

May 20, 2021

Senator Donna Campbell
Texas Senate
P.O. Box 12068 Capitol Station
Austin, Texas 78711

Representative Phil King
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768

**Re: Analysis of SB 1439 and Suggested Improvements to Protect Conscience Rights
in Texas Medical Education**

Dear Senator Campbell and Representative King:

I have examined SB 1439 with great interest and offer my opinion below concerning its public policy ramifications and how it can be improved to be fully consistent with federal conscience protection laws. My interest and experience in conscience in medicine runs deep. From March 2017 until January of 2021, I was charged with enforcing federal conscience protections in health care as the Director of the Office for Civil Rights at the U.S. Department of Health and Human Services (HHS), where I established the nation's first Conscience and Religious Freedom Division.¹

Among the conscience statutes I enforced at HHS was the law known as the Coats-Snowe Amendment.² Congress passed Coats-Snowe in 1996 in direct response to ideologically motivated actions taken by the Accreditation Council for Graduate Medical Education (ACGME) to require residency programs for obstetrics and gynecology include training in and performing abortions. ACGME argued such training was necessary because it saw, and perhaps still sees, abortion as integral to "primary and preventative health care."³ Pregnancy, however, is not a disease, and abortion is not health care. This is why, in part, abortion activities are generally banned in all federal programs and at federal health facilities and why abortion cannot be subsidized with federal dollars. Moreover, several federal laws prohibit federal, state, local,

¹ By way of further introduction, I am also a graduate of Harvard Law (J.D.) and Carnegie Mellon (Masters in Public Policy) and worked at the Becket Fund for Religious Liberty and the Department of Justice Civil Rights Division before joining the Ethics & Public Policy Center where I direct the HHS Accountability Project.

² 42 U.S. Code § 238n.

³ See submissions to the record on Coats-Snowe Amendment, available at <https://www.govinfo.gov/content/pkg/CREC-1996-03-19/html/CREC-1996-03-19-pt1-PgS2268.htm>.

and private actors who administer or receive federal funds from discriminating against doctors, hospitals, and individuals who decline to participate in, pay for, refer for, or train in abortions.

Texas is not merely authorized and encouraged under federal law to adopt bills and regulations protecting the conscience of doctors, trainees, and health care institutions—such action is required.

Coats-Snowe prohibits states that receive federal financial assistance from subjecting any health care entity to discrimination on the basis that the entity:

- declines to undergo training in the performance of induced abortions, to require or provide such training or abortions, or to provide related referrals; or
- attends (or attended) a post-graduate physician or other health training program that does not (or did not) perform abortions or require, provide, or refer for training in the performance of abortions.⁴

As a recipient of substantial federal funds from HHS through Medicaid and Medicare, Texas is obliged to follow these provisions and cannot, by action or inaction, alone or in collusion with private entities, “subject” health care entities to discrimination for declining to include or assist abortion in any physician training or institutional operations.

The ACGME is likewise bound by these antidiscrimination provisions if it receives federal funds. Congress was aware that ACGME and other accrediting bodies would not be covered if they did not accept federal funds and definitively closed this potential loophole by requiring states that receive federal funds to treat as *invalid* any determination by ACGME (or any other accrediting body) that would disqualify from or deny accreditation to a health care entity because such entity declines to follow or meet any abortion training, provision, or referral standard.⁵ Congress went further and made clear that states must treat abortion training standards as invalid “regardless of whether such standard provides exceptions or exemptions.”⁶ This means that education and training standards with respect to abortion **must be strictly opt-in**, and that exemptions or exceptions through an opt-out system are insufficient to comply with the law. This was done to close another potential loophole where ACGME and other accrediting bodies could have creatively evaded the law by allowing for individual (though likely difficult to acquire) exceptions while imposing abortion as a general standard of care on secular and even religious institutions. Under an individual opt-out system, Medical schools would have to offer abortion training and have staff available able to perform them, which would have led to gross violations of many institutions’ religious beliefs and moral convictions regarding the inviolability of

⁴ 42 U.S. Code § 238n(a)(1)–(3).

⁵ *Id.* at (b)(1). Coats-Snowe does allow for accrediting standards for training person who “voluntarily elect” to become abortionists and allows for the regulation of medical schools that, again, voluntarily choose to train in abortion. *Id.* at (b)(2)(B).

⁶ *Id.*

innocent human life. This is also why Coats-Snowe made clear that the protected entities “include[] an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions”⁷ and only allows truly voluntary opt-in standards for all.

Finally, it is not enough for Texas to not actively discriminate against physicians, students, and medical schools that do not train in abortion. Knowing of the potential for collusion between the ideologically driven accrediting bodies and states, Congress took the extra step of requiring all governments that provide licenses, certificates, financial assistance, services, or other benefits to a person or entity based on the accreditation of a physician training program to take affirmative steps to comply with Coats-Snowe. Specifically, states receiving federal funds “shall formulate such regulations or other mechanisms, or enter into such agreements with accrediting agencies, as are necessary to comply.”⁸

I have examined the text of SB 1439, and with some improvements, it can be considered the type of affirmative mechanism protecting conscience states are required to adopt by Coats-Snowe. In relevant part, SB 1439 reads:

Sec. 103.0015.⁹ OPT IN REQUIRED. (a) A physician, intern, or resident at an educational institution may not be scheduled for or assigned to duties involving directly or indirectly performing or participating in an elective abortion procedure unless the physician, intern, or resident first affirmatively consents in writing to perform or participate in the procedure.

This protects a broad category of individuals, including residents and physicians, but is underinclusive in that Coats-Snowe also requires protection for “a postgraduate physician training program, and a participant in a program of training in the health professions” which covers a potentially broader array of individuals and, crucially, also protects “programs” which includes the institutions running them.¹⁰ To be fully compliant with Coats-Snowe, SB 1439 should be amended to cover all participants in educational programs and the entities conducting them including those subject to accrediting standards. Accordingly, SB 1439 should be amended to state that recognition of accreditation and licensing will not depend in any way on any third-party accrediting organization’s findings or standards related to abortion training or education.

While SB 1439 prohibits coercing students and doctors from performing and participating in an abortion consistent with Coats-Snowe, Coats-Snowe also prohibits coerced

⁷ *Id.* at (c)(1).

⁸ *Id.* at (b)(1) (emphasis added).

⁹ This appears to be a typographical error that should instead read “Sec. 103.005.”

¹⁰ Although Chapter 103, Occupations Code, Sec. 103.004 provides institutions some protections from coerced participation in abortion, it is not clear that it protects them against coerced training in, or referral of, abortion.

“training” in abortions through other means, such as lectures or videos, and SB 1439 should be amended to cover training broadly.

Although SB 1439 as drafted requires affirmative consent, it is not fully an opt-in regime because affirmative consent can easily be interpreted as an opt-out system. Under SB 1439 a medical school can advertise abortion training as part of its core Ob-Gyn curriculum and not advertise that affirmative consent is required, thereby dissuading pro-life students from applying altogether. But even if a school did not advertise abortion as part of its Ob-Gyn curriculum, it could still wait until the day of an abortion demonstration before handing the students a form that says, “I affirmatively consent to participating in this procedure” and a signature line. For all intents and purposes, that is an opt-out system that would seemingly comply with SB 1439 as proposed. As discussed above, opt-out systems do not comply with Coats-Snowe. Accordingly, SB 1439 should require notice to students and residents that any abortion training offered is non-mandatory and that no student will receive such training unless they “voluntarily elect” to receive it and prohibit discrimination or retaliation against any student or resident that does not elect to train in abortion.

Proposed Modifications to SB 1439

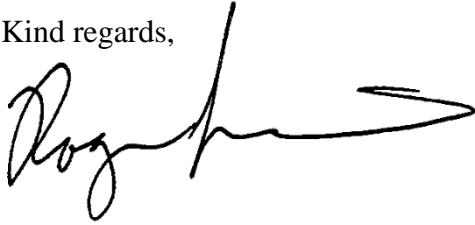
You may wish to consider the following language incorporating the improvements recommended above:

Sec. 103.005. OPT IN REQUIRED, RETALIATION PROHIBITED.

- (a) A physician, intern, participant, or resident at an educational program or institution may not be scheduled for, ~~or assigned to,~~ or otherwise required to participate in duties activities involving directly or indirectly performing, training in, or participating in an elective abortion procedure unless the physician, intern, participant, or resident ~~first affirmatively consents~~ voluntarily elects in writing to ~~perform, or participate in the procedure~~ such activities after being specifically informed that participation in such activities cannot be required under this Chapter.
- (b) No educational program or institution shall be required to schedule, assign, or otherwise participate in activities involving directly or indirectly performing, training in, or participating in an elective abortion procedure unless such program or institution voluntarily elects to participate in such activities.
- (c) No educational program or institution, and no physician, intern, participant, or resident at any educational program or institution shall be subject to discrimination or retaliation for availing themselves of any protection granted under this Chapter, including denial, loss, or impairment of licensing, financial assistance, services, grant or recognition of accreditation or certification, or any other benefit.

I hope you have found this analysis helpful and I encourage you to contact me if I can be of further assistance.

Kind regards,



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