



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82- 162

The Honorable Roy M. Ehrlich
State Senator, Thirty-Fifth District
Route 1, Box 92
Hoisington, Kansas 67544

Re: Public Health--Examination and Registration of
Pharmacists--Private, Not-For-Profit Family Planning
Clinics; Distribution and Control of Prescription
Medications

Synopsis: The provisions of K.S.A. 65-1648 (as amended by
L. 1982, ch. 262, §5), which authorize registered
nurses to distribute (under certain prescribed
circumstances) prescription medications at private,
not-for-profit family planning clinics, are valid
and constitutional. A prescription-only drug may
be distributed at such a clinic only where there
has been compliance with the provisions of subsection
(q) of K.S.A. 65-669. However, whether competent
medical practice necessitates a physical examination
prior to receiving prescription medications can be
determined only by consideration of the facts of
each specific case. Cited herein: K.S.A. 65-669,
65-1635 (as amended by L. 1982, ch. 262, §6),
65-1648 (as amended by L. 1982, ch. 262, §5),
65-2836, 21 U.S.C.A. §353.

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Dear Representative Ehrlich:

You request our opinion as to the constitutionality of Chapter
262 of the 1982 Session Laws of Kansas. Specifically, you ask

whether K.S.A. 65-1648 (as amended by L. 1982, ch. 262, §5), which permits registered nurses employed by private, not-for-profit family planning clinics to distribute prescription medications (under certain prescribed conditions), is valid. Also, you ask whether patients at the aforesaid clinics are required to have a physical examination and written prescription from a physician prior to receiving prescription medications.

Subsection (d) of K.S.A. 65-1648 (as amended) was added by the 1982 amendments and provides as follows:

"(1) The state department of health and environment, any county, city-county or multicounty health department and any private not-for-profit family planning clinic, when registered by the board, may keep drugs for the purpose of distributing drugs to patients being treated by that health department or family planning clinic. Distribution and control of prescription medications in a health department or family planning clinic shall be under the supervision of a pharmacist in charge. A designated registered nurse or nurses approved by the pharmacist in charge shall be in charge of distribution and control of drugs in the health department or family planning clinic under the supervision of the pharmacist in charge when a pharmacist is not on the premises. Drugs supplied to patients when a pharmacist is not on the premises shall be limited to the quantity necessary to complete a course of treatment as ordered by the practitioner supervising such treatment.

"(2) The board shall adopt rules and regulations relating to specific drugs to be used, to record-keeping and to storage of drugs by health departments or family planning clinics as are necessary for proper control of drugs."

The above-quoted provision changes state law relating to the dispensing of prescription-only drugs by registered nurses. Previously, registered nurses could not legally distribute or dispense prescription medications in health departments or private, not-for-profit family planning clinics. See Kansas Attorney General Opinion No. 81-182.

In considering the change effected by the subject enactment, it must be recognized that the "police power" gives the state the right to act to protect and promote the public health, State ex rel. Schneider v. Liggett, 223 Kan. 610, 615 (1978), and that laws concerning the dispensing and distribution of prescription medications clearly affect the public health. Although a statute enacted pursuant to the police power must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, due process is not violated where the legislation bears a rational relationship to the health and welfare of the citizens of the state. Id. at 616. Additionally, any statute coming before a court is cloaked in a presumption of constitutionality. Id.

Applying the above principles to the question concerning the constitutionality of subsection (d) of K.S.A. 65-1648 (as amended), we are unable to conclude that said subsection lacks a rational relationship to the health and welfare of the citizens of this state, or violates the Constitution. The legislature has clearly concluded that permitting registered nurses to distribute prescription medications, under the restricted circumstances prescribed in subsection (d) of K.S.A. 65-1648 (and under the circumstances prescribed in K.S.A. 65-1635, as amended by L. 1982, ch. 262, §6), promotes the public health and welfare. Courts will not sit as a "super legislature" and throw out laws they feel may be improvident or inappropriate, nor will they assume that they have wisdom superior to that of the legislature. State ex rel. Schneider v. Liggett, supra at 614; McAllister v. Fair, 72 Kan. 533, 536 (1906). For this reason, it is our opinion that subsection (d) of K.S.A. 65-1648 (as amended by L. 1982, ch. 262, §5) is valid and constitutional.

You also inquire as to whether patients at private, not-for-profit family planning clinics are required to have a physical examination and written prescription from a physician prior to receiving prescription medications. Regarding the need for a physical examination, we are unaware of any statutory provision which requires such an examination as a condition precedent to the issuance of a prescription order by a physician. General authorities, however, recognize that a patient is entitled to "an ordinarily careful and thorough examination, such as the circumstances, the condition of the patient, and the physician's opportunities for examination will permit." 70 C.J.S., Physicians and Surgeons §48d. In our opinion, the need for a physical examination depends entirely upon standards of competent medical practice, which standards must be adhered to by all persons licensed to practice any of the healing arts. See K.S.A. 65-2836(b). Whether competent medical practice

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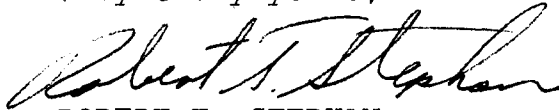
necessitates a physical examination in a specific case is a question which may be answered only upon consideration of the facts of the case.

Regarding the need for a written prescription, both state and federal law require that prescription-only drugs shall be dispensed only

"(i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist."
21 U.S.C.A. §353 (b)(1)(B); K.S.A. 65-669(q).

In our judgment, a private, not-for-profit family planning clinic must comply with above-quoted law in distributing drugs under the provisions of subsection (d) of K.S.A. 65-1648 (as amended).

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



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RTS:BJS:TRH:jm