

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2245/1dn  
DAK:jlg:hmh

April 28, 1999

To Representative Grothman:

As I told your aide, Maggie, I have been concerned about issues raised in the fiscal estimate for 1995 Assembly Bill 965, on which this bill is based, as to possible unconstitutionality and contravention of federal medicaid statutes and regulations. My research has yielded the following:

1. *Possible issues of unconstitutionality:*

States may not impose blanket prohibitions on the receipt by minors of certain procedures or treatment to which the constitutional right of privacy is perceived to attach, e.g., with respect to abortion, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, at 74 (1976), and with respect to contraceptives, *Carey v. Population Services International*, 431 U.S. 678 (1977). In *Carey*, the Court found unconstitutional a New York statute under which it was a crime for a person to sell or distribute contraceptives of any kind to a minor under the age of 16, for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or older, and for anyone to advertise or display contraceptives. The Court found that the restrictions on the sale and distribution of contraceptives burdened the minors' constitutional right of privacy to decide whether to bear children and were not justified by compelling state interests.

Generally, unless a state specifically provides otherwise, a minor is considered to be legally incapable of giving consent to his or her treatment. However, under *Bellotti v. Baird*, 443 U. S. 622 (1979), a state that requires a pregnant minor to obtain one or both parents' consent to an abortion must provide an alternative procedure whereby authorization for the abortion can be obtained.

The bill prohibits payment of funds for family planning services or pregnancy counseling to an organization that provides family planning services to a minor without the written consent of the minor's parent or legal guardian or custodian. The term "family planning services" is defined to include ". . . referral to licensed nurse practitioners . . ., licensed physicians or local health departments for . . . prescriptions for the purpose of family planning". The term "family planning" is, in turn, defined to mean voluntary action by individuals to prevent or aid conception. Thus, the bill does not directly prohibit a minor from obtaining contraceptives without parental consent, nor does it prohibit physicians from prescribing contraceptives for minors. However, the effect of the bill, in eliminating funding for organizations that provide family

planning services to minors without parental consent may be to eliminate access by some minors to a means of obtaining contraceptives that must be prescribed by a physician. To the extent that the bill prohibits access by a minor to contraceptives, by requiring parental consent to services that would provide a referral for the contraceptives and by not providing for an alternative procedure, it is conceivable that a court would find that the bill infringes on the minor's right to privacy, as applied under *Carey* and *Bellotti*. Whether any other services under the bill's definition of "family planning services" are applicable to this reasoning, would depend, I assume, on the extent to which a court might equate the other services with contraceptives in analyzing whether their deprivation would burden the minors' constitutional right of privacy to decide whether to bear children.

*2. Federal Medicaid requirements:*

Federal regulations set forth various requirements safeguarding information on Medicaid applicants and recipients, under 42 CFR 431.300 to 431.307. In 42 CFR 431.305 the agency (the state's lead agency for receipt of the federal moneys, i.e., in this state, the Department of Health and Family Services) must have criteria that govern the types of information about applicants and recipients that are safeguarded. This information must include, among other things, names and addresses, medical services provided and medical data, including past history of disease or disability. In 42 CFR 431.306, the agency must have criteria specifying the conditions for release and use of information about applicants and recipients and must not publish names of applicants or recipients. I do not know how these provisions affect access by minors to family planning services with or without parental consent. If you would wish, I would be happy to attempt to obtain this information from DHFS.

If I may assist you further with this draft, please do not hesitate to call.

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