

# **Abortion in California**

*A Medical-Legal Handbook*



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# **Abortion in California**

## *A Medical-Legal Handbook*



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## Introduction

The complex political, cultural and regulatory landscape surrounding abortion care in the United States requires that abortion providers develop a sophisticated understanding of the legal system. Words such as preliminary injunction, deposition and *amicus curiae* flow easily off the tongues of many abortion providers. Similarly, attorneys and reproductive health advocates increasingly are becoming “experts” in clinical terminology and scientific data related to abortion. We created this Handbook for each other – for clinicians and lawyers looking to navigate the bounds of California’s abortion laws in order to fully understand how these laws interact with clinical practice.

### *Historical Overview: Abortion Law in California*

Abortion has been legal in California for over four decades. From the nineteenth century until 1967, California prohibited abortion except where a physician determined the pregnant woman’s life was in danger. However, in 1967, California enacted the Therapeutic Abortion Act, becoming one of the first states to legalize abortion. Although legal, abortions could only be performed in a hospital by a physician after a hospital committee had determined that the pregnancy would “gravely impair” a woman’s “physical or mental health,” or a District Attorney had concluded that the pregnancy had resulted from rape or incest.

In 1969, the California Supreme Court struck down section 274 of the Penal Code, California’s criminal abortion statute, holding that a woman has a “fundamental right ... to choose whether to bear children.” In 1972, the California Supreme Court struck down most of the restrictions in the Therapeutic Abortion Act, leaving only the requirement that abortions be performed by a physician in a hospital.<sup>1</sup>

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<sup>1</sup> The hospital requirement was held unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973).

Also in 1972, only a few months before *Roe v. Wade* was decided, California voters added the right of “privacy” to the California Constitution by voter initiative.<sup>2</sup> By the time *Roe v. Wade* was decided by the U.S. Supreme Court in 1973, the right to abortion was firmly established under California law.

In 1981, the California Supreme Court struck down state funding restrictions on abortion in California’s Medi-Cal program, recognizing that the right of privacy in the state constitution was broader than the federal right. In 1997, the California Supreme Court struck down California’s parental consent law, finding the law violated the right of privacy in the state constitution.<sup>3</sup> Over the years, California voters have repeatedly rejected attempts to amend the California Constitution to require parental consent or notification for abortion.

Although virtually all provisions of the Therapeutic Abortion Act were invalid by 1973, the Act remained “on the books” until 2003. The California legislature passed the Reproductive Privacy Act (“RPA”), effective January 2003, finally repealing the Therapeutic Abortion Act. The RPA codifies *Roe v. Wade*, stating, in part:

The legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions ... Every individual has the fundamental right to choose or refuse birth control ... Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion ... The state shall not deny or interfere with a woman’s fundamental right to choose to bear a child or to choose and obtain an abortion.<sup>4</sup>

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2 The U.S. Constitution does not contain an explicit right of privacy. The explicit reference to privacy in California’s Constitution has been relied on to deviate from U.S. Constitutional doctrine, providing broader protection for a woman’s right to abortion, such as requiring state funding for abortion and invalidating parental involvement laws.

3 In 1987, the California legislature passed a law requiring parental or judicial consent for abortion performed on women under age eighteen. The law was immediately challenged and never went into effect because of court orders related to the lawsuit.

4 CAL HEALTH & SAFETY CODE § 123462 (2011).

The RPA's provisions protect the rights of women to access confidential abortion and reproductive health care and affirm the authority of clinicians to exercise independent professional judgment when providing reproductive health care to their patients. With the RPA, California also became the first state to legislatively allow nurse practitioners, physician assistants, and nurse-midwives to provide "nonsurgical" abortions. State law continues to restrict performance of a "surgical" abortion to a person with a "license to practice as a physician and surgeon."

Thus, women in California have both a constitutional right and a statutory right to abortion under state law. This right to abortion is separate and independent from the right to abortion under the United States Constitution. If the Supreme Court ever were to overturn *Roe v. Wade* in its entirety, Californians would still have the right to abortion under the state constitution and the Reproductive Privacy Act.

### *Background on Chapters 1-6: California Law*

Abortion is first and foremost a health care procedure. Like all other aspects of health care, abortion care is governed by a complex system of state, federal and local laws, from those regulating the licensure of clinics and the practice of medicine at the state level to federal laws requiring hospitals to stabilize patients experiencing medical emergencies. The process of locating laws related to abortion and reproductive health care in California reminds us that reproductive health issues are connected to many aspects of our lives. The Handbook covers statutes located in California's Family Code, Health and Safety Code, Business and Professions Code, Civil Code, Education Code, Government Code, Penal Code, Probate Code, and Welfare and Institutions Code, as well as regulations promulgated by the boards and agencies charged with interpreting and implementing these laws.

Even with this broad overview, we clearly have not included all relevant laws. For instance, we touch only briefly on scope of practice for health care professionals, and we do not cover clinic licensure, medical

malpractice, or protections for reproductive health workers in this first version of the Handbook.<sup>5</sup> Our focus on California law necessitates the inclusion of certain federal laws that trump or complement state laws and, therefore, affect California practice, such as the Partial-Birth Abortion Ban and the Born Alive Infant Protection Act;<sup>6</sup> however, we do not provide an exhaustive review of federal precedent. Finally, we recognize that you may not find clear answers to all of your legal questions in the chapters that follow. This Handbook provides legal information only (not legal advice or analysis); where legal interpretations and institutional practice may vary or where laws were written to allow clinicians to exercise their professional judgment, we provide only the information available under California's current judicial, legislative and administrative guidance.

*Background on Chapter 7: Medical Overview of Abortion*

For the chapter titled “Medical Overview of Abortion,” we include information beyond what is found in a traditional medical dictionary. It is our intent to provide a summary of medical terms and procedures in order to help lawyers, administrators and policymakers understand the different abortion methods and procedures, instruments, anesthesia,

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5 See CAL MED. ASS'N, CALIFORNIA PHYSICIAN'S LEGAL HANDBOOK (2011) for a comprehensive guide to California law governing physician practice. See MICHAEL SCARANO, JR., CAL. ACAD. OF PHYSICIAN ASSISTANTS, CALIFORNIA PHYSICIAN ASSISTANT'S AND SUPERVISING PHYSICIAN'S LEGAL HANDBOOK (3d ed. 2011) for a guide to Physician Assistant Practice. For resources for California Nurse Practitioners visit the California Associations of Nurse Practitioners at [www.canpweb.org](http://www.canpweb.org). For resources for Nurse Midwives visit the California Nurse-Midwives Association at [www.californianursemidwivesassociation.org](http://www.californianursemidwivesassociation.org).

6 The right of privacy in California's Constitution only applies to state laws or restrictions. Under the Supremacy Clause (Art. VI) of the United States Constitution, federal laws are supreme over all state laws, including state constitutions. Hence, federal law cannot be held invalid under a State's constitution. For instance, in *Gonzales v. Carhart* (2007), the Supreme Court held that the federal Partial Birth Abortion Act of 2003 ("PBA") did not violate the Fifth Amendment of the United States Constitution. As a consequence, California providers, like providers everywhere in the United States, are subject to this law.

contra-indications and complications without having to search through medical textbooks and studies. However, the Medical Overview is not intended to serve as a medical textbook or clinical practice reference.<sup>7</sup> We include clinical references, both online and in print, for those who desire additional information.

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<sup>7</sup> See Management of Unintended and Abnormal Pregnancy 111-34 (Maureen Paul et al. eds., 2009) for comprehensive information concerning abortion practice and procedure.



## CHAPTER I

### The Right of Privacy in California

#### A. The California Constitution

The California Constitution contains an explicit right of privacy. Article I, Section 1 states: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”<sup>1</sup>

California’s state constitution provides greater protection for privacy and abortion rights than the federal constitution.<sup>2</sup> This includes the right to funding for abortion services for eligible women under California’s Medi-Cal program,<sup>3</sup> as well as a minor’s right to obtain an abortion without parental involvement.<sup>4</sup>

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1 CAL. CONST. art. I, § 1 (The explicit right of privacy was added to the California Constitution by public vote on Proposition 11 in 1972.).

2 The California Constitution provides an independent avenue for challenging state restrictions on the right of privacy and abortion, even where similar state restrictions have been upheld under the federal constitution. Californians were able to challenge state laws restricting minors’ ability to consent to abortion and barring state funding for abortion under the state constitution. Because the Partial-Birth Abortion Act is a federal law, Californians had no recourse to challenge the legislation under their state constitution.

3 See *Comm. to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252 (1981) (holding that California’s Budget Act provisions that provided public funding for pregnancy care but not abortion violated the state Constitution); *but see Harris v. McRae*, 448 U.S. 297 (1980) (holding that federal funding restrictions on abortion do not violate the Fifth Amendment equal protection and liberty guarantees, nor the First Amendment Establishment Clause under U.S. Constitution).

4 *Compare Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997) (holding California’s parental consent law unconstitutional under the state Constitution) with *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding a provision that required parental consent or judicial authorization before an abortion could be provided to a minor).

## **B. The Reproductive Privacy Act**

In 2002, the California legislature enacted the Reproductive Privacy Act,<sup>5</sup> which codified key protections outlined in *Roe v. Wade*.<sup>6</sup> The law states:

The legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions .... Every individual has the fundamental right to choose or refuse birth control .... Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion ....The state shall not deny or interfere with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion.<sup>7</sup>

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5 CAL. HEALTH & SAFETY CODE §§ 123460-123468; CAL. BUS. & PROF. CODE § 2253 (2011).

6 410 U.S. 959 (1973).

7 CAL. HEALTH & SAFETY CODE § 123462 (2011).

## CHAPTER 2

### Procedure

#### A. Abortion Procedure

1. **Abortion:** Abortion is defined as “any medical treatment intended to induce the termination of a pregnancy except for the purpose of producing live birth.”<sup>1</sup>
2. **Right to Abortion:** The state may not deny or interfere with a woman’s right to choose or obtain an abortion prior to viability of the fetus, or after viability when the abortion is necessary to protect the life or health of the woman.<sup>2</sup>
3. **Risk to Life or Health:** An abortion is legally authorized at any period of gestation where the pregnancy poses a risk to the life or health of the pregnant woman.<sup>3</sup>
4. **Fetus Not Viable:** An abortion is legally authorized regardless of gestational age where the fetus is not viable.<sup>4</sup>
5. **Viability:** Viability is defined under California law as “the point in a pregnancy when, in the good faith medical judgment of a physician, on the particular facts of the case before that physician, there is a reasonable likelihood of the fetus’ sustained survival outside the uterus without the application of extraordinary medical measures.”<sup>5</sup>
6. **Pregnancy:** “Pregnancy” is defined as “the human reproductive process, beginning with the implantation of an embryo.”<sup>6</sup>

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1 CAL. HEALTH & SAFETY CODE § 123464(a) (2011).

2 *Id.* §§ 123462, 123468.

3 *Id.*

4 *Id.*

5 *Id.* § 123464(d).

6 *Id.* § 123464(b).

## B. Federal and State Statutes Governing Specific Acts and/or Procedures

I. **Partial-Birth Abortion:** The Partial-Birth Abortion Ban Act of 2003 (“PBA”) is a federal law criminalizing “partial-birth abortion.”<sup>7</sup> The PBA was upheld by the United States Supreme Court in 2007.<sup>8</sup>

a. Definition of Prohibited Act: “Partial-birth abortion” is defined as an abortion, in which the person performing the abortion:

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother; or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother; for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.<sup>9</sup>

b. Life Exception: The Act states that the statute does not apply to partial-birth abortion “that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life endangering physical condition caused by or arising from the pregnancy itself.”<sup>10</sup> The statute does not contain a health exception.

c. Living Fetus: The Act proscribes the procedure with respect to a “living fetus.” The Act does not apply where

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7 18 U.S.C. § 1531 (2011). The term “Partial-Birth Abortion” is a statutorily constructed term to describe the banned procedure. “Partial-Birth Abortion” is a term not recognized in peer reviewed literature or medical textbooks, other than in reference to the Partial-Birth Abortion Ban and similarly named state statutes.

8 *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Partial Birth Abortion Ban as constitutional).

9 18 U.S.C. § 1531(b) (2011).

10 *Id.* § 1531(a).

fetal demise has occurred **before** “the entire fetal head... or any part of the fetal trunk past the naval is outside the body of the mother.”<sup>11</sup>

- d. Criminal Penalties: The Act imposes a criminal penalty for a physician who “knowingly performs a partial-birth abortion and thereby kills a human fetus” with a fine and/or imprisonment not more than two years.<sup>12</sup>
- e. Civil Action: The Act authorizes a civil action by the “father of the fetus,” if married to the mother at the time of the procedure, and by the “maternal grandparents of the fetus,” if she is under the age of eighteen.<sup>13</sup> The plaintiff may claim damages for psychological and physical injuries suffered as a result of the procedure as well as statutory damages.<sup>14</sup> The “father” and “maternal grandparents” may not sue if they consented to the abortion.<sup>15</sup>

## 2. **“Born Alive” or “Rights of an Infant Prematurely Expelled During an Abortion”**

- a. Definition of “Live Birth”: “Live birth” is defined as “the complete expulsion or extraction from its mother of a product of conception (irrespective of the duration of pregnancy) which, after such separation, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.”<sup>16</sup>
- b. Treatment: An infant prematurely “born alive” in the course of an abortion has the same rights to medical treatment as an infant of similar medical status prematurely born spontaneously.<sup>17</sup>

11 *Id.* § 1531(b)(1)(A).

12 *Id.* § 1531(a).

13 *Id.* § 1531(c)(1).

14 *Id.* § 1531(c)(2).

15 *Id.* § 1531(c)(1).

16 CAL. CODE REGS. tit. 17, § 915 (2011). “Born alive” is similarly defined under the Federal Born Alive Infant Protection Act, 1 U.S.C. § 8 (2011).

17 CAL. HEALTH & SAFETY CODE § 123435 (2011).

## CHAPTER 3

### Documentation Requirements

#### A. Abortion

##### 1. Definitions

- a. *Abortion*: “Abortion” is defined as “any medical treatment intended to induce the termination of a pregnancy except for the purpose of producing live birth.”<sup>1</sup>
- b. *Pregnancy*: “Pregnancy” is defined as “the human reproductive process, beginning with the implantation of an embryo.”<sup>2</sup>

2. **Documentation for Abortion**: Documentation requirements relating to Fetal Death Certificates and Certificates of Still Birth do not apply to an induced abortion.<sup>3</sup>

#### B. Fetal Death

1. **Definition of Fetal Death**: “Fetal death” is defined as “a death prior to the complete expulsion or extraction from its mother of a product of conception irrespective of the duration of pregnancy; the death is indicated by the fact that after such separation, the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles.”<sup>4</sup>

##### 2. Documentation Requirements for Fetal Death

- a. Spontaneous Abortion (Miscarriage) Before 20 Weeks Gestation: There are no documentation requirements for a fetal death of less than 20 weeks gestation.

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1 CAL. HEALTH & SAFETY CODE § 123464(a) (2011).

2 *Id.* § 123464(b).

3 *Id.* §§ 102950(b), 103040.1(b).

4 CAL. CODE REGS. tit. 17, § 916 (2011).

- b. Fetal Demise/Stillbirth at or After 20 Weeks Gestation: A fetal death certificate is required for an intrauterine fetal demise when the fetus is at or after 20 weeks gestation.<sup>5</sup> The fetal death must be registered with the local registrar of births and deaths before disposition of the fetal remains.<sup>6</sup> A birth certificate is not required where fetal death occurs prior to complete expulsion or extraction.<sup>7</sup>

### **3. Note on Certificate of Still Birth**

- a. Definition of Stillbirth: “Stillbirth” is defined as “the delivery of a fetus where there was a naturally occurring intrauterine fetal death after a gestational age of not less than 20 completed weeks.”<sup>8</sup>
- b. When to Issue a Certificate of Still Birth: A Certificate of Still Birth must be issued by the local registrar of births and deaths in the case of a naturally occurring fetal death at 20 weeks or greater when requested by the mother or father of a fetus.<sup>9</sup>
- c. Certificate of Still Birth is Optional: A Certificate of Still Birth is not required documentation and does not replace the fetal death certificate.<sup>10</sup> The information included on a Certificate of Still Birth will not be used for any governmental purpose other than to respond to the request for the certificate from the parent.<sup>11</sup>

### **C. Spontaneous or Induced Abortion with Evidence of Life**

1. **Definition of Live Birth**: “Live birth” is defined as “the complete expulsion or extraction from its mother of a product of conception (irrespective of the duration of pregnancy) which, after such separation, breathes or shows any other evidence of

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5 CAL. HEALTH & SAFETY CODE § 102950(a) (2011).

6 *Id.* § 102950(a)

7 *Id.* § 102100.

8 *Id.* § 103040.1(i).

9 *Id.* § 103040.1(a).

10 *Id.* § 103040.1(b).

11 *Id.* § 103040.1(e).

life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.”<sup>12</sup>

2. **Treatment:** An infant prematurely “born alive” in the course of an abortion has the same rights to medical treatment as an infant of similar medical status prematurely born spontaneously.<sup>13</sup>
3. **Documentation:** Documentation is the same whether the live birth occurs prematurely or spontaneously or as a result of an induced abortion.
  - a. **Birth Certificate:** A birth certificate is required for any live birth at any gestational age.<sup>14</sup>
  - b. **Death Certificate:** A death certificate is required for death following a live birth.<sup>15</sup>

**D. General Provisions Relating to Disposition:** Specific policies and protocols relating to disposal of products of conception after abortion or disposition of fetal remains after fetal death will vary based on a variety of factors, such as type of facility and generally applicable institutional policies.<sup>16</sup>

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12 CAL. CODE REGS. tit. 17, § 915 (2011). Born alive is similarly defined under the Federal Born Alive Infant Protection Act, 1 U.S.C. § 8 (2011).

13 CAL. HEALTH & SAFETY CODE § 123435 (2011).

14 *Id.* § 102100, 102400.

15 *Id.* §§ 102100, 102775.

16 For general application see CAL. HEALTH & SAFETY CODE § 7054.3 (2011) (“[A] recognizable dead human fetus of less than 20 weeks uterogestation not disposed of by interment shall be disposed of by incineration.”) and CAL. PENAL CODE § 643 (2011) (“No person knowingly shall dispose of fetal remains in a public or private dump, refuse, or disposal site or place open to public view”). For application to Abortion Service in Primary Care Clinics see CAL. CODE REGS. tit. 22, § 75040(b) (2011) (“Products of conception shall be disposed of after examination, in accordance with [policies on infectious waste]”) and CAL. CODE REGS. tit. 22, § 75069 (2011) (governing disposal of infectious waste).

## CHAPTER 4

### Who May Provide and Who May Refuse to Provide

#### A. Who May Provide Abortions

1. **Nonsurgical Abortion:** Physicians and other clinicians who hold “a valid, unrevoked, and unsuspended license or certificate ... that authorizes him or her to perform or assist in performing the functions necessary for a nonsurgical abortion” (i.e. nurse practitioners, certified nurse-midwives, and physician assistants) are lawfully authorized to perform “nonsurgical abortions” in California.<sup>1</sup> The term “nonsurgical abortion” includes “termination of pregnancy through the use of pharmacological agents.”<sup>2</sup>
2. **Surgical Abortion:** A “surgical abortion” may only be performed by a person with “a valid, unrevoked, and unsuspended license to practice as a physician and surgeon.”<sup>3</sup>

#### B. Institutional Refusals

1. **Religiously Affiliated Hospitals:** A nonprofit hospital or other facility or clinic that is organized or operated by a religious corporation is not required to perform or permit the performance of an abortion on its premises. The failure or refusal of any such corporation, unincorporated association, or individual to perform or permit the performance of a medical

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1 CAL. BUS. & PROF. CODE § 2253(b)(2) (2011).

2 *Id.* § 2253(c).

3 *Id.* § 2253(b)(1). A note on California’s Health Workforce Pilot Project #171: On March 31, 2007, the California Office of Statewide Health Planning and Development (“OSHDP”) approved Health Workforce Pilot Project (“HWPP”) #171, sponsored by the University of California, San Francisco. Nurse practitioners, certified nurse-midwives, and physician assistants participating in HWPP #171 may provide first-trimester aspiration abortion under a legal waiver of the following provisions: (1) section 2253 of California Business and Professions Code, (2) section 75043 of title 22 of the California Code of Regulations, and (3) section 1399.541 of title 16 of the California Code of Regulations. This waiver applies only to identified health care providers working at demonstration sites participating in HWPP #171 for the duration of the project.

procedure shall not be the basis for disciplinary action.<sup>4</sup> This does not apply in the case of a medical emergency situation and spontaneous abortion.<sup>5</sup>

Any such facility or clinic that does not permit the performance of abortions on its premises shall post notice of that proscription in an area of the facility that is open to patients and prospective admittees.<sup>6</sup>

**2. *Protection for Employees Performing Abortions in Outside Hospital, Facility, or Clinic***

A hospital, facility or clinic that does not permit the performance of abortions may not subject an employee or person with staff privileges to any penalty or discipline based on the person's participation in the performance of an abortion in another hospital, facility or clinic.<sup>7</sup>

**3. *Religiously-Affiliated Medicaid Managed Care Organizations:*** A Medicaid (Medi-Cal in California) Managed Care Organization (MCO) may refuse to reimburse its providers for or provide enrollee coverage of counseling or referral to abortion, or any other service to which it has a moral or religious objection.<sup>8</sup>

**C. Individual's Right to Decline to Provide or Participate in Abortion Care**

- 1. *Current Employees:*** No employer or other person shall require health care providers or staff to directly participate in the performance of an abortion, if the employee or other person has filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate in the abortion. An employer may not discipline an employee based on her refusal to participate in an abortion.<sup>9</sup>

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4 CAL. HEALTH & SAFETY CODE § 123420(c) (2011).

5 *Id.* § 123420(d).

6 *Id.* § 123420(c).

7 *Id.* § 123420(a); 42 U.S.C. § 300a-7 (2011).

8 *Id.* § 1396u-2 (2011).

9 CAL. HEALTH & SAFETY CODE § 123420(a) (2011).

2. **Hiring:** No employer shall refuse to employ any person because of the person's refusal to participate in an abortion, unless the person would be assigned in the normal course of business to work in those parts of the hospital, facility, or clinic where abortion patients are cared for. No provision of this article prohibits any hospital, facility, or clinic that provides

abortions from inquiring whether an employee or prospective employee would refuse to participate in an abortion before hiring or assigning that person to that part of a hospital, facility, or clinic where abortion patients are cared for.<sup>10</sup>

3. **Residency Education:** All residency programs in obstetrics and gynecology shall be geared toward the development of competence in the provision of ambulatory primary health care services for women, including, but not limited to, training in abortion.<sup>11</sup>

#### 4. **Conscience-Based Objections**

- a. **Students:** No medical school or other facility which trains physicians, nurses, or other medical personnel shall refuse admission to or penalize a person because they are unwilling to participate in the performance of an abortion based on a moral, ethical or religious reason.<sup>12</sup>
- b. **Physicians:** No hospital, facility, or clinic shall refuse staff privileges to a physician because they are unwilling to participate in the performance of an abortion for moral, ethical, or religious reasons.<sup>13</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* § 123418. This provision complies with the program requirements for residency education in obstetrics and gynecology of the Accreditation Council for Graduate Medical Education. See *also* ACGME Program Requirements for Graduate Medical Education IV.A.2.d. (Jan. 1, 2008); the Coats Amendment, 42 U.S.C. § 238n (2011) (prohibiting federal, state, and local government from discriminating against any individual who refuses to undergo training in abortion or against any entity that refuses to require or provide training for abortion).

<sup>12</sup> CAL. HEALTH & SAFETY CODE § 123420(b) (2011).

<sup>13</sup> *Id.*

- 5. Federal Refusal Laws:** In addition to California provisions, Congress has enacted three federal refusal laws, commonly known as the Church Amendments, the Coats Amendment, and the Weldon Amendment.<sup>14</sup> Under certain circumstances these laws give individuals and institutions the ability to refuse to provide, and to prohibit requiring the performance of, or participation in, abortion and sterilization services.<sup>15</sup>
- a. The Church Amendments: The Church Amendments clarify that receipt of certain federal funds does not require:
    - (i) any individual to perform or assist in the performance of any sterilization procedure or abortion if it would be contrary to his religious beliefs or moral convictions; or
    - (ii) any entity to make its facilities available for the performance of any sterilization procedure or abortion if it is prohibited by the entity on the basis of religious beliefs or moral convictions.<sup>16</sup>
  - b. The Coats Amendment: The Coats Amendment prohibits federal, state, and local government from discriminating against any individual who refuses to undergo training in

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<sup>14</sup> See *also* Regulation for the Enforcement of Federal Healthcare Provider Conscience Protection Statutes, 76 Fed. Reg. 9976 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88). On December 19, 2008, the Bush Administration published a final regulation intending to give individuals and institutions the ability to refuse to perform and to prohibit requiring the performance of, or participation in, health care services which those persons or entities may object to for religious, moral, ethical, or other reasons. This regulation was titled, “Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law.” This rule went into effect on January 20, 2009. On March 10, 2009, the Department of Health and Human Services (“DHHS”) published a “Rescission Proposal,” which proposed to fully rescind it. On February 23, 2011, the DHHS published revised regulations, rescinding in part and revising in part the December 19, 2008 Bush Conscience Regulations.

<sup>15</sup> 42 U.S.C. §§ 238n, 300a-7 (2011); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117 § 508(d)(1), 123 Stat 3034 (2009).

<sup>16</sup> 42 U.S.C. § 300a-7 (2011).

abortion or against any entity that refuses to require or provide training for abortion.<sup>17</sup>

- c. The Weldon Amendment: No federal funds may be made available to any federal, state or local government entity that subjects any health care professional, health care facility, organization, HMO, or health insurance company to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.<sup>18</sup> Since 2005, Congress has passed this provision each year as part of the appropriations process.<sup>19</sup>

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<sup>17</sup> *Id.* § 238n.

<sup>18</sup> Consolidated Appropriations Act, 2010, Pub. L. No. 111-117 § 508(d)(1), 123 Stat 3034 (2009).

<sup>19</sup> Consolidated Appropriations Act, 2005, Pub. L. No. 108-447 § 508(d)(1), 118 Stat 2809 (2004); Departments of Labor, Health & Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149 § 508(d)(1), 119 Stat 2833 (2005); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161 § 508(d)(1), 121 Stat 1844 (2007); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8 § 508(d)(1), 123 Stat 524 (2009).

## CHAPTER 5

### Rights of Particular Groups and Classifications

#### A. Minors

1. **Right to Abortion:** Minors in California may consent to abortion care.<sup>1</sup> Parental consent or notification is not required.<sup>2</sup> Under California law, minors possess the same rights to access abortion care as adult women.
2. **Informed Consent:** In California, minors may obtain medical care related to the prevention or treatment of pregnancy, including abortion care, provided that the clinician is satisfied that the minor is capable of informed consent.<sup>3</sup>
3. **Medical Records:** A minor is entitled to inspect medical records relating to her abortion care.<sup>4</sup> A parent or guardian may not inspect or obtain copies of a minor's medical records relating to her abortion care without the minor's permission.<sup>5</sup>
4. **Research:** Parental permission is not legally required for a minor to participate in abortion-related research in California.<sup>6</sup> The right to consent to abortion-related research rests with the

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1 *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997); see also CAL. FAM. CODE §§ 6920-6929 (2011) for a complete list of medical services to which a minor may consent.

2 *Lungren*, 16 Cal. 4th 307; see also CAL. FAM. CODE § 6925 (2011).

3 *Id.*

4 CAL. HEALTH & SAFETY CODE § 123110 (2011).

5 *Id.* §§ 123105(e), 123110, 123115; see also CAL. CIVIL CODE § 56.11 (2011).

6 Federal regulations governing Institutional Review Board ("IRB") approval for studies involving human subjects provide special protections for subjects who are "children." 45 C.F.R. § 46.401 et seq. (2011). For a child to participate in research, parental permission and, where appropriate, the assent of the child must be provided unless these requirements are waived by the IRB. 45 C.F.R. § 46.408(a), (b) (2011). However, under the definition of "children," if state law authorizes a minor to consent to the medical care or treatment underlying the research, the minor is not considered a child and parental permission is not required. 45 C.F.R. § 46.402(a) (2011). Permission is generally not required for a minor to participate in abortion-related research in California as a minor may consent to pregnancy care, including abortion.

minor; provided she may consent to the underlying treatment under state law. All other laws relating to patient consent and research on human subjects apply (e.g., informed consent provisions and institutional internal review board requirements).

## **5. *Minors' Ability to Leave School for Confidential Treatment without Parental Involvement***

- a. District Must Notify Students and Parents of Right to Leave School for Confidential Medical Services: The governing board of each school district is required to notify pupils enrolled in the district and their parents that school authorities may excuse any student from the school for the purpose of obtaining confidential medical services without providing notice to, or obtaining consent from, the student's parent or guardian.<sup>7</sup>
- b. School May Not Require Parental Permission or Notify Parents: A school district may not require students to obtain written parental consent prior to leaving school to receive confidential medical services. A school may not notify a parent when a student leaves school to receive confidential medical services.<sup>8</sup>
- c. Protection from Discrimination: California law protects students who have obtained an abortion from discrimination in school settings. Public and certain private schools may not exclude or deny a student from any program or activity, including class, solely on the basis of a student's termination of a pregnancy or recovery from this procedure.<sup>9</sup>

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<sup>7</sup> CAL. EDUC. CODE § 46010.1 (2011).

<sup>8</sup> 87 Ops. Cal. Att'y. Gen. 168 (2004).

<sup>9</sup> CAL. CODE REGS. tit. 5, § 4950 (2011). "Educational institution" is defined as "any public or private preschool, elementary, or secondary school or institution operated by the local agency, or any combination of school districts or counties recognized as the administrative agency for public elementary or secondary schools." *Id.* § 4910. This provision applies to both public and private schools described above that receive state and federal funding, or that enroll students who receive state financial aid. *Id.* § 4900; CAL. EDUC. CODE § 220 (2011). However, provisions protecting students who have obtained an abortion are not applicable to schools controlled by religious organizations if the application would not be

## B. Women in Detention Facilities:

1. **Right to Abortion:** A pregnant woman in a state or local detention facility has the same right to access abortion care as all other women in California.<sup>10</sup> The right to obtain an abortion also applies to pregnant minors in state and local detention facilities.<sup>11</sup>
2. **Access to Services and Providers:** An incarcerated woman has the right to access services to determine whether she is pregnant and to obtain abortion or prenatal care from a physician of her choice.<sup>12</sup> These provisions apply to minors as well as adult women.<sup>13</sup>
3. **Notice:** Rights of incarcerated females relative to pregnancy and abortion care must be posted in at least one conspicuous place to which all females have access.<sup>14</sup>

## C. Incapacitated Adults

See Chapter 6 (Informed Consent and Capacity).

## D. Medi-Cal Funding for Abortion

California's Medi-Cal program pays for abortion services for qualifying low-income women.<sup>15</sup>

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consistent with the religious tenants of that organization. CAL. EDUC. CODE § 221.

10 CAL. PENAL CODE §§ 3405, 3406, 4023.6, 4028 (2011).

11 CAL. WELF. & INST. CODE §§ 1773, 222; see also CAL. CODE REGS. tit. 15, § 4736 (2011) (procedures for minors in state facilities to obtain abortions).

12 CAL. PENAL CODE §§ 3405, 3406, 4023.6, 4028 (2011).

13 CAL. WELF. & INST. CODE §§ 222, 1774 (2011); see also CAL. CODE REGS. tit. 15, §§ 1122, 1416 (2011).

14 CAL. PENAL CODE §§ 3405, 3406, 4023.6 (2011); CAL. WELF. & INST. CODE §§ 220, 1773 (2011).

15 Since 1977, the federal Hyde Amendment has prohibited the use of federal Medicaid funds to pay for medically necessary abortion care for low-income women, except in very limited circumstances. In 1981, the California Supreme Court considered this issue and held that statutory restrictions on Medi-Cal funding for abortion were unconstitutional under the privacy and equal protection guarantees of the California Constitution. See *Comm. to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252 (1981).

## CHAPTER 6

### Informed Consent and Capacity

#### A. Primary Care Clinics and Informed Consent

In California, primary care clinics providing abortion services shall provide pre-abortion and post-abortion information and education sessions.<sup>1</sup> These sessions should include, but are not limited to, information about how the abortion is performed, possible risks and complications, options or alternatives to abortion, post-procedure medical services, and family planning information and education.<sup>2</sup>

The pre-abortion information and education sessions shall be documented in each patient's medical record, which shall be signed and dated by the person providing the instruction and by the patient.<sup>3</sup>

#### B. Consent to Abortion and Public Benefits

1. **Public Benefits:** An individual's consent, or refusal to consent, to an abortion shall not be a condition precedent to the receipt of any public benefits.<sup>4</sup>
2. **Privileges or Immunities:** An individual's consent, or refusal to consent, to an abortion shall not be grounds for the loss of any privileges or immunities to which the person would otherwise be entitled.<sup>5</sup>

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1 CAL. CODE REGS. tit. 22, §§ 75040(a), 75041(a)(4) (2011). See CAL. HEALTH & SAFETY CODE §§1200, 1204 for the definition of "primary care clinics."

2 CAL. CODE REGS. tit. 22, § 75040(a).

3 *Id.* § 75040(c).

4 CAL. HEALTH & SAFETY CODE § 123425 (2011).

5 *Id.*

### **C. Informed Consent, Sterilization, and Post-Abortion Waiting Period**

1. ***Inability to Consent/Consent Not Valid:*** Informed consent for sterilization may not be obtained while the patient is in labor, seeking to obtain or obtaining an abortion, or within 24 hours postpartum or post-abortion.<sup>6</sup>
2. ***30 Day Wait Period:*** With certain exceptions, at least 30 days (but not more than 180 days) must have passed between the date on the consent form and the date the sterilization is performed.<sup>7</sup>

### **D. Minors and Consent for Abortion Services**

Under California law, minors possess the same rights to access abortion care as adult women.<sup>8</sup> Minors may obtain medical care related to the prevention or treatment of pregnancy, including abortion care, without parental consent or notification, provided that the clinician is satisfied that the minor is capable of informed consent.<sup>9</sup>

### **E. Adults, Capacity and Abortion**

#### **1. Conservatorships and Abortion**

- a. **Authority of Conservator:** As a general rule, a conservator may consent to medical treatment to the extent authorized by the court during the conservatorship hearing.<sup>10</sup>

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6 CAL. CODE REGS. tit. 22, § 51305.1-51305.4 (2011) (regulations governing Health Care Services provided through Medi-Cal); § 70707.3 (regulations governing Acute Care Hospitals). A minor may not be sterilized, other than in a medical emergency. CAL. FAM. CODE § 6925 (2011).

7 CAL. CODE REGS. tit. 22 § 51305.4(c)(4); 70707.1(a)(4) (2011).

8 See *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997).

9 *Id.*; see also CAL. FAM. CODE § 6925 (providing minor may consent to treatment and preventions of pregnancy, except sterilization), § 6920-6929 (providing list of medical services to which a minor may consent).

10 CAL. PROB. CODE § 1801 (2011).

- b. Patient Consent or Court Order Required Before Surgery: Except in emergency cases in which the conservatee faces loss of life or serious bodily injury, no surgery shall be performed upon the conservatee without the conservatee's prior consent or a court order authorizing the surgery.<sup>11</sup>
- c. Limited Conservatorships: The conservatee of a limited conservatorship shall not be presumed to lack capacity and shall retain all legal and civil rights except those which have been specifically granted to the limited conservator by court order. This means that a patient subject to a limited conservatorship retains the ability to consent to or refuse to consent to abortion where the conservator's authority to consent was not within the scope of rights granted to the conservator and the patient is capable of informed consent.<sup>12</sup>
- d. Limited Conservatorships and Court Order Authorizing Medical Treatment: If a conservatee requires medical treatment and the conservator has not been specifically authorized by the court to require the conservatee to receive medical treatment, the conservator may petition the court for an order authorizing that treatment.<sup>13</sup> The conservatee, if he or she chooses to contest the request for a court order, may petition the court for a hearing which shall be held prior to granting the order.<sup>14</sup>

## **2. Authority of Surrogates and Agents**

- a. Limits on Authority of Surrogate or Agent: An individual designated as a surrogate or agent in an advanced health care directive or a power of attorney for health care is not authorized to consent to an abortion on behalf of a patient.<sup>15</sup>

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11 CAL. WEL. & INST. CODE § 5358(b) (2011).

12 CAL. PROB. CODE § 1801 (2011).

13 CAL. WEL. & INST. CODE § 5358.2 (2011).

14 *Id.*

15 CAL. PROB. CODE § 4652 (2011).

- b. Court Petition Based on Known Wishes or Best Interests of Patient Lacking Capacity: While an agent or surrogate is not authorized to consent to an abortion on behalf of a patient who lacks capacity to make health care decisions, where the wishes of the patient are known or where an abortion may be in the best interests of the patient, filing a petition and seeking direction from the court may be prudent.<sup>16</sup>

**3. Court Petition to Protect Privacy Interests Where There Is no Appointed Conservator**: There is no clear statutory or case law addressing the right to abortion or to continue the pregnancy where a patient lacks capacity to make health care decisions for herself and there is no appointed conservator (see discussion of conservatorships). However, the California Supreme Court has held that the right to exercise choice over matters of procreation is protected under the United States and California Constitutions and may not be denied to an individual on the basis of limited capacity or disability.<sup>17</sup> While not

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<sup>16</sup> The intent of the Health Care Decisions Act is to require the surrogate to make decisions in accordance with the patient's individual health instructions, if any, and other wishes of the patient to the extent known to the surrogate. Otherwise, the surrogate shall make the decision in accordance with the best interests of the patient. In determining the patient's best interest, the surrogate shall consider the patient's personal values to the extent known to the surrogate. CAL. PROB. CODE § 4684, 4714 (2011). Section 4652 of the California Probate Code specifically precludes a surrogate or agent from consenting to certain specified types of treatment, including abortion; however, it may be appropriate to petition the court to authorize an abortion. See Section E.3.

<sup>17</sup> Denial of an abortion where it is sought by a pregnant patient and/or her designee may infringe on a woman's state and federal constitutional guarantees of privacy. In *Conservatorship of Valerie N.*, the California Supreme Court held that the right to exercise choice over matters of procreation is protected under the United States and California Constitutions and may not be denied to an individual on the basis of limited capacity or disability. 40 Cal. 3d 143 (1985) (holding statute barring sterilization of conservatee under guardianship-conservator law was unconstitutional as it denied developmentally disabled persons rights which are accorded to other persons in violation of state and federal constitutional guarantees of privacy). See also *Foy v. Greenblott*, Cal.App. 3d 1 (Ct.App. 1983) (holding woman lacking capacity to make health care decisions has right to privacy relating to childbearing and noting that the woman's conservator could have petitioned the court to authorize an abortion).

specifically addressed by case law or statute, filing a petition and seeking direction from the court may be prudent under these circumstances.

4. **Emergency Medical Treatment:** A conservator may consent to medical treatment in emergency cases.<sup>18</sup> Similarly, limits on the authority of agents and surrogates to consent to abortion would not bar abortion in a medical emergency.<sup>19</sup>

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18 CAL. PROB. CODE § 2354; CAL. WELF. & INST. CODE § 5358.2.

19 CAL. PROB. CODE § 4651 (Health Care Decisions Act does not apply to the law governing health care in an emergency); see also *Maxon v. Super. Ct.*, 135 Cal. App. 3d 626, 627 (Ct.App. 1982) (holding that a statutory prohibition against sterilization did not prevent the superior court from authorizing a lifesaving surgical operation).

## CHAPTER 7

### Medical Overview of Abortion Terminology

#### A. Sources for More Detailed Information

1. **Textbook:** MANAGEMENT OF UNINTENDED AND ABNORMAL PREGNANCY 111-34 (Maureen Paul et al. eds., 2009).<sup>1</sup>
2. **National Abortion Federation Website:** [www.prochoice.org/pubs\\_research/publications/downloads/index.html](http://www.prochoice.org/pubs_research/publications/downloads/index.html).

#### B. Gestational Age and Trimesters

1. **Gestational Age:** The duration of the pregnancy, which most commonly is measured from the first day of the last menstrual period (LMP), or two weeks before the estimated date of conception. Ultrasound often is used to “re-date” pregnancies when the measured duration of the pregnancy is found to be different than the LMP gestational dating. Different providers use various cut-offs for re-dating and some choose always to use ultrasound dating over dating by LMP.

A common guideline is to use the ultrasound dating rather than the dating by LMP if the difference is:

- 1 week+ difference in the first trimester
- 2 weeks+ difference in the second trimester
- 3 weeks+ difference in the third trimester

Other terms, such as “duration of pregnancy” are ambiguous and may mean gestational age or may mean from the time of conception, which would be two weeks less than gestational age. Even “gestational age” may refer either to dating by LMP or by conception, so the type of dating should be confirmed.

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<sup>1</sup> This chapter also relies on the following sources: B. Panda, S. Laifer, R. Stiller, & G. Kleinman, Primary Atony of the Lower Uterine Segment as a Distinct Cause of Early Postpartum Haemorrhage: A Case Series and Management Recommendations, 29 J. OBSTET. & GYNAECOLOGY 628 (2009); J.E. Steinauer, Uterine Artery Embolization in Postabortion Hemorrhage, 111 OBSTET. GYNECOL. 881 (2008).

2. **First Trimester:** The first 12 -14 weeks of gestation. There is no clear cut off and different organizations use different limits. The National Abortion Federation textbook chose to use 13 6/7 weeks as the end of the first trimester. Medi-Cal will pay “D&C” (first-trimester) rates up until 14 weeks, but will also pay “D&E” (second trimester) rates beginning at 12 weeks. First-trimester abortions usually are completed by medical abortion (usually to 9 weeks) or aspiration curettage (often referred to as dilation and curettage, or “D&C”).
3. **Second Trimester:** From the end of the first trimester to 24, but sometimes up to 26 or 28 weeks. Like the first trimester, there is no consensus on the gestational limits. Second-trimester abortions usually are completed by dilation and evacuation (“D&E”) or by labor induction (also called “induction termination” or sometimes “medical abortion”).
4. **Third Trimester:** From the end of the second trimester to birth.

### C. Abortion Methods and Procedures

1. **Medical Abortion (or “Medication Abortion”):** Medical methods of abortion involve the administration of medications to cause cramping and bleeding and passage of the pregnancy. In general, the term “medical abortion” refers to the process in the early first trimester (usually limited to nine weeks) and induction abortion refers to the process in the second trimester. The process is used less frequently in the later first trimester and early second trimester. Mifepristone (Danco Laboratories, [www.earlyoptionpill.com](http://www.earlyoptionpill.com)) is the only medication approved by the FDA for early medical abortion. It is followed by misoprostol one to three days later to cause cramping and bleeding. Misoprostol alone or methotrexate+misoprostol sometimes are used when mifepristone is not available. The FDA-approved regimen relies on evidence from 1995 and earlier. Subsequently many studies have led to evidence-based regimens. Organizations have produced guidelines for these evidenced-based regimens to help clinicians feel comfortable evaluating the evidence and changing their protocols or practice. The evidence-based regimens use a lower dose of mifepristone (200 mg versus the FDA’s 600 mg), home administration of

misoprostol as well as alternative routes of administration of misoprostol, such as vaginal, buccal and sublingual routes. Many studies of these alternative regimens report a success rate of over 95%, with a continuing pregnancy rate of less than 0.5%.

2. **Surgical Abortion:** Surgical abortion is the most common term for abortion procedures that use uterine aspiration or evacuation.<sup>2</sup> Vacuum aspiration is the primary method through 12-14 weeks. Suction is accomplished with a hand-held manual vacuum aspirator (“MVA,” sometimes referred to as manual uterine aspirator, or “MUA”) or an electric suction machine (electric vacuum aspirator, or “EVA”). Surgical abortion in the second trimester is called “dilation and evacuation” (“D&E”). Intact D&E or dilation and extraction (“D&X”) is a variation where the fetus is removed mostly intact. (See definitions below.)
3. **Aspiration Abortion:** Alternative terms used to describe aspiration abortion include the general term surgical abortion (elective or therapeutic), vacuum aspiration, suction curettage, manual vacuum aspiration (“MVA”) and electric vacuum aspiration (“EVA”). The MVA (also called **manual uterine aspirators** or Karman syringes) creates up to 60 mmHg of suction and are quiet, small, handheld, and do not require a power source. The provider closes the valves on the MVA, pulls on the plunger, and creates a vacuum. EVA consists of a plastic hose connected to a bottle on an aspiration machine or wall suction.

These are all methods of surgical abortion that remove the contents of the uterus using suction. MVAs can be used for termination up to 12 weeks gestation, and as part of terminations at later gestations. Many providers choose to switch to EVAs after about 9 weeks because the MVA must be emptied a few times at earlier gestations. Vacuum aspiration is typically used for first-trimester abortions, but suction may be used to complete early second trimester procedures.

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2. But see T.A. Weitz, A. Foster, C. Ellertson, D. Grossman, & F.H. Stewart, “Medical” and “Surgical” Abortion: Rethinking the Modifiers, 69 *CONTRACEPTION* 77 (2004) (questioning the use of the term “surgical” abortion to describe aspiration procedures).

4. **Dilation and Curettage (“D&C”)**: A procedure for abortion, miscarriage or diagnosis of uterine pathology in which the cervix is dilated and the walls of the uterus are scraped to remove the contents of the uterus. D&C is a general term and can refer to vacuum aspiration as well as use of the metal curette. Dilation and *sharp* curettage typically is used in countries where abortion is illegal and MVAs are not readily accessible. The word “sharp” refers to the metal loop curette used to scrape the inside of the uterus.
5. **Dilation and Evacuation (“D&E”)**: A second-trimester surgical abortion procedure that is sometimes referred to as a “standard D&E” in order to distinguish it from an “intact D&E” (see below), which was banned by the Partial-Birth Abortion Ban Act of 2003. The cervix initially is dilated using osmotic dilators and/or misoprostol for a few hours up to 3 days. (Direct mechanical dilation rarely is used alone in the second trimester because of concern for potential cervical damage.) For this procedure, osmotic dilators, if used, are taken out of the cervix, the amniotic fluid is removed with suction (or by drainage) and then the fetus is extracted using forceps, usually in multiple passes. This procedure can be performed between 14 weeks and about 25 weeks gestation. D&Es are the most common method for second-trimester abortion in the U.S. Based on one study at a training institution, some providers use ultrasound guidance to help monitor the uterus during the procedure.<sup>3</sup>
6. **Dilation and Extraction (“D&X”)**: This often is referred to as an “intact D&X” (Dilation and Extraction), or “intact D&E.” The cervix typically is dilated somewhat more than for a “standard D&E” to enable intact extraction of the fetus from the uterus. In a D&X, the calvarium (skull) frequently is decompressed before extraction to allow passage through the cervix. Collapse of the calvarium can be accomplished with forceps or by making a hole in the skull through which the intracranial contents are suctioned. If cervical dilation is sufficient, the provider can extract the entire fetus through the dilated

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3 P.D. Darney & R.L. Sweet, *Routine Intraoperative Ultrasonography for Second Trimester Abortion Reduces Incidence of Uterine Perforation*, 8 J. ULTRASOUND MED. 71 (1989)

cervix. To achieve this, cervical dilation generally is accomplished with multiple, osmotic dilators over two or more days. D&X is used as a method of second-trimester abortion and occasionally for early third-trimester terminations. An intact fetus allows more complete evaluation of structural abnormalities and can be an aid to patients grieving a desired pregnancy by providing the opportunity for a final act of bonding. Removing an intact fetus also reduces the chance of retained fetal tissue in the uterus and minimizes the number of times instruments pass into the uterus, which may reduce the risk of uterine and cervical injury. This technique most closely approximates what has been characterized legislatively and by the Supreme Court as “partial birth abortion,” a nomenclature that is not recognized in medicine and that applies only if the fetus has cardiac activity. One study showed that D&X may be somewhat safer than D&E, and it also may be preferable for certain indications, as described above.

- 7. *Second-Trimester Induction:*** The other option for second-trimester termination (other than D&E, D&X or least commonly, hysterotomy) is induction of labor with medications such as misoprostol, other prostaglandins or oxytocin. Typically the woman is admitted to the hospital for one to four days for induction medications and pain control. When given 36–48 hours before the start of labor induction, mifepristone shortens the interval for abortion on average by about eight hours. Several studies have suggested the safety of D&E over second trimester induction; however, this is a good option if there is no experienced D&E provider or if a patient prefers induction termination.
- 8. *Multi-Fetal Pregnancy Reduction:*** Abortion of one or more fetuses while one or more are left viable in the uterus to avoid the considerable risks of multiple gestation (twins or more) or to terminate a fetus with abnormalities while continuing the pregnancy with a normal fetus. The targeted fetus usually is injected with potassium chloride under ultrasound guidance. The demised fetus is left inside the uterus. This usually is done between 10 and 13 weeks gestation.

## D. Instruments

1. **Tenaculum:** A metal instrument used to hold and stabilize the cervix during uterine procedures.
2. **Forceps:** Metal instruments that have grasping loops at the end. Those made for D&E generally are used for grasping and removing the fetus in parts. Common types used for abortion are Sopher, Bierer and Hern Forceps. There also are many other types of medical forceps.
3. **Osmotic Dilators (*Laminaria japonica/digitata*, *Dilapan-S*):** Osmotic dilators absorb moisture and swell over time to effect chemical and/or mechanical expansion of the cervical canal. Osmotic dilators commonly are used a few hours to two days before a second-trimester abortion to open the cervix gradually to allow access to the uterus and to reduce the risk of injury to the cervix during abortion. They may be used for as little as four or five hours for earlier second trimester pregnancies to achieve a same-day procedure. Some providers use serial dilator placement, placing a new set each day until adequate dilation is achieved. Providers may choose to use one type alone, or in combination with other osmotic dilators or pharmacologic agents, such as misoprostol. The number of dilators used depends upon multiple factors, including the gestational age, time before procedure, dilator type and size, softness of the cervix, provider preference, and type of abortion planned (D&E vs. D&X).
  - a. Laminaria: Laminaria tents take longer to dilate the cervix and are the most commonly used osmotic dilator. They are made of dried, compressed seaweed stems that are produced in a range of diameters that range from 2-10 mm in width. When exposed to fluid, the laminaria swell to 3-4 times their dry width.
  - b. Dilapan-S: A synthetic rod that functions in the same way as laminaria, although it exerts more radial pressure, swells more rapidly and reaches a greater proportional diameter than laminaria. Most dilation is achieved within 4-6 hours of placement.

- c. Lamiclel: A sponge that is impregnated with magnesium sulfate that was used primarily for cervical softening, no longer is commercially available in the U.S.

4. **Mechanical Dilators (e.g., Pratt, Hegar, Denniston)**: A set of rods of varying diameters that are used to dilate the cervix before an intrauterine procedure. These rods have a tapered, curved tip on either end. When mechanical dilation is necessary, providers dilate incrementally to open the cervix gradually. This means starting with a dilator with a small diameter and gradually increasing the diameter until you create an opening in the cervical canal that is large enough for the cannula and/or forceps to pass.
5. **Cannula**: A sterile tube that is attached to a source of suction and passed through the cervix into the uterus. Disposable plastic suction cannulae come in models that are (1) flexible, (2) rigid curved or (3) rigid straight. Plastic cannulae increase in diameter by 1mm increments from 4 to 16 mm. Non-disposable metal cannulae are used rarely.

## E. Anesthesia

1. **Overview**: Anesthesia for abortion can consist of local numbing medicines in the cervix or uterus and/or generalized/systemic medications that travel through the blood to affect pain, relaxation and consciousness. There are three levels of systemic anesthesia that are classified by the patient's response to the medications.

### 2. Local analgesia

- a. Cervical or paracervical blocks, or intrauterine analgesia: For most abortions, medication is injected into the cervix to alleviate pain associated with the application of a tenaculum to the cervix and with cervical dilatation. This has some effect on uterine pain as well. Far less commonly, medication also is instilled or injected in the uterus. Most North American providers use 1% lidocaine.

### 3. **Systemic Anesthesia**

- a. Level 1 - Minimal sedation: A drug-induced state during which patients respond normally to verbal commands and can understand and answer questions. Although mental function and coordination may be impaired, breathing and heart functions are unaffected. Typical medications for minimal sedation, usually taken orally or sublingually, include benzodiazepines such as lorazepam and/or narcotic combinations such as acetaminophen and hydrocodone (Vicodin).
- b. Level 2 - Moderate, or “conscious” sedation: A minimally depressed level of consciousness that retains the patient’s ability to breathe independently, to be aroused easily, and to respond appropriately to physical stimuli and verbal commands. Medications usually are given through an intravenous catheter in the arm. Typical medications for moderate sedation include fentanyl and midazolam.
- c. Level 3/4 - Deep sedation/General anesthesia: A controlled state of depressed consciousness from which the patient is not easily aroused. An anesthesiologist (e.g., MD anesthetist or Certified Registered Nurse Anesthetist, or CRNA) usually administers this level of anesthesia.

### F. **Other Medications**

1. **Medication-Induced Fetal Demise (also known as “Feticide” or “Fetocide”)**: Generally used to refer to the use of medications, most commonly digoxin or concentrated potassium chloride (KCl) that are used to stop the fetal heart before doing an induction or surgical abortion. Fetal demise results in softening of fetal tissues and possibly facilitates extraction of the fetus. It is used before induction abortion to avoid the delivery of a live fetus. Potassium chloride injection can be used to reduce the number of fetuses in multiple gestations, such as reducing triplets to twins. In doing this to terminate an anomalous fetus, it is called “selective reduction” (SR) (see “multifetal pregnancy reduction” above).

2. **Digoxin:** Digoxin is a heart medication that sometimes is injected into the amniotic fluid or fetus to cause fetal demise before surgical or induction abortion (see Feticide). For both intra-amniotic and intra-fetal digoxin injection, a dose of 1 mg is common. Higher doses, up to 3 mg in the third trimester, are used by some clinicians, but the safety of larger doses has not been established in studies. Demise is less immediate than with KCl, but usually occurs within 24 hours.
3. **Potassium Chloride (KCl):** Potassium chloride (KCl) is a pharmacologic agent that is used to cause fetal demise before abortion. It also is used for multifetal pregnancy reduction (abortion of one or more fetuses while one or more are left viable in the uterus). KCl requires direct fetal intra-cardiac or intra-umbilical injection and is done under ultrasound guidance by specially trained physicians. KCl will not cause fetal demise when injected into the amniotic fluid, unlike digoxin. Injection of KCl into the fetal heart or umbilical cord typically stops fetal cardiac activity immediately.
4. **Mifepristone:** Mifepristone, a steroid related to progesterin, works by blocking the activity of the body's progesterone, a substance needed to continue pregnancy. (See Medical Abortion.)
5. **Misoprostol:** Misoprostol is a synthetic prostaglandin (PG E1) developed and manufactured in the U.S. for the treatment and prevention of stomach ulcers. Thousands of studies have evaluated its use in gynecology because it causes uterine contractions and cervical softening, or "ripening." In the U.S., misoprostol is not FDA-approved for induction termination, but it is approved as part of the early medical abortion regimen with mifepristone. Misoprostol also is given to women before a surgical abortion or labor induction to achieve cervical ripening<sup>4</sup> and for treatment of excessive bleeding after an abortion or other uterine procedure. Misoprostol tablets are produced for oral use in doses of 100mcg and 200mcg, but have also been studied for various indications to be used vaginally, buccally (in the cheeks), sublingually (under the tongue) or rectally.

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4 See *supra* Section C.

- 6. Vasopressin and Epinephrine:** These medications cause constriction of blood vessels in the areas where injected. They sometimes are added to the cervical numbing medications. Vasopressin has been shown to reduce blood loss significantly from second-trimester dilation and evacuation abortions and decrease the need for reaspiration.
- 7. Oxytocin (Pitocin) and Methylergonovine Maleate (Methergine):** These medications are uterotonic drugs that frequently are administered following second-trimester procedures to cause uterine contraction and decrease blood loss. They may be used either to prevent or to treat heavier bleeding.

## **G. Complications and Interventions**

- 1. Post-Abortion Hemorrhage:** A blood loss of 500 mL or bleeding requiring transfusion are commonly used definitions of post-abortion hemorrhage. Causes include incomplete abortion, uterine atony, placental abnormalities, perforation or uterine injury, cervical laceration, and bleeding disorders. Post-abortion hemorrhage occurs in approximately 0.8 per 100,000 abortions, with increased risk at more advanced gestations. Treatment depends upon the underlying cause of the hemorrhage, and may include uterine massage; re-aspiration; medications (such as prostaglandin F<sub>2α</sub>, oxytocin, misoprostol, methylergonovine, or vasopressin); a pressure balloon inside the uterus; surgery, including laparotomy for repair of perforation or hysterectomy; or uterine artery embolization by Interventional Radiology.
- 2. Cervical Laceration:** A cervical tear most commonly resulting from the tenaculum, mechanical dilation or pressure on the cervix. Tears of the external cervix are the most common, are usually easy to repair and have little impact on the patient. Treatment options include observation alone; direct compression for 5-10 minutes; the application of silver nitrate, ferric subsulfate or other procoagulants (medications that cause blood clotting); or surgical repair using an absorbable suture. For higher cervical tears that extend inside the internal cervical os, or opening to the uterus, pressure with a balloon, uterine artery embolization or surgery may be needed. Although not

entirely preventable, the risk of a cervical laceration can be lessened especially in later gestations by the use of osmotic dilators or cervical priming agents. The rate of occurrence is 0-1%.

3. **Uterine Atony (or Uterine Hypotonous):** Failure of the uterine musculature to contract normally after an abortion. This complication also is common after childbirth. The blood vessels supplying the pregnancy are severed when the placenta separates from the wall of the uterus. The bleeding that results from these severed vessels normally stops when the uterus contracts, compressing the vessels. However, if the uterus does not contract enough, bleeding can continue. Significant blood loss can result from a floppy, uncontracted uterus. Greater gestational age increases the risk of uterine atony. Treatment may include uterine massage, medications (uterotonics), placement of a pressure balloon or Foley catheter in the uterus, uterine artery embolization (temporary blockage of the uterine arteries by Interventional Radiologists) and surgery (most commonly hysterectomy).
4. **Lower Uterine Segment Atony:** The lower uterine segment is the inferior portion of the uterus that joins with the cervical canal and expands during pregnancy to become the lower part of the uterine cavity. This part of the uterus has less muscle tissue and is affected by scar tissue after a cesarean section. Even when the top of the uterus contracts well, atony of the lower segment can result in significant bleeding. Treatment is similar to that for all causes of uterine atony.
5. **Placenta Accreta/Increta/Percreta**

Placenta Accreta: Refers to the abnormally deep attachment of the placenta through the endometrium (inside lining of the uterus) and into the myometrium (the muscle layer of the uterus). It is present in 1-2 per 10,000 second-trimester abortions and usually produces hemorrhage during or after the procedure. It is rarely an issue before the second trimester. Placenta accreta frequently is associated with prior uterine surgery such as cesarean delivery and surgery to remove fibroids (myomectomy). When the condition is suspected

before a procedure, preoperative planning helps to mobilize staff and have the proper equipment to handle treatment of hemorrhage, including uterine artery embolization or hysterectomy. “Accreta” often is used non-specifically to refer to any degree of abnormal placentation, but more strictly refers to the least deep invasion of the placenta, with deeper invasion becoming increasingly more difficult to treat.

Type	Invasion of placenta has occurred:
Accreta	Superficially onto the myometrium (uterine muscle)
Increta	Deep into the myometrium
Percreta	Through the myometrium

6. **Endometritis/Post-Abortal Infection:** Infection after abortion is uncommon. Studies demonstrate preventative antibiotics reduce infection risk after surgical abortion. Treatment with antibiotics may be done as an outpatient or in the hospital depending upon the severity of the infection. Sterile procedure is critical to prevent infection after surgical abortion but still does not completely prevent it.
7. **Uterine Perforation:** A hole usually caused by an instrument puncturing the uterine wall. Small holes caused by a smooth dilator may not require treatment other than observation or antibiotics. Holes that have been penetrated by forceps or suction usually require surgery to check for damage to other organs and to repair the hole and any other damaged organs.
8. **Broad Ligament Hematoma:** A blood clot collection (or hematoma) that results from a tear in the upper vagina, cervix, or uterus that disrupts the uterine or vaginal arteries. Blood collects in the limited yet expandable space to the side of the uterus.
9. **Uterine Foley/Bakri Balloon:** A balloon used to create pressure inside the uterus in cases of persistent bleeding when pharmacologic therapies have failed and before resorting to more invasive procedures, such as uterine artery embolization

or surgery. An intrauterine pressure balloon also can serve to temporize before another surgical procedure or uterine artery embolization.

**10. Uterine Artery Embolization:** A procedure performed by a radiologist under X-ray guidance (fluoroscopy) where a small catheter is threaded through the largest artery in the groin to the uterine arteries and a substance is placed into the uterine arteries to block blood flow to the uterus. In the setting of post-abortion hemorrhage, the substance generally used is very temporary, so that it should be less likely to cause difficulties with future pregnancies.

**11. Pregnancy Complications Seen During Abortion Care:** Pregnancy complications seen during abortion care include ectopic pregnancy (pregnancy outside of the uterus, usually in the Fallopian tube) and molar pregnancy (an abnormal overgrowth of tissue that is supposed to develop into placenta, which may increase post-abortion bleeding and is associated with other medical risks).



# **Appendices**



## **APPENDIX A: CALIFORNIA STATE LAWS GOVERNING ABORTION**

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**I. CALIFORNIA CONSTITUTION**

**CAL. CONST. art. I, § I**

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

## II. EXCERPTS FROM THE CALIFORNIA BUSINESS & PROFESSIONS CODE

### CAL. BUS. & PROF. CODE § 2253 (2011)<sup>1</sup>

(a) Failure to comply with the Reproductive Privacy Act (Article 2.5 (commencing with Section 123460) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code) in performing, assisting, procuring or aiding, abetting, attempting, agreeing, or offering to procure an illegal abortion constitutes unprofessional conduct.

(b) (1) A person is subject to Sections 2052 and 2053<sup>2</sup> if he or she performs or assists in performing a surgical abortion, and at the time of so doing, does not have a valid, unrevoked, and unsuspended license to practice as a physician and surgeon as provided in this chapter, or if he or she assists in performing a surgical abortion and does not have a valid, unrevoked, and unsuspended license or certificate obtained in accordance with some other provision of law that authorizes him or her to perform the functions necessary to assist in performing a surgical abortion.

(2) A person is subject to Sections 2052 and 2053<sup>3</sup> if he or she performs or assists in performing a nonsurgical abortion, and at the time of so doing, does not have a valid, unrevoked, and unsuspended license to practice as a physician and surgeon as provided in this chapter, or does

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<sup>1</sup> On March 31, 2007, the California Office of Statewide Health Planning and Development (“OSHDP”) approved the University of California, San Francisco’s proposal to conduct a demonstration project under the Health Workforce Pilot Project (“HWPP”) Program. Under HWPP #171, participating nurse practitioners, certified nurse midwives, and physician assistants may provide 1<sup>st</sup> trimester aspiration abortion under a legal waiver of the following provisions: (1) Section 2253 Business and Professions Code, (2) Section 75043 of Title 22 of the California Code of Regulations, and (3) Section 1399.541 of Title 16 of the California Code of Regulations. This waiver applies only to identified health care providers at demonstration sites participating in the HWPP project for the duration of project approval.

<sup>2</sup> CAL. BUS. & PROF. CODE § 2053 was repealed in 2002.

<sup>3</sup> *Id.*

not have a valid, unrevoked, and unsuspended license or certificate obtained in accordance with some other provision of law that authorizes him or her to perform or assist in performing the functions necessary for a nonsurgical abortion.

(c) For purposes of this section, "nonsurgical abortion" includes termination of pregnancy through the use of pharmacological agents.

**CAL. BUS. & PROF. CODE § 2254 (2011)**

The violation of Section 123440 of the Health and Safety Code, relating to research on aborted products of human conception, constitutes unprofessional conduct

### III. EXCERPTS FROM THE CALIFORNIA CIVIL CODE

#### **CAL. CIV. CODE § 56.11 (2011)**

Any person or entity that wishes to obtain medical information pursuant to subdivision (a) of Section 56.10, other than a person or entity authorized to receive medical information pursuant to subdivision (b) or (c) of Section 56.10, except as provided in paragraph (21) of subdivision (c) of Section 56.10, shall obtain a valid authorization for the release of this information.

An authorization for the release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor shall be valid if it:

- (a) Is handwritten by the person who signs it or is in a typeface no smaller than 14-point type.
- (b) Is clearly separate from any other language present on the same page and is executed by a signature which serves no other purpose than to execute the authorization.
- (c) Is signed and dated by one of the following:
  - (1) The patient. A patient who is a minor may only sign an authorization for the release of medical information obtained by a provider of health care, health care service plan, pharmaceutical company, or contractor in the course of furnishing services to which the minor could lawfully have consented under Part I (commencing with Section 25) or Part 2.7 (commencing with Section 60).
  - (2) The legal representative of the patient, if the patient is a minor or an incompetent. However, authorization may not be given under this subdivision for the disclosure of medical information obtained by the provider of health care, health care service plan, pharmaceutical company, or contractor in the course of furnishing services to which a minor patient could lawfully have consented under Part I (commencing with Section 25) or Part 2.7 (commencing with Section 60).

(3) The spouse of the patient or the person financially responsible for the patient, where the medical information is being sought for the sole purpose of processing an application for health insurance or for enrollment in a nonprofit hospital plan, a health care service plan, or an employee benefit plan, and where the patient is to be an enrolled spouse or dependent under the policy or plan.

(4) The beneficiary or personal representative of a deceased patient.

(d) States the specific uses and limitations on the types of medical information to be disclosed.

(e) States the name or functions of the provider of health care, health care service plan, pharmaceutical company, or contractor that may disclose the medical information.

(f) States the name or functions of the persons or entities authorized to receive the medical information.

(g) States the specific uses and limitations on the use of the medical information by the persons or entities authorized to receive the medical information.

(h) States a specific date after which the provider of health care, health care service plan, pharmaceutical company, or contractor is no longer authorized to disclose the medical information.

(i) Advises the person signing the authorization of the right to receive a copy of the authorization.

#### **IV. EXCERPTS FROM THE CALIFORNIA EDUCATION CODE**

##### **CAL. EDUC. CODE § 230 (2011)**

For purposes of this chapter, harassment and other discrimination on the basis of sex include, but are not limited to, the following practices:

- (a) On the basis of sex, exclusion of a person or persons from participation in, denial of the benefits of, or subjection to harassment or other discrimination in, any academic, extracurricular, research, occupational training, or other program or activity.
- (b) On the basis of sex, provision of different amounts or types of student financial aid, limitation of eligibility for student financial aid, or the application of different criteria to applicants for student financial aid or for participation in the provision of student financial aid by others. Nothing in this subdivision shall be construed to prohibit an educational institution from administering, or assisting in the administration of, scholarships, fellowships, or other forms of student financial aid, established pursuant to domestic or foreign wills, bequests, trusts, or similar legal instruments or by acts of a foreign government, which require that awards be made to members of a particular sex; provided, that the overall effect of the award of these sex-restricted scholarships, fellowships, and other forms of student financial aid does not discriminate on the basis of sex.
- (c) On the basis of sex, exclusion from participation in, or denial of equivalent opportunity in, athletic programs. For purposes of this subdivision, "equivalent" means equal or equal in effect.
- (d) An educational institution may be found to have effectively accommodated the interests and abilities in athletics of both sexes within the meaning of Section 4922 of Title 5 of the California Code of Regulations as that section exists on January 1, 2003, using any one of the following tests:
  - (1) Whether interscholastic level participation opportunities for male and female pupils are provided in numbers substantially proportionate to their respective enrollments.

(2) Where the members of one sex have been and are underrepresented among interscholastic athletes, whether the school district can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interest and abilities of the members of that sex.

(3) Where the members of one sex are underrepresented among interscholastic athletes, and the institution cannot show a history and continuing practice of program expansion as required in paragraph (2), whether the school district can demonstrate that the interest and abilities of the members of that sex have been fully and effectively accommodated by the present program.

(e) If an educational institution must cut its athletic budget, the educational institution shall do so consistently with its legal obligation to comply with both state and federal gender equity laws.

(f) It is the intent of the Legislature that the three-part test articulated in subdivision (d) be interpreted as it has been in the policies and regulations of the Office of Civil Rights in effect on January 1, 2003.

(g) On the basis of sex, harassment or other discrimination among persons, including, but not limited to, students and nonstudents, or academic and nonacademic personnel, in employment and the conditions thereof, except as it relates to a bona fide occupational qualification.

(h) On the basis of sex, the application of any rule concerning the actual or potential parental, family, or marital status of a person, or the exclusion of any person from any program or activity or employment because of pregnancy or related conditions.

**CAL. EDUC. CODE § 46010.1 (2011)**

Commencing in the fall of the 1986-87 academic year, the governing board of each school district shall, each academic year, notify pupils in grades 7 to 12, inclusive, and the parents or guardians of all pupils enrolled in the district, that school authorities may excuse any pupil from the school for the purpose of obtaining confidential medical services without the consent of the pupil's parent or guardian.

The notice required pursuant to this section may be included with any other notice given pursuant to this code.

## V. EXCERPTS FROM THE CALIFORNIA FAMILY CODE

### **CAL. FAM. CODE § 6920 (2011)**

Subject to the limitations provided in this chapter, notwithstanding any other provision of law, a minor may consent to the matters provided in this chapter, and the consent of the minor's parent or guardian is not necessary.

### **CAL. FAM. CODE § 6922 (2011)**

#### Consent by minor 15 or older living separately

(a) A minor may consent to the minor's medical care or dental care if all of the following conditions are satisfied:

(1) The minor is 15 years of age or older.

(2) The minor is living separate and apart from the minor's parents or guardian, whether with or without the consent of a parent or guardian and regardless of the duration of the separate residence.

(3) The minor is managing the minor's own financial affairs, regardless of the source of the minor's income.

(b) The parents or guardian are not liable for medical care or dental care provided pursuant to this section.

(c) A physician and surgeon or dentist may, with or without the consent of the minor patient, advise the minor's parent or guardian of the treatment given or needed if the physician and surgeon or dentist has reason to know, on the basis of the information given by the minor, the whereabouts of the parent or guardian.

**CAL. FAM. CODE § 6924 (2011)**

(a) As used in this section:

(1) "Mental health treatment or counseling services" means the provision of mental health treatment or counseling on an outpatient basis by any of the following:

(A) A governmental agency.

(B) A person or agency having a contract with a governmental agency to provide the services.

(C) An agency that receives funding from community united funds.

(D) A runaway house or crisis resolution center.

(E) A professional person, as defined in paragraph (2).

(2) "Professional person" means any of the following:

(A) A person designated as a mental health professional in Sections 622 to 626, inclusive, of Article 8 of Subchapter 3 of Chapter 1 of Title 9 of the California Code of Regulations.

(B) A marriage and family therapist as defined in Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code.

(C) A licensed educational psychologist as defined in Article 5 (commencing with Section 4986) of Chapter 13 of Division 2 of the Business and Professions Code.

(D) A credentialed school psychologist as described in Section 49424 of the Education Code.

(E) A clinical psychologist as defined in Section 1316.5 of the Health and Safety Code.

(F) The chief administrator of an agency referred to in paragraph (1) or (3).

(G) A marriage and family therapist registered intern, as defined in Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code, while working under the supervision of a licensed professional specified in subdivision (g) of Section 4980.03 of the Business and Professions Code.

(3) "Residential shelter services" means any of the following:

(A) The provision of residential and other support services to minors on a temporary or emergency basis in a facility that services only minors by a governmental agency, a person or agency having a contract with a governmental agency to provide these services, an agency that receives funding from community funds, or a licensed community care facility or crisis resolution center.

(B) The provision of other support services on a temporary or emergency basis by any professional person as defined in paragraph (2).

(b) A minor who is 12 years of age or older may consent to mental health treatment or counseling on an outpatient basis, or to residential shelter services, if both of the following requirements are satisfied:

(1) The minor, in the opinion of the attending professional person, is mature enough to participate intelligently in the outpatient services or residential shelter services.

(2) The minor (A) would present a danger of serious physical or mental harm to self or to others without the mental health treatment or counseling or residential shelter services, or (B) is the alleged victim of incest or child abuse.

(c) A professional person offering residential shelter services, whether as an individual or as a representative of an entity specified in paragraph (3) of subdivision (a), shall make his or her best efforts to notify the parent or guardian of the provision of services.

(d) The mental health treatment or counseling of a minor authorized by this section shall include involvement of the minor's parent or guardian unless, in the opinion of the professional person who is treating or counseling the minor, the involvement would be inappropriate. The professional person who is treating or counseling the minor shall state

in the client record whether and when the person attempted to contact the minor's parent or guardian, and whether the attempt to contact was successful or unsuccessful, or the reason why, in the professional person's opinion, it would be inappropriate to contact the minor's parent or guardian.

(e) The minor's parents or guardian are not liable for payment for mental health treatment or counseling services provided pursuant to this section unless the parent or guardian participates in the mental health treatment or counseling, and then only for services rendered with the participation of the parent or guardian. The minor's parents or guardian are not liable for payment for any residential shelter services provided pursuant to this section unless the parent or guardian consented to the provision of those services.

(f) This section does not authorize a minor to receive convulsive therapy or psychosurgery as defined in subdivisions (f) and

(g) of Section 5325 of the Welfare and Institutions Code, or psychotropic drugs without the consent of the minor's parent or guardian.

### **CAL. FAM. CODE § 6925 (2011)**

(a) A minor may consent to medical care related to the prevention or treatment of pregnancy.

(b) This section does not authorize a minor:

(1) To be sterilized without the consent of the minor's parent or guardian.

~~(2) To receive an abortion without the consent of a parent or guardian other than as provided in Section 123450 of the Health and Safety Code.<sup>1</sup>~~

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<sup>1</sup> Authors have indicated where provisions are unconstitutional by striking through inoperative language. See *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997) (holding that the California Constitution's right of privacy precludes requiring young women to obtain parental or judicial consent for abortion).

**CAL. FAM. CODE § 6926 (2011)**

(a) A minor who is 12 years of age or older and who may have come into contact with an infectious, contagious, or communicable disease may consent to medical care related to the diagnosis or treatment of the disease, if the disease or condition is one that is required by law or regulation adopted pursuant to law to be reported to the local health officer, or is a related sexually transmitted disease, as may be determined by the State Director of Health Services.

(b) The minor's parents or guardian are not liable for payment for medical care provided pursuant to this section.

**CAL. FAM. CODE § 6927 (2011)**

A minor who is 12 years of age or older and who is alleged to have been raped may consent to medical care related to the diagnosis or treatment of the condition and the collection of medical evidence with regard to the alleged rape.

**CAL. FAM. CODE § 6928 (2011)**

(a) "Sexually assaulted" as used in this section includes, but is not limited to, conduct coming within Section 261, 286, or 288a of the Penal Code.

(b) A minor who is alleged to have been sexually assaulted may consent to medical care related to the diagnosis and treatment of the condition, and the collection of medical evidence with regard to the alleged sexual assault.

(c) The professional person providing medical treatment shall attempt to contact the minor's parent or guardian and shall note in the minor's treatment record the date and time the professional person attempted to contact the parent or guardian and whether the attempt was successful or unsuccessful. This subdivision does not apply if the professional person reasonably believes that the minor's parent or guardian committed the sexual assault on the minor.

**CAL. FAM. CODE § 6929 (2011)**

(a) As used in this section:

(1) "Counseling" means the provision of counseling services by a provider under a contract with the state or a county to provide alcohol or drug abuse counseling services pursuant to Part 2 (commencing with Section 5600) of Division 5 of the Welfare and Institutions Code or pursuant to Division 10.5 (commencing with Section 11750) of the Health and Safety Code.

(2) "Drug or alcohol" includes, but is not limited to, any substance listed in any of the following:

(A) Section 380 or 381 of the Penal Code.

(B) Division 10 (commencing with Section 11000) of the Health and Safety Code.

(C) Subdivision (f) of Section 647 of the Penal Code.

(3) "LAAM" means levoalphacetylmethadol as specified in paragraph (10) of subdivision (c) of Section 11055 of the Health and Safety Code.

(4) "Professional person" means a physician and surgeon, registered nurse, psychologist, clinical social worker, marriage and family therapist, marriage and family therapist registered intern when appropriately employed and supervised pursuant to Section 4980.43 of the Business and Professions Code, psychological assistant when appropriately employed and supervised pursuant to Section 2913 of the Business and Professions Code, or associate clinical social worker when appropriately employed and supervised pursuant to Section 4996.18 of the Business and Professions Code.

(b) A minor who is 12 years of age or older may consent to medical care and counseling relating to the diagnosis and treatment of a drug- or alcohol-related problem.

(c) The treatment plan of a minor authorized by this section shall include the involvement of the minor's parent or guardian, if appropriate, as determined by the professional person or treatment facility treating the

minor. The professional person providing medical care or counseling to a minor shall state in the minor's treatment record whether and when the professional person attempted to contact the minor's parent or guardian, and whether the attempt to contact the parent or guardian was successful or unsuccessful, or the reason why, in the opinion of the professional person, it would not be appropriate to contact the minor's parent or guardian.

(d) The minor's parent or guardian is not liable for payment for any care provided to a minor pursuant to this section, except that if the minor's parent or guardian participates in a counseling program pursuant to this section, the parent or guardian is liable for the cost of the services provided to the minor and the parent or guardian.

(e) This section does not authorize a minor to receive replacement narcotic abuse treatment, in a program licensed pursuant to Article 3 (commencing with Section 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code, without the consent of the minor's parent or guardian.

(f) It is the intent of the Legislature that the state shall respect the right of a parent or legal guardian to seek medical care and counseling for a drug- or alcohol-related problem of a minor child when the child does not consent to the medical care and counseling, and nothing in this section shall be construed to restrict or eliminate this right.

(g) Notwithstanding any other provision of law, in cases where a parent or legal guardian has sought the medical care and counseling for a drug- or alcohol-related problem of a minor child, the physician shall disclose medical information concerning the care to the minor's parent or legal guardian upon his or her request, even if the minor child does not consent to disclosure, without liability for the disclosure.

**VI. EXCERPTS FROM THE CALIFORNIA GOVERNMENT CODE****CAL. GOV'T CODE § 27491 (2011)**

It shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths; unattended deaths; deaths where the deceased has not been attended by either a physician or a registered nurse, who is a member of a hospice care interdisciplinary team, as defined by subdivision (e) of Section 1746 of the Health and Safety Code in the 20 days before death; deaths related to or following known or suspected self-induced or criminal abortion; known or suspected homicide, suicide, or accidental poisoning; deaths known or suspected as resulting in whole or in part from or related to accident or injury either old or recent; deaths due to drowning, fire, hanging, gunshot, stabbing, cutting, exposure, starvation, acute alcoholism, drug addiction, strangulation, aspiration, or where the suspected cause of death is sudden infant death syndrome; death in whole or in part occasioned by criminal means; deaths associated with a known or alleged rape or crime against nature; deaths in prison or while under sentence; deaths known or suspected as due to contagious disease and constituting a public hazard; deaths from occupational diseases or occupational hazards; deaths of patients in state mental hospitals serving the mentally disabled and operated by the State Department of Mental Health; deaths of patients in state hospitals serving the developmentally disabled and operated by the State Department of Developmental Services; deaths under such circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another; and any deaths reported by physicians or other persons having knowledge of death for inquiry by coroner. Inquiry pursuant to this section does not include those investigative functions usually performed by other law enforcement agencies.

In any case in which the coroner conducts an inquiry pursuant to this section, the coroner or a deputy shall personally sign the certificate of death. If the death occurred in a state hospital, the coroner shall forward a copy of his or her report to the state agency responsible for the state hospital.

The coroner shall have discretion to determine the extent of inquiry to be made into any death occurring under natural circumstances and falling within the provisions of this section, and if inquiry determines that

the physician of record has sufficient knowledge to reasonably state the cause of a death occurring under natural circumstances, the coroner may authorize that physician to sign the certificate of death.

For the purpose of inquiry, the coroner shall have the right to exhume the body of a deceased person when necessary to discharge the responsibilities set forth in this section.

Any funeral director, physician, or other person who has charge of a deceased person's body, when death occurred as a result of any of the causes or circumstances described in this section, shall immediately notify the coroner. Any person who does not notify the coroner as required by this section is guilty of a misdemeanor.

## VII. EXCERPTS FROM THE CALIFORNIA HEALTH & SAFETY CODE

### CAL. HEALTH & SAFETY CODE § 1200 (2011)

(a) As used in this chapter, “clinic” means an organized outpatient health facility that provides direct medical, surgical, dental, optometric, or podiatric advice, services, or treatment to patients who remain less than 24 hours, and that may also provide diagnostic or therapeutic services to patients in the home as an incident to care provided at the clinic facility. Nothing in this section shall be construed to prohibit the provision of nursing services in a clinic licensed pursuant to this chapter. In no case shall a clinic be deemed to be a health facility subject to the provisions of Chapter 2 (commencing with Section 1250). A place, establishment, or institution that solely provides advice, counseling, information, or referrals on the maintenance of health or on the means and measures to prevent or avoid sickness, disease, or injury, where that advice, counseling, information, or referral does not constitute the practice of medicine, surgery, dentistry, optometry, or podiatry, shall not be deemed a clinic for purposes of this chapter.

(b) For purposes of this chapter:

(1) “Primary care clinics” means all the types of clinics specified in subdivision (a) of Section 1204, including community clinics and free clinics.

(2) “Specialty clinics” means all the types of clinics specified in subdivision (b) of Section 1204, including surgical clinics, chronic dialysis clinics, and rehabilitation clinics.

(3) “Clinic corporation” means a nonprofit organization that operates one or more primary care clinics, as defined in paragraph (1) of subdivision (a) of Section 1204, that are required to be licensed under Section 1205, one or more mobile health care units required to be licensed or approved pursuant to the Mobile Health Care Services Act (Chapter 9 (commencing with Section 1765.101)) and operated as primary care clinics, or one or more primary care clinics and one or more mobile health care units.

(4) “Department” means the Licensing and Certification Division of the State Department of Public Health, or its successor.

(5) “Centralized applications unit” means the centralized applications

unit in the Licensing and Certification Division of the department, or a successor entity.

### **CAL. HEALTH & SAFETY CODE § 1204 (2011)**

Clinics eligible for licensure pursuant to this chapter are primary care clinics and specialty clinics.

(a) (1) Only the following defined classes of primary care clinics shall be eligible for licensure:

(A) A “community clinic” means a clinic operated by a tax-exempt nonprofit corporation that is supported and maintained in whole or in part by donations, bequests, gifts, grants, government funds or contributions, that may be in the form of money, goods, or services. In a community clinic, any charges to the patient shall be based on the patient’s ability to pay, utilizing a sliding fee scale. No corporation other than a nonprofit corporation, exempt from federal income taxation under paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954 as amended, or a statutory successor thereof, shall operate a community clinic; provided, that the licensee of any community clinic so licensed on the effective date of this section shall not be required to obtain tax-exempt status under either federal or state law in order to be eligible for, or as a condition of, renewal of its license. No natural person or persons shall operate a community clinic.

(B) A “free clinic” means a clinic operated by a tax- exempt, nonprofit corporation supported in whole or in part by voluntary donations, bequests, gifts, grants, government funds or contributions, that may be in the form of money, goods, or services. In a free clinic there shall be no charges directly to the patient for services rendered or for drugs, medicines, appliances, or apparatuses furnished. No corporation other than a nonprofit corporation exempt from federal income taxation under paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954 as amended, or a statutory successor thereof, shall operate a free clinic; provided, that the licensee of any free clinic so licensed on the effective date of this section shall not be required to obtain tax-exempt status under either federal or state law in order to be eligible for, or as a condition of, renewal of its license. No natural person or persons shall operate a free clinic.

(2) Nothing in this subdivision shall prohibit a community clinic or a free clinic from providing services to patients whose services are reimbursed by third-party payers, or from entering into managed care contracts for services provided to private or public health plan subscribers, as long as the clinic meets the requirements identified in subparagraphs (A) and (B). For purposes of this subdivision, any payments made to a community clinic by a third-party payer, including, but not limited to, a health care service plan, shall not constitute a charge to the patient. This paragraph is a clarification of existing law.

(b) The following types of specialty clinics shall be eligible for licensure as specialty clinics pursuant to this chapter:

(1) A “surgical clinic” means a clinic that is not part of a hospital and that provides ambulatory surgical care for patients who remain less than 24 hours. A surgical clinic does not include any place or establishment owned or leased and operated as a clinic or office by one or more physicians or dentists in individual or group practice, regardless of the name used publicly to identify the place or establishment, provided, however, that physicians or dentists may, at their option, apply for licensure.

(2) A “chronic dialysis clinic” means a clinic that provides less than 24-hour care for the treatment of patients with end-stage renal disease, including renal dialysis services.

(3) A “rehabilitation clinic” means a clinic that, in addition to providing medical services directly, also provides physical rehabilitation services for patients who remain less than 24 hours. Rehabilitation clinics shall provide at least two of the following rehabilitation services: physical therapy, occupational therapy, social, speech pathology, and audiology services. A rehabilitation clinic does not include the offices of a private physician in individual or group practice.

(4) An “alternative birth center” means a clinic that is not part of a hospital and that provides comprehensive perinatal services and delivery care to pregnant women who remain less than 24 hours at the facility.

**CAL. HEALTH & SAFETY CODE § 7054.3 (2011)**

Notwithstanding any other provision of law, a recognizable dead human fetus of less than 20 weeks uterogestation not disposed of by interment shall be disposed of by incineration.

**CAL. HEALTH & SAFETY CODE § 102100 (2011)**

Each live birth, fetal death, death, and marriage that occurs in the state shall be registered as provided in this part on the prescribed certificate forms. In addition, a report of every judgment of dissolution of marriage, legal separation, or nullity decree shall be filed with the State Registrar, as provided in this part. All confidential information included in birth, fetal death, death, and marriage certificates and reports of dissolution of marriage, legal separation, or nullity that are required to be filed by this part, shall be exempt from the California Public Records Act contained in Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

**CAL. HEALTH & SAFETY CODE § 102400 (2011)**

Each live birth shall be registered with the local registrar of births and deaths for the district in which the birth occurred within 10 days following the date of the event.

**CAL. HEALTH & SAFETY CODE § 102775 (2011)**

Each death shall be registered with the local registrar of births and deaths in the district in which the death was officially pronounced or the body was found, within eight calendar days after death and prior to any disposition of the human remains.

**CAL. HEALTH & SAFETY CODE § 102950 (2011)**

(a) Each fetal death in which the fetus has advanced to or beyond the 20th week of uterogestation shall be registered with the local registrar

of births and deaths of the district in which the fetal death was officially pronounced within eight calendar days following the event and prior to any disposition of the fetus.

(b) Subdivision (a) shall not apply to the termination of a pregnancy performed in compliance with Article 2.5 (commencing with Section 123460) of Chapter 2 of Part 2 of Division 106.<sup>1</sup>

**CAL. HEALTH & SAFETY CODE § 103040.1 (2011)**

(a) The local registrar of births and deaths of the county in which a fetal death, in which the fetus has advanced beyond the 20th week of uterogestation, is registered, shall issue, upon the request of the mother or father of the fetus, a Certificate of Still Birth, on a form approved by the State Registrar of Vital Statistics for each naturally occurring intrauterine fetal death after a gestational age of not less than 20 completed weeks.

(b) A Certificate of Still Birth issued pursuant to subdivision (a) shall, except as otherwise set forth in this section, comply with all of the format requirements governing a certificate for a live birth contained in Article 2 (commencing with Section 102425). The Certificate of Still Birth shall be in addition to and shall not replace the fetal death certificate issued pursuant to Article 1 (commencing with Section 102950).

(c) The request for a Certificate of Still Birth shall be on a form prescribed by the State Registrar of Vital Statistics.

(d) The Certificate of Still Birth shall be on a form prescribed by the State Registrar of Vital Statistics and shall only contain the following information taken from the fetal death certificate:

- (1) The date of the stillbirth.
- (2) The county in which the stillbirth occurred.
- (3) The name of and sex of the stillborn fetus, as provided on the original or amended fetal death certificate.

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<sup>1</sup> CAL. HEALTH & SAFETY CODE §§ 123460–23468 (2011) is the Reproductive Privacy Act. See *supra* Part II.

- (4) The time and place of stillbirth, including the street address and city, and, if applicable, the name of the hospital.
  - (5) The names, date of birth, and state of birth of the mother and father.
  - (6) The corresponding file number of the final fetal death certificate.
  - (7) A title at the top of the Certificate of Still Birth that reads: Certificate of Still Birth.
  - (8) A statement at the bottom of the Certificate of Still Birth that states: This Certificate of Still Birth is not proof of a live birth.
- (e) The State Registrar of Vital Statistics shall not use the information included on a Certificate of Still Birth for any governmental purpose other than to respond to the request for the certificate from the persons identified in subdivision (a).
- (f) The State Registrar of Vital Statistics may charge an appropriate fee for processing and issuing a Certificate of Still Birth. The fee shall cover, but shall not exceed, the entity's full cost of providing the certificate. During the 2007-08 fiscal year, the fee shall not exceed twenty dollars (\$20), thereafter, the fee may be adjusted annually pursuant to Section 100430. The local registrar of births and deaths may charge an appropriate fee for the processing and issuing of a Certificate of Live Birth, not to exceed the entity's full cost of providing the certificate.
- (g) The State Registrar of Vital Statistics shall issue a Certificate of Still Birth upon request regardless of the date on which the certificate of fetal death was issued.
- (h) This section shall not be used to establish, bring, or support a civil cause of action seeking damages against any person or entity for bodily injury, personal injury, or wrongful death for a stillbirth.
- (i) For the purposes of this section, "stillbirth" as recorded in the Certificate of Still Birth means the delivery of a fetus where there was a naturally occurring intrauterine fetal death after a gestational age of not less than 20 completed weeks.
- (j) This section shall not supersede any other provision of law. The terms and conditions contained in this section shall only apply to this section,

and shall not affect the definition, use, meaning, or intent of those terms as they may appear in any other statute, California case law, or the California Constitution. Other than prescribing the right to request a Certificate of Still Birth, nothing in this section shall be construed to create any new right, privilege, or entitlement, or to abrogate any existing right, privilege, or entitlement.

(k) Through its courts, statutes, and under its Constitution, California law protects a woman's right to reproductive privacy, and it is the intent of the Legislature to reaffirm these protections in accordance with the California Supreme Court's decision in *People v. Belous* (1969) 71 Cal.2d 954, 966-968.

#### **CAL. HEALTH & SAFETY CODE § 123105 (2011)**

As used in this chapter:

(a) "Health care provider" means any of the following:

(1) A health facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2.

(2) A clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2.

(3) A home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2.

(4) A physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code or pursuant to the Osteopathic Act.

(5) A podiatrist licensed pursuant to Article 22 (commencing with Section 2460) of Chapter 5 of Division 2 of the Business and Professions Code.

(6) A dentist licensed pursuant to Chapter 4 (commencing with Section 1600) of Division 2 of the Business and Professions Code.

(7) A psychologist licensed pursuant to Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.

(8) An optometrist licensed pursuant to Chapter 7 (commencing with Section 3000) of Division 2 of the Business and Professions Code.

(9) A chiropractor licensed pursuant to the Chiropractic Initiative Act.

(10) A marriage and family therapist licensed pursuant to Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code.

(11) A clinical social worker licensed pursuant to Chapter 14 (commencing with Section 4990) of Division 2 of the Business and Professions Code.

(12) A physical therapist licensed pursuant to Chapter 5.7 (commencing with Section 2600) of Division 2 of the Business and Professions Code.

(13) An occupational therapist licensed pursuant to Chapter 5.6 (commencing with Section 2570).

(b) “Mental health records” means patient records, or discrete portions thereof, specifically relating to evaluation or treatment of a mental disorder. “Mental health records” includes, but is not limited to, all alcohol and drug abuse records.

(c) “Patient” means a patient or former patient of a health care provider.

(d) “Patient records” means records in any form or medium maintained by, or in the custody or control of, a health care provider relating to the health history, diagnosis, or condition of a patient, or relating to treatment provided or proposed to be provided to the patient. “Patient records” includes only records pertaining to the patient requesting the records or whose representative requests the records. “Patient records” does not include information given in confidence to a health care provider by a person other than another health care provider or the patient, and that material may be removed from any records prior to inspection or copying under Section 123110 or 123115. “Patient records” does not include information contained in aggregate form, such as indices, registers, or logs.

(e) "Patient's representative" or "representative" means any of the following:

- (1) A parent or guardian of a minor who is a patient.
  - (2) The guardian or conservator of the person of an adult patient.
  - (3) An agent as defined in Section 4607 of the Probate Code, to the extent necessary for the agent to fulfill his or her duties as set forth in Division 4.7 (commencing with Section 4600) of the Probate Code.
  - (4) The beneficiary as defined in Section 24 of the Probate Code or personal representative as defined in Section 58 of the Probate Code, of a deceased patient.
- (f) "Alcohol and drug abuse records" means patient records, or discrete portions thereof, specifically relating to evaluation and treatment of alcoholism or drug abuse.

#### **CAL. HEALTH & SAFETY CODE § 123110 (2011)**

(a) Notwithstanding Section 5328 of the Welfare and Institutions Code, and except as provided in Sections 123115 and 123120, any adult patient of a health care provider, any minor patient authorized by law to consent to medical treatment, and any patient representative<sup>2</sup> shall be entitled to inspect patient records upon presenting to the health care provider a written request for those records and upon payment of reasonable clerical costs incurred in locating and making the records available. However, a patient who is a minor shall be entitled to inspect patient records pertaining only to health care of a type for which the minor is lawfully authorized to consent. A health care provider shall permit this inspection during business hours within five working days after receipt of the written request. The inspection shall be conducted by the patient or patient's representative requesting the inspection, who may be accompanied by one other person of his or her choosing.

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2 CAL. HEALTH & SAFETY CODE § 123105(e) (2011) (defines a "patient's representative" or "representative" as a parent or guardian of a minor who is a patient).

(b) Additionally, any patient or patient's representative shall be entitled to copies of all or any portion of the patient records that he or she has a right to inspect, upon presenting a written request to the health care provider specifying the records to be copied, together with a fee to defray the cost of copying, that shall not exceed twenty-five cents (\$0.25) per page or fifty cents (\$0.50) per page for records that are copied from microfilm and any additional reasonable clerical costs incurred in making the records available. The health care provider shall ensure that the copies are transmitted within 15 days after receiving the written request.

(c) Copies of X-rays or tracings derived from electrocardiography, electroencephalography, or electromyography need not be provided to the patient or patient's representative under this section, if the original X-rays or tracings are transmitted to another health care provider upon written request of the patient or patient's representative and within 15 days after receipt of the request. The request shall specify the name and address of the health care provider to whom the records are to be delivered. All reasonable costs, not exceeding actual costs, incurred by a health care provider in providing copies pursuant to this subdivision may be charged to the patient or representative requesting the copies.

(d) (1) Notwithstanding any provision of this section, and except as provided in Sections 123115 and 123120, any patient or former patient or the patient's representative shall be entitled to a copy, at no charge, of the relevant portion of the patient's records, upon presenting to the provider a written request, and proof that the records are needed to support an appeal regarding eligibility for a public benefit program. These programs shall be the Medi-Cal program, social security disability insurance benefits, and Supplemental Security Income/State Supplementary Program for the Aged, Blind and Disabled (SSI/SSP) benefits. For purposes of this subdivision, "relevant portion of the patient's records" means those records regarding services rendered to the patient during the time period beginning with the date of the patient's initial application for public benefits up to and including the date that a final determination is made by the public benefits program with which the patient's application is pending.

(2) Although a patient shall not be limited to a single request, the patient or patient's representative shall be entitled to no more than one copy of any relevant portion of his or her record free of charge.

(3) This subdivision shall not apply to any patient who is represented by a private attorney who is paying for the costs related to the patient's appeal, pending the outcome of that appeal. For purposes of this subdivision, "private attorney" means any attorney not employed by a nonprofit legal services entity.

(e) If the patient's appeal regarding eligibility for a public benefit program specified in subdivision (d) is successful, the hospital or other health care provider may bill the patient, at the rates specified in subdivisions (b) and (c), for the copies of the medical records previously provided free of charge.

(f) If a patient or his or her representative requests a record pursuant to subdivision (d), the health care provider shall ensure that the copies are transmitted within 30 days after receiving the written request.

(g) This section shall not be construed to preclude a health care provider from requiring reasonable verification of identity prior to permitting inspection or copying of patient records, provided this requirement is not used oppressively or discriminatorily to frustrate or delay compliance with this section. Nothing in this chapter shall be deemed to supersede any rights that a patient or representative might otherwise have or exercise under Section 1158 of the Evidence Code or any other provision of law. Nothing in this chapter shall require a health care provider to retain records longer than required by applicable statutes or administrative regulations.

(h) This chapter shall not be construed to render a health care provider liable for the quality of his or her records or the copies provided in excess of existing law and regulations with respect to the quality of medical records. A health care provider shall not be liable to the patient or any other person for any consequences that result from disclosure of patient records as required by this chapter. A health care provider shall not discriminate against classes or categories of providers in the transmittal of X-rays or other patient records, or copies of these X-rays or records, to other providers as authorized by this section.

Every health care provider shall adopt policies and establish procedures for the uniform transmittal of X-rays and other patient records that effectively prevent the discrimination described in this subdivision. A health care provider may establish reasonable conditions, including a reasonable deposit fee, to ensure the return of original X-rays

transmitted to another health care provider, provided the conditions do not discriminate on the basis of, or in a manner related to, the license of the provider to which the X-rays are transmitted.

(i) Any health care provider described in paragraphs (4) to (10), inclusive, of subdivision (a) of Section 123105 who willfully violates this chapter is guilty of unprofessional conduct. Any health care provider described in paragraphs (1) to (3), inclusive, of subdivision (a) of Section 123105 that willfully violates this chapter is guilty of an infraction punishable by a fine of not more than one hundred dollars (\$100). The state agency, board, or commission that issued the health care provider's professional or institutional license shall consider a violation as grounds for disciplinary action with respect to the licensure, including suspension or revocation of the license or certificate.

(j) This section shall be construed as prohibiting a health care provider from withholding patient records or summaries of patient records because of an unpaid bill for health care services. Any health care provider who willfully withholds patient records or summaries of patient records because of an unpaid bill for health care services shall be subject to the sanctions specified in subdivision (i).

### **CAL. HEALTH & SAFETY CODE § 123115 (2011)**

(a) The representative of a minor shall not be entitled to inspect or obtain copies of the minor's patient records in either of the following circumstances:

(1) With respect to which the minor has a right of inspection under Section 123110.

(2) Where the health care provider determines that access to the patient records requested by the representative would have a detrimental effect on the provider's professional relationship with the minor patient or the minor's physical safety or psychological well-being. The decision of the health care provider as to whether or not a minor's records are available for inspection or copying under this section shall not attach any liability to the provider, unless the decision is found to be in bad faith.

(b) When a health care provider determines there is a substantial risk of significant adverse or detrimental consequences to a patient in seeing

or receiving a copy of mental health records requested by the patient, the provider may decline to permit inspection or provide copies of the records to the patient, subject to the following conditions:

(1) The health care provider shall make a written record, to be included with the mental health records requested, noting the date of the request and explaining the health care provider's reason for refusing to permit inspection or provide copies of the records, including a description of the specific adverse or detrimental consequences to the patient that the provider anticipates would occur if inspection or copying were permitted.

(2) The health care provider shall permit inspection by, or provide copies of the mental health records to, a licensed physician and surgeon, licensed psychologist, licensed marriage and family therapist, or licensed clinical social worker, designated by request of the patient. Any marriage and family therapist registered intern, as defined in Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code, may not inspect the patient's mental health records or obtain copies thereof, except pursuant to the direction or supervision of a licensed professional specified in subdivision (g) of Section 4980.03 of the Business and Professions Code. Prior to providing copies of mental health records to a marriage and family therapist registered intern, a receipt for those records shall be signed by the supervising licensed professional. The licensed physician and surgeon, licensed psychologist, licensed marriage and family therapist, licensed clinical social worker, or marriage and family therapist registered intern to whom the records are provided for inspection or copying shall not permit inspection or copying by the patient.

(3) The health care provider shall inform the patient of the provider's refusal to permit him or her to inspect or obtain copies of the requested records, and inform the patient of the right to require the provider to permit inspection by, or provide copies to, a licensed physician and surgeon, licensed psychologist, licensed marriage and family therapist, or licensed clinical social worker, designated by written authorization of the patient.

(4) The health care provider shall indicate in the mental health records of the patient whether the request was made under paragraph (2).

**CAL. HEALTH & SAFETY CODE § 123418 (2011)**

Subject to all other provisions of this article, all residency programs in obstetrics and gynecology shall comply with the program requirements for residency education in obstetrics and gynecology of the Accreditation Council for Graduate Medical Education, which require that in addition to education and training in in-patient care, the program in obstetrics-gynecology be geared toward the development of competence in the provision of ambulatory primary health care for women, including, but not limited to, training in the performance of abortion services.

**CAL. HEALTH & SAFETY CODE § 123420 (2011)**

(a) No employer or other person shall require a physician, a registered nurse, a licensed vocational nurse, or any other person employed or with staff privileges at a hospital, facility, or clinic to directly participate in the induction or performance of an abortion, if the employee or other person has filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate in the abortion. No such employee or person with staff privileges in a hospital, facility, or clinic shall be subject to any penalty or discipline by reason of his or her refusal to participate in an abortion. No such employee of a hospital, facility, or clinic that does not permit the performance of abortions, or person with staff privileges therein, shall be subject to any penalty or discipline on account of the person's participation in the performance of an abortion in other than the hospital, facility, or clinic. No employer shall refuse to employ any person because of the person's refusal for moral, ethical, or religious reasons to participate in an abortion, unless the person would be assigned in the normal course of business of any hospital, facility, or clinic to work in those parts of the hospital, facility, or clinic where abortion patients are cared for. No provision of this article prohibits any hospital, facility, or clinic that permits the performance of abortions from inquiring whether an employee or prospective employee would advance a moral, ethical, or religious basis for refusal to participate in an abortion before hiring or assigning that person to that part of a hospital, facility, or clinic where abortion patients are cared for. The refusal of a physician, nurse, or any other person to participate or aid in the induction or performance of an abortion pursuant to this subdivision shall not form the basis of any claim for damages.

(b) No medical school or other facility for the education or training of physicians, nurses, or other medical personnel shall refuse admission to a person or penalize the person in any way because of the person's unwillingness to participate in the performance of an abortion for moral, ethical, or religious reasons. No hospital, facility, or clinic shall refuse staff privileges to a physician because of the physician's refusal to participate in the performance of abortion for moral, ethical, or religious reasons.

(c) Nothing in this article shall require a nonprofit hospital or other facility or clinic that is organized or operated by a religious corporation or other religious organization and licensed pursuant to Chapter 1 (commencing with Section 1200) or Chapter 2 (commencing with Section 1250) of Division 2, or any administrative officer, employee, agent, or member of the governing board thereof, to perform or to permit the performance of an abortion in the facility or clinic or to provide abortion services. No such nonprofit facility or clinic organized or operated by a religious corporation or other religious organization, nor its administrative officers, employees, agents, or members of its governing board shall be liable, individually or collectively, for failure or refusal to participate in any such act. The failure or refusal of any such corporation, unincorporated association or individual person to perform or to permit the performance of such medical procedures shall not be the basis for any disciplinary or other recriminatory action against such corporations, unincorporated associations, or individuals. Any such facility or clinic that does not permit the performance of abortions on its premises shall post notice of that proscription in an area of the facility or clinic that is open to patients and prospective admittees.

(d) This section shall not apply to medical emergency situations and spontaneous abortions.

Any violation of this section is a misdemeanor.

### **CAL. HEALTH & SAFETY CODE § 123425 (2011)**

The refusal of any person to submit to an abortion or surgical sterilization or to give consent therefore shall not be grounds for loss of any privileges or immunities to which the person would otherwise be entitled, nor shall submission to an abortion or surgical sterilization

or the granting of consent therefore be a condition precedent to the receipt of any public benefits. The decision of any person to submit to an abortion or surgical sterilization or to give consent therefore shall not be grounds for loss of any privileges or immunities to which the person would otherwise be entitled, nor shall the refusal to submit to an abortion or surgical sterilization or to give consent therefore be a condition precedent to the receipt of any public benefits.

**CAL. HEALTH & SAFETY CODE § 123435 (2011)**

The rights to medical treatment of an infant prematurely born alive in the course of an abortion shall be the same as the rights of an infant of similar medical status prematurely born spontaneously.

**CAL. HEALTH & SAFETY CODE § 123440 (2011)**

(a) It is unlawful for any person to use any aborted product of human conception, other than fetal remains, for any type of scientific or laboratory research or for any other kind of experimentation or study, except to protect or preserve the life and health of the fetus. "Fetal remains," as used in this section, means a lifeless product of conception regardless of the duration of pregnancy. A fetus shall not be deemed to be lifeless for the purposes of this section, unless there is an absence of a discernible heartbeat.

(b) In addition to any other criminal or civil liability that may be imposed by law, any violation of this section constitutes unprofessional conduct within the meaning of the Medical Practice Act, Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.

**CAL. HEALTH & SAFETY CODE § 123445 (2011)**

(a) Except as provided in subdivision (b), at the conclusion of any scientific or laboratory research or any other kind of experimentation or study upon fetal remains, the fetal remains shall be promptly interred or disposed of by incineration.

Storage of the fetal remains prior to the completion of the research, experimentation, or study shall be in a place not open to the public, and the method of storage shall prevent any deterioration of the fetal remains that would create a health hazard.

(b) Subdivision (a) shall not apply to public or private educational institutions.

Any violation of this section is a misdemeanor.

**NOTE: THE FOLLOWING STATUTE REQUIRING A PREGNANT MINOR TO OBTAIN PARENTAL CONSENT OR JUDICIAL AUTHORIZATION FOR AN ABORTION WAS HELD UNCONSTITUTIONAL UNDER THE CALIFORNIA CONSTITUTION.<sup>3</sup>**

**~~CAL. HEALTH & SAFETY CODE § 123450 (2009)~~<sup>4</sup>**

~~Performance of abortion on unemancipated minor; Consent; Petition without consent of parent or guardian; Appeal~~

~~(a) Except in a medical emergency requiring immediate medical action, no abortion shall be performed upon an unemancipated minor unless she first has given her written consent to the abortion and also has obtained the written consent of one of her parents or legal guardian.~~

~~(b) If one or both of an unemancipated, pregnant minor's parents or her guardian refuse to consent to the performance of an abortion, or if the minor elects not to seek the consent of one or both of her parents or her guardian, an unemancipated pregnant minor may file a petition with the juvenile court. If, pursuant to this subdivision, a minor seeks a petition, the court shall assist the minor or person designated by the minor in preparing the petition and notices required pursuant to this section. The petition shall set forth with specificity the minor's~~

<sup>3</sup> *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997) (holding that the California Constitution's right of privacy precludes requiring young women to obtain parental or judicial consent for abortion).

<sup>4</sup> Authors have indicated where provisions are unconstitutional by striking through inoperative language.

reasons for the request. The court shall ensure that the minor's identity is confidential. The minor may file the petition using only her initials or a pseudonym. An unemancipated pregnant minor may participate in the proceedings in juvenile court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court-appointed counsel upon request. The hearing shall be set within three days of the filing of the petition. A notice shall be given to the minor of the date, time, and place of the hearing on the petition.

(c) At the hearing on a minor's petition brought pursuant to subdivision (b) for the authorization of an abortion, the court shall consider all evidence duly presented, and order either of the following:

(1) If the court finds that the minor is sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, and that the minor has, on that basis, consented thereto, the court shall grant the petition.

(2) If the court finds that the minor is not sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, the court shall then consider whether performance of the abortion would be in the best interest of the minor. In the event that the court finds that the performance of the abortion would be in the minor's best interest, the court shall grant the petition ordering the performance of the abortion without consent of, or notice to, the parents or guardian. In the event that the court finds that the performance of the abortion is not in the best interest of the minor, the court shall deny the petition.

Judgment shall be entered within one court day of submission of the matter.

(d) The minor may appeal the judgment of the juvenile court by filing a written notice of appeal at any time after the entry of the judgment. The Judicial Council shall prescribe, by rule, the practice and procedure on appeal and the time and manner in which any record on appeal shall be prepared and filed. These procedures shall require that the notice of the date, time, and place of hearing, which shall be set within five court days of the filing of notice of appeal, shall be mailed to the parties by the clerk of the court. The appellate court shall ensure that the minor's identity is confidential. The minor may file the petition using only her initials or a

pseudonym. Judgment on appeal shall be entered within one court day of submission of the matter.

(e) No fees or costs incurred in connection with the procedures required by this section shall be chargeable to the minor or her parents, or either of them, or to her legal guardian.

(f) It is a misdemeanor, punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in the county jail of up to 30 days, or both, for any person to knowingly perform an abortion on an unmarried or unemancipated minor without complying with the requirements of this section.

## **THE REPRODUCTIVE PRIVACY ACT**

### **CAL. HEALTH & SAFETY CODE § 123460 (2011)**

This article shall be known and may be cited as the Reproductive Privacy Act.

### **CAL. HEALTH & SAFETY CODE § 123462 (2011)**

The Legislature finds and declares that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions. Accordingly, it is the public policy of the State of California that:

- (a) Every individual has the fundamental right to choose or refuse birth control.
- (b) Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specifically limited by this article.
- (c) The state shall not deny or interfere with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically permitted by this article.

### **CAL. HEALTH & SAFETY CODE § 123464 (2011)**

The following definitions shall apply for purposes of this chapter:

- (a) "Abortion" means any medical treatment intended to induce the termination of a pregnancy except for the purpose of producing a live birth.
- (b) "Pregnancy" means the human reproductive process, beginning with the implantation of an embryo.
- (c) "State" means the State of California, and every county, city, town and municipal corporation, and quasi-municipal corporation in the state.
- (d) "Viability" means the point in a pregnancy when, in the good faith medical judgment of a physician, on the particular facts of the case before that physician, there is a reasonable likelihood of the fetus' sustained survival outside the uterus without the application of extraordinary medical measures.

**CAL. HEALTH & SAFETY CODE § 123466 (2011)**

The state may not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman.

**CAL. HEALTH & SAFETY CODE § 123468 (2011)**

The performance of an abortion is unauthorized if either of the following is true:

(a) The person performing or assisting in performing the abortion is not a health care provider authorized to perform or assist in performing an abortion pursuant to Section 2253 of the Business and Professions Code.

(b) The abortion is performed on a viable fetus, and both of the following are established:

(1) In the good faith medical judgment of the physician, the fetus was viable.

(2) In the good faith medical judgment of the physician, continuation of the pregnancy posed no risk to life or health of the pregnant woman.

## **VIII. EXCERPTS FROM THE CALIFORNIA PENAL CODE**

### **CAL. PENAL CODE § 643 (2011)**

No person knowingly shall dispose of fetal remains in a public or private dump, refuse, or disposal site or place open to public view. For the purposes of this section, "fetal remains" means the lifeless product of conception regardless of the duration of the pregnancy.

Any violation of this section is a misdemeanor.

### **CAL. PENAL CODE § 3405 (2011)**

No condition or restriction upon the obtaining of an abortion by a prisoner, pursuant to the Therapeutic Abortion Act (Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code),<sup>1</sup> other than those contained in that act, shall be imposed. Prisoners found to be pregnant and desiring abortions, shall be permitted to determine their eligibility for an abortion pursuant to law, and if determined to be eligible, shall be permitted to obtain an abortion.

The rights provided for females by this section shall be posted in at least one conspicuous place to which all female prisoners have access.

### **CAL. PENAL CODE § 3406 (2011)**

Any female prisoner shall have the right to summon and receive the services of any physician and surgeon of her choice in order to determine whether she is pregnant. The warden may adopt reasonable rules and regulations with regard to the conduct of examinations to effectuate this determination.

If the prisoner is found to be pregnant, she is entitled to a determination of the extent of the medical services needed by her and to the receipt

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<sup>1</sup> The Therapeutic Abortion Act, CAL. HEALTH & SAFETY CODE §§ 123400–123415; 123430 was repealed in 2002. See CAL. HEALTH & SAFETY CODE §§ 123418, 123420, 123435–123450; The Reproductive Privacy Act, CAL. HEALTH & SAFETY CODE §§ 123460–123468 (2011).

of these services from the physician and surgeon of her choice. Any expenses occasioned by the services of a physician and surgeon whose services are not provided by the institution shall be borne by the prisoner.

Any physician providing services pursuant to this section shall possess a current, valid, and unrevoked certificate to engage in the practice of medicine issued pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.

The rights provided for prisoners by this section shall be posted in at least one conspicuous place to which all female prisoners have access.

**CAL. PENAL CODE § 4023.6 (2011)**

Any female prisoner in any local detention facility shall have the right to summon and receive the services of any physician and surgeon of her choice in order to determine whether she is pregnant. The superintendent of such facility may adopt reasonable rules and regulations with regard to the conduct of examinations to effectuate such determination.

If the prisoner is found to be pregnant, she is entitled to a determination of the extent of the medical services needed by her and to the receipt of such services from the physician and surgeon of her choice. Any expenses occasioned by the services of a physician and surgeon whose services are not provided by the facility shall be borne by the prisoner.

For the purposes of this section, "local detention facility" means any city, county, or regional facility used for the confinement of any female prisoner for more than 24 hours.

Any physician providing services pursuant to this section shall possess a current, valid, and unrevoked certificate to engage in the practice of medicine issued pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.

The rights provided for prisoners by this section shall be posted in at least one conspicuous place to which all female prisoners have access.

**CAL. PENAL CODE § 4028 (2011)**

No condition or restriction upon the obtaining of an abortion by a female detained in any local detention facility, pursuant to the Therapeutic Abortion Act (Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code),<sup>2</sup> other than those contained in that act, shall be imposed. Females found to be pregnant and desiring abortions shall be permitted to determine their eligibility for an abortion pursuant to law, and if determined to be eligible, shall be permitted to obtain an abortion.

For the purposes of this section, "local detention facility" means any city, county, or regional facility used for the confinement of any female person for more than 24 hours.

The rights provided for females by this section shall be posted in at least one conspicuous place to which all female prisoners have access.

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<sup>2</sup> *Id.*

**IX. EXCERPTS FROM CALIFORNIA PROBATE CODE**

**CAL. PROB. CODE § 1801 (2011)**

Subject to Section 1800.3:

- (a) A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter, except as provided for the person as described in subdivision (b) or (c) of Section 1828.5.
- (b) A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence, except as provided for that person as described in subdivision (b) or (c) of Section 1828.5. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.
- (c) A conservator of the person and estate may be appointed for a person described in subdivisions (a) and (b).
- (d) A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult. A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. The intent of the Legislature, as expressed in Section 4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying mandate of this division in its application to adults alleged to be developmentally disabled.
- (e) The standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence.

### **CAL. PROB. CODE § 1950 (2011)**

The Legislature recognizes that the right to exercise choice over matters of procreation is fundamental and may not be denied to an individual on the basis of disability. This chapter is enacted for the benefit of those persons with developmental disabilities who, despite those disabilities, are capable of engaging in sexual activity yet who, because of those disabilities, are unable to give the informed, voluntary consent necessary to their fully exercising the right to procreative choice, which includes the right to choose sterilization.

However, the Legislature further recognizes that the power to sterilize is subject to abuse and, historically, has been abused. It is the intent of the Legislature that no individual shall be sterilized solely by reason of a developmental disability and that no individual who knowingly opposes sterilization be sterilized involuntarily. It is further the intent of the Legislature that this chapter shall be applied in accord with the overall intent of Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code that persons with developmental disabilities be provided with those services needed to enable them to live more normal, independent, and productive lives, including assistance and training that might obviate the need for sterilization.

### **CAL. PROB. CODE § 1951 (2011)**

(a) No person who has the ability to consent to his or her sterilization shall be sterilized pursuant to this chapter.

(b) For the purposes of this chapter, the following terms have the meanings given:

(1) “Consent to sterilization” means making a voluntary decision to undergo sterilization after being fully informed about, and after fully understanding the nature and consequences of, sterilization.

(2) “Voluntary” means performed while competent to make the decision, and as a matter of free choice and will and not in response to coercion, duress, or undue influence.

(3) “Fully understanding the nature and consequences of sterilization,” includes, but is not limited to, the ability to understand each of the following:

(A) That the individual is free to withhold or withdraw consent to the procedure at any time before the sterilization without affecting the right to future care or treatment and without loss or withdrawal of any publicly funded program benefits to which the individual might be otherwise entitled.

(B) Available alternative methods of family planning and birth control.

(C) That the sterilization procedure is considered to be irreversible.

(D) The specific sterilization procedure to be performed.

(E) The discomforts and risks that may accompany or follow the performing of the procedure, including an explanation of the type and possible effects of any anesthetic to be used.

(F) The benefits or advantages that may be expected as a result of the sterilization.

(G) The approximate length of the hospital stay.

(H) The approximate length of time for recovery.

(c) The court shall appoint a facilitator or interpreter if such a person's assistance would enable the person named in the petition to understand any of these factors.

### **CAL. PROB. CODE § 1952 (2011)**

The conservator of an adult, or any person authorized to file a petition for the appointment of a conservator under paragraphs (2) to (5), inclusive, of subdivision (a) of Section 1820, may file a petition under this chapter for appointment of a limited conservator authorized to consent to the sterilization of an adult with a developmental disability. The content of the petition under this chapter shall conform to the

provisions of Section 1821 and in addition allege that the person for whom sterilization is proposed has a developmental disability as defined in Section 1420 and shall allege specific reasons why court-authorized sterilization is deemed necessary. A petition under this chapter shall be considered separately from any contemporaneous petition for appointment of a conservator under this division.

### **CAL. PROB. CODE § 1953 (2011)**

At least 90 days before the hearing on the petition under this chapter, notice of the time and place of the hearing and a copy of the petition shall be served on the person named in the petition and, if the petitioner is not the conservator of the person, on the conservator, if any. Service shall be made in the manner provided in Section 415.10 or Section 415.30 of the Code of Civil Procedure or in such manner as may be authorized by the court.

### **CAL. PROB. CODE § 1954 (2011)**

In any proceeding under this chapter, if the person named in the petition for court authorization to consent to sterilization has not retained legal counsel and does not plan to retain legal counsel, the court shall immediately appoint the public defender or private counsel to represent the individual for whom sterilization is proposed. Counsel shall undertake the representation with the presumption that the individual opposes the petition.

### **CAL. PROB. CODE § 1954.5 (2011)**

(a) The court shall appoint a facilitator for the person named in the petition, who shall assist the person named in the petition to do all of the following:

- (1) Understand the nature of the proceedings.
- (2) Understand the evaluation process required by Section 1955.
- (3) Communicate his or her views.

- (4) Participate as fully as possible in the proceedings.
- (b) All of the following factors shall be considered by the court in appointing a facilitator:
  - (1) The preference of the person named in the petition.
  - (2) The proposed facilitator's personal knowledge of the person named in the petition.
  - (3) The proposed facilitator's ability to communicate with the person named in the petition, when that person is nonverbal, has limited verbal skills, or relies on alternative modes of communication.
  - (4) The proposed facilitator's knowledge of the developmental disabilities service system.
- (c) The petitioner may not be appointed as the facilitator.

**CAL. PROB. CODE § 1955 (2011)**

- (a) The court shall request the director of the appropriate regional center for the developmentally disabled to coordinate an investigation and prepare and file a written report thereon. The appropriate regional center for purposes of this section is (1) the regional center of which the person named in the petition is a client, (2) if the individual named in the petition is not a client of any regional center, the regional center responsible for the area in which the individual is then living, or (3) such other regional center as may be in the best interests of the individual. The report shall be based upon comprehensive medical, psychological, and sociosexual evaluations of the individual conducted pursuant to subdivisions (b) and (c), and shall address, but shall not be limited to, each of the factors listed in Section 1958. A copy of the report shall be provided to each of the parties at least 15 days prior to the hearing.
- (b) Prior to the hearing on the issue of sterilization, the person who is proposed to be sterilized shall be personally examined by two physicians, one of whom shall be a surgeon competent to perform the procedure, and one psychologist or clinical social worker, each of whom has been mutually agreed to by the petitioner and counsel for the

person named in the petition or, if agreement is not reached, appointed by the court from a panel of qualified professionals. At the request of counsel for the person named in the petition, the court shall appoint one additional psychologist, clinical social worker, or physician named by counsel. Any psychologist or clinical social worker and, to the extent feasible, any physicians conducting an examination shall have had experience with persons who have developmental disabilities. To the extent feasible, each of the examiners shall also have knowledge and experience relating to sociosexual skills and behavior. The examinations shall be at county expense subject to Section 1963.

(c) The examiners shall consider all available alternatives to sterilization and shall recommend sterilization only if no suitable alternative is available. Each examiner shall prepare a written, comprehensive report containing all relevant aspects of the person's medical, psychological, family, and sociosexual conditions. Each examiner shall address those factors specified in Section 1958 related to his or her particular area of expertise. In considering the factors in subdivision (a) of, and paragraph (1) of subdivision (d) of, Section 1958, each examiner shall include information regarding the intensity, extent, and recentness of the person's education and training, if any, regarding human sexuality, including birth control methods and parenting skills, and in addition, shall consider whether the individual would benefit from training provided by persons competent in education and training of persons with comparable intellectual impairments. If an examiner recommends against sterilization, the examiner shall set forth in his or her report available alternatives, including, as warranted, recommendations for sex education, parent training, or training in the use of alternative methods of contraception. Copies of each report shall be furnished at least 30 days prior to the hearing on the petition to the person or persons who filed the petition, the conservator, if any, and counsel for the person proposed to be sterilized, the regional center responsible for the investigation and report required under this section, and such other persons as the court may direct. The court may receive these reports in evidence.

(d) The contents of the reports prepared pursuant to this section shall be confidential. Upon judgment in the action or the proceeding becoming final, the court shall order the contents of the reports sealed.

(e) Regional centers for the developmentally disabled shall compile and maintain lists of persons competent to perform the examinations

required by this section. These lists shall be provided to the court. If the person named in the petition resides at a state hospital or other residential care facility, no person conducting an examination pursuant to subdivision (b) shall be an employee of the facility.

(f) Any party to the proceedings has the right to submit additional reports from qualified experts.

(g) Any person who has written a report received in evidence may be subpoenaed and questioned by any party to the proceedings or by the court and when so called is subject to all rules of evidence including those of legal objections as to the qualification of expert witnesses.

(h) No regional center or person acting in his or her capacity as a regional center employee may file a petition under Section 1952.

#### **CAL. PROB. CODE § 1956 (2011)**

The person to whom the petition applies shall be present at the hearing except for reason of medical inability. Emotional or psychological instability is not good cause for the absence of the proposed conservatee from the hearing unless, by reason of the instability, attendance at the hearing is likely to cause serious and immediate physiological damage to the proposed conservatee.

#### **CAL. PROB. CODE § 1957 (2011)**

To the greatest extent possible, the court shall elicit and take into account the views of the individual for whom sterilization is proposed in determining whether sterilization is to be authorized.

**CAL. PROB. CODE § 1958 (2011)**

The court may authorize the conservator of a person proposed to be sterilized to consent to the sterilization of that person only if the court finds that the petitioner has established all of the following beyond a reasonable doubt:

- (a) The person named in the petition is incapable of giving consent to sterilization, as defined in Section 1951, and the incapacity is in all likelihood permanent.
- (b) Based on reasonable medical evidence, the individual is fertile and capable of procreation.
- (c) The individual is capable of engaging in, and is likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy.
- (d) Either of the following:
  - (1) The nature and extent of the individual's disability as determined by empirical evidence and not solely on the basis of any standardized test, renders him or her permanently incapable of caring for a child, even with appropriate training and reasonable assistance.
  - (2) Due to a medical condition, pregnancy or childbirth would pose a substantially elevated risk to the life of the individual to such a degree that, in the absence of other appropriate methods of contraception, sterilization would be deemed medically necessary for an otherwise nondisabled woman under similar circumstances.
- (e) All less invasive contraceptive methods including supervision are unworkable even with training and assistance, inapplicable, or medically contraindicated. Isolation and segregation shall not be considered as less invasive means of contraception.
- (f) The proposed method of sterilization entails the least invasion of the body of the individual.
- (g) The current state of scientific and medical knowledge does not suggest either (1) that a reversible sterilization procedure or other less drastic contraceptive method will shortly be available, or (2) that science

is on the threshold of an advance in the treatment of the individual's disability.

(h) The person named in the petition has not made a knowing objection to his or her sterilization. For purposes of this subdivision, an individual may be found to have knowingly objected to his or her sterilization notwithstanding his or her inability to give consent to sterilization as defined in Section 1951. In the case of persons who are nonverbal, have limited verbal ability to communicate, or who rely on alternative modes of communication, the court shall ensure that adequate effort has been made to elicit the actual views of the individual by the facilitator appointed pursuant to Section 1954.5, or by any other person with experience in communicating with developmentally disabled persons who communicate using similar means.

**CAL. PROB. CODE § 1959 (2011)**

The fact that, due to the nature or severity of his or her disability, a person for whom an authorization to consent to sterilization is sought may be vulnerable to sexual conduct by others that would be deemed unlawful, shall not be considered by the court in determining whether sterilization is to be authorized under this chapter.

**CAL. PROB. CODE § 1960 (2011)**

If the person named in the petition already has a conservator, the court may authorize that person to consent to sterilization or may appoint another person as limited conservator under the provisions of this chapter. The court shall ensure that the person or agency designated as conservator under this chapter is capable of adequately representing and safeguarding the interests of the conservatee.

**CAL. PROB. CODE § 1961 (2011)**

A sterilization procedure authorized under this chapter shall not include hysterectomy or castration. However, if the report prepared under Section 1955 indicates that hysterectomy or castration is a medically necessary treatment, regardless of the need for sterilization, the court shall proceed pursuant to Section 2357.

**CAL. PROB. CODE § 1962 (2011)**

(a) Any court order granting a petition under this chapter shall be accompanied by a written statement of decision pursuant to Section 632 of the Code of Civil Procedure detailing the factual and legal bases for the court's determination on each of the findings required under Section 1958.

(b) When a judgment authorizing the conservator of a person to consent to the sterilization is rendered, an appeal is automatically taken by the person proposed to be sterilized without any action by that person, or by his or her counsel. The Judicial Council shall provide by rule for notice of and procedure for the appeal. The appeal shall have precedence over other cases in the court in which the appeal is pending.

**CAL. PROB. CODE § 1963 (2011)**

(a) At the conclusion of the hearing, the court, after inquiring into financial ability, may make an order based upon their ability that any one or more of the following persons pay court costs and fees in whole or in part as in the opinion of the court is proper and in any installments and manner which is both reasonable and compatible with ability to pay:

(1) The person to whom the petition applies.

(2) The petitioner.

(3) Any person liable for the support and maintenance of the person to whom the petition applies.

(b) An order under subdivision (a) may be enforced in the same manner as a money judgment.

(c) For the purposes of this section, court costs and fees include the costs of any examination or investigation ordered by the court, expert witnesses' fees, and the costs and fees of the court-appointed public defender or private counsel representing the person to whom the petition applies.

(d) Any fees and costs not ordered to be paid by persons under

subdivision (a) are a charge against and paid out of the treasury of the county on order of the court.

**CAL. PROB. CODE § 1964 (2011)**

An order of the court authorizing a conservator to consent to sterilization which is upheld on appeal automatically expires in one year from the final determination on appeal unless earlier terminated by the court. A conservatorship established for the sole purpose of authorizing a conservator to consent to sterilization under this chapter shall automatically terminate upon completion of the sterilization procedure or upon expiration of the court's order authorizing the conservator to consent to sterilization, whichever occurs first. If, upon the expiration of the court's order under this chapter, the person named as conservator determines that the conservatorship is still required for the purpose of this chapter, he or she may petition the court for reappointment as conservator for a succeeding six-month period upon a showing of good cause as to why any sterilization authorized by the court has not been completed.

**CAL. PROB. CODE § 1965 (2011)**

Any court order made pursuant to this chapter granting authority to consent to sterilization shall be stayed pending a final determination on appeal.

**CAL. PROB. CODE § 1966 (2011)**

After the filing of a first petition for sterilization pursuant to this chapter and a determination by the court that any one or more of the conditions required in Section 1958 has not been proven beyond a reasonable doubt, and that therefore authorization for the proposed sterilization should not be given by the court, a subsequent petition may be filed only on the showing of a material change in circumstances.

**CAL. PROB. CODE § 1967 (2011)**

(a) The sterilization of a person in accordance with this chapter does not render the petitioner or any person participating in the conservatorship proceedings or sterilization liable, either civilly or criminally, except for any injury caused by negligent or willful misconduct in the performance of the sterilization.

(b) Notwithstanding the provisions of subdivision (a), any individual who petitions for authorization to consent to sterilization knowing that the person to whom the petition relates is capable of giving consent to sterilization as defined in Section 1951 is guilty of a misdemeanor, and may be civilly liable to the person concerning whom sterilization was sought.

**CAL. PROB. CODE § 1968 (2011)**

This chapter does not prohibit medical treatment or surgery required for other medical reasons and in which sterilization is an unavoidable or medically probable consequence, but is not the object of the treatment or surgery.

**CAL. PROB. CODE § 1969 (2011)**

Nothing in this chapter shall infringe on the right of persons with developmental disabilities who are capable of giving consent to sterilization to give that consent without the necessity of a court order or substitute decisionmaker.

**CAL. PROB. CODE § 2354 (2011)**

(a) If the conservatee has not been adjudicated to lack the capacity to give informed consent for medical treatment, the conservatee may consent to his or her medical treatment. The conservator may also give consent to the medical treatment, but the consent of the conservator is not required if the conservatee has the capacity to give informed consent to the medical treatment, and the consent of the conservator alone is not sufficient under this subdivision if the conservatee objects to the medical treatment.

(b) The conservator may require the conservatee to receive medical treatment, whether or not the conservatee consents to the treatment, if a court order specifically authorizing the medical treatment has been obtained pursuant to Section 2357.

(c) The conservator may consent to medical treatment to be performed upon the conservatee, and may require the conservatee to receive the medical treatment, in any case where the conservator determines in good faith based upon medical advice that the case is an emergency case in which the medical treatment is required because (1) the treatment is required for the alleviation of severe pain or (2) the conservatee has a medical condition which, if not immediately diagnosed and treated, will lead to serious disability or death. In such a case, the consent of the conservator alone is sufficient and no person is liable because the medical treatment is performed upon the conservatee without the conservatee's consent.

**CAL. PROB. CODE § 2355 (2011)**

(a) If the conservatee has been adjudicated to lack the capacity to make health care decisions, the conservator has the exclusive authority to make health care decisions for the conservatee that the conservator in good faith based on medical advice determines to be necessary. The conservator shall make health care decisions for the conservatee in accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known to the conservator. Otherwise, the conservator shall make the decision in accordance with the conservator's determination of the conservatee's best interest. In determining the conservatee's best interest, the conservator shall consider the conservatee's personal values to the extent known to the conservator. The conservator may require the conservatee to receive the health care, whether or not the conservatee objects. In this case, the health care decision of the conservator alone is sufficient and no person is liable because the health care is administered to the conservatee without the conservatee's consent. For the purposes of this subdivision, "health care" and "health care decision" have the meanings provided in Sections 4615 and 4617, respectively.

(b) If prior to the establishment of the conservatorship the conservatee was an adherent of a religion whose tenets and practices call for reliance

on prayer alone for healing, the treatment required by the conservator under the provisions of this section shall be by an accredited practitioner of that religion.

**CAL. PROB. CODE § 2356 (2011)**

(a) No ward or conservatee may be placed in a mental health treatment facility under this division against the will of the ward or conservatee. Involuntary civil placement of a ward or conservatee in a mental health treatment facility may be obtained only pursuant to Chapter 2 (commencing with Section 5150) or Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code. Nothing in this subdivision precludes the placing of a ward in a state hospital under Section 6000 of the Welfare and Institutions Code upon application of the guardian as provided in that section. The Director of Mental Health shall adopt and issue regulations defining “mental health treatment facility” for the purposes of this subdivision.

(b) No experimental drug as defined in Section 111515 of the Health and Safety Code may be prescribed for or administered to a ward or conservatee under this division. Such an experimental drug may be prescribed for or administered to a ward or conservatee only as provided in Article 4 (commencing with Section 111515) of Chapter 6 of Part 5 of Division 104 of the Health and Safety Code.

(c) No convulsive treatment as defined in Section 5325 of the Welfare and Institutions Code may be performed on a ward or conservatee under this division. Convulsive treatment may be performed on a ward or conservatee only as provided in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code.

(d) No minor may be sterilized under this division.

(e) This chapter is subject to a valid and effective advance health care directive under the Health Care Decisions Law (Division 4.7 (commencing with Section 4600)).

**CAL. PROB. CODE § 4651 (2011)**

(a) Except as otherwise provided, this division applies to health care decisions for adults who lack capacity to make health care decisions for themselves.

(b) This division does not affect any of the following:

(1) The right of an individual to make health care decisions while having the capacity to do so.

(2) The law governing health care in an emergency.

(3) The law governing health care for unemancipated minors.

**CAL. PROB. CODE § 4652 (2011)**

This division does not authorize consent to any of the following on behalf of a patient:

(a) Commitment to or placement in a mental health treatment facility.

(b) Convulsive treatment (as defined in Section 5325 of the Welfare and Institutions Code).

(c) Psychosurgery (as defined in Section 5325 of the Welfare and Institutions Code).

(d) Sterilization.

(e) Abortion.



**X. EXCERPTS FROM THE CALIFORNIA WELFARE & INSTITUTIONS CODE**

**CAL. WELF. & INST. CODE § 220 (2011)**

No condition or restriction upon the obtaining of an abortion by a female detained in any local juvenile facility, pursuant to the Therapeutic Abortion Act (Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code),<sup>1</sup> other than those contained in that act, shall be imposed. Females found to be pregnant and desiring abortions, shall be permitted to determine their eligibility for an abortion pursuant to law, and if determined to be eligible, shall be permitted to obtain an abortion.

For the purposes of this section, "local juvenile facility" means any city, county, or regional facility used for the confinement of female juveniles for more than 24 hours.

The rights provided for females by this section shall be posted in at least one conspicuous place to which all females have access.

**CAL. WELF. & INST. CODE § 222 (2011)**

(a) Any female in the custody of a local juvenile facility shall have the right to summon and receive the services of any physician and surgeon of her choice in order to determine whether she is pregnant. If she is found to be pregnant, she is entitled to a determination of the extent of the medical services needed by her and to the receipt of those services from the physician and surgeon of her choice. Any expenses occasioned by the services of a physician and surgeon whose services are not provided by the facility shall be borne by the female.

(b) A ward shall not be shackled by the wrists, ankles, or both during labor, including during transport to a hospital, during delivery, and while in recovery after giving birth, subject to the security needs described in this section. Pregnant wards temporarily taken to a hospital outside the

<sup>1</sup> The Therapeutic Abortion Act, CAL. HEALTH & SAFETY CODE §§ 123400–123415; 123430 was repealed in 2002. See CAL. HEALTH & SAFETY CODE §§ 123418, 123420, 123435–123450; The Reproductive Privacy Act, CAL. HEALTH & SAFETY CODE §§ 123460–123468 (2011).

facility for the purposes of childbirth shall be transported in the least restrictive way possible, consistent with the legitimate security needs of each ward. Upon arrival at the hospital, once the ward has been declared by the attending physician to be in active labor; the ward shall not be shackled by the wrists, ankles, or both, unless deemed necessary for the safety and security of the ward, the staff, and the public.

(c) For purposes of this section, “local juvenile facility” means any city, county, or regional facility used for the confinement of juveniles for more than 24 hours.

(d) The rights provided to females by this section shall be posted in at least one conspicuous place to which all female wards have access.

#### **CAL. WELF. & INST. CODE § 1773 (2011)**

(a) No condition or restriction upon the obtaining of an abortion by a female committed to the Division of Juvenile Facilities, pursuant to the Therapeutic Abortion Act (Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code),<sup>2</sup> other than those contained in that act, shall be imposed. Females found to be pregnant and desiring abortions shall be permitted to determine their eligibility for an abortion pursuant to law, and if determined to be eligible, shall be permitted to obtain an abortion.

(b) The rights provided for females by this section shall be posted in at least one conspicuous place to which all females have access.

#### **CAL. WELF. & INST. CODE § 1774 (2011)**

(a) Any female who has been committed to the authority shall have the right to summon and receive the services of any physician and surgeon of her choice in order to determine whether she is pregnant. The director may adopt reasonable rules and regulations with regard to the conduct of examinations to effectuate that determination.

(b) If she is found to be pregnant, she is entitled to a determination of the extent of the medical services needed by her and to the receipt

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<sup>2</sup> *Id.*

of those services from the physician and surgeon of her choice. Any expenses occasioned by the services of a physician and surgeon whose services are not provided by the facility shall be borne by the female.

(c) A ward who gives birth while under the jurisdiction of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, or a community treatment program has the right to the following services:

- (1) Prenatal care.
- (2) Access to prenatal vitamins.
- (3) Childbirth education.

(d) A ward shall not be shackled by the wrists, ankles, or both during labor, including during transport to a hospital, during delivery, and while in recovery after giving birth, subject to the security needs described in this section. Pregnant wards temporarily taken to a hospital outside the facility for the purposes of childbirth shall be transported in the least restrictive way possible, consistent with the legitimate security needs of each ward. Upon arrival at the hospital, once the ward has been declared by the attending physician to be in active labor, the ward shall not be shackled by the wrists, ankles, or both, unless deemed necessary for the safety and security of the ward, the staff, and the public.

(e) Any physician providing services pursuant to this section shall possess a current, valid, and unrevoked certificate to engage in the practice of medicine issued pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.

(f) The rights provided to females by this section shall be posted in at least one conspicuous place to which all female wards have access.

### **CAL. WELF. & INST. CODE § 5358 (2011)**

(a) (1) When ordered by the court after the hearing required by this section, a conservator appointed pursuant to this chapter shall place his or her conservatee as follows:

(A) For a conservatee who is gravely disabled, as defined in subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008, in the least restrictive alternative placement, as designated by the court.

(B) For a conservatee who is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008, in a placement that achieves the purposes of treatment of the conservatee and protection of the public.

(2) The placement may include a medical, psychiatric, nursing, or other state-licensed facility, or a state hospital, county hospital, hospital operated by the Regents of the University of California, a United States government hospital, or other nonmedical facility approved by the State Department of Mental Health or an agency accredited by the State Department of Mental Health, or in addition to any of the foregoing, in cases of chronic alcoholism, to a county alcoholic treatment center.

(b) A conservator shall also have the right, if specified in the court order, to require his or her conservatee to receive treatment related specifically to remedying or preventing the recurrence of the conservatee's being gravely disabled, or to require his or her conservatee to receive routine medical treatment unrelated to remedying or preventing the recurrence of the conservatee's being gravely disabled. Except in emergency cases in which the conservatee faces loss of life or serious bodily injury, no surgery shall be performed upon the conservatee without the conservatee's prior consent or a court order obtained pursuant to Section 5358.2 specifically authorizing that surgery.

(c) (1) For a conservatee who is gravely disabled, as defined in subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008, if the conservatee is not to be placed in his or her own home or the home of a relative, first priority shall be to placement in a suitable facility as close as possible to his or her home or the home of a relative. For the purposes of this section, suitable facility means the least restrictive residential placement available and necessary to achieve the purpose of treatment. At the time that the court considers the report of the officer providing conservatorship investigation specified in Section 5356, the court shall consider available placement alternatives. After considering all the evidence the court shall determine the least restrictive and most appropriate alternative placement for the conservatee. The court shall

also determine those persons to be notified of a change of placement. The fact that a person for whom conservatorship is recommended is not an inpatient shall not be construed by the court as an indication that the person does not meet the criteria of grave disability.

(2) For a conservatee who is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008, first priority shall be placement in a facility that achieves the purposes of treatment of the conservatee and protection of the public. The court shall determine the most appropriate placement for the conservatee. The court shall also determine those persons to be notified of a change of placement, and additionally require the conservator to notify the district attorney or attorney representing the originating county prior to any change of placement.

(3) For any conservatee, if requested, the local mental health director shall assist the conservator or the court in selecting a placement facility for the conservatee. When a conservatee who is receiving services from the local mental health program is placed, the conservator shall inform the local mental health director of the facility's location and any movement of the conservatee to another facility.

(d) (1) Except for a conservatee who is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008, the conservator may transfer his or her conservatee to a less restrictive alternative placement without a further hearing and court approval. In any case in which a conservator has reasonable cause to believe that his or her conservatee is in need of immediate more restrictive placement because the condition of the conservatee has so changed that the conservatee poses an immediate and substantial danger to himself or herself or others, the conservator shall have the right to place his or her conservatee in a more restrictive facility or hospital. Notwithstanding Section 5328, if the change of placement is to a placement more restrictive than the court-determined placement, the conservator shall provide written notice of the change of placement and the reason therefor to the court, the conservatee's attorney, the county patient's rights advocate and any other persons designated by the court pursuant to subdivision (c).

(2) For a conservatee who is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008, the conservator

may not transfer his or her conservatee without providing written notice of the proposed change of placement and the reason therefor to the court, the conservatee's attorney, the county patient's rights advocate, the district attorney of the county that made the commitment, and any other persons designated by the court to receive notice. If any person designated to receive notice objects to the proposed transfer within 10 days after receiving notice, the matter shall be set for a further hearing and court approval. The notification and hearing is not required for the transfer of persons between state hospitals.

(3) At a hearing where the conservator is seeking placement to a less restrictive alternative placement pursuant to paragraph (2), the placement shall not be approved where it is determined by a preponderance of the evidence that the placement poses a threat to the safety of the public, the conservatee, or any other individual.

(4) A hearing as to placement to a less restrictive alternative placement, whether requested pursuant to paragraph (2) or pursuant to Section 5358.3, shall be granted no more frequently than is provided for in Section 5358.3.

### **CAL. WELF. & INST. CODE § 5358.2 (2011)**

If a conservatee requires medical treatment and the conservator has not been specifically authorized by the court to require the conservatee to receive medical treatment, the conservator shall, after notice to the conservatee, obtain a court order for that medical treatment, except in emergency cases in which the conservatee faces loss of life or serious bodily injury. The conservatee, if he or she chooses to contest the request for a court order, may petition the court for hearing which shall be held prior to granting the order.

## **XI. EXCERPTS FROM THE CALIFORNIA CODE OF REGULATIONS**

### **Title 5**

#### **CAL. CODE REGS. tit. 5, § 4950 (2011)**

An educational institution shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(a) An educational institution shall not exclude or deny any student from any educational program or activity including class or extracurricular activity solely on the basis of a student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom.

(b) An educational institution may require a student to obtain the certification of a physician or nurse practitioner that the student is physically and emotionally able to continue participation in the regular program or activity.

(c) Voluntary Alternative Program. Pregnant minors and minor parents shall not be required to participate in pregnant minor programs or alternative educational programs. Such minors who do voluntarily participate in such alternative programs shall be given educational programs, activities and courses equal to those they would have been in if participating in the regular program.

(d) Any educational institution shall treat pregnancy, child birth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disabling condition.

Note: Authority cited: Sections 232 and 33031, Education Code; and Section 11138, Government Code. Reference: Section 230, Education Code; and 34 CFR 106.

## **Title 15**

### **CAL. CODE REGS. tit. 15, § 1122 (2011)**

The health administrator, in cooperation with the facility administrator, shall develop written policies and procedures to assure that reproductive health services are available to both male and female minors in jails.

Such services shall include, but not be limited to, those prescribed by Welfare and Institutions Code Sections 220, 221 and 222 and Health and Safety Code Section 123450.<sup>1</sup>

Note: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.

### **CAL. CODE REGS. tit. 15, § 1416 (2011)**

For all juvenile facilities, the health administrator, in cooperation with the facility administrator, shall develop written policies and procedures to assure that reproductive health services are available to both male and female minors.

Such services shall include but not be limited to those prescribed by Welfare and Institutions Code Sections 220, 221 and 222 and Health and Safety Code Section 123450.<sup>2</sup>

Note: Authority cited: Sections 210 and 885, Welfare and Institutions Code; and Assembly Bill 1397, Chapter 12, Statutes of 1996. Reference: Section 209, Welfare and Institutions Code; 1995-96 Budget Act, Chapter 303, Item Number 5430-001-001, Statutes of 1995; Assembly Bill 904, Chapter 304, Statutes of 1995; and Assembly Bill 1397, Chapter 12, Statutes of 1996.

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<sup>1</sup> See *Am. Acad. of Pediatrics v. Lungren*, 16 Cal.4th 307 (1997) (holding that the California Constitution's right of privacy precludes requiring young women to obtain parental or judicial consent for abortion).

<sup>2</sup> *Id.*

**CAL. CODE REGS. tit. 15, § 4736 (2011)**

A female ward in a facility setting who is found to be pregnant and desiring an abortion shall be permitted to determine her eligibility for an abortion pursuant to law, including Article 2, Chapter 2, Division 106 of the Health and Safety Code,<sup>3</sup> and, when determined to be eligible, shall be permitted to obtain an abortion.

(a) Facilities in which female wards reside shall maintain a procedure to:

(1) Advise the ward of the pregnancy and determine necessary steps to assist her in obtaining services pursuant to Article 2, Chapter 2, Division 106 of the Health and Safety Code.<sup>4</sup>

(2) Obtain the services of an independent agency, e.g., Planned Parenthood, to provide counseling and information when the ward indicates she wishes to consider an abortion.

(A) Place the ward in contact with the outside agency and

(B) Provide transportation, if necessary.

(b) When the ward chooses to have an abortion, an independent agency shall be contacted, and arrangements will be made for the abortion by that agency.

(1) Financial arrangements shall be as follows:

(A) The ward assumes financial responsibility, or

(B) The staff arranges to return the ward to the county of commitment, if the ward is a diagnostic commitment pursuant to Sections 704 or 707.2 of the Welfare and Institutions Code.

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<sup>3</sup> The Therapeutic Abortion Act, CAL. HEALTH & SAFETY CODE § 123400–123450, was repealed in 2002. See CAL. HEALTH & SAFETY CODE §§ 123418 et seq. (2011); see also The Reproductive Privacy Act, CAL. HEALTH & SAFETY CODE §§ 123460–123468 (2011).

<sup>4</sup> *Id.*

(2) When the ward is unable to pay her own expenses, staff shall explore available financial resources, such as payment by a parent or guardian or medical insurance. When the ward has inadequate or no financial resources, the Youth Authority shall provide the necessary funds to cover the medical expenses.

(3) Staff shall provide transportation and security coverage as necessary.

(4) Staff shall arrange for appropriate medical follow-up, if required.

Note: Authority cited: Section 1712, Welfare and Institutions Code. Reference: Sections 1002, 1004, 1752, 1753 and 1755, Welfare and Institutions Code; and Article 2, Chapter 2, Division 106, Health and Safety Code.

## **Title 16**

### **CAL. CODE REGS. tit. 16, § 1399.541 (2011)**

Because physician assistant practice is directed by a supervising physician, and a physician assistant acts as an agent for that physician, the orders given and tasks performed by a physician assistant shall be considered the same as if they had been given and performed by the supervising physician. Unless otherwise specified in these regulations or in the delegation or protocols, these orders may be initiated without the prior patient specific order of the supervising physician. In any setting, including for example, any licensed health facility, out-patient settings, patients' residences, residential facilities, and hospices, as applicable, a physician assistant may, pursuant to a delegation and protocols where present:

(a) Take a patient history; perform a physical examination and make an assessment and diagnosis therefrom; initiate, review and revise treatment and therapy plans including plans for those services described in Section 1399.541(b) through Section 1399.541(i) inclusive; and record and present pertinent data in a manner meaningful to the physician.

(b) Order or transmit an order for x-ray, other studies, therapeutic diets, physical therapy, occupational therapy, respiratory therapy, and nursing services.

- (c) Order, transmit an order for, perform, or assist in the performance of laboratory procedures, screening procedures and therapeutic procedures.
- (d) Recognize and evaluate situations which call for immediate attention of a physician and institute, when necessary, treatment procedures essential for the life of the patient.
- (e) Instruct and counsel patients regarding matters pertaining to their physical and mental health. Counseling may include topics such as medications, diets, social habits, family planning, normal growth and development, aging, and understanding of and long-term management of their diseases.
- (f) Initiate arrangements for admissions, complete forms and charts pertinent to the patient's medical record, and provide services to patients requiring continuing care, including patients at home.
- (g) Initiate and facilitate the referral of patients to the appropriate health facilities, agencies, and resources of the community.
- (h) Administer or provide medication to a patient, or issue or transmit drug orders orally or in writing in accordance with the provisions of subdivisions (a)-(f), inclusive, of Section 3502.1 of the Code.
- (i) (1) Perform surgical procedures without the personal presence of the supervising physician which are customarily performed under local anesthesia. Prior to delegating any such surgical procedures, the supervising physician shall review documentation which indicates that the physician assistant is trained to perform the surgical procedures. All other surgical procedures requiring other forms of anesthesia may be performed by a physician assistant only in the personal presence of an approved supervising physician.
- (2) A physician assistant may also act as first or second assistant in surgery under the supervision of an approved supervising physician.

Note authority cited: Sections 2018, 3502 and 3510, Business and Professions Code. Reference: Sections 2058, 3502 and 3502.1, Business and Professions Code.

## **Title 17**

### **CAL. CODE REGS. tit. 17, § 915 (2011)**

"Live birth" means the complete expulsion or extraction from its mother of a product of conception (irrespective of the duration of pregnancy) which, after such separation, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.

Note authority cited: Section 10001, Health and Safety Code. Reference: Sections 10100 and 10102, Health and Safety Code.<sup>5</sup>

### **CAL. CODE REGS. tit. 17, § 916 (2011)**

"Fetal death" means a death prior to the complete expulsion or extraction from its mother of a product of conception (irrespective of the duration of pregnancy); the death is indicated by the fact that after such separation, the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles. Registration of fetal deaths is subject to the provisions of Division 9, Chapter 4 of the Health and Safety Code.

Note authority cited: Section 10001, Health and Safety Code. Reference: Section 10175, Health and Safety Code.<sup>6</sup>

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<sup>5</sup> CAL. HEALTH & SAFETY CODE § 102415 (2011) (This provision effectively repealed CAL. HEALTH & SAFETY CODE §§ 10001, 10100, and 10102 in 1995.).

<sup>6</sup> CAL. HEALTH & SAFETY CODE § 102950 (2011) (This statute repealed CAL. HEALTH & SAFETY CODE §§ 10001 and 10175 in 1995.).

**CAL. CODE REGS. tit. 17, § 100085 (2011)**

Fetal tissue shall be procured in accordance with 17 Cal. Code of Regs. Section 100080, subdivision (a)(2). In addition, research involving human fetal tissue will adhere to the following provisions:

(a) The woman who donates the fetal tissue must sign a statement declaring:

(1) That the donation is being made for research purposes, and

(2) The donation is made without any restriction regarding who may be the recipient(s) of materials derived from the tissue; and

(b) The attending physician must:

(1) Sign a statement that he or she has obtained the tissue in accordance with the donor's signed statement. In the case of tissue obtained pursuant to an induced abortion, the physician must sign a statement stating that he or she:

(A) Obtained the woman's consent for the abortion before requesting or obtaining consent for the tissue to be used for research;

(B) Did not alter the timing, method, or procedures used to terminate the pregnancy solely for the purpose of obtaining the tissue for research; and

(C) Performed the abortion in accordance with applicable law.

(2) Disclose to the donor any financial interest that the attending physician has in the research to be conducted with the tissue.

(3) Disclose any known medical risks to the donor or risks to her privacy that might be associated with the donation of the tissue and that are in addition to risks of such type that are associated with the woman's medical care.

(c) The principal investigator of the research project must sign a statement certifying that he or she:

- (1) Is aware that the tissue is human fetal tissue obtained in a spontaneous or induced abortion or pursuant to a stillbirth;
- (2) Is aware that the tissue was donated for research purposes;
- (3) Had no part in any decisions as to the timing, method, or procedures used to terminate the pregnancy; and
- (4) Is not the donor's attending physician.

Note: Authority cited: California Constitution, article XXXV; and Section 125290.40(j), Health and Safety Code. Reference: Sections 125290.35, 125290.40, 125290.55 and 125300, Health and Safety Code.

## **Title 22**

*California Medical Assistance Program (Medi-Cal) – Excerpts from Title 22 of the California Code of Regulations*

### **CAL. CODE REGS. tit. 22, § 51305.1 (2011)**

- (a) A sterilization shall be performed only if the following conditions are met:
- (1) The individual is at least 21 years old at the time consent is obtained.
  - (2) The individual is not a mentally incompetent individual.
  - (3) The individual is able to understand the content and nature of the informed consent process as specified in 51305.3.
  - (4) The individual is not an institutionalized individual.
  - (5) The individual has voluntarily given informed consent in accordance with all the requirements prescribed in Section 51305.1 through 51305.4.
  - (6) At least 30 days, but not more than 180 days, have passed between the date of written informed consent and the date of the sterilization, except in the following instances:

(A) Sterilization may be performed at the time of emergency abdominal surgery if the following requirements are met:

1. The written informed consent to be sterilized was given at least 30 days before the individual intended to be sterilized.
2. At least 72 hours have passed after written informed consent to be sterilized was given.

(B) Sterilization may be performed at the time of premature delivery if the following requirements are met:

1. The written informed consent was given at least 30 days before the expected date of the delivery.
2. At least 72 hours have passed after written informed consent to be sterilized was given.

(b) For the purposes of this section the following definitions apply:

(1) Mentally incompetent individual means an individual who has been declared mentally incompetent by a federal, State or local court of competent jurisdiction for any purpose, unless the individual has been declared competent for purposes which include the ability to consent to sterilization.

(2) Institutionalized individual means an individual who is:

(A) Involuntarily confined or detained, under a civil or criminal statute, in a correctional or rehabilitative facility, including a mental hospital or other facility for the care and treatment of mental illness.

(B) Confined, under a voluntary commitment, in a mental hospital or other facility for the care and treatment of mental illness.

**CAL. CODE REGS. tit. 22, § 51305.3 (2011)**

(a) An individual has given informed consent only if:

(1) The person who obtained consent for the sterilization procedure:

(A) Offered to answer any questions the individual to be sterilized may have concerning the procedure.

(B) Provided the individual with a copy of the consent form and the booklet on sterilization published by the Department.

(C) Provided orally all of the following to the individual to be sterilized:

1. Advice that the individual is free to withhold or withdraw consent to the procedure at any time before the sterilization without affecting the right to future care or treatment and without loss or withdrawal of any federally funded program benefits to which the individual might be otherwise entitled.

2. A full description of available alternative methods of family planning and birth control.

3. Advice that the sterilization procedure is considered to be irreversible.

4. A thorough explanation of the specific sterilization procedure to be performed.

5. A full description of the discomforts and risks that may accompany or follow the performing of the procedure, including an explanation of the type and possible effects of any anesthetic to be used.

6. A full description of the benefits or advantages that may be expected as a result of the sterilization.

7. Approximate length of hospital stay.

8. Approximate length of time for recovery.

9. Financial cost to the patient.

10. Information that the procedure is established or new.

11. Advice that the sterilization will not be performed for at least 30 days, except under the circumstances specified in Section 51305.1.

12. The name of the physician performing the procedure. If another physician is to be substituted, the patient shall be notified, prior to administering pre-anesthetic medication, of the physician's name and the reason for the change in physician.

(2) Suitable arrangements were made to ensure that the information specified in (a)(1) was effectively communicated to any individual who is blind, deaf, or otherwise handicapped.

(3) An interpreter was provided if the individual to be sterilized did not understand the language used on the consent form or the language used by the person obtaining consent.

(4) The individual to be sterilized was permitted to have a witness of the individual's choice present when consent was obtained.

(5) The sterilization operation was requested without fraud, duress, or undue influence.

(6) The consent form requirements of Section 51305.4 were met.

(b) Informed consent may not be obtained while the individual to be sterilized is:

(1) In labor or within 24 hours postpartum or post-abortion.

(2) Seeking to obtain or obtaining an abortion.

(A) Seeking to obtain means that period of time during which the abortion decision and the arrangements for the abortion are being made.

(B) Obtaining an abortion means that period of time during which an individual is undergoing the abortion procedure, including any period during which preoperative medication is administered.

(3) Under the influence of alcohol or other substances that affect the

individual's state of awareness.

(c) The informed consent process may be conducted either by a physician or by the physician's designee.

(d) A copy of the signed consent form shall be:

(1) Provided to the patient.

(2) Retained by the physician and the hospital in the patient's medical records.

(3) Attached to the physician's billing form.

Note: Authority cited: Sections 14105, 14124.5 and 14191, Welfare and Institutions Code. Reference: Sections 14053, 14053.6, 14059, 14105, 14124.5, 14132, 14184<sup>7</sup> and 14191, Welfare and Institutions Code.

**CAL. CODE REGS. tit. 22, § 51305.4 (2011)**

(a) The Consent Form, provided by the Department in English and Spanish, shall be the only approved form and shall be signed and dated by the:

(1) Individual to be sterilized.

(2) Interpreter, if one is provided.

(3) Person who obtained the consent.

(4) Physician who performed the sterilization procedure.

(b) The person securing consent shall certify, by signing the Consent Form, to have personally:

(1) Advised the individual to be sterilized, before the individual to be sterilized signed the Consent Form, that no federal benefits may be withdrawn because of the decision not to be sterilized.

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<sup>7</sup> CAL. WELF. & INST. CODE § 14184 was repealed in 1990.

(2) Explained orally the requirements for informed consent to the individual to be sterilized as set forth on the Consent Form and in Section 51305.3.

(3) Determined, to the best of his or her knowledge and belief, that the individual to be sterilized appeared mentally competent and knowingly and voluntarily consented to be sterilized.

(c) The physician performing the sterilization shall certify, by signing the Consent Form, that:

(1) The physician, shortly before the performance of the sterilization, advised the individual to be sterilized that federal benefits shall not be withheld or withdrawn because of a decision not to be sterilized.

(2) The physician explained orally the requirements for informed consent as set forth on the Consent Form.

(3) To the best of the physician's knowledge and belief, the individual to be sterilized appeared mentally competent and knowingly and voluntarily consented to be sterilized.

(4) At least 30 days have passed between the date of the individual's signature on the Consent Form and the date upon which the sterilization was performed, except in the following instances:

(A) Sterilization may be performed at the time of emergency abdominal surgery if the physician:

1. Certifies that the written informed consent to be sterilized was given at least 30 days before the individual intended to be sterilized.

2. Certifies that at least 72 hours have passed after written informed consent to be sterilized was given.

3. Describes the emergency on the Consent Form.

(B) Sterilization may be performed at the time of premature delivery if the physician certifies that:

1. The written informed consent was given at least 30 days before the expected date of the delivery. The physician shall state the expected date of delivery on the Consent Form.

2. At least 72 hours have passed after written informed consent to be sterilized was given.

(d) The interpreter, if one is provided, shall certify that the interpreter:

(1) Transmitted the information and advice presented orally to the individual to be sterilized.

(2) Read the Consent Form and explained its contents to the individual to be sterilized.

(3) Determined, to the best of the interpreter's knowledge and belief, that the individual to be sterilized understood what the interpreter told the individual.

(e) The person who obtains consent shall provide the individual to be sterilized with a copy of the booklet on sterilization, provided by the Department in English and Spanish, before obtaining consent.

(f) For the purposes of this section, shortly before means a period within 72 hours prior to the time the patient receives any preoperative medication.

*Acute Care Hospitals – Excerpts from Title 22 of the California Code of Regulations*

**CAL. CODE REGS. tit. 22, § 70707.1 (2011)**

(a) A sterilization shall be performed only if the following conditions are met:

(1) The individual is at least 18 years old at the time the consent is obtained, or the individual is under 18 and:

(A) Has entered into a valid marriage, whether or not such marriage was terminated by dissolution; or

(B) Is on active duty with the United States armed services; or

(C) Is over 15 years old, lives apart from his or her parents or guardian(s) manages, his or her own financial affairs; or

(D) Has received a declaration of emancipation pursuant to Section 64 of the Civil Code.

(2) The individual is able to understand the content and nature of the informed consent process as specified in 70707.3.

(3) The individual has voluntarily given informed consent in accordance with all the requirements prescribed in Sections 70707.1 through 70707.6.

(4) At least 30 days, but not more than 180 days, have passed between the date of informed consent and the date of the sterilization, except in the following instances.

(A) Sterilization may be performed at the time of emergency abdominal surgery if the following requirements are met:

1. The written informed consent to be sterilized was given at least 30 days before the individual intended to be sterilized.

2. At least 72 hours have passed after written informed consent to be sterilized was given.

(B) Sterilization may be performed at the time of premature delivery if the following requirements are met:

1. The written informed consent was given at least 30 days before the expected date of the delivery.

2. At least 72 hours have passed after written informed consent to be sterilized was given.

(C) The patient voluntarily requests in writing that the procedure be performed in less than 30 days. However, in no case shall a sterilization be performed in less than 72 hours following the signing of the consent form.

Note: Authority cited: Sections 208, 1275, 1276, Health and Safety Code. Reference: Sections 1250 et seq., Health and Safety Code; Sections 25.6, 25.7, 34.6, and 63, Civil Code.

**CAL. CODE REGS. tit. 22, § 70707.3 (2011)**

(a) An individual has given informed consent only if:

(1) The person who obtained consent for the sterilization procedure:

(A) Offered to answer any questions the individual to be sterilized may have concerning the procedure.

(B) Provided the individual with a copy of the consent form and the booklet on sterilization published by the Department.

(C) Provided orally all of the following to the individual to be sterilized:

1. Advice that the individual is free to withhold or withdraw consent to the procedure at any time before the sterilization without affecting the right to future care or treatment and without loss or withdrawal of any federally funded program benefits to which the individual might be otherwise entitled.

2. A full description of available alternative methods of family planning and birth control.

3. Advice that the sterilization procedure is considered to be irreversible.

4. A thorough explanation of the specific sterilization procedure to be performed.

5. A full description of the discomforts and risks that may accompany or follow the performing of the procedure, including an explanation of the type and possible effects of any anesthetic to be used.

6. A full description of the benefits or advantages that may be expected as a result of the sterilization.

7. Approximate length of hospital stay.

8. Approximate length of time for recovery.

9. Financial cost to the patient.

10. Information that the procedure is established or new.

11. Advice that the sterilization will not be performed for at least 30 days, except under the circumstances specified in Section 70707.1.

12. The name of the physician performing the procedure. If another physician is to be substituted, the patient shall be notified, prior to administering pre-anesthetic medication of the physician's name and the reason for the change in physician.

(2) Suitable arrangements were made to ensure that the information specified in (a)(1) was effectively communicated to any individual who is blind, deaf, or otherwise handicapped.

(3) An interpreter was provided if the individual to be sterilized did not understand the language used on the consent form or the language used by the person obtaining consent.

(4) The individual to be sterilized was permitted to have a witness of the individual's choice present when consent was obtained.

(5) The sterilization operation was requested without fraud, duress, or undue influence.

(6) The consent form requirements of Section 70707.4 were met.

(b) Informed consent may not be obtained while the individual to be sterilized is:

(1) In labor or within 24 hours postpartum or postabortion.

(2) Seeking to obtain or obtaining an abortion.

(A) Seeking to obtain means that period of time during which the abortion decision and the arrangement for the abortion are being made.

(B) Obtaining an abortion means that period of time during which the

individual is undergoing the abortion procedure, including any period during which preoperative medication is administered.

(3) Under the influence of alcohol or other substances that affect the individual's state of awareness.

(c) The informed consent process may be conducted either by a physician or by the physician's designee.

(d) A copy of the signed consent form shall be:

(1) Provided to the patient.

(2) Retained by the physician and the hospital in the patient's medical records.

(e) No person shall by reason of mental retardation alone be prevented from consenting to sterilization under this section.

Note: Authority cited: Sections 208(a),<sup>8</sup> 1275, and 1276, Health and Safety Code. Reference: Section 1250, Health and Safety Code.

*Primary Care Clinic Regulations for Abortion Service – Excerpts from Title 22 of the California Code of Regulations*

### **Cal. Code Regs. tit. 22, § 75040 (2011)**

#### **Abortion Service – General Requirements**

(a) Primary care clinics providing abortion services shall provide:

(1) Pre-abortion and post-abortion information and education sessions. These sessions shall include but not be limited to:

(A) How the abortion procedure is performed.

(B) Possible risks and complications.

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<sup>8</sup> CAL. HEALTH & SAFETY CODE § 208(a) was repealed in 1995; see CAL. HEALTH & SAFETY CODE § 100275 (2011) (codifying the California Department of Health Services' authority to adopt and enforce regulations for the execution of its duties).

- (C) Options or alternatives to abortion.
- (D) Post-procedure medical services.
- (E) Family planning information and education.
- (2) Laboratory Services.

(b) The physician shall make a gross examination of the aborted specimen and shall refer the specimen to a pathologist if no products of conception are visualized or if the tissue appears abnormal. Products of conception shall be disposed of after examination, in accordance with Section 75069.<sup>9</sup>

(c) Pre-abortion informational and educational sessions shall be documented in each patient's medical record and shall be signed and dated by the person providing this instruction and by the patient.

Note: Authority cited: Sections 208(a) and 1225, Health and Safety Code.  
Reference: Section 1226, Health and Safety Code.

### **Cal. Code Regs. tit. 22, § 75041 (2011)**

#### Abortion Service – Policies and Procedures

(a) The policies and procedures which the clinic shall implement shall include but not be limited to the following subjects:

- (1) Medical criteria for selection of patients.
- (2) Determination of pregnancy status.
- (3) Rh typing.
- (4) Information and education sessions for the patient before and after the abortion.
- (5) Post-abortion care of the patient in the recovery area.

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<sup>9</sup> CAL. CODE REGS. tit. 22, § 75069 (2011) regulates disposal of infectious waste.

(6) Referral and transfer of the patient to other agencies or programs for additional medical services and counseling beyond the scope of the clinic.

(7) Follow-up of patients after the abortion.

(8) Notice to patients that they must arrange for post-abortion transportation.

(9) Provision for family planning information and education.

Note: Authority cited: Sections 208(a) and 1225, Health and Safety Code.  
Reference: Section 1226, Health and Safety Code.

### **Cal. Code Regs. tit. 22, § 75042 (2011)**

#### Abortion Service – Equipment and Supplies

(a) There shall be adequate and appropriate equipment and supplies maintained to provide the services offered, including at least the following:

(1) Standard gynecological examination table.

(2) Pharyngeal suction equipment.

(3) Oxygen source and mask.

(4) Surgical instruments necessary for the performance of the abortion.

(5) Emergency medications.

(6) Appropriate intravenous fluids.

Note: Authority cited: Sections 208(a) and 1225, Health and Safety Code.  
Reference: Section 1226, Health and Safety Code.

**Cal. Code Regs. tit. 22, § 75043 (2011)**

Abortion Service – Staff

(a) A physician who is certified or eligible for certification by the American Board of Obstetrics and Gynecology or a physician with training and experience in performing abortions shall be responsible for the abortion service. This physician may also hold the position of professional director of the clinic. Only a physician responsible to the professional director of the clinic may perform abortions.

(b) A licensed nurse shall be present in the clinic when an abortion is performed.

(c) A system ensuring availability of staff for follow-up care or referral of patients shall be operative on a 24-hour basis.

Note: Authority cited: Sections 208(a) and 1225, Health and Safety Code.  
Reference: Section 1226, Health and Safety Code.

**Cal. Code Regs. tit. 22, § 75044 (2011)**

Abortion Service – Space

(a) Each abortion room shall have a floor area which can accommodate the patient, the equipment and supplies required in Section 75042 and the staff required in Section 75043.

(b) A post-abortion recovery area shall be maintained. The area shall be adequate for the number of patients recovering at any given time and shall provide privacy for those patients who request it.

(c) Space for a counseling area shall be maintained and may be the same area as the post-abortion recovery area. The counseling area shall provide privacy for those patients who request it.

(d) Provisions for the storage of patient's clothing and personal items shall be maintained.

Note: Authority cited: Sections 208(a) and 1225, Health and Safety Code.  
Reference: Section 1226, Health and Safety Code.

**Cal. Code Regs. tit. 22, § 75047 (2011)**

**Transfer Agreements**

(a) The clinic shall maintain written transfer agreements, which include provisions for communication and transportation, with one or more nearby hospitals and other inpatient health facilities as appropriate to meet medical emergencies. Essential personal, health and medical information shall either accompany the patient upon transfer or be transmitted immediately by telephone to the receiving facility.

(b) Clinics, except those providing abortion or birthing services, may request that the Department waive the requirement of (a). The clinic must demonstrate to the Department that all nearby hospitals and other inpatient health facilities, as appropriate to meet medical emergencies have refused to enter into transfer agreements.

Note: Authority cited: Sections 208(a) and 1225, Health and Safety Code. Reference: Section 1226, Health and Safety Code.

## **XII. STATE COURT DECISIONS**

### **CALIFORNIA SUPREME COURT DECISIONS**

*Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997) (holding California's parental notification law unconstitutional under the state Constitution).

*Comm. to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252 (1981) (holding California's Budget Act provisions that provided public funding for pregnancy care but not abortion violated the state Constitution).

*Conservatorship of Valerie N.*, 40 Cal. 3d 143 (1985) (holding statute barring sterilization of conservatee under guardianship-conservator law was unconstitutional as it denied incompetent developmentally disabled persons rights which are accorded to other persons in violation of state and federal constitutional guarantees of privacy).

### **CALIFORNIA COURT OF APPEALS DECISIONS**

*Foy v. Greenblott*, 141 Cal.App. 3d 1 (1983) (holding incompetent woman has right to privacy relating to childbearing and noting that an incompetent woman's conservator could have petitioned the court to authorize an abortion).

*Maxon v. Super. Ct.*, 135 Cal.App. 3d 626 (1982) (interpreting Cal. Prob. Code § 2356(d), which generally prohibited courts from authorizing the sterilization of any ward or conservatee, to allow the authorization of a potentially lifesaving operation (i.e. a hysterectomy), which incidentally rendered the conservatee sterile).

### **XIII. CALIFORNIA ATTORNEY GENERAL OPINION**

#### **87 Ops. Cal.Att’y. Gen. 168 (2004)**

1. May a school district require that a student obtain written parental consent prior to releasing the student from school to receive confidential medical services?
2. May a school district adopt a policy pursuant to which the district will notify a parent when a student leaves school to receive confidential medical services?

#### **CONCLUSIONS**

1. A school district may not require that a student obtain written parental consent prior to releasing the student from school to receive confidential medical services.
2. A school district may not adopt a policy pursuant to which the district will notify a parent when a student leaves school to obtain confidential medical services.

#### **ANALYSIS**

Generally speaking, parental consent is required for a minor’s medical treatment. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 314-315; *Ballard v. Anderson* (1971) 4 Cal.3d 873, 878.) There are, however, exceptions, such as when the public interest in preserving the health of a minor takes precedence over the parent’s interest in custody and control of the minor. (*Wisconsin v. Yoder* (1972) 406 U.S. 205, 233-234; *In re Roger S.* (1977) 19 Cal.3d 921, 930, 935.) In addition, a number of “medical emancipation” statutes allow minors to consent to medical treatment without parental knowledge, approval, or consent.

Medical emancipation statutes may be separated into two categories. First, they may authorize minors to consent to their own health care treatment because of a particular status. (See *American Academy of Pediatrics v. Lungren*, *supra*, 16 Cal.4th at pp. 315-316.) A minor who has become emancipated by reason of a court order, marriage, or active duty in the United States armed forces is considered an adult for purposes of consenting to health care services. (Fam. Code, §§ 7002; 7050, subd.

(e)(1).) In addition, minors who are “self-sufficient” (minors who are 15 or older, living away from home, and managing their own financial affairs regardless of the source of their income) may consent to their own medical care. (Fam. Code, § 6922.)

Second, they may authorize minors to consent to what are considered to be particularly sensitive medical services. (See Fam. Code, §§ 6920-6929; *American Academy of Pediatrics v. Lungren, supra*, 16 Cal.4th at pp. 316-317.) A minor of any age may consent to care related to the prevention or treatment of pregnancy. (Fam. Code, § 6925.) A minor of age 12 or older may consent to treatment of an infectious, contagious, or communicable disease ( Fam. Code, § 6926) or to care related to the diagnosis or treatment of rape ( Fam. Code, § 6927). A minor of any age may consent to care related to the diagnosis or treatment of sexual assault. ( Fam. Code, § 6928.) A minor of age 12 or older may consent to care related to the diagnosis or treatment of drug-related or alcohol-related problems. ( Fam. Code, 6929.) A minor of age 12 or older may consent to mental health treatment, counseling, or residential shelter services if (1) the minor is mature enough to participate intelligently, in the opinion of the health care provider, and (2) the minor is either a danger to himself or herself or others without the treatment, or is the alleged victim of incest or child abuse. ( Fam. Code, § 6924.) A minor of any age may consent to HIV testing. (Health & Saf. Code, § 121020.) Further, the records of these medical services are kept confidential from the minor's parent or guardian, unless the minor consents to such disclosure. (Health & Saf. Code, § 123115, subd. (a)(1); Civ. Code, § 56.11, subd. (c); see Health & Saf. Code, § 123110, subd. (a); Civ. Code, § 56.10.)

The two questions presented for resolution concern “confidential medical services” provided to school students. For our purposes, such services refer to the second category of medical emancipation statutes -- services which, by statute, a minor is authorized to obtain without the consent of or disclosure to a parent or guardian.

### I. Requiring Parental Consent

The first question concerns whether a school district may require that a student obtain written parental consent prior to releasing the student from school to receive confidential medical services. We conclude that it may not.

School districts have broad powers to adopt policies in furtherance of their educational purposes, provided they do not act in a manner “in conflict with or inconsistent with, or preempted by, any law.” (Ed. Code, § 35160; see Cal. Const., art. IX, § 14; *Hartzell v. Connell* (1984) 35 Cal.3d 899, 915.) A policy requiring the prior written consent of a parent to release a student for confidential medical services would conflict with state law.

The Legislature has established a system of compulsory education for children between the ages of 6 and 18. (Ed. Code, §§ 42800-48341.) Attendance at school is excused, however, under specified circumstances. Education Code section 48205, subdivision (a), provides in relevant part:

“Notwithstanding Section 48200 [requiring compulsory full-time education], a pupil shall be excused from school when the absence is:

“.....”

“(3) For the purpose of having medical, dental, optometrical, or chiropractic services rendered.

“.....”

“(7) For justifiable personal reasons, including, but not limited to, an appearance in court, attendance at a funeral service, observance of a holiday or ceremony of his or her religion, attendance at religious retreats, or attendance at an employment conference, *when the pupil's absence has been requested in writing by the parent or guardian* and approved by the principal or a designated representative pursuant to uniform standards established by the governing board.” (Italics added.)

On its face, subdivision (a)(3) of section 48205 does not require parental consent for an excused medical absence. In contrast is subdivision (a)(7) of the statute, which does require parental consent for certain excused absences. We construe this difference in language as signifying a legislative intent *notto* require parental consent in order to excuse a student for the purpose of obtaining medical services.

In so construing the language of Education Code section 48205, we apply well established rules of statutory construction.” “Where a statute,

with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject... is significant to show that a different intention existed.' [Citation.] We presume a different legislative intent, not an oversight, from the fact that words used in [one provision] are missing from [another]." (*People v. Duran*(2001) 94 Cal.App.4th 923, 941; accord, *People v. Trevino* (2001) 26 Cal.4th 237, 242; *People v. Drake*(1977) 19 Cal.3d 749, 755.) The phrase "when the pupil's absence has been requested in writing by the parent or guardian" cannot be added to subdivision (a)(3) of the statute in the guise of statutory interpretation. "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. [Citations.]" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633.) "[A] statute '... is to be interpreted by the language in which it is written, and courts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its express provisions.' [Citations.]" (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1097.)

We reject the suggestion that Education Code section 46010.1 grants school districts discretion to require parental consent before releasing a student for confidential medical services, notwithstanding the language of Education Code section 48205. Education Code section 46010.1 states:

Commencing in the fall of the 1986-87 academic year, the governing board of each school district shall each academic year notify pupils in grades 7-12 inclusive and the parents or guardians of all pupils enrolled in the district, that school authorities may excuse any pupil from the school for the purpose of obtaining confidential medical services without the consent of the pupil's parent or guardian. The notice required pursuant to this section may be included with any other notice given pursuant to this code.

We view this provision as requiring school districts to notify both students and their parents that students are allowed to be excused from school for confidential medical appointments without parental consent.

If a school district *could* require parental consent under the terms

of Education Code section 46010.1, the statute would no longer concern “confidential medical services.” By definition, such services are kept confidential from the parent or guardian of the pupil. The legislative history of the statute makes clear that the Legislature intended only to ensure that parents of adolescent schoolchildren understand the requirements of the law with respect to medical services that are made “confidential” by statute.

Most importantly, a school district policy requiring prior written consent of a parent for a student's confidential medical services would undermine the purposes and intent of the medical emancipation statutes. In *American Academy of Pediatrics v. Lungren, supra*, 16 Cal.4th 307, the Supreme Court observed:

... [O]ver the past four decades the Legislature has recognized that, in a variety of specific contexts, the protection of the health of minors may best be served by permitting a minor to obtain medical care without parental consent. These statutes do not reflect a legislative determination that a minor who, for example, has been raped or has contracted a sexually transmitted disease would not benefit from the consultation and advice of a supportive parent. Indeed, as noted, a few of the statutes specifically call upon the treating physician or health care provider to notify and attempt to involve the minor's parents in the treatment process, so long as the circumstances suggest to the health care provider that such involvement will not be detrimental to the health or interests of the minor. [Citation.] Nor do these statutes imply that a minor who, for example, has been sexually assaulted or has a drug or alcohol abuse problem is more mature or knowledgeable than other minors of similar age; a minor who may obtain medical care for such conditions must still obtain parental consent before she or he may obtain, for example, an appendectomy.

Instead, each of these statutory provisions embodies a legislative recognition that, particularly in matters concerning sexual conduct, minors frequently are reluctant, either because of embarrassment or fear,

to inform their parents of medical conditions relating to such conduct, and consequently that there is a considerable risk that minors will postpone or avoid seeking needed medical care if they are required to obtain parental consent before receiving medical care for such conditions. To protect their health in these particular circumstances, the statutes authorize minors to receive medical care for these designated conditions without parental consent. (*Id.* at pp. 317-318.)

We are directed to construe the provisions of Education Code sections 35160, 46010.1, and 48205 in light of the relevant provisions of the Family Code and the Health and Safety Code relating to confidential medical services. “[W]e interpret a statute in context, examining other legislation on the same subject, to determine the Legislature’s probable intent. [Citations.]” (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.*, *supra*, 14 Cal.4th at p. 642.) “ “[P]rovisions relating to the same subject matter must be harmonized to the extent possible.” ’ ” (*Cooley v. Superior Court* (2002) 29 Cal.4th 220, 248.) “Where... two codes are to be construed, they ‘must be regarded as blending into each other and forming a single statute.’ [Citation.]” (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 679, overruled on other grounds in *Frink v. Prod* (1982) 31 Cal.3d 166, 180; see also *Building Material & Construction Teamsters’ Union v. Farrell* (1986) 41 Cal.3d 651, 665.) Accordingly, the relevant Education Code statutes may not be interpreted in a manner that eviscerates the requirements of the Family Code and Health and Safety Code.

We conclude that a school district may not require that a student obtain written parental consent prior to releasing the student from school to receive confidential medical services.

## 2. Notifying the Parent

The second question presented is whether a school district may adopt a policy pursuant to which the district will notify a parent when a student leaves school to obtain confidential medical services. We conclude that such a policy would violate state law.

Notice is not the same as consent, and while the medical emancipation statutes expressly address consent, they do not directly address giving

notice. However, we are dealing here with “confidential” medical services. Just like requiring parental consent, a district’s notification of a parent regarding a student’s absence to receive confidential medical services would destroy the confidentiality of the medical services -- contrary to the intent and purposes of the medical emancipating statutes.

Not only may minors seek sensitive medical treatment without parental consent, they have the right to keep the existence of such medical services confidential, even from their parents. (Health & Saf. Code, § 123115, subd. (a)(1); Civ. Code, § 56.11, subd. (c); see Health & Saf. Code, § 123110, subd. (a); Civ. Code, § 56.10.) These confidentiality statutes evince a clear legislative intent to shield minors, not just from the possibility that parental consent might be withheld for certain medical services, but also from the necessity of revealing that the minor has resorted to those services at all.

Statutes protecting the privacy of medical information are based on the Legislature’s awareness that the threat of disclosure might deter persons needing treatment from seeking it. (See *In re Lifschutz* (1970) 2 Cal.3d 415, 431; *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 433-434; *Simek v. Superior Court* (1981) 117 Cal.App.3d 169, 177.) A policy that requires parental notice when a student seeks such services would be inconsistent with the legislative intent to encourage minors to receive medical treatment by protecting the confidentiality of their medical information.

Our conclusion is not inconsistent with the provisions in some of the medical emancipation statutes that require health care professionals to notify the parent or guardian in certain situations. Unlike school officials, health care professionals are qualified to evaluate a minor’s capacity to understand his or her treatment options on a case-by-case basis. (See *American Academy of Pediatrics v. Lungren*, *supra*, 16 Cal.4th at p. 355.) Furthermore, the statutes give health care professionals the discretion to bypass parental notification when notification would be contrary to the minor patient’s welfare. (Fam. Code, §§ 6924, subd. (d); 6928, subd. (c); 6929, subd. (c).) This is the kind of safeguard that has been a consistent feature of the parental consent and notification statutes upheld by the United States Supreme Court. (See *Lambert v. Wicklund* (1997) 520 U.S. 292, 298, 300; *Akron v. Akron Center for Reproductive Health* (1990) 497 U.S. 502, 510-512.) A policy pursuant to which a school would notify a parent whenever a student left school to obtain confidential medical services would afford no such recognized safeguard.

Nor is our conclusion inconsistent with statutes giving parents access to certain information bearing on their children's education, including access to their children's school records. (Ed. Code, §§ 49061; 51101, subd. (a) (10).) While providing parental access to this information, the Legislature has protected students' rights to informational privacy, specifically regarding confidential medical services (e.g., Ed. Code, § 49091.12, subd. (b)) and disclosure of personal information to school counselors (Ed. Code, § 49602).

We conclude that a school district may not adopt a policy pursuant to which the school will notify a parent when a student leaves school to receive confidential medical services.

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Attorney General

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## **APPENDIX B: FEDERAL LAWS GOVERNING ABORTION**

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**I. THE “PARTIAL-BIRTH” ABORTION ACT OF 2003**

18 U.S.C. § 1531 (2011)

(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment [enacted Nov. 5, 2003].

(b) As used in this section—

(1) the term “partial-birth abortion” means an abortion in which the person performing the abortion—

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother; or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother; for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

(2) the term “physician” means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: Provided, however, that any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

(c) (1) The father, if married to the mother at the time she receives a partial-birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents

of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

(2) Such relief shall include—

(A) money damages for all injuries, psychological and physical, occasioned by the violation of this section; and

(B) statutory damages equal to three times the cost of the partial-birth abortion.

(d) (1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.

(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.

## **II. THE FEDERAL BORN ALIVE INFANT PROTECTION ACT**

### **I U.S.C. § 8 (2011)**

(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words “person”, “human being”, “child”, and “individual”, shall include every infant member of the species homo sapiens who is born alive at any stage of development.

(b) As used in this section, the term “born alive”, with respect to a member of the species homo sapiens, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

(c) Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being “born alive” as defined in this section.

### III. FEDERAL REFUSAL CLAUSES

#### The Church Amendments<sup>1</sup>

(a) [Omitted]

(b) Prohibition of public officials and public authorities from imposition of certain requirements contrary to religious beliefs or moral convictions. The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require—

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

(2) such entity to--

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

(c) Discrimination prohibition.

(1) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health

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<sup>1</sup> 42 U.S.C. § 300a-7 (2011) (commonly referred to as the “Church Amendments,” these provisions were enacted in the 1970s in response to concerns that federal funds required the recipients to provide abortions or sterilizations.).

Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after the date of enactment of this Act [enacted June 18, 1973] may--

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

(2) No entity which receives after the date of enactment of this paragraph [enacted July 12, 1974] a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health, Education and Welfare [Secretary of Health and Human Services] may—

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

(d) Individual rights respecting certain requirements contrary to religious beliefs or moral convictions. No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health, Education and

Welfare [Secretary of Health and Human Services] if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

(e) Prohibition on entities receiving Federal grant, etc., from discriminating against applicants for training or study because of refusal of applicant to participate on religious or moral grounds. No entity which receives, after the date of enactment of this paragraph [enacted Sept. 29, 1979], any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000 may deny admission or otherwise discriminate against any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.

### **The Coats Amendment<sup>2</sup>**

(a) In general. The Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity to discrimination on the basis that--

(1) the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions;

(2) the entity refuses to make arrangements for any of the activities specified in paragraph (1); or

(3) the entity attends (or attended) a post-graduate physician training program, or any other program of training in the health professions, that does not (or did not) perform induced abortions or require, provide or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

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<sup>2</sup> 42 U.S.C. § 238n (2011) (the U.S. Department of Health and Human Services relies on authority granted by section 245 the Public Health Service Act ("PHS Act"), which prohibits the federal government from discriminating against a health care entity because it refuses to provide or teach abortion procedures.).

(b) Accreditation of postgraduate physician training programs.

(1) In general. In determining whether to grant a legal status to a health care entity (including a license or certificate), or to provide such entity with financial assistance, services or other benefits, the Federal Government, or any State or local government that receives Federal financial assistance, shall deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standards [standard] that requires an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training, regardless of whether such standard provides exceptions or exemptions. The government involved shall formulate such regulations or other mechanisms, or enter into such agreements with accrediting agencies, as are necessary to comply with this subsection.

(2) Rules of construction.

(A) In general. With respect to subclauses (I) and (II) of section 705(a)(2)(B)(i) [42 USCS § 292d(a)(2)(B)(i)(I), (II)] (relating to a program of insured loans for training in the health professions), the requirements in such subclauses regarding accredited internship or residency programs are subject to paragraph (1) of this subsection.

(B) Exceptions. This section shall not--

(i) prevent any health care entity from voluntarily electing to be trained, to train, or to arrange for training in the performance of, to perform, or to make referrals for induced abortions; or

(ii) prevent an accrediting agency or a Federal, State or local government from establishing standards of medical competency applicable only to those individuals who have voluntarily elected to perform abortions.

(c) Definitions. For purposes of this section:

(1) The term "financial assistance", with respect to a government program, includes governmental payments provided as reimbursement for carrying out health-related activities.

(2) The term "health care entity" includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.

(3) The term "postgraduate physician training program" includes a residency training program.

### **The Weldon Amendment<sup>3</sup>**

(1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

(2) In this subsection, the term "health care entity" includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

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<sup>3</sup> Pub. L. No. 111-117 § 508(d)(1), 123 Stat 3034 (2009) (beginning in 2005, the Weldon Amendment has been passed each year as part of the appropriations process).

#### IV. THE FEDERAL HYDE AMENDMENT

##### Sec. 507<sup>1</sup>

(a) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion.<sup>2</sup>

(b) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act shall be expended for health benefits coverage that includes coverage of abortion.

(c) The term “health benefits coverage” means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.

##### Sec. 508

(a) The limitations established in the preceding section shall not apply to an abortion—

(1) if the pregnancy is the result of an act of rape or incest; or

(2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.”

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<sup>1</sup> Consolidated Appropriations Act, 2010, Pub. L. No. 111-117 §§ 507-508, 123 Stat 3034 (2011) (the Hyde Amendment is passed each year as part of the appropriations process. It prohibits federal funding to be used for abortion care for Medicaid-eligible women and Medicare beneficiaries. Similar longstanding restrictions on abortion funding exist for federal employees and their dependents, American Indians and Alaskan Natives, women in federal prisons, and Peace Corps volunteers.).

<sup>2</sup> *But see Comm. to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252 (1981) (holding that the California Constitution’s right of privacy prevents the state from denying poor women public funding for abortion).

**V. EXCERPTS FROM TITLE 45 OF THE CODE OF FEDERAL REGULATIONS**

**45 C.F.R. § 46.116 (2011)**

Except as provided elsewhere in this policy, no investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative. An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative. No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.

(a) Basic elements of informed consent. Except as provided in paragraph (c) or (d) of this section, in seeking informed consent the following information shall be provided to each subject:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures which are experimental;

(2) A description of any reasonably foreseeable risks or discomforts to the subject;

(3) A description of any benefits to the subject or to others which may reasonably be expected from the research;

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;

(6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

(7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject; and

(8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

(b) Additional elements of informed consent. When appropriate, one or more of the following elements of information shall also be provided to each subject:

(1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) which are currently unforeseeable;

(2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's consent;

(3) Any additional costs to the subject that may result from participation in the research;

(4) The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;

(5) A statement that significant new findings developed during the course of the research which may relate to the subject's willingness to continue participation will be provided to the subject; and

(6) The approximate number of subjects involved in the study.

(c) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth above, or waive the requirement to obtain informed consent provided the IRB finds and documents that:

(1) The research or demonstration project is to be conducted by or subject to the approval of state or local government officials and is designed to study, evaluate, or otherwise examine: (i) Public benefit of service programs; (ii) procedures for obtaining benefits or services under those programs; (iii) possible changes in or alternatives to those programs or procedures; or (iv) possible changes in methods or levels of payment for benefits or services under those programs; and

(2) The research could not practicably be carried out without the waiver or alteration.

(d) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth in this section, or waive the requirements to obtain informed consent provided the IRB finds and documents that:

(1) The research involves no more than minimal risk to the subjects;

(2) The waiver or alteration will not adversely affect the rights and welfare of the subjects;

(3) The research could not practicably be carried out without the waiver or alteration; and

(4) Whenever appropriate, the subjects will be provided with additional pertinent information after participation.

(e) The informed consent requirements in this policy are not intended to preempt any applicable federal, state, or local laws which require additional information to be disclosed in order for informed consent to be legally effective.

(f) Nothing in this policy is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is

permitted to do so under applicable federal, state, or local law.

#### **45 C.F.R. § 46.401 (2011)**

(a) This subpart applies to all research involving children as subjects, conducted or supported by the Department of Health and Human Services.

(1) This includes research conducted by Department employees, except that each head of an Operating Division of the Department may adopt such nonsubstantive, procedural modifications as may be appropriate from an administrative standpoint.

(2) It also includes research conducted or supported by the Department of Health and Human Services outside the United States, but in appropriate circumstances, the Secretary may, under paragraph (e) of § 46.101 of Subpart A, waive the applicability of some or all of the requirements of these regulations for research of this type.

(b) Exemptions at § 46.101(b)(1) and (b)(3) through (b)(6) are applicable to this subpart. The exemption at § 46.101(b)(2) regarding educational tests is also applicable to this subpart. However, the exemption at § 46.101(b)(2) for research involving survey or interview procedures or observations of public behavior does not apply to research covered by this subpart, except for research involving observation of public behavior when the investigator(s) do not participate in the activities being observed.

(c) The exceptions, additions, and provisions for waiver as they appear in paragraphs (c) through (i) of § 46.101 of Subpart A are applicable to this subpart.

#### **45 C.F.R. § 46.402 (2011)**

The definitions in § 46.102 of Subpart A shall be applicable to this subpart as well. In addition, as used in this subpart:

(a) Children are persons who have not attained the legal age for consent to treatments or procedures involved in the research, under

the applicable law of the jurisdiction in which the research will be conducted.

(b) Assent means a child's affirmative agreement to participate in research. Mere failure to object should not, absent affirmative agreement, be construed as assent.

(c) Permission means the agreement of parent(s) or guardian to the participation of their child or ward in research.

(d) Parent means a child's biological or adoptive parent.

(e) Guardian means an individual who is authorized under applicable State or local law to consent on behalf of a child to general medical care.

#### **45 C.F.R. § 46.408 (2011)**

(a) In addition to the determinations required under other applicable sections of this subpart, the IRB shall determine that adequate provisions are made for soliciting the assent of the children, when in the judgment of the IRB the children are capable of providing assent. In determining whether children are capable of assenting, the IRB shall take into account the ages, maturity, and psychological state of the children involved. This judgment may be made for all children to be involved in research under a particular protocol, or for each child, as the IRB deems appropriate. If the IRB determines that the capability of some or all of the children is so limited that they cannot reasonably be consulted or that the intervention or procedure involved in the research holds out a prospect of direct benefit that is important to the health or well-being of the children and is available only in the context of the research, the assent of the children is not a necessary condition for proceeding with the research. Even where the IRB determines that the subjects are capable of assenting, the IRB may still waive the assent requirement under circumstances in which consent may be waived in accord with § 46.116 of Subpart A.

(b) In addition to the determinations required under other applicable sections of this subpart, the IRB shall determine, in accordance with and to the extent that consent is required by § 46.116 of Subpart A, that adequate provisions are made for soliciting the permission of each

child's parents or guardian. Where parental permission is to be obtained, the IRB may find that the permission of one parent is sufficient for research to be conducted under § 46.404 or § 46.405. Where research is covered by §§ 46.406 and 46.407 and permission is to be obtained from parents, both parents must give their permission unless one parent is deceased, unknown, incompetent, or not reasonably available, or when only one parent has legal responsibility for the care and custody of the child.

(c) In addition to the provisions for waiver contained in § 46.116 of Subpart A, if the IRB determines that a research protocol is designed for conditions or for a subject population for which parental or guardian permission is not a reasonable requirement to protect the subjects (for example, neglected or abused children), it may waive the consent requirements in Subpart A of this part and paragraph (b) of this section, provided an appropriate mechanism for protecting the children who will participate as subjects in the research is substituted, and provided further that the waiver is not inconsistent with Federal, state or local law. The choice of an appropriate mechanism would depend upon the nature and purpose of the activities described in the protocol, the risk and anticipated benefit to the research subjects, and their age, maturity, status, and condition.

(d) Permission by parents or guardians shall be documented in accordance with and to the extent required by § 46.117 of Subpart A.

(e) When the IRB determines that assent is required, it shall also determine whether and how assent must be documented.

## **VI. FEDERAL COURT DECISIONS**

### United States Supreme Court Decisions

*Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Partial Birth Abortion Ban Act of 2003).

*Harris v. McRae*, 448 U.S. 297 (1980) (upholding Hyde Amendment and holding Medicaid is not required to fund abortions).

*Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (upholding a provision requiring a minor to obtain parental consent or judicial authorization in order to obtain an abortion).

*Roe v. Wade*, 410 U.S. 113 (1973) (holding that the right to privacy, founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy)

