



Memorandum

To: Association of Washington Public Hospital Districts

From: Bradley J. Berg

Date: October 6, 2000

Subject: Abortion, Family Planning and Reproductive Health Services

This memorandum summarizes the legal obligations of public hospital districts in the state of Washington with respect to the provision of abortion, family planning and reproductive health services. In general, if a public hospital district provides, directly or by contract, maternity care benefits, services, or information to women, the public hospital district is required by state law to also provide women with substantially equivalent benefits, services, or information to permit them to voluntarily terminate their pregnancies. Therefore, a public hospital district facility that provides maternity care may not prohibit abortions from being performed in its facilities. No law or regulation requires a public hospital district to provide family planning or reproductive health services.

The Reproductive Privacy Act

On November 5, 1991, Initiative Measure No. 120, known as the "Reproductive Privacy Act" (the "Act"), was approved by the voters of the state of Washington. The Act declares that it is the public policy of the state of Washington that:

- (1) every individual has a fundamental right to choose or refuse birth control;
- (2) every woman has a fundamental right to choose or refuse to have an abortion, except as specifically limited by the Act;
- (3) the state and its municipal corporations shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion, except as specifically permitted by the Act; and
- (4) the state and its municipal corporations shall not discriminate against the exercise of these rights in the regulation or provision of benefits, facilities, services or information.

RCW 9.02.100. The Act imposes specific obligations on public entities, such as public hospital districts, with respect to abortion services, but does not impose specific obligations with respect to birth control or other family planning or reproductive health services.

Abortion

The Act provides a woman with the fundamental right to an abortion prior to viability of the fetus. The Act applies to all pregnancy terminations. The Act prohibits the performance of an abortion after viability unless the abortion is necessary to protect the woman's life or health. RCW 9.02.120. The Act does not define viability by weeks of gestation. Instead, the Act defines viability as the point in the pregnancy, when, in the judgment of the physician on the particular facts before the physician, there is a reasonable likelihood of the fetus's sustained survival outside of the uterus without the application of extraordinary medical measures. RCW 9.02.170. A physician's good faith judgment as to the viability of the fetus or the risk to life or health of a woman is a defense to a violation of the Act. RCW 9.02.130.

The Act also requires the state to provide abortion benefits, services and information that are substantially equivalent to the maternity care benefits, services and information offered by the state. The Act provides in part:

If the state provides, directly or by contract, *maternity care benefits, services, or information* to women through any program administered or funded in whole or in part by the state, the state shall also provide women otherwise eligible for any such program *with substantially equivalent benefits, services, or information* to permit them to voluntarily terminate their pregnancies.

(Emphasis provided.) RCW 9.02.160.

For purposes of the Act, the term "state" is defined in the Act to include municipal corporations such as public hospital districts. RCW 9.02.170. Therefore, the statute requires facilities owned by a public hospital district to provide abortion benefits, services and information that are "substantially equivalent" to the maternity care benefits, services or information provided by the facility.

The Act does not define "substantially equivalent benefits, services or information." RCW 9.02.160 was intended, in part, to prohibit state benefit programs, such as Medicaid and the health insurance program for state employees, from providing maternity care benefits while denying abortion benefits. Similarly, the Act requires that health benefits offered by a public hospital districts to their employees provide coverage for abortions that is substantially equivalent to the coverage for maternity care.

However, the meaning of “substantially equivalent” when applied to services provided by public hospital districts is less clear.

From 1970 to December 5, 1991, Washington statutes gave hospitals, including public hospitals, the right to refuse to allow their facilities to be used in the performance of an abortion. See RCW 9.02.080 (1970), see also, AGLO 1975 No. 71. Currently, the Act allows only “persons and private medical facilities” to refuse to participate in abortions. RCW 9.02.150 provides:

No person or private medical facility may be required by law or contract in any circumstances to participate in the performance of an abortion if such person or private medical facility objects to doing so. No person may be discriminated against in employment or professional privileges because of the person’s participation or refusal to participate in the termination of a pregnancy.

(Emphasis provided.)

Public hospital districts cannot perform abortions without the assistance of their medical staff and employees. The Act prohibits a public hospital district from requiring its medical staff or employees to participate in the performance of abortions. A public hospital district also is prohibited from requiring a physician by contract (including employment) to perform abortions. Physicians who refuse to perform abortions cannot be denied privileges nor can their medical staff privileges be adversely affected. As a result, if a public hospital district’s medical staff or employees are unwilling to perform abortion services, it may be impossible for a public hospital district to provide abortion services that are substantially equivalent to the maternity care services available at its facilities.

The only way to reconcile the above provisions is to conclude that a public hospital district is required to make its facilities available to members of its medical staff who are willing to perform abortions, but is not required to provide abortion services if no member of its medical staff is willing to perform abortions. Accordingly, a public hospital district cannot, in its bylaws, regulations or policies, prohibit physicians from providing abortion services. However, a provision that states that no member of the medical staff of the hospital (or employee of the hospital) will be required to perform abortions would be acceptable.

In summary, a public hospital district may not prohibit abortions from being performed at its facilities through the adoption of hospital or medical staff bylaws, rules or regulations. If a public hospital district provides maternity services, it must make its facilities available to physicians who are willing to perform abortions. Public hospital district medical staff and employees may refuse to assist with the abortion procedure. In addition, if a public hospital district facility provides referral information for maternity services, it should provide similar referral information for abortions. If the medical staff

does not perform abortions, the patient should be provided with information similar to a patient seeking information regarding maternity services that are not provided by the medical staff.

Family Planning and Reproductive Services

The Act declares that it is the public policy of the state Washington that every individual has the fundamental right to choose or refuse birth control. The Act does not, however, impose an affirmative duty on the state or its municipal corporations, such as public hospital districts, to provide birth control or other family planning or reproductive services.