

From the UMHS ObGyn Program in Sexual Rights and Reproductive Justice



**University of Michigan
Health System**

Editor:

Ed Goldman, J.D.
Department of ObGyn
egoldman@umich.edu

In This Edition:

- Pending Federal Legislation
- Pending State Legislation
- Litigation to Watch

Individual Highlights

- No Taxpayer Funding for Abortion Act.....1
- Bill to Give a Fetus Personhood.....1
- Ultrasound Bills That Would Require Use of the Most Technologically Advanced Equipment at Facility2
- Fetal Remains Bills.....2
- Partial-Birth Abortion Bills.....3
- Availability of Emergency Contraception (Plan B).....3-4
- Scope of the Dickey-Wicker Amendment and Human Embryonic Stem Cell Research.....4

Pending Federal Legislation

No Taxpayer Funding for Abortion

The No Taxpayer Funding for Abortion Act would prohibit the expenditure of federal funds for abortions. If this sounds familiar, it is because the Hyde Amendment already bans the use of certain federal funds to pay for abortions. The Hyde Amendment includes exceptions for cases of rape, incest, or when a pregnant woman's life is endangered by a

physical disorder, illness, or injury.

However, the proposed Act extends restrictions on a federally funded abortion in two notable ways: 1) The Act would also prohibit federal funds from being used for any health benefits coverage that includes coverage of abortion and 2) The Act includes an exception for "forcible rape" (as opposed to all rape).

The bill does not define "rape" or "forcible

rape." The U.S. Department of Justice defines "forcible rape" as sexual intercourse against one's will by force or threat of force. Statutory rape that does not involve force is not considered "forcible rape." While some criticize the bill as an attempt to redefine rape, others say the language is not intended to change the existing law as it applies to abortion for rape victims.

BREAKING NEWS:

The federal government has decided not to change federal rape laws in determining which abortions can be covered by federal benefit programs. House Republicans have removed the controversial "forcible rape" provision from their "No Taxpayer Funding for Abortion Act." According to a spokesman for Rep. Chris Smith (R-N.J.), who introduced the bill, the original language from the Hyde Amendment—which bans federal funding for abortions through Medicaid except in cases of rape, incest, or to save a mother's life—will replace the "forcible" provision.

Pending State Legislation in Michigan

Bill to Give a Fetus Personhood

Senate Bill 0013 is a bill to amend M.C.L. 8.3 by adding section 3x, which reads as follows: "The word 'individual' shall be construed to mean a natural person and to include a fetus." Granting a fetus the status of personhood would alter criminal and family laws, compromise a woman's right to use emergency contraceptive, and place an effective (though currently unconstitutional) ban on abortion.

Please consult UMHS' Medical-Legal Handbook for ObGyn Health Care Professionals for more information about medical-legal issues: <http://www.med.umich.edu/obgyn/research/ssrj/>

Individual Highlights

No Taxpayer Funding for Abortion Act.....1

Bill to Give a Fetus Personhood.....1

Ultrasound Bills That Would Require Use of the Most Technologically Advanced Equipment at Facility2

Fetal Remains Bills.....2

Partial-Birth Abortion Bills.....3

Availability of Emergency Contraception (Plan B).....3-4

Scope of the Dickey-Wicker Amendment and Human Embryonic Stem Cell Research.....4

Ultrasound Bills That Would Require Use of the Most Technologically Advanced Equipment at Facility

Senate Bill 0150 and House Bill 4433 seek to amend Michigan's law (M.C.L. 333.17015) on the special informed consent procedure that doctors need to undertake before performing an abortion. Currently, state law requires that a doctor provide an ultrasound exam to any pregnant woman seeking an abortion and give the mother the option to

view the image. The proposed bill specifies that a pregnant woman seeking an abortion must be provided a high-quality ultrasound image taken with the most technologically advanced equipment available at the facility.

Proponents of the bills cite concerns that women are not being sufficiently informed and have even claimed that some physicians deliberately show women blurry or low-quality images taken with outdated equipment. Critics say that the bills attempt to restrict access

to abortion in three ways: 1) the requirement to view the image and the additional time it takes can place undue emotional pressure on a woman to choose not to terminate her pregnancy, 2) the requirement to use the most technologically advanced equipment in the facility can impose a financial hardship on abortion providers that may be prohibitively costly, and 3) treating a woman as a consumer is not the right approach for issues concerning her bodily integrity.

BREAKING NEWS:

On April 12, a second ultrasound bill—SB 0313—was also introduced. The newer bill maintains the provisions requiring that providers use the most technologically advanced equipment available in the facility and also requires that an ultrasound be performed “at least 2 hours before an abortion.” The newer bill contains greater specificity as to what the physician's responsibilities would be should the bill become law, saying that “the physician or qualified person assisting the physician shall ensure that the ultrasound screen is turned toward the patient to enable her to easily view the active ultrasound image of the fetus.”

Fetal Remains Bills

A series of bills that center on the disposition of fetal remains have been introduced this year and would amend Michigan's Public Health Code if passed into law. SB 0025 defines “fetal remains” as “a dead fetus or part of a dead fetus that has completed at least eight weeks of gestation” or has

“reached the stage of development at which...the head, torso, or extremities appear to be supported by skeletal or cartilaginous structures.” The umbilical cord and placenta are not considered fetal remains. SB 0054 specifies that fetal remains that are disposed of by cremation must be incinerated separately from other

Please consult UMHS' Medical-Legal Handbook for ObGyn Health Care Professionals for more information about medical-legal issues:
<http://www.med.umich.edu/obgyn/research/ssrj/>

Individual Highlights

No Taxpayer Funding for Abortion Act.....1

Bill to Give a Fetus Personhood.....1

Ultrasound Bills That Would Require Use of the Most Technologically Advanced Equipment at Facility2

Fetal Remains Bills.....2

Partial-Birth Abortion Bills.....3

Availability of Emergency Contraception (Plan B).....3-4

Scope of the Dickey-Wicker Amendment and Human Embryonic Stem Cell Research.....4

medical waste. Furthermore, SB0054 and SB 0055 make it a felony punishable by up to three years' imprisonment and/or a maximum fine of \$5,000 for failing to incinerate fetal remains separately from other medical waste. Fetal remains and "products of conception" must be separated after eight weeks gestation.

Institutions where a dead fetus is delivered must make arrangements for disposition of the fetus. Physicians who attend the delivery of a dead fetus must inform the family that Michigan law requires authorization of disposition arrangements.

Practically, it is hard to distinguish fetal remains from "products of conception" if the gestation period is only a few months. Abortion providers would have to find medical waste companies who are willing to separate the remains in accordance with the law if it passes. Medical waste companies, who must exercise a high degree of care given the criminalization of improper disposition, are likely to either charge abortion providers a premium for providing the newly required service or simply refuse to provide the service.

Partial-Birth Abortion Bills

Senate Bills 0160-0161 and House Bill 4109 are among the latest attempts by the Michigan legislature to prohibit partial-birth abortions. Three similar measures that have been introduced in past years—the Michigan Partial-Birth Abortion Ban, the Infant Protection Act, and the Legal Birth Definition Act—have all been held unconstitutional for vagueness, for lacking an exception for the mother's health, and/or for unduly burdening a woman's rights.

However, in 2007, the Supreme Court upheld the federal Partial-Birth Abortion Ban Act, which mirrors the past Michigan attempts to ban partial-

birth abortions and conspicuously does not have an exception for the mother's health. While partial-birth abortions are effectively prohibited nationwide by the federal Partial-Birth Abortion Ban Act, members of the Michigan legislature periodically try to pass corresponding state legislation just in case the federal law is overturned in the future. Now that the Supreme Court has determined in *Gonzales v. Carhart (Carhart II)* that the federal prohibition passes constitutional muster, the new bills introduced in Michigan that do not contain a health exception for the mother might successfully pass.

Litigation to Watch

Availability of Emergency Contraception (Plan B)

In 2009, the U.S. District Court for the Eastern District of New York ruled that the Food and Drug Administration (FDA) must reconsider its decision to

place age restrictions on over-the-counter (OTC) access to the emergency contraceptive Plan B. In his decision in *Tummino v. Torti*, Judge Korman held that the FDA deviated from its own

legal standards for agency decision-making and that the decisions with respect to OTC use of Plan B were "arbitrary and capricious because they were not the result of reasoned and good

Please consult UMHS' Medical-Legal Handbook for ObGyn Health Care Professionals for more information about medical-legal issues:
<http://www.med.umich.edu/obgyn/research/ssrj/>

Individual Highlights

No Taxpayer Funding for Abortion Act.....1

Bill to Give a Fetus Personhood.....1

Ultrasound Bills That Would Require Use of the Most Technologically Advanced Equipment at Facility2

Fetal Remains Bills.....2

Partial-Birth Abortion Bills.....3

Availability of Emergency Contraception (Plan B).....3-4

Scope of the Dickey-Wicker Amendment and Human Embryonic Stem Cell Research.....4

faith agency decision-making.” Korman also noted the strong evidence suggesting that the FDA succumbed to political pressures from the administration.

Accordingly, Korman ruled that Plan B must be made available to 17-year-olds without a prescription under the same conditions as it is

made available to 18-year-olds and that the FDA must reconsider its decisions regarding the OTC use of Plan B for women under age 17.

Since Korman's ruling, the FDA has failed to reconsider its decisions per the court order and has indicated that it will not be doing so in the near future.

A motion for contempt was filed in November in hopes of forcing the FDA to comply with the judicial order. As of now, Plan B is available OTC to those 17 years and older. If litigation continues, it is possible that emergency contraception will be approved for OTC distribution without age restrictions.

Scope of the Dickey-Wicker Amendment and Human Embryonic Stem Cell Research

In 2009, President Obama signed an executive order that overturned President Bush's limitation on federal funding to preexisting human embryonic stem cell (hESC) lines. Under the new NIH guidelines, researchers could apply for federal funding for new lines, provided that they come from unused IVF-derived embryos that were donated for research purposes in accordance with a prescribed consent process. In response to the new policy, plaintiffs brought a lawsuit (*Doe v. Obama*) claiming that the executive order and the NIH guidelines violated the Fifth, Thirteenth, and Fourteenth Amendment

rights of the embryos. The plaintiffs—who are a frozen embryo that symbolically represents all frozen embryos and a group of adoptive parents—also assert that the administration has violated the Dickey-Wicker Amendment that prohibits federal funding resulting in the destruction of embryos for research purposes.

While *Doe v. Obama* was dismissed for the embryos' lack of standing, a D.C. court in the separate case of *Sherley v. Sebelius* has determined that doctors seeking NIH funding do have standing in this matter. Judge Royce Lamberth held that the order and

guidelines violated the Dickey-Wicker Amendment because the prohibition includes “all research in which an embryo is destroyed, not just the ‘piece of research’ in which the embryo is destroyed.”

BREAKING NEWS:

Lamberth's decision was appealed by the NIH. On April 29, the U.S. Court of Appeals in D.C. vacated the preliminary injunction finding that research involving privately derived embryonic stem cell lines does not violate the Dickey-Wicker Amendment. The case now continues in the D.C. Circuit court.