



Secretariat for Pro-Life Activities

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THE NEED FOR COMPREHENSIVE ANTI-DISCRIMINATION PROTECTION FOR HEALTH CARE ORGANIZATIONS THAT CHOOSE NOT TO PROVIDE ABORTIONS

Recent attempts to force health care organizations to provide, refer or pay for abortions demonstrate the need to strengthen federal protections against discrimination based on objections to abortion.

Current Law

Currently, federal law provides limited statutory protection for individuals and providers who choose not to perform or refer for abortion.

Abortion-related Discrimination in Governmental Activities Regarding Training and Licensing of Physicians, 42 U.S.C. § 238n. In 1996, Congress reacted to a dispute involving the accreditation of physician training programs by prohibiting discrimination against health care entities on the basis that they refuse to provide training in, perform, or refer for abortions.

Recent Threats

Optima Health, Inc. New Hampshire

In 1994, Elliot Hospital and the Catholic Medical Center formed Optima Health, Inc. After abortion advocacy groups learned that the Elliot location would no longer perform elective abortions, they approached the New Hampshire attorney general to challenge the merger. In 1998, the New Hampshire attorney general issued an opinion challenging the merger by applying the law of charitable trusts and concluding on several grounds that the merger must be reviewed in Probate Court. (See New Hampshire Attorney General's Report on Optima Health, March 10, 1998, www.state.nh.us/nhdoj/CHARITABLE/optima1.html accessed 09/09/03). After the opinion was issued, the hospitals dissolved the merger.

Pro-abortion groups followed up by developing a strategy to “use charitable assets laws to protect reproductive health services by emphasizing to hospital officials, the media, and the states attorney general that the hospital has violated or is about to violate its mission to provide vital community services” (*Hospital Mergers and the Threat to Women's Reproductive Health Services: Using Charitable Assets Laws to Fight Back*, National Women's Law Center, 2001).

Valley Hospital Ass'n. v. Mat-Su Coalition for Choice, 948 P.2d 963 (Alaska 1997)

On November 21, 1997, the Alaska Supreme Court held that a private non-sectarian hospital was required to provide abortion. The court reasoned that Alaska law protects abortion as a fundamental right; factors such as, the state's granting of a certificate of need to the hospital,

and the receipt of federal and state funds for construction and operation of the hospital, transform the hospital into a “quasi-public” actor, which **must** provide abortions. The hospital stated that its policy against abortion was based on the sincere moral conscience of the hospital’s operating board and asserted that it was protected by the Alaska conscience law. The Alaska Supreme Court struck down the conscience law as applied to this hospital, holding that there is no compelling state interest in the conscience rights of the hospital. In April 1998, a proposed state constitutional amendment to reverse the court’s decision fell one vote short of the two-thirds majority needed for approval by the legislature. Incredibly, the court’s mandate results in part from the hospital’s receipt of federal funds, even though federal funds themselves are generally barred from being used for abortions.

Several other state constitutions have been construed to protect abortion to a greater extent than the federal courts. Hospitals in these states are at risk of having a state court mandate the provision of abortion even by hospitals with moral objections.

Fidelis Health Care New York

In 1997, after Catholic dioceses in New York created Fidelis Care, a managed care health plan, Family Planning Advocates of New York (FPA) began pressuring the state health department to force the Catholic health plan to provide abortion counseling and referrals. FPA said that “Fidelis’ ability to serve women of childbearing age is severely compromised by its refusal to cover...abortions” and called upon the State Health Department to “increase its monitoring of Fidelis’ informational and referral processes concerning reproductive health care” (*Religious Hospital Mergers and HMOs: The Hidden Crisis for Reproductive Health Care*, MergerWatch, pages 24-26; available at www.mergerwatch.org/publications). Subsequently, the state comptroller recommended that Fidelis no longer be assigned state health contracts for women of childbearing age.

In 2003, two bills were introduced in the New York State Legislature to allow the state health commissioner in licensing decisions to discriminate against hospitals that do not participate in abortions. (A. 4945 and S. 4031). A third bill would mandate abortion coverage in all health plans that provide maternity coverage (A. 2611). These remain active for the 2004 legislative session.

Conclusion

Strengthening and clarifying existing law to protect health care organizations from abortion-related discrimination is urgently needed. Two simple changes in current law would protect all health care organizations from discrimination. The Abortion Non-Discrimination Act (S. 1397), introduced by Senator Judd Gregg, would accomplish both these changes.

Clarifying Existing Law

Already, the plain language of 42 U.S.C. § 238n protects a broad range of health care providers. The statute says, “the term ‘health care entity’ includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health

professions.” 42 U.S.C. § 238n(c)(2). As Senators Coats, Gregg, Frist, Dewine, McConnell and Hutchinson have said, “by the word ‘includes’ congress intended to add to, not subtract, from, the range of entities generally seen as health care entities.” (Senate Report, 105-220, page 65, June 23, 1998). In light of the pressures placed on health care providers by decisions like *Valley Hospital*, existing law should be explicitly clarified to state that “health care entity” also includes a hospital, a health professional, a provider sponsored organization, a health maintenance organization, a health insurance plan or any other kind of health care facility, organization or plan. The section heading should be modified to read, “abortion-related discrimination in governmental activities regarding training, licensing *and practice* of physicians *and other health care entities*,” to reflect the newly clarified scope of the statute.

Strengthening Existing Law

Existing law protects health care entities from discrimination based on three kinds of participation in abortion: performing, training and referring. The law should be strengthened to include providing coverage of, or paying for, abortion. This change is urgently needed to protect health care plans, like Fidelis, that have adopted a policy against abortion.

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