IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ELIZABETH KARLIN, M.D.; PLANNED
PARENTHOOD OF WISCONSIN, INC.;
GARY T. PROHASKA, M.D.; DENNIS D.
CHRISTENSEN, M.D.; and SUMMIT
WOMEN'S HEALTH ORGANIZATION,
on behalf of themselves and their patients
seeking abortions,

OPINION AND
ORDER

Plaintiffs,

v.

96-C-0374-C

C. WILLIAM FOUST, in his official capacity
as district attorney for Dane County and a
representative of the class of all district attorneys
in Wisconsin; JAMES E. DOYLE, in his official
capacity as Attorney General of Wisconsin; E. MICHAEL
McCANN, in his official capacity as district attorney for
Milwaukee County; JAMES CHAMBERS, MICHAEL MEHR,
B. ANN NEVAISER, JAMES ESSWEIN, RUDOLFO MOLINA,
W.R. SCHWARTZ, MIKKI PATTERSON, SIDNEY JOHNSON,
SANDRA MAKHORN, PABLO PEDRAZA, GLENN HOBERG,
WANDA ROEVER, RONALD GROSSMAN, and DAROLD
TREFFERT, in their official capacities as members of the Wisconsin
Medical Examining Board; ELAINE AUGUST, TIMOTHY D. BURNS,
BONNIE M. CREIGHTON, RUTH E. LINDGREN, PAMELA
A. MAXON, LORRAINE A. NOREM, ROBERTA P. OVERBY,
McARTHUR WEDDLE, and ANN BREWER, in their official
capacities as members of the Wisconsin Board of Nursing; MURIEL
HARPER, VIRGINIA HEINEMANN, CORNELIA HEMPE,

DOUGLAS KNIGHT, and ANITA KROPF, in their official capacities as members of the social worker section of the Wisconsin Examining Board of Social Workers, Marriage and Family Therapists and Professional Counselors; JOSEPH LEEAN, in his official capacity as Secretary of the Wisconsin Department of Health and Family Services; and K.B. PIPER, in his official capacity as Administrator of the Division of Health of the Wisconsin Department of Health and Family Services,

Defendants.

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This case is before the court for one last matter: approval of the state certification form that Wis. Stat. § 253.10(3)(d)3 requires of women seeking abortions to insure that they have been given certain statutorily mandated information. Defendants have submitted a copy of the proposed form, along with a copy of the cover letter that will be sent to physicians and human services agencies with the form. (Copies of the cover letter and the form are attached to this order.)

Plaintiffs have lodged certain objections to the form. They believe that 1) it does not accurately advise physicians of the manner in which they are to inform women how to obtain fetal ultrasound imaging and auscultation of fetal heart tone services, as required by Wis. Stat. § 253.10(3)(c)1.g; 2) it does not advise physicians that they may withhold certain information in the case of a woman "whose child has been diagnosed with a lethal anomaly" and that they may redact the form in such circumstances, despite the fact that without this information

neither the form nor the letter is in conformance with the opinion of the Court of Appeals for the Seventh Circuit in Karlin v. Foust, 188 F.3d 446, 489 (7th Cir. 1999); 3) the cover letter does not inform physicians that they may forgo providing certain information to a woman if giving that information would cause her psychological harm sufficient to rise to the level of a medical emergency, in conformance with Karlin, 188 F.3d at 490; and 4) the three paragraphs of the cover letter relating to special emergency informational and documentation requirements do not make sense in the context of a doctor's decision to withhold specific information from a woman who will suffer psychological harm rising to the level of a medical emergency.

As I understand plaintiffs' first objection, it is that the form does not specify that a woman is to be told how she may obtain fetal ultrasound imaging and auscultation of fetal heart tone services *only* if she desires such services. I am not persuaded that the form must make that distinction. It is consistent with the statute that "these are the services available if you should want to use them," which is how the state reads the language. Under the state's reading, the physician need not make an initial determination whether the woman desires the services but may simply tell her how she can obtain the services, leaving her free to act on the information or ignore it, as she wishes. In addition, of course, the physician is to explain to women with fetuses under ten weeks that neither an image nor a heartbeat could be ascertained at that point. See Karlin, 188 F.3d at 492.

Plaintiffs' second objection rests on the court of appeals' holding in Karlin, 188 F.3d at 489-490, to the effect that a physician need not inform a woman whose child has been diagnosed as having a lethal anomaly either that the child's father is responsible for financial assistance or that state assistance may be available to pay for prenatal care, childbirth and neonatal care. Plaintiffs criticize the form because it does not give any notice to the physician that he or she may withhold such information in circumstances in which the fetus has a condition that will prove fatal. Defendants argue that the form needs no correction. In their view, the court of appeals misunderstood the concept of lethal anomaly and thus failed to appreciate the fact that fetuses with a lethal anomaly may survive birth and even live for some period of time thereafter. For this reason, defendants argue, the mother may need to know about sources of financial assistance. I agree that the court of appeals may have misstated the concept of lethal anomaly. My understanding of the term from the evidence adduced at trial is that it connotes a condition that will lead to certain death of the fetus, either in utero, at birth or very shortly thereafter. One such condition is anencephaly, the condition of having no brain. See Robert K. Ausman, M.D. and Dean E. Snyder, Ausman & Snyder's Medical Library § 5:39, p. 155 (anencephaly "is entirely incompatible with life, although some infants will survive for several months if the skull is intact").

Although the court of appeals may have used the wrong definition of fetal anomaly, it

does not follow that the court erred in holding that no legitimate state purpose is furthered by giving information about sources of financial assistance to a woman who is carrying a baby with a lethal anomaly. See Karlin, 188 F.3d at 489 n.16. Such information is to be provided to women generally as a part of promoting the state's interest in protecting fetal life. Giving a woman information about financial help to encourage her to continue a pregnancy when her fetus cannot live does not advance either the state's interest in protecting maternal health or its interest in protecting fetal life. Id. The state has no justification for subjecting a woman carrying such a fetus to a litany of information in an effort to encourage her to choose a full term pregnancy with a moribund baby over abortion. The issue is not whether the information would be helpful to a woman who decides to forgo an abortion; it is whether the state has a legitimate interest in mandating that the physician give such information to a woman whose fetus will not survive. The court of appeals held that it did not.

Defendants argue that nothing in the form prevents physicians from withholding the information about financial assistance, as they are permitted to do under Karlin. They contend, however, that the form should not be so comprehensive as to cover every situation and particularly the statistically unusual situation of a fetus who has a diagnosed lethal anomaly that will cause death precisely at the moment of birth. Defendants' concerns about the appropriate level of specificity is overriden by the state's obligation to give clear and

understandable directions to the physicians who will be struggling to comply with the complex requirements of the new law. That obligation extends to even those situations that the state believes will be rare.

It will be necessary for defendants to modify both the certification form and the cover letter to make clear that the information on financial assistance need not be given to women carrying fetuses that have been diagnosed as having lethal anomalies, that is, conditions that will lead to death in utero, at birth or shortly after birth.

Plaintiffs' third and fourth objections go to the wording of the cover letter that refers to the physician's responsibility to forgo giving statutorily required information to a woman when doing so would cause her "psychological harm sufficient to rise to the level of a medical emergency." See Karlin, 188 F.3d at 490. I agree with defendants that the medical emergency provision to which the court of appeals is referring is the same one set out in the statute. However, plaintiffs are correct that setting out the circumstances in which a physician can undertake an emergency abortion without a 24-hour delay only makes the advice in the letter confusing. Defendants have offered to add a sentence to the effect that physicians may redact the certification in certain circumstances and that physicians should consult their own legal counsel for legal assistance in completing the form in such circumstances. This is not an adequate solution to the problem defendants perceive. It is of no help to tell a physician to

consult his or her attorney before deciding whether it is permissible to redact the form to reflect the omission of the statutorily required information to a woman at risk of psychological harm. Even if time permitted a physician to try to secure such help, it is hard to imagine how a lawyer could give useful advice when the state itself is unable to define the circumstances in which the information can be withheld.

In my view, the letter must be redrafted to delete the first full paragraph on the second page and then rewrite the second full paragraph on that page to read as follows:

> In the case of psychological harms, "medical emergency" means a psychological condition that in a physician's reasonable medical judgment would cause a woman's death or the serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions.

Defendants may add to the end of this paragraph the following sentence: "The physician shall certify these medical indications in writing and place the certification in the woman's medical record."

I can see no other way to accommodate the court of appeals' concerns that psychological health is as important as physical health and the state's concerns that a standardless concept of psychological medical emergency would allow physicians to substitute their unfettered subjective views for the requirements of Wis. Stat. § 253.10(2)(d). Deleting the first full paragraph and making the interpretive change set out above avoids the confusion engendered by the obvious conflict between the first full paragraph as presently written and the statement

on the prior page that "[t]his conclusion [that giving information to a woman would cause her psychological harm sufficient to rise to the level of a medical emergency] does not, however, exempt the physician from otherwise complying with [the law's] informed consent requirements or the twenty-four hour waiting period."

Also, defendants are to add a sentence at the end of the letter, preceding the paragraph telling the recipients to discontinue using the old forms, that reads as follows: "In any instance in which you are permitted to omit giving otherwise statutorily required information to a woman consulting you about an abortion, you may redact the accompanying certification form so that it conforms to what you are required to advise her."

Because the parties have not had a chance to consider the changes I am directing the state to make, I will give them a brief opportunity to be heard.

ORDER

IT IS ORDERED that the parties may be heard on the proposed changes to the form and cover letter according to the following schedule:

Defendants may file and serve objections and a brief no later than July 5, 2000; plaintiffs may have until July 19, 2000, in which to respond to any objections defendants

raise or to note their own objections to my rulings.

Entered this _____________ day of June, 2000.

BY THE COURT:

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BARBARA B. CRABB
District Judge