

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN)	
NEW ENGLAND, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	No. C-03-491-JD
)	
KELLY AYOTTE, Attorney General of)	
New Hampshire, in her official capacity,)	
)	
Defendant.)	
)	

PLAINTIFFS' MOTION FOR LEAVE TO SUPPLEMENT COMPLAINT

Plaintiffs come before this Court pursuant to Rule 15(d) of the Federal Rules of Civil Procedure for an order granting leave to file a Supplemental Complaint in their challenge to New Hampshire's Parental Notification Prior to Abortion Act. Plaintiffs seek leave to supplement the Complaint in order to add allegations and a new claim regarding the Act's judicial bypass process, based on court procedures and forms that were apparently approved after the Complaint was filed and that first became known to Plaintiffs while this case was pending in the United States Supreme Court.

I. Background.

Plaintiffs filed this case on November 17, 2003, challenging New Hampshire's Parental Notification Prior to Abortion Act (the Act). RSA 132:24-132:28. The Act requires at least 48-hours notice to a minor's parent before an abortion or a judicial waiver of the notice and delay requirements. Plaintiffs alleged that the Act is unconstitutional because (1) it lacks an exception to its notice and delay requirements for situations in which a minor's health is threatened; (2) its exception for abortions

necessary to prevent a minor's death is unduly narrow; and (3) the Act's judicial bypass provision fails to protect minors' confidentiality.

On December 29, 2003, prior to the Act's effective date, this Court declared the Act unconstitutional and permanently enjoined its enforcement. Planned Parenthood v. Heed, 296 F. Supp. 2d 59 (D.N.H. 2003). This Court held that the Act was unconstitutional both because it lacks an exception for situations in which the Act's notice and delay requirements threaten a minor's health and because its death exception does not adequately protect a minor in need of a life-saving abortion. Id. at 65-67. With respect to Plaintiffs' claim regarding the defects in the judicial bypass, the Court concluded that there was a constitutional question, but declined to rule on it because the Act was otherwise fatally flawed. Id. at 67.

The United States Court of Appeals for the First Circuit affirmed, holding that the absence of a health exception and the Act's narrow death exception each rendered the Act unconstitutional and facially invalid. Planned Parenthood v. Heed, 390 F.3d 53 (1st Cir. 2004) (Heed II). Like this Court, the First Circuit noted the constitutional question, but declined to rule on Plaintiffs' claim regarding the Act's judicial bypass provision. Id. at 64-65.

On May 23, 2005, the Supreme Court granted the Attorney General's petition for certiorari. Ayotte v. Planned Parenthood, ___ U.S. ___, 125 S. Ct. 2294 (2005). In her Reply Brief to the Supreme Court, Defendant stated that the New Hampshire Supreme Court was "close to finalizing" rules and forms to govern the judicial bypass. Reply Brief of Petitioner at 12 n.5, Ayotte v. Planned Parenthood, ___ U.S. ___, 126 S. Ct. 961 (2006) (No. 04-1144). Subsequently, on November 18, 2005, the Governor's Legal

Counsel received from the Director of the Administrative Office of the Courts a package of procedures and forms, dated December 2003, with an accompanying memorandum indicating that they, in fact, had been approved by the New Hampshire Supreme Court. See Memorandum to Katherine Hanna from Donald D. Goodnow, Esq. (Nov. 18, 2005) and attachments thereto, attached to the Supplemental Complaint as Exhibit B.

Thereafter, Plaintiffs received a copy of the procedures and forms. Prior to receiving the Reply Brief, Plaintiffs were unaware of the existence of the procedures and forms.

On January 18, 2006, the Supreme Court vacated the First Circuit's decision and remanded the case to that court. Ayotte v. Planned Parenthood, ___ U.S. ___, 126 S. Ct. 961, 969 (2006). The Supreme Court left in place the First Circuit's ruling that the Act was unconstitutional for failure to include a health exception but questioned whether the invalidation of the entire statute was the necessary remedy. The Court therefore remanded the case to the First Circuit for a determination of whether the Act is susceptible to "carefully crafted injunctive relief . . . prohibiting the Act's unconstitutional applications." Ayotte, 126 S. Ct. at 969. Finding that "[t]here is some dispute as to whether New Hampshire's legislature intended the statute to be susceptible to such a remedy," the Court remanded the case "for the lower courts to determine legislative intent in the first instance." Id. The Supreme Court also instructed that if the lower courts determine that the lack of a health exception can be remedied by enjoining the unconstitutional applications, the lower courts should address Plaintiffs' claim that the Act is unconstitutional because it fails to protect the confidentiality of minors seeking a judicial bypass. Id. On March 22, 2006, the First Circuit remanded the case to this Court.

II. This Court Should Grant Leave to Supplement the Complaint to Guarantee the Efficient and Complete Resolution of the Case.

Federal Rule of Civil Procedure 15(d) provides that a court may grant leave to supplement a complaint to set forth “transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” Fed. R. Civ. P. 15(d). The Supreme Court has stated that supplementing a complaint pursuant to Rule 15(d) is “well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice.” Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 227 (1964); see also Keith v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988) (stating that Rule 15(d) is “a tool of judicial economy and convenience. . . . [whose] use is therefore favored”). “[L]eave should be freely granted” under Rule 15(d) and “should be denied only where good reason exists” such as prejudice to opposing party. Franks v. Ross, 313 F.3d 184, 198 n.15 (4th Cir. 2002) (internal quotation marks omitted); see also Volpe, 858 F.2d at 476 (noting that courts “liberally construe Rule 15(d) absent a showing of prejudice to the defendant” (collecting cases)); LaSalvia v. United Dairymen of Arizona, 804 F.2d 1113, 1119 (9th Cir. 1986) (stating that Rule 15(d) motions “should be granted unless undue prejudice to the opposing party will result” (internal quotation and alteration marks omitted)).

Plaintiffs seek leave to supplement the Complaint based on the procedures and forms approved by the New Hampshire Supreme Court for administration of the judicial bypass. Plaintiffs’ original Complaint challenged the adequacy of the bypass because it jeopardized minors’ confidentiality. The procedures and forms exacerbate this constitutional problem. In addition, the petition form approved by the New Hampshire

Supreme Court violates constitutional and statutory mandates by requiring a minor to elect between seeking a bypass on the ground that she is mature and capable of giving informed consent, or on the ground that an abortion without parental notification is in her best interest. See Bellotti v. Baird, 443 U.S. 622, 643-44 (1979); RSA 132:26, II.

Permitting Plaintiffs to supplement the Complaint furthers the purposes of Rule 15(d): to facilitate “as complete an adjudication of the dispute between the parties as is possible,” LaSalvia, 804 F.2d at 1119 (internal quotation marks omitted), and “to promote the economical and speedy disposition of the controversy,” Volpe, 858 F.2d at 473. This Court cannot undertake a complete evaluation of the constitutionality of the judicial bypass without examining the procedures and forms designed to implement it. Requiring that Plaintiffs file a separate case attacking the constitutionality of the procedures and forms would be needlessly confusing and inefficient. Cf. Franks, 313 F.3d at 198 (“Various courts have concluded that requiring a plaintiff to go through the needless formality and expense of instituting a new action when events occurring after the original filing indicated he had a right to relief is inconsistent with the philosophy of the federal rules.” (internal quotation and alteration marks omitted)). Similarly, given that the Court will be considering both the manner in which the judicial bypass functions and whether some applications of the Act may stand despite its constitutional flaws, it would be inefficient and a waste of judicial resources to delay consideration of Plaintiffs’ additional claim based on the administration of the Act’s judicial bypass.

Plaintiffs therefore respectfully request that the Court grant leave to file their Supplemental Complaint.

MEMORANDUM STATEMENT (LR 7.1(a)(2))

The grounds for this motion are stated herein, so no separate memorandum of law is being submitted.

CONCURRENCE STATEMENT (LR 7.1(c))

Counsel for the Defendant does not concur in the relief requested in this motion.

Respectfully submitted,

Date: June 9, 2006

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Wayne Goldner, M.D.

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2006, the foregoing motion was served through the ECF system. In addition, the documents were sent by first-class mail, postage prepaid to Jennifer Dalven, Esq. and Dara Klassel, Esq.

/s/ Martin P. Honigberg
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PLANNED PARENTHOOD OF NORTHERN)
NEW ENGLAND, CONCORD FEMINIST)
HEALTH CENTER, FEMINIST HEALTH)
CENTER OF PORTSMOUTH, and)
WAYNE GOLDNER, M.D.,)
)
) Plaintiffs,)
)
) v.) No. C-03-491-JD
)
)
) KELLY AYOTTE, Attorney General of)
) New Hampshire, in her official capacity,)
)
) Defendant.)
)
_____)

SUPPLEMENTAL COMPLAINT

PRELIMINARY STATEMENT

1. This action seeks injunctive and declaratory relief, pursuant to 42 U.S.C. § 1983, against enforcement of the new New Hampshire law that prevents a minor from obtaining an abortion unless a parent has been notified at least forty-eight hours in advance of the abortion. RSA 132:24-:28 (the Act). A copy of the Act is attached hereto as Exhibit A.

2. Contrary to thirty years of Supreme Court precedent, the Act contains no exception to its notice and delay requirements for circumstances in which delay will threaten the health of the young woman. Without such an exception, doctors will be forced to delay abortions for critically ill minors, putting them at risk for serious medical

problems including infertility, loss of vision, and impaired liver and kidney function. For this reason alone, the Act is unconstitutional.

3. In violation of constitutional commands, the Act also endangers young women by preventing physicians from performing even emergency life-saving abortions unless the physician can certify that the minor will die within the time it takes to comply with the Act's notice requirements, and the abortion is the only procedure that will prevent death. Because physicians are not always able in life-threatening situations to make such a certification, the Act threatens the well-being of minors even in these circumstances. Moreover, the Act violates the due process rights of abortion providers and chills the provision of emergency abortions by failing to make clear that physicians may rely on their good faith medical judgment in determining which abortions are necessary to prevent imminent death.

4. The Act also endangers and violates the rights of those minors who cannot safely notify a parent of their pregnancy and need for an abortion. The Constitution guarantees these young women the right to seek a confidential judicial waiver of the Act's notice requirements. But the Act fails to include specific provisions that are necessary to ensure the confidentiality of young women who need such a waiver.

5. The procedures and forms approved by the New Hampshire Supreme Court do not adequately fill the gap left by the Act and create additional problems. For example, neither the Act nor the Court Procedure Bulletin contain procedures for protecting the confidentiality of documents relating to a waiver petition at the trial level. Nor is there anything to alert court employees to the fact that parents are not permitted access to documents or information relating to a waiver proceeding. Indeed, the Court

Procedure Bulletin and the Petition Form specifically contemplate that in some instances a court employee will call or mail documents to the minors – actions that are likely to breach the minor’s confidentiality and lead to the very harms of parental notification that the minor sought to avoid by seeking a waiver. Nor is there any procedure to protect the minor’s identity from disclosure through, for example, the court’s docket, calendar call, or other case postings.

6. In addition, as implemented by the New Hampshire Supreme Court, the parental notification law contravenes both constitutional and statutory mandates by forcing minors to seek a judicial waiver on the ground *either* that they are mature and able to give informed consent *or* that an abortion without notification of a parent would be in their best interests, but not on *both* grounds.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

8. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because defendant and plaintiffs are located in the District of New Hampshire.

PARTIES

Plaintiffs

10. Planned Parenthood of Northern New England (PPNNE) is a Vermont not-for-profit charitable organization registered to do business in New Hampshire with headquarters in Williston, Vermont. PPNNE operates health centers in New Hampshire, Maine and Vermont, with seven centers in New Hampshire. PPNNE offers its patients a

full range of reproductive health services, including family planning counseling and medical services; testing and treatment of sexually transmitted infections; HIV/AIDS testing and counseling; breast and cervical cancer screening; pregnancy testing and options counseling; education and community outreach; abortions; and prenatal care. In New Hampshire, PPNNE offers abortions at its West Lebanon and Manchester centers. Among PPNNE's patients are unemancipated women under the age of eighteen who need abortions. PPNNE sues on its own behalf and on behalf of its minor patients.

11. Concord Feminist Health Center (CFHC) is a New Hampshire-based not-for-profit charitable organization that operates a reproductive health care center in Concord. CFHC provides a full range of reproductive health care services, including family planning counseling and medical services; testing and treatment of sexually transmitted infections; HIV/AIDS testing and counseling; prevention and screening for breast and gynecological cancer; health education and community outreach; pregnancy testing and options counseling; and abortions. Among CFHC patients are unemancipated women under the age of eighteen who need abortions. CFHC sues on its own behalf and on behalf of its minor patients.

12. Feminist Health Center of Portsmouth (FHCP) is a New Hampshire-based not-for-profit charitable organization that operates a reproductive health care center in Greenland. FHCP offers full well-woman gynecological care, including family planning counseling and medical services; testing and treatment for sexually transmitted infections; counseling and anonymous testing for HIV/AIDS for women and men; prevention and screening for breast and gynecological cancers; health education and community outreach; pregnancy testing and options counseling; and abortions. FHCP's

patients include unemancipated women under the age of eighteen who need abortions. FHCP sues on its own behalf and on behalf of its minor patients.

13. Dr. Wayne Goldner is an obstetrician and gynecologist in private practice in Manchester. Dr. Goldner provides a full range of services, including pregnancy testing and options counseling; prenatal care; delivery of newborns; prevention and screening of gynecological and breast cancers; evaluation and treatment for infertility; care for symptoms of menopause; screening and treatment for sexually transmitted infections; counseling and testing for HIV/AIDS; and abortions. Among his patients are unemancipated women under the age of eighteen who need abortions. Dr. Goldner sues on his own behalf and on behalf of his minor patients.

Defendant

14. Kelly Ayotte is the Attorney General of New Hampshire. She is charged by law with supervision of all county attorneys and other prosecutors and enforcement of the criminal laws of New Hampshire, including the Act. Attorney General Ayotte is sued in her official capacity, as are her agents and successors in office.

STATUTORY FRAMEWORK

15. The Act defines “abortion” as the “use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous miscarriage.” RSA 132:24, I.

16. The Act prohibits performance of an abortion upon an unemancipated minor unless the physician or his or her agent provides at least forty-eight hours advance

notice of the abortion to one of the minor's parents. Id. 132:25, I. The forty-eight hour notice period begins to run from the time of delivery of the notice. Notice may be delivered in person to the parent's residence or by certified mail. If sent by certified mail, the notice is deemed delivered at noon on the next day on which regular mail delivery takes place subsequent to mailing. Id. 132:25, II & III. These requirements may be dispensed with if the parent certifies in writing that he or she has been notified. Id. 132:26, I(b).

17. In lieu of parental notification, a minor may petition a court of competent jurisdiction for a waiver of the notice requirement. The statute requires a court to grant the waiver if it finds that the minor is mature and capable of giving informed consent to the abortion. If the court determines that the pregnant minor is not mature, or if the pregnant minor does not claim to be mature, the court must grant the waiver if it determines that the performance of an abortion without parental notification is in the minor's best interests. Id. 132:26, II.

18. The New Hampshire Supreme Court approved procedures and forms to implement the judicial waiver process. These procedures and forms are attached as Exhibit B.

19. Contrary to both constitutional requirements and the Act, see Belloti v. Baird, 443 U.S. 622 (1979); RSA 132:26, II, the form the Supreme Court approved for minors to petition for a judicial waiver requires a minor to elect between maturity and best interests as a grounds for seeking a waiver. See Exhibit B, Petition for Waiver of Parental Notice for Abortion Requested by a Minor (RSA 132:26), at 1.

20. The Act states that the judicial waiver process “shall be confidential” and that a “confidential appeal shall be available” but no specific procedures are set forth in the statute to effectuate this right of confidentiality. RSA 132:26, II(b), (c).

21. The Court Procedure Bulletin approved by the New Hampshire Supreme Court does not remedy this problem. The Bulletin does state that judicial waiver “cases are confidential; hearings will be closed.” Exhibit B, Court Procedure Bulletin, at 1. The Bulletin also states that if a minor’s petition is denied, she “may file an expedited confidential appeal to the New Hampshire Supreme Court,” *id.* at 2, and that “[a]ll documents and proceedings related to an *appeal* of a trial court decision on a petition for waiver of parental notification shall be confidential,” *id.* at 3 (emphasis added). There is no parallel statement regarding the confidentiality of documents in the trial court. The Court Procedure Bulletin also advises court employees to call minors in some instances to advise them of information about their case. *See id.* at 2; *see also* Exhibit B, Petition for Waiver of Parental Notice for Abortion Requested by a Minor (RSA 132:26), at 1 (form petition requiring minor to provide her mailing address and telephone number). The Form Petition also requires the minor to provide her name, *see also id.*, yet the Bulletin makes no provision for pseudonymous filings or for otherwise protecting the minor’s identity from disclosure, for example, through listing the caption of the case (which contains the minor’s name) on the court’s docket, calendar call or other case postings.

22. The Act states that the court must rule on the minor’s petition within seven calendar days from the time the petition is filed. RSA 132:26, II(b). An appellate court

must rule on a minor's appeal within seven calendar days of the docketing of the appeal. Id. 132:26, II(c).

23. The sole exception to notification or judicial waiver is when the attending physician "certifies" in the pregnant minor's medical record that the abortion "is necessary to prevent the minor's death and there is insufficient time to provide the required notice." Id. 132:26, I(a). There is no exception for medical emergencies that will not result in imminent death.

24. Violation of the Act is a misdemeanor and grounds for a civil action by a person wrongfully denied notification. A provider may avoid criminal or civil liability by "establish[ing] by written evidence" that he or she "relied on evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with the section are bona fide and true." Id. 132:27.

FACTUAL ALLEGATIONS

25. Abortion is among the safest surgical procedures that doctors perform. Both in terms of mortality (death) and morbidity (serious complications), abortion is safer than carrying a pregnancy to term. Although abortion remains safe throughout pregnancy, the risks associated with the procedure increase as the pregnancy progresses.

26. Most minors involve a parent in their decision to have an abortion. The younger the minor is, the more likely she is to do so. Most minors who do not involve a parent involve a trusted adult such as a relative or school nurse.

27. Confidentiality is of the greatest concern to all women seeking abortion services, but particularly to minors. Among the urgent reasons a minor may fear

revealing her pregnancy and planned abortion to a parent are fear of parental retaliation, including physical abuse, being made to leave home, and being forced to carry a pregnancy to term against her will.

28. The judicial waiver process fails to protect minors' confidentiality. For example, neither the Act nor the Court Procedure Bulletin contain procedures for protecting the confidentiality of documents relating to a waiver petition at the trial level. Nor is there anything to alert court employees to the fact that, contrary to other cases designated as confidential under New Hampshire law, parents should not be given access to records or information concerning their daughter's judicial waiver petitions. In fact, the Court Procedure Bulletin and Petition Form specifically contemplate that court employees will call (and perhaps mail documents to) the minor. See Exhibit B, Court Procedure Bulletin, at 2; Exhibit B, Petition for Waiver of Parental Notice for Abortion Requested by a Minor (RSA 132:26), at 1. Nor is there any provision that allows a minor to file under a pseudonym or otherwise to protect the minor's identity from disclosure, for example, through listing the caption of the case (which contains the minor's name) on the court's docket, calendar call or other case postings. Without adequate guarantees of confidentiality, minors will be deterred from seeking judicial waivers they need. Moreover, the lack of appropriate safeguards is likely to breach minors' confidentiality and lead to the very harms minors seek to avoid by using the judicial waiver.

29. The Act fails to allow a physician to provide a prompt abortion to a minor whose health would be endangered by the delay necessary to comply with the Act.

30. There are a number of urgent medical situations that require a prompt abortion to be provided to protect the health of the woman. Among these situations are

premature rupture of the membranes that enclose the pregnancy; preeclampsia; and significant bleeding from the uterus in early pregnancy. Often, in these situations, delaying the procedure in order to comply with the parental notification requirements of the statute or for the minor to obtain a court waiver, would pose dangers to the minor's health, including the dangers of infertility, vision loss, chronic pain, or kidney or liver damage. Yet, the physician will not always be able to certify that performing the procedure without the delay required by the Act would be necessary to prevent the minor's death.

31. By failing to allow immediate abortions in circumstances where the minor's health, but not her life, is threatened by the delay necessary to comply with the Act, the Act endangers the health of minors.

32. The Act's requirement that even to protect a minor's life the physician "certif[y]" that "the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice," endangers even those minors in need of life-saving abortions. Because a physician cannot accurately predict when a minor's condition has progressed to the point where she will die within the time it takes to comply with the Act's requirements, physicians will not be able to rely on this exception.

33. The requirement that the abortion be the only procedure that will prevent death during the period necessary to comply with the Act will require physicians to use procedures to stave off death that could cause long term impairment of the minor's health.

34. The Act's exception for abortions necessary to prevent a minor's imminent death does not make it clear that a physician may exercise his or her best

medical judgment in making the certification required by the Act. The prospect of prosecutors, judges and juries disagreeing with physicians' judgment and convicting them for acting on their good faith medical judgment will chill the provision of emergency abortion services.

35. The Act states that a provider may avoid criminal or civil liability by "establish[ing] by written evidence" that he or she "relied on evidence sufficient to convince a careful and prudent person that the representations of the pregnant minor regarding information necessary to comply with the section are bona fide and true." RSA 132:27. This provision places an unduly high burden of proof on providers seeking to defend themselves against civil or criminal liability. RSA 132:27 further conflicts with standards of culpability set out in RSA 626:2. This conflict renders the Act void for vagueness.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

36. The Act deprives plaintiffs' patients of their right to privacy as protected by the Fourteenth Amendment to the United States Constitution by (a) failing to allow prompt abortions necessary to protect the minor's health; (b) failing to provide an adequate emergency exception to protect their lives; (c) failing to allow minors to seek a judicial waiver on both maturity and best interest grounds; (d) failing to provide a confidential judicial waiver procedure; and (e) chilling the provision of abortion services by failing to give clear notice of what conduct is prohibited by the Act's terms and

placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability.

SECOND CAUSE OF ACTION

37. The Act deprives plaintiffs of due process of law as protected by the Fourteenth Amendment to the United States Constitution by (a) subjecting plaintiffs to criminal prosecution and civil liability for providing abortions to prevent the minor's death without clearly providing that they may rely on their good faith medical judgment in certifying that such abortions are necessary to prevent the minor's imminent death; (b) containing vague and/or conflicting terms that fail to give plaintiffs adequate notice of what conduct the law prohibits; and (c) placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability.

WHEREFORE, Plaintiffs request that the Court:

1. Issue a declaratory judgment that the Act violates the rights of plaintiffs and their patients as protected by the Fourteenth Amendment to the United States Constitution and is therefore void and of no effect;
2. Issue preliminary and permanent relief, without bond, restraining enforcement, operation and execution of the Act by enjoining defendant, her agents employees, appointees or successors from enforcing, threatening to enforce or otherwise applying the provisions of the Act;
3. Grant plaintiffs attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988; and

4. Grant such further relief as this Court deems just and proper.

Respectfully submitted,

June 9, 2006

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

AN ACT requiring parental notification before abortions may be performed on unemancipated minors.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 173:1 Legislative Purpose and Findings.

2 I. It is the intent of the legislature in enacting this parental notification provision to further
3 the important and compelling state interests of protecting minors against their own immaturity,
4 fostering the family structure and preserving it as a viable social unit, and protecting the rights of
5 parents to rear children who are members of their household.

6 II. The legislature finds as fact that:

7 (a) Immature minors often lack the ability to make fully informed choices that take
8 account of both immediate and long-range consequences.

9 (b) The medical, emotional, and psychological consequences of abortion are serious and
10 can be lasting, particularly when the patient is immature.

11 (c) The capacity to become pregnant and the capacity for mature judgment concerning
12 the wisdom of abortion are not necessarily related.

13 (d) Parents ordinarily possess information essential to a physician's exercise of best
14 medical judgment concerning the child.

15 (e) Parents who are aware that their minor daughter has had an abortion may better
16 ensure that she receives adequate medical attention after the abortion.

17 III. The legislature further finds that parental consultation is usually desirable and in the
18 best interest of the minor.

19 173:2 New Subdivision: Parental Notification Prior to Abortion. Amend RSA 132 by inserting
20 after section 23 the following new subdivision:

21 Parental Notification Prior to Abortion

22 132:24 Definitions. In this subdivision:

23 I. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other
24 substance or device intentionally to terminate the pregnancy of a female known to be pregnant with
25 an intention other than to increase the probability of a live birth, to preserve the life or health of the

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1 child after live birth, or to remove an ectopic pregnancy or the products from a spontaneous
2 miscarriage.

3 II. "Commissioner" means the commissioner of the department of health and human
4 services.

5 III. "Department" means the department of health and human services.

6 IV. "Emancipated minor" means any minor female who is or has been married or has by
7 court order otherwise been freed from the care, custody, and control of her parents.

8 V. "Guardian" means the guardian or conservator appointed under RSA 464-A, for pregnant
9 females.

10 VI. "Minor" means any person under the age of 18 years.

11 VII. "Parent" means one parent of the pregnant girl if one is living or the guardian or
12 conservator if the pregnant girl has one.

13 132:25 Notification Required.

14 I. No abortion shall be performed upon an unemancipated minor or upon a female for whom
15 a guardian or conservator has been appointed pursuant to RSA 464-A because of a finding of
16 incompetency, until at least 48 hours after written notice of the pending abortion has been delivered
17 in the manner specified in paragraphs II and III.

18 II. The written notice shall be addressed to the parent at the usual place of abode of the
19 parent and delivered personally to the parent by the physician or an agent.

20 III. In lieu of the delivery required by paragraph II, notice shall be made by certified mail
21 addressed to the parent at the usual place of abode of the parent with return receipt requested and
22 with restricted delivery to the addressee, which means the postal employee shall only deliver the
23 mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the
24 next day on which regular mail delivery takes place, subsequent to mailing.

25 132:26 Waiver of Notice.

26 I. No notice shall be required under RSA 132:25 if:

27 (a) The attending abortion provider certifies in the pregnant minor's medical record that
28 the abortion is necessary to prevent the minor's death and there is insufficient time to provide the
29 required notice; or

30 (b) The person or persons who are entitled to notice certify in writing that they have
31 been notified.

32 II. If such a pregnant minor elects not to allow the notification of her parent or guardian or
33 conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after
34 an appropriate hearing, authorize an abortion provider to perform the abortion if said judge
35 determines that the pregnant minor is mature and capable of giving informed consent to the
36 proposed abortion. If said judge determines that the pregnant minor is not mature, or if the

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1 pregnant minor does not claim to be mature, the judge shall determine whether the performance of
2 an abortion upon her without notification of her parent, guardian, or conservator would be in her
3 best interests and shall authorize an abortion provider to perform the abortion without such
4 notification if said judge concludes that the pregnant minor's best interests would be served thereby.

5 (a) Such a pregnant minor may participate in proceedings in the court on her own
6 behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her
7 that she has a right to court-appointed counsel, and shall, upon her request, provide her with such
8 counsel.

9 (b) Proceedings in the court under this section shall be confidential and shall be given
10 such precedence over other pending matters so that the court may reach a decision promptly and
11 without delay so as to serve the best interest of the pregnant minor. In no case shall the court fail to
12 rule within 7 calendar days from the time the petition is filed. A judge of the court who conducts
13 proceedings under this section shall make in writing specific factual findings and legal conclusions
14 supporting the decision and shall order a record of the evidence to be maintained including the
15 judge's own findings and conclusions.

16 (c) An expedited confidential appeal shall be available to any such pregnant minor for
17 whom the court denies an order authorizing an abortion without notification. The court shall make a
18 ruling within 7 calendar days from the time of the docketing of the appeal. An order authorizing an
19 abortion without notification shall not be subject to appeal. No filing fees shall be required of any
20 such pregnant minor at either the trial or the appellate level. Access to the trial court for the
21 purposes of such a petition or motion, and access to the appellate courts for purposes of making an
22 appeal from denial of the same, shall be afforded such a pregnant minor 24 hours a day, 7 days a
23 week.

24 132:27 Penalty. Performance of an abortion in violation of this subdivision shall be a
25 misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A
26 person shall not be held liable under this section if the person establishes by written evidence that
27 the person relied upon evidence sufficient to convince a careful and prudent person that the
28 representations of the pregnant minor regarding information necessary to comply with this section
29 are bone fide and true, or if the person has attempted with reasonable diligence to deliver notice, but
30 has been unable to do so.

31 132:28 Severability. If any provision of this subdivision or the application thereof to any person
32 or circumstance is held invalid, such invalidity shall not affect the provisions or applications of this
33 subdivision which can be given effect without the invalid provisions or applications, and to this end,
34 the provisions of this subdivision are severable.

35 173:3 Effective Date. This act shall take effect December 31, 2003.

36 (Approved: June 19, 2003)

37 (Effective Date: December 31, 2003)

The State of New Hampshire
ADMINISTRATIVE OFFICE OF THE COURTS

Donald D. Goodnow, Esq.
Director

Two Noble Drive
Concord, NH 03301
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TTY/TDD Relay: (800) 735-2964

MEMORANDUM

TO: Katherine Hanna
FROM: Donald D. Goodnow, Esq.
Director *D DGA*
DATE: November 18, 2005
RE: Parental Notification Procedures and Forms

Eileen Fox asked that I provide you with copies of the procedures and forms that were developed by the Judicial Branch to implement RSA 132:26, the Parental Notification Prior to Abortion Law.

I enclose copies of the following documents:

- 1. Information for Minors;
- 2. Court Procedure Bulletin;
- 3. Petition for Waiver of Parental Notice for Abortion;
- 4. Order on Petition for Waiver;
- 5. Guidelines for Judges;
- 6. Certificate of Lower Court Decision;
- 7. Draft Letter to the New Hampshire Medical Society.

These forms were developed by representatives of the three established trial courts. The Administrative Council recommended these materials and the Supreme Court approved them.

Please let me know if I can provide you with additional materials or information in connection with Judicial Branch efforts to prepare for implementation of the Parental Notification Legislation.

The State of New Hampshire

JUDICIAL BRANCH

INFORMATION FOR MINORS REQUEST FOR A WAIVER OF PARENTAL NOTIFICATION TO HAVE AN ABORTION PERFORMED

A law has been passed requiring a doctor to notify at least one of your parents or a guardian before performing an abortion if you are under the age of eighteen years. You may believe that neither of your parents nor a guardian should be notified before an abortion is performed because (a) you believe you are mature and capable of giving your consent to an abortion, or (b) you believe it would not be in your best interests to notify one of your parents or a guardian prior to an abortion. In either situation, you have the right to ask a judge to let a doctor perform an abortion without notifying anyone. You also have the right to have a lawyer help you in court, free of charge. All court forms related to this request and the hearing will be confidential.

Court form needed

If you want to ask a judge to allow you to have an abortion without telling one of your parents or a guardian, you will need to fill out a form called a petition. You can get this form from any court or from the internet at www.courts.state.nh.us. Follow the link to either the Superior Court, District Court, Probate Court, or Family Division Pilot Project home pages. Then follow the link on the left side to "Forms". The name of the form is "Petition for Waiver of Parental Notice for Abortion Requested by a Minor" and the form number is AOC-340-2348.

You should fill in all the blanks on the petition as well as you are able. The more information you can provide to the judge about your circumstances, the better. This form and any court hearing will be confidential. You will have to prove to the judge, in your own words, (a) that you are mature or old enough to give your informed consent to have an abortion performed without notifying your parents or a guardian or (b) that it would be in your best interests to have an abortion without notifying either of your parents or a guardian. You will also need to show the judge some kind of identification, such as a school identification card, a driver's license, a report card from school, or a paycheck stub if you are working.

Where and when to file form

The statute says you can file your petition in "a court of competent jurisdiction." You or your lawyer must decide in which court you will file your petition. If you are not sure what courts you may consider filing in, you may consult the judicial branch web site, www.courts.state.nh.us and click on "Find Your Court." You may find it helpful to go to the bottom of that page and use the alphabetical list of towns that shows the courts that serve each town in New Hampshire.

It is best if you or your lawyer bring your petition to the trial court you have chosen between 8:30 AM and 4:00 PM on a regular court business day and ask that a hearing date be set for your case.

You may file your petition by FAX after 4:00 PM and before 8:30 AM on regular court business days or on a weekend or holiday at 271-8485. If you file your petition by FAX, you must deliver a signed paper copy of your petition to the court you have chosen on the next regular court business day. If you file your petition by FAX, you must also call your court on the next regular court business day to ask for your hearing date and to ask that a lawyer be appointed to help you, if you want a lawyer and do not already one. You will find the telephone numbers for all New Hampshire courts on the judicial branch web site at www.courts.state.nh.us; click on "Find Your Court."

Your right to have a lawyer

As mentioned earlier, if you do not yet have a lawyer, you may ask the court to appoint a lawyer to represent you. You do not have to pay for the lawyer. You can talk to your lawyer and he or she will represent you in this process. In addition, the court may appoint a Guardian ad Litem. If appointed, this person will represent your best interests to the court, not necessarily what you want.

Court hearing

The court will schedule a hearing on your petition very soon after you file it. You must attend that hearing. The only people who will be present during your hearing will be you, a judge, your lawyer, a court security officer, a person who will record your hearing, and if appointed, a Guardian ad Litem. You may also bring your doctor, nurse, family planning counselor, or anyone else you want at the hearing. The judge will decide whether any one you bring can come into the courtroom during the hearing.

After reading what you have written on the form, the judge will ask you questions. The judge will be trying to determine if (a) you are mature or old enough to give your consent to an abortion without telling either of your parents or a guardian or (b) it is in your best interests to have an abortion performed without telling either of your parents or a guardian. After your hearing, the judge will write an order that will tell you what the judge has decided and you will be given a copy of that order.

If the judge decides that you may have the abortion without telling one of your parents or a legal guardian, you do not have to notify your parents or guardian. You will be given two copies of a "Certificate of Lower Court Decision to Allow Abortion Provider to Perform an Abortion without Notifying a Minor's Parents or Guardian." One copy will have a court seal and should be given to your medical provider.

If the judge decides you cannot have an abortion without telling one of your parents or a legal guardian, you have the right to appeal to the New Hampshire Supreme Court. Your lawyer will also help you with this process.

Appeal to NH Supreme Court

If you decide to appeal the judge's decision that you cannot have an abortion without notifying a parent or legal guardian, you must file a Notice of Appeal with the New Hampshire Supreme Court within 30 days of the trial court clerk's notice of decision. You must send a copy of the Notice of Appeal to the clerk of the trial court.

You may deliver your Notice of Appeal to the Supreme Court during regular business hours or mail it to the New Hampshire Supreme Court, 1 Noble Drive, Concord, New Hampshire 03301. The telephone number of the clerk's office is (603) 271-2646.

If you decide to file your appeal during non-business hours, you may send it by FAX to the Supreme Court clerk's office. The Supreme Court's FAX number is (603) 271-8900. If you send your appeal by FAX, you must also call the clerk of the Supreme Court at 1-877-877-9014 to advise the clerk that an appeal has been filed by FAX. You should also contact the Supreme Court clerk's office on the next business day to confirm that it has received your appeal. If you send your notice of appeal to the Supreme Court by FAX, you must deliver or mail the original notice of appeal form to the Supreme Court by the next business day. You may file a memorandum of law and an appendix of relevant documents with your notice of appeal or within two days of filing the appeal. For more information review Supreme Court Rule 7-B.

The Supreme Court will review your notice of appeal, the recording of the trial court proceedings, and the judge's written decision. It will issue a ruling on the appeal within 7 days of docketing. All documents and proceedings related to the appeal will be confidential.

The State of New Hampshire

COURT PROCEDURE BULLETIN

RELATIVE TO: Petition for Waiver of Parental Notice for Abortion

Requested by a Minor Pursuant to RSA 132:26

1. Petitioner will obtain the "Petition for Waiver of Parental Notice for Abortion Requested by a Minor" form from a court, her health care provider, or the internet.
2. The statute allows a minor to file a petition in "a court of competent jurisdiction," without defining that term. The petitioner, or her lawyer, must choose which court to file in.

The Information for Minors instructs people to deliver a petition to a trial court and ask for a hearing date. In the alternative, because the statute requires that the courts provide access 24 hours per day, 7 days per week for these matters, a person may FAX a petition to the Domestic Violence Protective Order Registry (DVPOR) FAX line (271-8485) after regular court hours, on weekends, or on holidays. The DVPOR data entry person (Peg Paveglio or Pam Livingston) will forward the petition to the court designated by the petitioner as soon as she comes into work on the next regular court business day. The Information for Minors also instructs the petitioner to deliver to the trial court a paper copy of a FAXED petition on the next regular court business day.

3. There is no filing fee for this petition.
4. These cases are confidential; hearings will be closed. Cases shall be docketed in the superior court in the Equity Division with a filing type code of "WPN;" in the district courts in the Juvenile Division with a case type code of "WPN;" in the probate courts in the Confidential Division with a case type code of "WPN;" and in the family division pilot project in the Juvenile Division with a case type code of "WPN."
5. The court must schedule a hearing on a date that will allow the judge to rule within 7 calendar days from the date the petition was filed. Note that a FAXED petition is considered filed when the FAX is received at the DVPOR; the trial court may have a very short time in which to hold a hearing and issue an order.
6. If the petitioner has indicated that she wants a lawyer, assign a lawyer to the case. The court may also assign a Guardian ad Litem for the petitioner.
 - a. Select an attorney from the list of attorneys available to represent minors in cases under this statute.

- b. Attorney rates will be \$60/hour with a \$1,000 maximum.
- c. Bills should be submitted to the judge for review and approval and sent to the AOC for payment.

7. Enter the hearing information on the bottom of the petition, enter the docket number on the top, and give a copy to the petitioner while she is at the court to file the petition. If necessary, call the petitioner to advise her of the time, place and lawyer assigned if she has indicated that she wants a lawyer. Copies of the petition must also be given to the attorney and the Guardian ad Litem, if either has been appointed.
8. Petitioner should provide some sort of identification at the hearing.
9. The petitioner may be accompanied by a doctor, nurse, or family planning counselor. The court will determine whether these people will be allowed to attend the court hearing.
10. All hearings conducted in these matters shall be recorded on audiotape or on digital compact disc to ensure the lower court is able to immediately deliver a copy of the recording to the Supreme Court, in the event a minor appeals an order denying her petition.
11. The court must rule on the petition within 7 calendar days from the time the petition was filed. Again, note that a FAXED petition is considered filed when the FAX is received at the DVPOR; the trial court may have a very short time in which to hear the petition and issue an order. The judge must make written specific factual findings and legal conclusions supporting the decision. The Order on Petition for Waiver of Parental Notice for Abortion Requested by a Minor should be used for this order.

If the judge grants the minor's petition, a staff member shall prepare a "Certificate of Lower Court Decision to Allow Abortion Provider to Perform an Abortion Without Notifying a Minor's Parents or Guardian." It is a template form found in your WORD directories under FILE-NEW in the following template directories: superior court "Civil and Equity;" district court "Civil;" probate court "Probate General;" and family division pilot project "Juvenile."

Give the minor a copy of the Certificate and the original Certificate which must bear an original signature and an original court seal; keep a copy of the Certificate for the court file. The minor will give the original Certificate to her health care provider to evidence the court's authorization to perform an abortion and to satisfy RSA 132:27.

12. If the judge denies the minor's petition, staff must give the minor a copy of the order. The petitioner may file an expedited confidential appeal to the New Hampshire Supreme Court.

An order authorizing an abortion without notification is not subject to appeal.

Supreme Court Appeal Procedure

13. A petitioner seeking to file an appeal must file a notice of appeal form with the Supreme Court. The petitioner must send a copy of the notice of appeal to the clerk of the trial court.

If the notice of appeal is filed during business hours, it must be delivered or mailed to the clerk's office. When a notice of appeal is delivered or mailed to the Supreme Court, the date of receipt shall be considered the docketing date for purposes of RSA 132:26, II(c).

A petitioner may file the notice of appeal during non-business hours by sending the notice of appeal form to the clerk of the Supreme Court by FAX (271-8900), which will provide 24 hours a day, 7 days a week access to the courts. If the notice of appeal is sent to the FAX number, the petitioner must also contact the clerk of court by telephone (1-877-877-9014) to advise the clerk of the FAX transmission. When a notice of appeal is sent by FAX, the date that the documents is received in the clerk's office shall be considered the docketing date for purposes of RSA 132:26, II(c).

14. There is no filing fee for such an appeal.
15. Upon receipt of the copy of the Notice of Appeal, the clerk of the trial court shall arrange for immediate transfer of the recording of the proceedings before the trial court to the clerk of the Supreme Court and all exhibits filed and considered in the trial court.
16. All documents and proceedings related to an appeal of a trial court decision on a petition for waiver of parental notification for abortion shall be confidential.
17. A decision on the appeal must be issued within 7 calendar days of docketing of the appeal. The Supreme Court clerk's office shall send a copy of its decision by FAX to the clerk of the trial court. The Supreme Court clerk shall issue the mandate in accordance with Supreme Court Rule 24 on the same date as the decision and shall send a copy of the mandate by FAX to the clerk of the trial court.

The State of New Hampshire

Court _____

Docket Number: _____
(For Court Use)

In Re: _____
(Your Name)

Petition for Waiver of Parental Notice for Abortion Requested by a Minor (RSA132:26)

1. Name of person requesting waiver _____
Mailing address _____
Date of birth _____
Telephone number where you can be reached by court _____
2. Where are you living now? _____
3. Have you talked to an adult about your pregnancy? Yes No
If yes, who? _____
4. What doctor, nurse or family planning counselor have you talked to about your pregnancy? _____

5. The following statements are true: (Check all that apply.)
 I am pregnant
 I am _____ years old.
 I wish to have an abortion to end my pregnancy.
 I do not want either one of my parents or legal guardian to be notified of my abortion.
 I understand I am entitled to have the court appoint a lawyer to represent me in this matter free of charge. I want a lawyer. I do not want a lawyer.

6. I ask the court to allow my doctor to perform an abortion on me without notifying either of my parents or my legal guardian for one of the following reasons: (Complete section a. or b.)
 a. I believe I am mature and capable of giving my informed consent to an abortion because _____

 b. I believe it is in my best interests to have an abortion without notifying either of my parents or a legal guardian because _____

Date: _____
_____ Petitioner signature

YOU MUST CALL THE COURT TO ASK FOR INSTRUCTIONS ON THE NEXT REGULAR BUSINESS DAY AFTER YOU FILE YOUR PETITION.

HEARING INFORMATION -- TO BE COMPLETED BY THE COURT

A hearing on this matter will be held at the following time and place:
Date _____ Time _____
Court name _____ Telephone number _____
Court address _____

Your court appointed lawyer is: _____
Address _____
Telephone number _____

Guardian ad litem (optional) _____
Address _____
Telephone number _____

The State of New Hampshire

Court: _____ Docket Number: _____

In Re: _____

**ORDER
ON PETITION FOR WAIVER OF PARENTAL NOTICE FOR ABORTION
REQUESTED BY A MINOR
RSA 132:26**

_____ of _____
Name Address

petitioned this court for a waiver of parental notice prior to abortion. A
confidential hearing on this matter was held on _____.

The petitioner was or was not represented by counsel.

A guardian ad litem was or was not appointed for petitioner.

Complete Section I or Section II or Section III

Section I

The petitioner claims to be mature and the court finds the petitioner is mature and capable of giving informed consent to the proposed abortion. Specific factual findings and legal conclusions supporting this decision are as follows:

Accordingly, the petition is granted. The court authorizes an abortion provider to perform the abortion without parental notification.

Section II

The court finds the petitioner lacks the necessary maturity or does not demonstrate the necessary maturity to give informed consent to the proposed abortion. The court further finds, however, that it is in the best interests of the petitioner to authorize an abortion for the petitioner without notification of her

3
7

parent or guardian. Specific factual findings and legal conclusions supporting the court's decisions relative to the maturity of the petitioner and the best interests of the petitioner are as follows:

Accordingly, the petition is granted. The court authorizes an abortion provider to perform the abortion without parental notification.

Section III

The court finds the petitioner lacks the necessary maturity or does not demonstrate the necessary maturity to give informed consent to the proposed abortion. The court further finds that it is not in the best interests of the petitioner to authorize an abortion for the petitioner without notification of her parent or guardian. Specific factual findings and legal conclusions supporting the court's decisions relative to the maturity of the petitioner and the best interests of the petitioner are as follows:

Accordingly, the petition is denied. The court does not authorize an abortion provider to perform the abortion without parental notification.

SO ORDERED

Date: _____

Judge

The State of New Hampshire
ADMINISTRATIVE OFFICE OF THE COURTS

Donald D. Goodnow, Esq.
Director

Two Noble Drive
Concord, NH 03301
(603) 271-2521
Fax: (603) 271-3977
eMail: aoc@courts.state.nh.us
TTY/TDD Relay: (800) 735-2964

Date

Palmer P. Jones
Executive Vice President
New Hampshire Medical Society
7 North State Street
Concord, NH 03301

Dear

A new law, RSA 132:26, governing the procedures for a minor to obtain an abortion without parental notice will go into effect December 31, 2003. The Judicial Branch has developed forms and procedures to comply with the portions of the new law related to court procedures. Copies of the new law and the forms and procedures are attached and are also available on our website at: www.courts.state.nh.us

Please disburse this information as you feel is appropriate to the NH medical community. If you have any questions, please contact this office.

Sincerely,

Donald D. Goodnow
Director

DDG:rc

Enclosures

The State of New Hampshire

Petition for Waiver of Parental Notice for Abortion Requested by a Minor (RSA132:26)

Guidelines for Judges

Questions when Assessing Maturity

Support questions

1. Who supports you?
2. Do you go to school?
3. Do you have a job?

Independence questions

1. Whom have you talked to about your pregnancy?
2. Who is your doctor or do you go to a clinic?
3. Have you discussed this situation (pregnancy?) with the father of the baby?
4. Have you discussed pregnancy with a counselor or friend?

Personal relationships

1. Why do you want to end this pregnancy?
2. Why don't you want to tell your parents?
3. Why do you feel you are mature enough to decide to have an abortion?

Issues to consider when determining Best Interests

1. Emotional state of minor
2. Medical condition
3. Home life
4. Financial considerations
5. Negative consequences of parental involvement if they receive notice

The State of New Hampshire

Court _____

In Re: _____

Docket Number: _____

Certificate of Lower Court Decision to Allow Abortion Provider to Perform an Abortion Without Notifying a Minor's Parents or Guardian

Minor name: _____

Date of Order: _____

This document certifies that on the above date a judge of this court signed an order that allows an abortion provider to perform an abortion on the above-named minor without first notifying the minor's parents or guardian, pursuant to NH RSA 132:6. This certificate is valid only if it bears the original signature of a court official and an original seal of the court.

Date

Title

Affix Seal