



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WARDEN

March 9, 2011

*STATEHOUSE MAIL*

Hon. Dan J. Schmidt  
IDAHO SENATE  
Boise, Idaho 83720

Re: Senate Bill 1148

Dear Senator Schmidt:

You have raised several questions concerning the proper construction or application of Senate Bill 1148, also known as the Pain-Capable Unborn Child Protection Act. Briefly summarized, Senate Bill 1148 imposes restrictions on the performance of abortions with respect to unborn children beyond the nineteenth week of postfertilization; provides for physician reporting requirements, criminal penalties and civil remedies; and establishes a "pain-capable unborn child protection act litigation fund for the purpose of providing funds to pay for any costs and expenses incurred by the state attorney general in relation to actions surrounding defense" of the statute.

At the outset, we emphasize that this response is not intended, and should not be deemed, to express the official position of the Attorney General. It reflects a preliminary analysis prepared by our Office under significant time constraints to assist you in determining whether to support, oppose or seek modifications to the involved legislation.

Question 1. Senate Bill 1148 would add a new provision, Idaho Code § 18-505, that in relevant part would prohibit any person from performing an abortion when "the probable postfertilization age aged of the woman's unborn child is twenty (20) or more weeks unless, in reasonable medical judgment: (1) she has a condition that so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avoid serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions; or (2) it is necessary to preserve the life of an unborn child." You ask whether this Office can "provide any guidance as to what the legal standards are for determining what is a 'substantial risk'" and who makes that determination.

We believe that the term “substantial risk” likely would be construed comparably to the term “significant risk” as applied by the United States Supreme Court in various abortion-related decisions. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 161-67 (2007); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 880 (1992) (joint opinion). Whether a “substantial” or “significant” risk exists in a particular situation is, as Senate Bill 1148 states, a determination left to the attending physician subject to the “reasonable medical judgment” standard as defined in the proposed Idaho Code § 502(8). The legislation therefore imposes an objective standard that is applied in the first instance by the attending physician and, in any ensuing litigation, by a court. *Cf. Stenberg v. Carhart*, 530 U.S. 914, 932 (2000) (observing that courts “heard expert evidence” to determine whether a particular abortion procedure might be the most appropriate for purposes of saving a mother’s life or preserving her health). This Office declines, in the context of this letter, to define with any more particularity the precise scope of the term “substantial risk” other than to note the presumption that the Legislature intends it to be applied consistently with relevant, controlling precedent and therefore in a manner consonant with constitutional requirements.

Question 2. You ask “what the legal standards are concerning what is considered a ‘major bodily function.’” Once again, we decline to address the precise scope of this term in the present context because, like the other components of the medical emergency exception in Senate Bill 1148, the meaning of “major bodily function” must be determined with reference to accepted medical standards. This Office does point out, however, that the definition of “medical emergency” in the proposed Idaho Code § 18-501(4) excludes “psychological or emotional conditions.”

Question 3. You indicate confusion over “the new definition of abortion in Senate Bill 1148” and ask whether “a circumstance where a physician induced labor to hasten delivery of a fetus with a condition incompatible with life outside the womb, such as anencephaly, [would] be considered an abortion under Senate Bill 1148.” This Office believes the definition of “abortion” in the proposed Idaho Code § 18-502(1) speaks for itself and that your question must be answered with the definition and the particular circumstances in which the physician is exercising his or her medical judgment. The “abortion” definition in Senate Bill 1148, in other words, sets out a comprehensible framework within which physicians must exercise their medical judgment to determine whether they are performing an “abortion.”

Question 4. You state concern with regard to the civil remedy provisions in the proposed Idaho Code § 18-508(1) “which allow[] ‘the father of the unborn child’ to pursue legal action” but do not exclude a rapist from that right of action. Section 508(1) is unambiguous on this score and, as currently drafted, provides a private right of action to the biological father without any exclusion. The answer to your question is therefore in the affirmative.

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Question 5. You ask whether the civil remedy for injunctive relief accorded “current and former licensed health care provider[s]” in the proposed Idaho Code § 18-508(2) can “be reconciled with HIPAA, which prohibits disclosure of medical information.” The Health Insurance Portability and Accountability Act (codified in scattered sections of Titles 18, 26, 29 and 42 of the United States Code). *See* 45 C.F.R. §§ 164.500 to 164.534 (regulations implementing HIPAA confidentiality requirements for protected health information). It is possible for patients to authorize disclosure of their medical records under HIPAA. *Id.* §§ 164.502 and 508. This Office does not believe that this provision of the proposed legislation is preempted facially.

We hope that this response adequately addresses your questions. Please contact me if it does not.

Very truly yours,



CLAY R. SMITH  
Deputy Attorney General

*CRS/jd*