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ATTORNEY GENERAL OPINION NO. 92-71

Bill McCormick
Director of Federal and State Affairs
Office of the Governor
State Capitol, 2nd Floor
Topeka, Kansas 66612

Re: Domestic Relations -- Family Planning Centers -- Establishment and Maintenance; State Funding of Contraceptives for Minors

Synopsis: In our opinion the portion of K.S.A. 23-501 which provides that the secretary of health and environment (KDHE) shall establish and maintain family planning centers is directory in nature, not mandatory. K.S.A. 23-501 prohibits the distribution of contraceptive information and services to minors through family planning centers established and maintained by KDHE. Such centers are not presently maintained by KDHE specifically because of the prohibition of K.S.A. 23-501. Should KDHE reestablish and maintain family planning centers in the future, so long as K.S.A. 23-501 is in effect contraceptive services could not be provided to minors at such centers.

A mature minor may authorize medical and surgical services, including contraceptive services, by giving an informed consent to such services. In the absence of an informed consent medical care is unauthorized, thus subjecting the medical care providers, whether public or private, to potential liability.

> Two distinct governmental interests may be served simultaneously without jeopardizing the legality of either. The mere fact of apparent inconsistency alone does not negate either governmental interest nor does one interest prevent or preclude legislation promoting another interest. Statutes protecting minors from illicit sexual activity thus do not preclude acceptance and distribution of Title X funds which are conditioned upon provision of contraceptive services to minors. Cited herein: K.S.A. 21-3502; K.S.A. 1991 Supp. 21-3503; K.S.A. 21-3504; 21-3602; 21-3606; 23-501; 23-502; 38-1501; L. 1965, ch. 384, § 1; L. 1973, ch. 186, § 20; L. 1975, ch. 462, § 34; L. 1980, ch. 182, § 20; 42 U.S.C.S. § 300.

* * *

Dear Mr. McCormick:

As counsel to the governor, you pose a number of questions regarding the state of Kansas' rights, obligations and responsibilities concerning the provision of contraceptive information and services to minors.

Since the issues you raise must be assessed in light of the interplay of state and federal law which has affected family planning programs in Kansas, we will begin with an historical review before reaching your specific questions.

In 1965 the Kansas legislature authorized the then state board of health to establish and maintain family planning centers in cooperation with county social welfare offices and county health departments. L. 1965, ch. 384, § 1. In 1973 that statute was amended to allow the state board of health to cooperate with the state social welfare office and county health departments in the establishment and maintenance of such centers. L. 1973, ch. 186, § 20. In 1975 another amendment modified the statute by replacing the state board of health with the secretary of the newly created department of health and environment. L. 1975, ch. 462, § 34. Finally, in 1980 the statute was again amended to its present form now found at K.S.A. 23-501:

> "The secretary of health and environment shall establish and maintain family planning centers in cooperation with the secretary of social and rehabilitation services and county, city-county and

> multicounty health departments." L. 1980, ch. 182, § 8.

This legislative history regarding the authorized cooperative effort to establish and maintain family planning centers has not, however, continuously tracked with the actual funding and implementation of family planning programs in Kansas.

According to information contained in the department of health and environment's (KDHE) 1991 grant application for Title X funds, from 1965 to 1970 state-funded family planning clinic programs were established by the state board of health in nine Kansas counties in cooperation with local public health agencies. In 1970 federal funds became available to the states for family planning programs. An excellent background review of this federal funding mechanism is presented in Planned Parenthood Federation of America, Inc., et al. v. Heckler, 712 F.2d 650 (1983), from which we quote at length:

> "In 1970 Congress enacted Title X of the Public Service Act to establish a nationwide program with the express purpose of making 'comprehensive family planning services readily available to all persons desiring such services.' Congress authorized the Department of Health, Education and Welfare (HEW) to make grants and enter into contracts with public or nonprofit private entities to assist in the establishment of family planning projects that offer a broad range of family planning methods, including the provision of prescription and nonprescription contraceptive drugs and devices. See 42 U.S.C. Sec. 300(a) [42 USCS Sec. (a)] (as amended). The Title X program was originally funded for three years, but has since been reauthorized and refunded continuously.
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> "In light of the breadth of the statutory language and clear congressional intent that all persons receive such services, Title X grantees have served the teenage population from the inception of the program. Following enactment of Title X, however, Congress frequently expressed its increasing concern about the still unmet family planning needs of sexually active teenagers in this country. See, e.g.,

> H.R. Reps. No. 1161, 93rd Cong., 2d Sess. 14 (1974) ('certain population groups requiring these services are not being reached . . . including teenagers'); S. Rep. No. 29, 94th Cong., 1st Sess. 55 (1975). Ultimately, Congress in 1978 amended the statute itself to require that Title X projects offer 'a broad range of acceptable and effective family planning methods and services (including . . . services for adolescents).' See 42 U.S.C. Sec. 300(a) [42 USCS Sec. 300(a)] (emphasis added). While this amendment simply codified accepted past practice, the added language clearly reflected Congress' intent to place 'a special emphasis on preventing unwanted pregnancies among sexually active adolescents.' S.Rep. No. 822, 95th Cong., 2d Sess. 24 (1978).
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> "In 1981 Congress again amended Title X, this time to require by statute that grantees encourage family participation in their Title X programs. With this additional language, Section 300(a) of the Act now reads:
>
> > 'The Secretary is authorized to make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents). To the extent practical, entities which receive grants or contracts under this subsection shall encourage family participation in projects assisted under this subsection.'
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> "42 U.S.C. Sec. 300(a) [42 USCS Sec. 300(a)]." (Emphasis in original).

According to KDHE's grant application, from 1971 to 1975 the Kansas state board of health applied for, received and administered Title X grants which supplemented state funding

of family planning projects. In 1971 twelve counties received Title X projects grants; the board of health continued to operate twenty state funded family planning clinics in local health departments. By 1975 family planning services were being provided to fifty-six counties through a combination of Title X and state funds.

Throughout the legislative history of K.S.A. 23-501, the following provision has appeared substantially unchanged:

> "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."

In 1975 that provision was the subject of Attorney General Opinion No. 75-450. A county attorney had questioned the propriety of a public health nurse administering pregnancy tests and issuing birth control devices to individuals under eighteen years of age through a family planning center established and operated pursuant to K.S.A. 23-501. The opinion concluded:

> "The assistance provided by family planning centers is available only to that class of individuals identified in K.S.A. 23-501 which does not include individuals under eighteen years of age."

In response to that opinion, Dr. Lowell M. Wiese, director of health for the department of health and environment issued a memorandum to all county health officers advising "that the Department of Health and Environment will discontinue the direct operation of family planning centers established under K.S.A. 23-501 and 502 on June 3, 1976." The memorandum further stated:

> "This action brings to conclusion our seven year plan of demonstrating family planning services in areas of the state where such services were not available, then phasing out the state operated

> centers as local communities developed their own integrated services. We believe that quality family planning services can best be provided at the community level as a component of a comprehensive maternal and child health service.
>
> "The Department has received approval from the regional HEW office to allocate Title X funds to county health departments through the aid-to-county grant program for integrated maternal and child health services. The Kansas statutory qualifications for eligibility for family planning centers, concerning age, residence and marital status, as discussed by the Attorney General in opinion no. 75-450, of December 9, 1975, apply only to State Department of Health and Environment centers established under K.S.A. 23-501, and not to those operated by local health departments or under private auspices or through other public agencies. County Health Departments will therefore be able to extend a full program of maternal and child health services, including family planning services, to all persons, and thus remain in compliance with Title X regulations." (Emphasis added).

Within a month of the issuance of that memorandum an Attorney General's opinion was requested seeking confirmation of Dr. Weise's statements. Attorney General Opinion No. 76-184 concluded that Dr. Wiese was "entirely correct," opining:

> "The qualifications governing eligibility for services of the centers applies, clearly, only to services furnished by '[s]uch family centers' as are established and maintained by the Secretary of Health and Environment under this act. These qualifications manifestly do not apply to services and programs offered by county health departments, by other public agencies, or under private auspices.
>
> "To recapitulate, if and when the Secretary of Health and Environment should reestablish and maintain family planning

> centers at any time in the future, so long as K.S.A. 23-501 is in effect, eligibility for the services of such centers is governed by the restriction of that provision, as discussed earlier in Opinion No. 75-450. However, that provision, and the cited opinion, apply only to family planning centers established and operated by the Secretary of Health and Environment, and not to other providers of such services, including county health departments. Accordingly, I agree fully with the advice of Dr. Wiese in the referenced memorandum."

In July of 1976, state funding for family planning centers was withdrawn. Since then family planning programs have continued to provide contraceptive services, including services to minors, through local health agencies with Title X and locally generated funds. KDHE serves as the Title X grantee for the purpose of administering and allocating federal funds to local program recipients.

Thus, while KDHE originally established many family planning centers, as of July, 1976 family planning programs have been maintained primarily by the federal government through Title X grants; KDHE does not maintain such centers. Expenses incurred by KDHE in administering and allocating Title X funds are borne by the federal government. In the absence of Title X funds, family planning programs in Kansas would be maintained, if at all, by local public or private agencies. Should KDHE not seek further Title X funds, a private non-profit entity or a local public agency could become grant applicants. Consequently, although K.S.A. 23-501 reads that the secretary of health and environment shall establish and maintain family planning centers in cooperation with the secretary of social and rehabilitation services and county, city-county and multicounty health departments, since July, 1976 that statute has not been so implemented through KDHE.

Despite the language of K.S.A. 23-501 ("The secretary of KDHE shall establish and maintain. . ."), in our opinion that statute is directory in nature, not mandatory. The use of the word "shall" is not a hard and fast identifying mark which can foretell the mandatory or directory character to be assigned to any statutory provision. City of Kansas City v. Board of County Commissioners of Wyandotte County, 213 Kan. 777 (1974). Factors which indicate that a statute is mandatory are the presence of negative words requiring that an act shall be done in no other manner or at no other time than

that designated or a provision for a penalty or other consequence of noncompliance. Paul v. City of Manhattan, 212 Kan. 381 (1973). Absence of these factors lead us to conclude that K.S.A. 23-501 is directory in nature.

Turning now to your questions, you first ask whether the state of Kansas has a right to prohibit by statute the use of public funds for the distribution of contraceptive services to minors. As indicated in the above discussion, the Kansas legislature enacted K.S.A. 23-501 which does prohibit the distribution of contraceptive information and services to minors through family planning centers funded by the secretary of health and environment in cooperation with the secretary of social and rehabilitation services and county, city-county and multicounty health departments. As discussed, such centers are not presently maintained by KDHE nor are state funds presently used for the distribution of contraceptive services to minors specifically because of the prohibition found at K.S.A. 23-501. The source of family planning funds to local Kansas agencies is primarily Title X funds, a federal source which specifically requires that family planning methods and services be made available to adolescents. 42 U.S.C.S. § 300(a).

Whether the state of Kansas could enact another law entirely banning the use of all public funding, state as well as federal and local, for contraceptive services to minors is a separate question. In connection with this issue, you ask whether either of two recent United States Supreme Court cases, Rust v Sullivan, 500 U.S. ____, 114 L.Ed.2d 233, 111 S.Ct. 1759 (1991) or Webster v. Reproductive Health Services, 492 U.S. 490, 106 L.Ed.2d 410, 109 S.Ct. 3040 (1989), affect the conclusion expressed in Attorney General Opinion No. 87-66:

> "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."

That opinion addressed whether a state could prohibit minors from accessing contraceptives. We understand your question to be whether a state may prohibit public funding of contraceptives for minors.

Rust addressed regulations adopted under and implementing Section 1008 of Title X of the Public Health Service Act which provides that "none of the funds appropriated under this

subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C.S. § 300a-6. Rust held that the regulations were a permissible construction of the prohibition contained in Title X.

In Webster the constitutionality of a Missouri statute regulating the performance of abortions was challenged. A statutory restriction prohibiting the use of public funds and public facilities for abortions was upheld by the United States Supreme Court.

These cases, while not having a direct bearing on Attorney General Opinion No. 87-66, do make clear that a state or the federal government may condition the use of its public funds. As mentioned, Kansas has already prohibited the use of state funds for contraceptive services to minors in state established and maintained family planning centers. While Kansas could enact a law totally prohibiting the use of any state funds for contraceptive services to minors, as a practical matter that has been accomplished pursuant to K.S.A. 23-501. As to federal Title X funds, the state through KDHE could forego applying to be the grant recipient for administrative and allocation purposes; but since Title X allows a private non-profit entity to be the grant applicant, state law may not contravene the use of such federal public funds. In other words, Kansas may not enact a law prohibiting private non-profit entities from applying for federal funds under Title X. Likewise, it is questionable whether the state could prohibit local public agencies from applying directly for Title X funds.

Your second group of questions appears to be premised on the erroneous assumption that the department of health and environment has established and presently maintains family planning clinics. You ask whether K.S.A. 23-501 requires KDHE to cooperate in the "establishment" and "maintenance" of family planning clinics? Clearly the statute authorizes state sponsored family planning centers. However, as discussed, in our opinion K.S.A. 23-501 is directory rather than mandatory. Were that statute being implemented, KDHE would have a responsibility to establish and maintain such centers in cooperation with SRS and local health agencies. However, K.S.A. 23-501 has not been implemented since 1976. You also ask whether the provision by KDHE of services, supplies and funding of family planning clinics constitutes "maintaining" such clinics. Were KDHE providing services, supplies and funding of family planning clinics it had established, in our opinion, KDHE would be considering to be maintaining such clinics. You then ask whether KDHE's participation in establishing and maintaining family planning

clinics pursuant to K.S.A. 23-501 permit it to refuse contraceptive services to minors. Again, if KDHE were maintaining family planning clinics, as opined in Attorney General Opinion No. 75-450, K.S.A. 23-501 would prohibit distribution of contraceptive services to minors in such clinics.

You next draw our attention to Attorney General Opinion No. 91-93 which concluded:

> "An unemancipated, immature minor is not considered legally capable of understanding the nature and consequences of medical or surgical treatment or procedures and therefore is not legally capable of providing an informed consent to any medical or surgical services."

In the course of that opinion we stated that, "absent such an informed consent a health care provider risks liability even if a minor falls within one of the statutory exceptions to the parental consent requirement." In light of that opinion, you now ask: To the extent physicians and/or other health care providers may incur liability arising from unauthorized care to minors, can the state of Kansas and/or a local unit of government incur similar liability for provision of services related to contraception or compensable injury arising therefrom?

Since such a wide range of contraceptive devices exists, in the discussion of liability as it relates to an absence of informed consent to medicare care, that term will refer only to those contraceptive devices which necessitate a prescription (such as birth control pills) or the active assistance of a health care provider (such as an inter-uterine device). The term will not refer to contraceptives which may be purchased over-the-counter (such as condoms or spermacidal jellies and foams).

As discussed in Attorney General Opinion No. 91-93, the fact of minority alone does not preclude medical care from being authorized. In Kansas a mature minor may authorize medical or surgical services by giving an informed consent to such services. Assuming the minor is able to understand and comprehend the nature of the service, the risks involved and the probability of attaining the desired results in light of attendant circumstances, a medical care provider is shielded from liability which could otherwise accrue merely from the proper performance of the service. Younts v. St. Frances Hospital and School of Nursing, 205 Kan. 292 (1970).

Accordingly, medical or surgical care to a minor is authorized when either a mature minor or the legal guardian of an immature minor gives an informed consent to the service. Medical care, including the provision of some contraceptive prescriptions and devices, is unauthorized, thus subjecting the medical care provider to potential liability, if such an informed consent is not obtained.

As discussed in Attorney General Opinion No. 87-66, minors have constitutional rights under the United States constitution which preclude absolute prohibitions on family planning services for minors. Thus, a state may not require parental consent as an absolute condition for providing contraceptive services to minors. However, as with adults, health care providers should assure themselves that any particular minor is sufficiently capable of making an informed decision regarding contraceptive services.

As we stated in response to a similar question in 1989:

> "In accordance with the constitutional rights recognized in [Attorney General Opinion No. 87-66], it does not appear that a city or county could be subject to any liability for providing contraceptive services to minors that does not exist with respect to providing such services to adults." Informal Letter Opinion from Attorney General Robert T. Stephan to Thomas R. Powell, Wichita City Attorney, and Henry H. Blase, Sedgwick County Counselor, December 6, 1989.

Were the state providing contraceptives to minors the legal conclusion would be the same.

Finally you point out that various provisions of Kansas law protect minors from improper sexual activity, e.g. the Kansas code for care of children, K.S.A. 38-1501 et seq., and amendments thereto; rape, K.S.A. 21-3502; indecent liberties with a child, K.S.A. 1991 Supp. 21-3503; aggravated indecent liberties with a child, K.S.A. 21-3504; incest, K.S.A. 21-3602; aggravated incest, K.S.A. 21-3606. In light of these protective statutes, you ask whether the state of Kansas is permitted to distribute contraceptive devices to unemancipated, immature minors for use in conjunction with the act of sexual intercourse.

As pointed out above, since 1976 the state of Kansas has not distributed contraceptive devices to any person under the age

of eighteen due to the prohibition of K.S.A. 23-501. Should that statute be amended or repealed, the state might risk liability by providing contraceptive devices to unemancipated, immature minors in the absence of an informed consent from a legal guardian. Such would be the case under general principles of liability regardless of any protective laws relating to children. However, the fact that the state has enacted laws protective of children does not preclude the federal, state or local government from providing contraceptive devices to informed and consenting mature minors without consent from the legal guardian or to immature minors with parental consent.

Two distinct governmental interests may be served simultaneously without jeopardizing the legality of either.

> "[A]ll statutes should be so construed, if possible, by a fair and reasonable interpretation, as to give full force and effect to each and all of them. In conformity with this principle, it is not to be assumed that one or the other or related statutes is meaningless; rather, such statutes will be so construed as to give each a field of operation." 73 Am.Jur.2d Statutes, § 253 (1974).

One set of laws serves the governmental interest of protecting children from sexual abuse. Another, such as Title X, declares as one of its purposes "to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services. . . ." Act Dec. 24, 1970, P.L. 91-572, Sec. 2, 84 Stat. 1504. Each has a field of operation, which, while related to minors, serves a distinct governmental interest. The mere fact of apparent inconsistency alone does not negate either governmental interest nor does one interest prevent or preclude legislation promoting another interest. See Gray v. Benson, 443 F.Supp. 1284 (1978).

In conclusion, in our opinion the portion of K.S.A. 23-501 which provides that the secretary of health and environment (KDHE) shall establish and maintain family planning centers is directory in nature, not mandatory. K.S.A. 23-501 prohibits the distribution of contraceptive information and services to minors through family planning centers established and maintained by KDHE. Such centers are not presently maintained by KDHE specifically because of the prohibition of K.S.A. 23-501. Should KDHE reestablish and maintain family planning centers in the future, so long as K.S.A.

23-501 is in effect contraceptive services could not be provided to minors at such centers.

A mature minor may authorize medical and surgical services, including contraceptive services, by giving an informed consent to such services. In the absence of an informed consent medical care is unauthorized, thus subjecting the medical care providers, whether public or private, to potential liability.

Two distinct governmental interests may be served simultaneously without jeopardizing the legality of either. The mere fact of apparent inconsistency alone does not negate either governmental interest nor does one interest prevent or preclude legislation promoting another interest. Statutes protecting minors from illicit sexual activity thus do not preclude acceptance and distribution of Title X funds which are conditioned upon provision of contraceptive services of minors.

Very truly yours,

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