain authorization for an abortion.<sup>10</sup> In *Belotti v. Baird*, the Court reiterated the *Danforth* holding and stated that such an alternative must provide a pregnant minor the opportunity to demonstrate that she is "mature enough and well enough informed" to make an abortion decision without parental involvement, or that the abortion is in her best interests.<sup>11</sup>

**Judicial Bypass Procedure.** Thirty-four state laws that require parental involvement in a pregnant minor's abortion decision provide for a judicial bypass procedure as the alternate means for a minor to obtain permission for an abortion. A judicial bypass procedure allows a minor who seeks an abortion to obtain permission from a court to waive the relevant parental involvement requirement. In cases preceding *Casey*, the Court held that adequate judicial bypass procedures are constitutional alternatives to state parental involvement statutes. Both *Danforth* and *Belotti*, for example, involved judicial bypass procedures that the Court upheld as valid safeguards of a pregnant minor's right to obtain an abortion.

While the Court has invalidated state parental *consent* laws that do not include judicial bypass procedures, it has not determined whether a state law that requires

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<sup>9</sup> *Ayotte*, 126 S. Ct. at 966-67.

<sup>10</sup> 428 U.S. 52 (1976). Minnesota, Mississippi, and North Dakota have laws that require the parental consent of both parents before a pregnant minor may obtain an abortion. The Court has held that a state law that contains a two-parent consent provision is unconstitutional unless it contains an alternative for parental consent, such as a judicial bypass procedure.

<sup>11</sup> 443 U.S. 622, 642 (1979).

parental *notification* must contain a judicial bypass procedure. In *Ohio v. Akron Center for Reproductive Health, et al.*, the Court held that the Ohio parental notification statute at issue was constitutional, suggesting that the statute’s judicial bypass procedure adequately protected a pregnant minor’s right to obtain an abortion.<sup>12</sup> The Court expressly declined, however, to decide whether a state parental notification law that did not include a judicial bypass procedure would *per se* violate the Constitution. In *Lambert v. Wicklund*, the Court similarly declined to reach the question of whether a state parental notification law must contain a judicial bypass procedure.<sup>13</sup> Rather, the Court held narrowly that the Montana parental notification law at issue, which contained a judicial bypass procedure, did not place an undue burden on a pregnant minor’s right to obtain an abortion.<sup>14</sup>

Although the Court has refused to address directly whether a state parental notification law must contain a judicial bypass procedure, Court precedent appears to suggest that a parental notification law would be unconstitutional if it did not provide a pregnant minor with some alternative to parental notification. In *H.L. v. Matheson*, the Court upheld as constitutional a state statute that requires an unemancipated minor who lives with her parents to notify them, “if possible,” before she obtains an abortion, but includes exceptions for a minor who demonstrates that notification is not in her best interests.<sup>15</sup> Moreover, in *Belotti*, the Court indicated that a parental notification law would be unconstitutional if it did not provide an alternative to notification for a “mature” minor or when notification would not be in a minor’s best interests.

The Court has declined to establish specific parameters for the adequacy of judicial bypass procedures in the context of state parental involvement laws. In writing for the majority in *Akron*, Justice Kennedy rejected the dissenting opinion’s call to articulate specific procedural thresholds for the constitutionality of a judicial bypass alternative, such as whether it must be anonymous or only confidential, or how quickly a state must provide a pregnant minor with the opportunity for a court proceeding. He stated only that the Ohio judicial bypass procedure contained “reasonable steps” to protect the identity of pregnant minors seeking a judicial bypass and that the procedure included adequate provisions to expedite a pregnant minor’s request for a proceeding.<sup>16</sup> The Court majority also held that a state may validly require a pregnant minor to establish “by clear and convincing evidence” during a judicial bypass hearing that she is mature enough to make an abortion decision without parental involvement.<sup>17</sup>

**Medical Emergency Exception.** State parental involvement statutes in Louisiana, Maryland, Massachusetts, and Ohio contain no express exception to

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<sup>12</sup> 497 U.S. 502 (1990).

<sup>13</sup> 520 U.S. 292 (1997).

<sup>14</sup> *Id.* at 295.

<sup>15</sup> 450 U.S. 398 (1981).

<sup>16</sup> *Akron*, 497 U.S. at 513.

<sup>17</sup> *Akron*, 497 U.S. at 515.

protect the life or health of the pregnant minor. In *Ayotte*, the Court expressly reiterated its prior holdings in *Roe* and *Casey* that a state may not restrict access to an abortion that is necessary to preserve the life or health of the pregnant woman.<sup>18</sup> The Court also stated the factual proposition that in a small number of cases a pregnant minor requires an immediate abortion to prevent serious health consequences.<sup>19</sup> Therefore, a state statute that restricts a pregnant minor's access to an abortion likely must include an exception for medical emergencies involving the minor's health or life.

## Federal Legislation in the 109<sup>th</sup> Congress

During the 109<sup>th</sup> Congress, legislation that would have prohibited the knowing transport of a minor across state lines with the intent to obtain an abortion was passed by both chambers. Senator John E. Ensign introduced S. 403, the Child Custody Protection Act, on February 16, 2005. The measure passed the Senate on July 25, 2006 by a vote of 65-34. Violators of the act would have been subject to a fine under title 18 of the U.S. Code, imprisonment for not more than one year, or both. The act included an exception for abortions that are necessary to save the life of the minor when endangered by a physical disorder, physical injury, or physical illness.

Representative Ileana Ros-Lehtinen introduced H.R. 748, the Child Interstate Abortion Notification Act, on February 10, 2005. The measure passed the House on April 27, 2005 by a vote of 270-157. The act would have also prohibited the interstate transport of a minor with the purpose of obtaining an abortion. In addition, H.R. 748 would have required a physician performing an abortion on a minor outside the minor's state of residence to notify her parents of the intended abortion at least 24 hours before the procedure. The act included exceptions to the notification provision for abortions necessary to save the minor's life.

On September 26, 2006, the House considered an amendment in the nature of a substitute to the version of S. 403 that was passed by the Senate. Voting 264-153, the House passed S. 403, now titled the Child Interstate Abortion Notification Act. Like H.R. 748, the House-passed version of S. 403 would have required a physician who performs or induces an abortion on a minor who is a resident of a state other than the state in which the abortion is performed to provide actual notice to a parent of the minor at least 24 hours before performing the abortion.

The House-passed version of S. 403 would have made additional changes not considered by H.R. 748, including a prohibition on the transportation of a minor across a state line and into a foreign nation in circumvention of a law requiring parental involvement in a minor's abortion decision; the denial of a civil action to a parent who has committed an act of incest with the minor; and the establishment of

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<sup>18</sup> *Ayotte*, 126 S. Ct. at 967. In *Doe v. Bolton*, 410 U.S. 179 (1973), the Court held that, to determine whether an abortion is necessary to protect a woman's "health," a doctor may exercise his or her judgment based on various factors, such as a woman's physical, emotional, psychological, and familial well-being, as well as her age.

<sup>19</sup> *Ayotte*, 126 S. Ct. at 967.



penalties for the transport of a minor across a state line for the purpose of obtaining an abortion by someone who has committed an act of incest with the minor.

Efforts to reconcile the differences in the Senate-passed version of S. 403 and the House-passed version of the measure were not successful.

The following table provides citations to state parental involvement statutes. Information concerning whether the applicable statute requires parental consent or notification is included in the table. Statutes that include judicial bypass provisions, medical emergency exceptions, and/or exceptions for a pregnant minor who is the victim of parental abuse or neglect are marked accordingly.

### State Parental Involvement Statutes

| State and Statute  | Parental Involvement Required  | Judicial Bypass Available | Medical emergency exception | Abuse/ Incest Exception |
|--|--|---------------------------|-----------------------------|-------------------------|
| Alabama, § 26-21-1 <i>et seq.</i>  | Consent; one parent  | X                         | X                           | X                       |
| Alaska, §§ 18.16.020, 18.16.030  | Not enforced: permanently enjoined by judicial order                       |                           |                             |                         |
| Arizona, § 36-2152   | Consent; one parent  | X                         | X                           | X                       |
| Arkansas, §§ 20-16-802(2), 20-16-804, 20-16-805(1), 20-16-808, 20-16-809 | Consent; one parent  | X                         | X                           | X                       |
| California Health & Safety Code, § 123450                                | Not enforced: permanently enjoined by judicial order                       |                           |                             |                         |
| Colorado, § 12.37.5.101 <i>et seq.</i>                                   | Notification; one parent   | X                         | X                           | X                       |
| Delaware (applies to minors under 16), tit. 24 § 1780 <i>et seq.</i>     | Notification; one parent (or adult relative)                               | X                         | X                           |                         |
| Florida, § 390.01114   | Notification; one parent   | X                         | X                           | X                       |
| Georgia, § 15-11-110 <i>et seq.</i>                                      | Notification; one parent   | X                         | X                           |                         |
| Idaho, § 18-609A   | Consent; one parent (Not enforced: temporarily enjoined by judicial order) |                           |                             |                         |
| Illinois, ch. 750, § 70/1 <i>et seq.</i>                                 | Notification; one parent (Not enforced: enjoined by judicial order)        |                           |                             |                         |
| Indiana, § 16-34-2-4   | Consent; one parent  | X                         | X                           |                         |
| Iowa, § 135L.1 <i>et seq.</i>  | Notification; one parent (or adult relative)                               | X                         | X                           | X                       |
| Kansas, § 65-6705  | Notification; one parent   | X                         | X                           | X                       |

| <b>State and Statute</b>                   | <b>Parental Involvement Required</b>                                | <b>Judicial Bypass Available</b> | <b>Medical emergency exception</b> | <b>Abuse/ Incest Exception</b> |
|--|---|----------------------------------|------------------------------------|--------------------------------|
| Kentucky, § 311.732                        | Consent; one parent   | X                                | X                                  |                                |
| Louisiana, §§ 40:1299.35.5<br>40:1299.35.7 | Consent; one parent   | X                                |                                    | X                              |
| Maryland Health-General Code, § 20-103     | Notification; one parent  | X                                |                                    |                                |
| Massachusetts, ch. 112, § 12S              | Consent; one parent   | X                                |                                    |                                |
| Michigan, § 722.901 <i>et seq.</i>         | Consent; one parent   | X                                | X                                  |                                |
| Minnesota, § 144.343 subd. 2               | Notification; both parents  | X                                | X                                  | X                              |
| Mississippi, § 41-41-51 <i>et seq.</i>     | Consent; both parents   | X                                | X                                  |                                |
| Missouri, § 188.028                        | Consent; one parent   | X                                |                                    |                                |
| Montana, § 50-20-201 <i>et seq.</i>        | Notification; one parent (Not enforced: enjoined by judicial order) |                                  |                                    |                                |
| Nebraska, § 71-6901 <i>et seq.</i>         | Notification; one parent  | X                                | X                                  | X                              |
| Nevada, § 442.255 <i>et seq.</i>           | Notification; one parent (Not enforced: enjoined by judicial order) |                                  |                                    |                                |
| New Hampshire, §§ 132:2b, 132:25           | Notification; one parent (Not enforced: enjoined by judicial order) |                                  |                                    |                                |
| New Jersey, §§ 9:17A-1.1–9:17A-1.12        | Notification; one parent (Not enforced: enjoined by judicial order) |                                  |                                    |                                |
| New Mexico, § 30-5-1                       | Consent; one parent (Not enforced: enjoined by judicial order)      |                                  |                                    |                                |
| North Carolina, § 90-21.6 <i>et seq.</i>   | Consent; one parent (or other adult relative)                       | X                                | X                                  |                                |

| <b>State and Statute</b>                      | <b>Parental Involvement Required</b>          | <b>Judicial Bypass Available</b> | <b>Medical emergency exception</b>          | <b>Abuse/ Incest Exception</b> |
|---|---|----------------------------------|---|--------------------------------|
| North Dakota, §§ 14-02.1-03, 14-02.1-03.1     | Consent; both parents                         | X                                | X   |                                |
| Ohio, §§ 2151.85, 2503.073, 2919.12, 2919.121 | Consent; one parent                           | X                                | X   | X                              |
| Oklahoma, § 1-740.1 <i>et seq.</i>            | Notification; one parent                      | X                                | X   | X                              |
| Pennsylvania, 18 § 5206 <i>et seq.</i>        | Consent; one parent                           | X                                | X   |                                |
| Rhode Island, §§ 23-4.7-4, 23-4.7-6           | Consent; one parent                           | X                                | X   |                                |
| South Carolina, § 44-41-30 – 44-41-36         | Consent; one parent                           | X                                | X   | X                              |
| South Dakota, §§ 34-23A-7, 34-23A-7.1         | Notification; one parent                      | X                                | X   |                                |
| Tennessee, § 37-10-301 <i>et seq.</i>         | Consent; one parent                           | X                                | X   | X                              |
| Texas, Fam Code § 33.002 <i>et seq.</i>       | Consent; one parent                           | X                                | X   | X                              |
| Utah, §§ 76-7-304, 76-7-305                   | Consent and notification; one parent          | X (for consent provision)        | X (for consent and notification provisions) | X (for notification provision) |
| Virginia, § 16.1-241(V)                       | Consent; one parent (or other adult relative) | X                                | X   | X                              |
| West Virginia, § 16-2F-1 <i>et seq.</i>       | Notification; one parent                      | X                                | X   |                                |
| Wisconsin, § 48.375                           | Consent; one parent (or other adult relative) | X                                | X   | X                              |
| Wyoming, § 35-6-118                           | Consent; one parent                           | X                                | X   |                                |