

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

October 29, 1986

The Honorable Robert W. Hayes, Jr.
Member, House of Representatives
Box 10587
Rock Hill, South Carolina 29731

Dear Representative Hayes:

You have asked for our comments on a bill similar to H.3202, which is planned to be introduced by you during the next legislative year. In summary, H.3202 amends Section 44-41-70 of the Code by requiring the Department of Health and Environmental Control to "promulgate and enforce regulations" for the furnishing of proof of age before an abortion is performed and proof of required relationship whenever consent for performance of an abortion is given for a person under sixteen years of age as provided for in Section 44-41-30. The proposed bill further provides that violation of such regulations by any hospital or other facility may subject such entity to decertification by DHEC and is a misdemeanor punishable by a \$2000 fine or imprisonment for two years or both.

With respect to your first question concerning whether such a statute is necessary, I am unaware of any existing express statutory authorization for DHEC to promulgate proof of age regulations. Indeed, the only express statutory authority to promulgate regulations in this area concerns the certification of facilities pursuant to Section 44-41-70. We have found no other statutory provision from which it may be implied that DHEC presently possesses such authority. Since an agency possesses only such authority as may have been expressly delegated to it or as may be implied, 81A C.J.S., States, Section 120, obviously, the more cautious approach would be that the express authority provided by the referenced bill is advisable.

With respect to your questions concerning constitutional issues generally, the United States Supreme Court has decided a

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number of cases in this area since the South Carolina statutes, Section 44-41-10 et seq., were enacted. The leading cases in this area are Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 49 L.Ed.2d 788 (1976), Bellotti v. Baird, 443 U.S. 622, 61 L.Ed.2d 797 (1979) and Planned Parenthood Assn. of Kansas City, Missouri v. Ashcroft, 462 U.S. 476, 76 L.Ed.2d 733 (1983). I am attaching copies of each of these cases for your information.

Specifically, as to your question regarding parental consent, I am enclosing a copy of 23 A.L.R. 4th 1061 which basically sets forth and summarizes the Supreme Court's recent holdings in this area. As you can see from the annotation, the Supreme Court requires that statutes must provide that the courts have input into determining the maturity of the minor.

You may also wish to review the Ashcroft case and note the wording of the statute that survived constitutional scrutiny in that instance in proposing any legislation for the upcoming year. The statute under consideration in Ashcroft is quoted in full at 76 L.Ed.2d p. 738 at n. 4. I have taken the liberty of highlighting this for your reference.

As to proof of age requirements, it is now well established that a state can reasonably determine that parental consultation is desirable and in the best interest of a minor. Bellotti v. Baird, 443 U.S. 622, 640 (1970); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). Since the State possesses an interest in the protection of immature minors, the State may determine that such consultation is particularly desirable in this area.

I have found no decision which squarely upholds a proof of age requirement. Indeed, one case, Women's Comm. Health Ctr. v. Cohen, 477 F.Supp. 542 (D. Me. 1979) held to the contrary. 477 F.Supp. at 548-49, n. 6. However, this case was decided prior to the Ashcroft decision which, as noted above, upheld a state statute which set a minimum age (18) below which either parental or judicial consent was required. Implicitly, it would thus appear that a reasonable age limitation is constitutionally acceptable. Moreover, the lower court decision in Ashcroft stated in the context of whether or not the proof of age requirement was void for vagueness that:

A physician's good faith certification of a woman's age based on as little proof as the

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woman's own declaration or written statement of her age would satisfy the statute. There is no constitutional infirmity.

483 F. Supp. 679, 696 (W. D. Mo. C. D. 1980). Thus, we believe a proof of age requirement would be constitutionally valid, particularly in light of the fact that the Supreme Court now recognizes that certain consent requirements may be imposed with respect to minors. I would caution however, that in the final analysis, such cannot be certain until a court squarely addresses the question.

If I can be of further assistance, please let me know.
With kindest regards, I remain

Very truly yours,

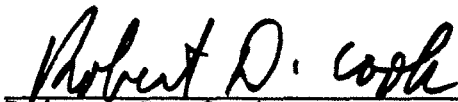


Charles H. Richardson
Assistant Attorney General

CHR/an

Enclosures

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions