Law & Medicine News

Spring 2013
Volume 2, Issue 4

From the UMHS ObGyn Program in Sexual Rights and Reproductive Justice

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

Associate Editor:
Kylee Sunderlin,
Law Clerk

In This Edition:

Proposed Legislation

Plan B Litigation

Individual Highlights

Proposed State Legislation in Michigan

Bill to Expand Objections to Providing Health Services

On March 21, 2013, the Senate Health and Policy Committee advanced Senate Bill 136 to the Senate floor. The bill, introduced by Senator John Moolenaar, is the "Religious Liberty and Conscience Protection Act." Among other things, the bill would allow a health facility to assert an objection to participating in a health care service, and decline to participate in that service.

Although state law already permits hospitals, physicians, and other medical professionals to object to performing abortions on grounds of conscience or religion, SB 136 goes further by allowing health care providers and insurance companies to refuse any services, including birth control and mammograms. For example, a physician could refuse pediatric vaccinations for rubella or chickenpox since the vaccines are currently produced from cell lines that originated in abortion.

Proponents of the legislation claim that it addresses concerns raised by the Affordable Care Act's birth control mandate, however, given the breadth of the proposal, opponents worry that it could create healthcare discrimination and open the door to civil rights violations. A recent article by Dr. Lisa Harris argues that abortion providers' rights to act are also a matter of conscience and should be respected.

For more information on Dr. Harris' article, find her article in the New England Journal of Medicine: PERSPECTIVE, Recognizing Conscience in Abortion Provision (Sept. 13, 2012).

New State Law

New Statewide Database

Governor Rick Snyder signed legislation establishing a statewide electronic database for storing individuals' health care advance directives and organ donation documents. Patients in Michigan will be among the first in the nation to have the opportunity to voluntarily upload or to send their signed documents to an accessible, central database, named the "Peace of Mind Registry." This registry will enable hospitals, nursing homes, physicians, and other health care providers to search for directives in a centralized location, as well as allow providers to download them directly to their own electronic medical record system.

After its passage, the sponsor of the law—Public Act 179 of 2012—Senator Jim Marleau, stated that now "we can have the peace of knowing our loved ones and health providers understand our wishes."

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

Individual Highlights

New State Laws Around the Nation

Personhood Measures in Kansas and North Dakota

The Kansas House of Representatives passed one of the most restrictive abortion laws in the nation by a vote of 90–30 on April 8, 2013. House Bill 2253 declares that the "life of each human being begins at fertilization," and that, accordingly, "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges and immunities available to other persons, citizens and residents of this state." The bill also definitively bans sex-selective abortions, despite any solid data on how many sex-selective abortions are performed in Kansas.

On April 22, 2013, Governor Sam Brownback signed the bill into law. Among other things, it prohibits the use of public funds, tax preferences, or tax credits for abortion services, and prevents state-provided public healthcare services from being used in any manner to carry out abortions. The law also prohibits providers, as well as employees, agents, or volunteers of abortion service providers, from being involved in public school sex education classes "relating to human sexuality or sexually transmitted diseases." The law will be effective on July 1, 2013.

Just a month prior to the Kansas House's vote, on March 15, 2013, the North Dakota House of Representatives passed a fetal personhood amendment by a vote of 57–35. The amendment grants legal personhood rights to embryos from the moment of fertilization and will now appear on the November 2014 ballot. If North Dakota voters accept the ballot measure, it would ban abortion in the state, without exception, and it could affect the legality of some forms of birth control, stem cell research, and in vitro fertilization. It would also amend the state constitution such that "the inalienable right to life of every human being at any stage of development must be recognized and protected."

There are numerous bills being debated in different States, including issues like fetal pain, fetal heartbeat, prohibiting abortions after 6-weeks, and Targeted Regulations of Abortions Providers (TRAP). For more information on these bills and the litigation challenging them, visit RH Reality Check at: www.rhrealitycheck.org

UPDATE: DOMA and Proposition 8 Litigation

In March 2013, the Supreme Court heard oral arguments in two potentially landmark equal protection cases for the LGBT community. In *Hollingsworth v. Perry*, the court probed whether the Equal Protection Clause of the Fourteenth Amendment prohibits California from defining marriage as the union of a man and a woman. In *United States v. Windsor*, the court questioned whether Section 3 of the Defense of Marriage Act violates the Fifth Amendment's guarantee of equal protection of the laws as applied to same sex persons who are legally married under the laws of their State. The Supreme Court's decisions are expected by June or July.

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

Individual Highlights

Litigation to Watch

The Affordable Care Act's Much Challenged Contraception Mandate

The Affordable Care Act's Contraception Mandate," requires most employers to cover birth control for their female employees at no additional cost. However, group health plans of religious employers are exempted from having to provide contraceptive coverage if they have religious objections to contraception. Employers with religious objections are required to self-certify that they are non-profits with religion as a core part of their mission, and religiously affiliated organizations that choose to insure themselves must instruct their third-party administrator to provide contraceptive coverage through separate individual health insurance policies so that they do not have to pay for services to which they morally object.

With nearly 50 cases addressing the contraception mandate, it is clear that the accommodation still feels insufficient to many, including for-profit companies that are not religiously affiliated, but are Christian-owned. Most of these for-profit organizations have filed suit seeking declaratory and injunctive relief (which means a court order that the rule would not be enforced against the company) based on allegations that the preventive services coverage mandate for employers violated constitutional and statutory protections of religious freedom by forcing them to provide health insurance coverage for abortion-inducing drugs and devices, as well as related education and counseling. In these cases, federal judges have denied four injunctions, granted eight injunctions, and two injunctions are pending appeal.

The remaining cases involve non-profits primarily alleging that the mandate violated their rights to religious liberty because it requires them to pay for contraceptive coverage despite their sincerely held religious beliefs. In these cases, federal judges have allowed two cases to proceed with litigation, stayed four cases, ten cases have been dismissed, and eleven cases are still awaiting a decision on the motions to dismiss.

Given the number of cases, the validity of the law will likely end up being decided by the US Supreme Court.

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

Individual Highlights

UPDATE: Final Decision on Plan B?

On April 5, 2013, Federal judge Edward R. Korman ordered the Food and Drug Administration (FDA) to approve Plan B emergency contraception for over-the-counter (OTC) distribution to women without age restriction. In 1999, the FDA approved Plan B for prescription use. This decision follows more than a decade of debate and litigation surrounding the FDA's age restrictions on OTC access.

In 2001, the Center for Reproductive Rights and over 60 other organizations together filed a Citizen's Petition calling for FDA approval of OTC access to Plan B. In 2003, Plan B's sponsor, Barr Pharmaceuticals, Inc., submitted a supplemental new drug application (SNDA) requesting OTC access to Plan B with no age restrictions. The FDA denied this application as well as a second SNDA requesting that those 16-years and older be permitted OTC access. Although a vast majority of FDA advisory committee members confirmed that Plan B was safe for use by women 17-years or older, a third SNDA requesting OTC access to Plan B for women 17-years or older was nevertheless denied by the FDA.

On August 24, 2006—after refusing to take action on the Citizen Petition for 5 years and solely in order to obtain Senate confirmation of a new commissioner—the FDA allowed Plan B to be available OTC only to women 18-years or older, and only in venues with a licensed pharmacist on staff. As a result, women under 18 requiring Plan B were obliged to seek prescriptions from physicians in order to gain access to emergency contraception.

In 2005, when it became clear that the FDA was declining to take action on the 1999 Citizen's Petition, a group of individuals and organizations advocating wider distribution of and access to emergency contraceptives brought suit claiming that the FDA's decisions regarding Plan B were arbitrary and capricious because they were not the result of reasoned and good faith agency decision-making.

In the 2009 decision in *Tummino v. Torti*, Judge Korman held that the "denial of the SNDA was arbitrary and capricious because of the FDA's demonstrated bad faith." He then ordered that Plan B be made available to 17-year old women under the same conditions that it is available to women 18 and older. He also required that the FDA reconsider its decisions on the Citizen's Petition, which meant reevaluating several issues, including: OTC access for women under 17, selling Plan B only at pharmacies and health clinics, storing Plan B behind the counter, and requiring customers to present government-issued identification.

Since that decision, the FDA and the Department of Health and Human Services (HHS) have delayed reconsideration and rulemaking and succumbed to political pressure, which has resulted in additional litigation. In 2011, the FDA said it was prepared to lift restrictions, but the Obama administration backed an HHS decision, overruling the FDA, not to allow women under the age of 17 to obtain emergency contraceptives without a prescription.

Judge Korman's most recent decision stated that the agency had engaged in "intolerable days" responding to the Citizen Petition, and ordered the FDA to make Plan B available OTC without age restriction within 30 days.