STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

April 9, 1987

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 87- 66

Thomas J. Burgardt
Finney County Counselor
Box M
Garden City, Kansas 67846

Re: Domestic Relations -- Family Planning Centers -- Parental Consent for Family Planning Services for Minors

Synopsis: In that minors are protected by the United States Constitution and possess constitutional rights, absolute prohibitions on family planning (contraceptive) services for minors are unconstitutional. However, because activities of minors may constitutionally be regulated more strictly than those of adults, reasonable parental consultation restrictions, such as notice, may be placed on a minor's decision of whether or not to use contraceptive devices. Mandatory parental consent requirements for all contraceptive services to minors are unconstitutional. Cited herein: K.S.A. 23-501; 38-101; 38-123; 38-123b; K.S.A. 1986 Supp. 65-2891; K.S.A. 65-2892; 65-2892a.

* * *

Dear Mr. Burgardt:

As County Counselor for Finney County, you inquire as to whether the Finney County Health Department can provide family planning services to minors without parental consent.

Several statutes have been enacted in Kansas granting certain minors the authority to consent to specific medical treatment. K.S.A. 38-123 (medical care of unmarried, pregnant minor); 38-123b (medical care); K.S.A. 1986 Supp. 65-2891 (emergency care); K.S.A. 65-2892 (venereal disease); 65-2892a (drug abuse). By contrast, K.S.A. 23-501, the statute which allows for the establishment and maintenance of family planning centers, contains no language which would authorize a minor to give consent for the receipt of family planning services. The statute provides:

> "Such family planning centers, upon request of any person who is over eighteen (18) years of age and who is married or who has been referred to said center by a person licensed to practice medicine and surgery and who resides in this state, may furnish and disseminate information concerning, and means and methods of planned parenthood, including such contraceptive devices as recommended by the secretary of health and environment."

While the issue of requiring parental consent for contraceptive services to minors has never been considered in the Kansas courts, the United States Supreme Court and several federal circuit courts have considered the issue. For purposes of this opinion, a minor is any person, married or single, who has not yet reached the age of eighteen (18) years. See K.S.A. 38-101 [persons sixteen (16) years of age or over who are or have been married shall be considered of the age of majority only for matters relating to contracts, property rights, liabilities and the capacity to sue and be sued.]

A landmark Supreme Court decision which considered the constitutional rights of minors, as distinguished from those of adults, is Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2nd 788 (1976). In determining the validity of a parental consent requirement in a Missouri abortion statute, the court stated that "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." Id. at 74. See, e.g., Breed v. Jones, 421 U.S. 519, 95 S.Ct.

1779, 44 L.Ed. 2d 346 (1975); Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

At the same time, however, the Danforth court recognized the long-standing principle that the State has somewhat broader authority to regulate the activities of children than those of adults, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 74, citing Prince v. Massachusetts, 328 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944). Thus, the court concluded that the validity of a state's restriction on the privacy rights of minors must be determined in a balancing test. The restriction will only be valid if it serves a "significant state interest . . . that is not present in the case of an adult." Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 75. In this instance, the parental consent provision was declared unconstitutional because the restriction on minors' rights was not justified by a significant state interest.

Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), addressed the constitutionality of a New York statute prohibiting the sale or distribution of nonprescription contraceptives to persons under 16. Following the Danforth decision, the Carey court found it particularly significant that the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults. Id. at 693. Thus, the court stated that "state restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult.'" Id., citing Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 75, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

As noted previously in this opinion, the Danforth decision found that no such interest justified a state requirement of parental consent for an abortion. The Carey court reasoned that since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, Planned Parenthood of Central Missouri v. Danforth, supra at 74, "the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed." Carey v. Population Services International, supra, 431 U.S. at 694. As in the Danforth decision, the Carey court found that any possible significant state interest served by the statute (i.e. restricting minors' access to contraceptives as a deterrent to early sexual

behavior) was not sufficient to justify the state's blanket prohibition on the availability of contraceptives to persons under 16. Id. at 694-695. Thus, the court struck down the statute as unconstitutional.

Bellotti v. Baird, 443 U.S. 622, 995 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (Bellotti II) (plurality opinion), again considered the constitutional rights of minors when examining the validity of an alternative parental/judicial consent requirement in a Massachusetts abortion statute. The court set forth three guidelines to consider when dealing with the constitutional rights of minors, as distinguished from those of adults. First, although children generally are protected by the same constitutional guarantees against governmental deprivations as adults, "the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern . . . sympathy, and . . . paternal attention.'" Id. at 635, citing McKeiver v. Pennsylvania, 403 U.S. 528, 550, 91 S.Ct. 1976, 16 L.Ed.2d 647 (1971). Second, the States may validly limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. Bellotti II, supra, at 635. And finally, the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. Id. at 637.

In light of these guidelines, the Bellotti II court concluded that legal restrictions on minors, and especially those restrictions which are supportive of the parental role, "may be important to the child's chances for the full growth and maturity that make participation in a free society meaningful and rewarding." 443 U.S. at 638-639. Thus, while acknowledging its previous prohibition on an absolute parental veto over the decision of a minor to terminate her pregnancy, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Supreme Court determined that "parental notice and consent are qualifications that typically may be imposed by the state on a minor's right to make important decisions." Bellotti II, supra, 443 U.S. at 640.

Applying this policy to the Massachusetts abortion statute, the court held that if the State decides to require parental consent for a minor's abortion, it must also provide an alternative procedure whereby judicial authorization for an abortion can be obtained, thus preventing the minor's decision from being subject to the blanket third-party veto power

struck down as unconstitutional in Planned Parenthood of Central Missouri v. Danforth, supra, 428 U.S. at 74. In this instance, the statute was struck down as unconstitutional, with four members of the court reasoning it was unconstitutional because the statute's alternative parental/judicial consent requirement still vested absolute veto power over a minor's abortion decision in the hands of a third party. Bellotti II, supra, 443 U.S. at 651.

After considering the aforementioned Supreme Court decisions, we reach the following conclusions regarding the provision of contraceptive services to minors in Kansas. First, it is clear that absolute prohibitions on the availability of contraceptives for minors are unconstitutional. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); Carey v. Population Services International, 431 U.S. 678, 694, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). See also Doe v. Irwin, 428 F. Supp. 1198, 1215 (W.D. Mich. 1977). As stated plainly by the Danforth court, minors are protected by the Constitution and possess constitutional rights. 428 U.S. at 74.

Second, we believe that restrictions other than a blanket veto by a third party over a minor's decision of whether or not to use contraceptive devices could pass constitutional muster. As stated in Bellotti II, 443 U.S. at 640, "immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences." Further, the court recognized in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 73, that "parental discretion, too, has been protected from unwarranted or unreasonable interference from the State." The issue of contraceptive use by minors is an area of unquestioned parental discretion. While the Danforth opinion held that blanket veto power in the hands of a third party over a minor's right to use contraceptives is unconstitutional, we believe the court implicitly recognized (428 U.S. at 75) that minors may well be immature, and thus restrictions other than a blanket veto could be constitutional.

In our judgment, the encouragement of minors to seek the help and advice of their parents is a valid constitutional claim. It is important to respect the position of parents who have brought teenagers to the point at which decisions regarding the use of contraceptive devices will be made. A requirement of notice would afford parents the opportunity to alert a minor to the dangers, problems and consequences of sexual

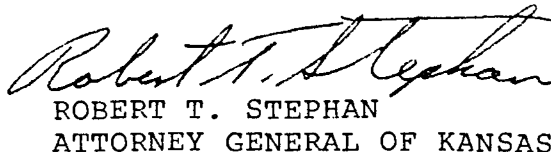
activity. Once aware, a decision may be reached in joint consultation with the parents, or a minor may prevail without parental consent. In either event, however, the value of family involvement would be afforded the minor.

We believe that when the conflicting interests of the government and the family collide, every caution must be exercised in protecting parental and familial values. Thus, in our opinion, a state reasonably may impose parental consultation requirements, such as notice, on the availability of contraceptive services for minors. See, Bellotti v. Baird, 443 U.S. at 640; Doe v. Irwin, 428 F. Supp. at 1215. The validity of any restriction on the rights of minors to obtain contraceptives may be determined through a balancing test, where the restriction will be valid if it serves a "significant state interest . . . that is not present in the case of an adult." Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 75.

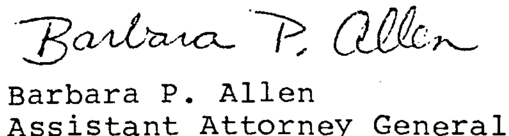
Finally, it is apparent that mandatory parental consent requirements for all contraceptive services to minors are unconstitutional. See, City of Akron v. Akron Center, 462 U.S. 416, 76 L.Ed.2d 687, 103 S.Ct. 2481 (1983); Jane Does v. State of Utah Dept. of Health, 776 F.2d 253, 256 (10th Circuit 1985). Such a requirement would give a parent the blanket veto power over a minor's procreation choices which was struck down as unconstitutional in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 74; See also, Carey v. Population Services International, 431 U.S. at 694; Bellotti II, 443 U.S. at 651.

In summary, because minors are protected by the United States Constitution and possess constitutional rights, absolute prohibitions on family planning (contraceptive) services for minors are unconstitutional. However, since activities of minors may constitutionally be regulated more strictly than those of adults, reasonable parental consultation restrictions, such as notice, may be placed on a minor's decision of whether or not to use contraceptive devices. Mandatory parental consent requirements for all contraceptive services to minors are unconstitutional.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Barbara P. Allen
Assistant Attorney General

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