

April 24, 2013

Jeffrey Gold, M.D.

Chancellor, Executive Vice president for Biosciences and Health Affairs,
Dean of the College of Medicine

Lloyd Jacobs, M.D.

University of Toledo President

Dear Dr. Gold and Dr. Jacobs:

We write, as law professors from four law schools in Ohio, in order to counter the mistaken legal argument advanced by Ohio Right to Life (ORTL) regarding the legality of the written transfer agreements between the University of Toledo hospital (UT) and two Toledo clinics. As a matter of Ohio law, it is crystal clear that UT's agreements with Capital Care Network of Toledo and Center for Choice are entirely legal and permissible. Indeed, it is UT's rescindment of the agreements – under political pressure to make abortion care inaccessible – that raises legal concerns.

Ohio Right to Life argues that it is a violation of Ohio law for UT, a state hospital, to sign transfer agreements with abortion care providers. With limited exceptions, Ohio law prohibits the use of state or local funds “for payment or reimbursement for *abortion services*” and the use of public facilities “for the purpose of *performing or inducing* a nontherapeutic abortion.” Ohio Rev. Code Ann. §§ 5101.56(B), 5101.57(B) (emphases added). There is no credible argument that a written transfer agreement could violate these laws or any other law.

First, the written transfer agreements, such as the agreement that UT previously signed, do not constitute “payment or reimbursement for abortion services.” They do not state or even imply that UT would provide, pay for, or reimburse for any “abortion services.” They only memorialize the fact that the hospital will receive a woman in the unlikely event that she requires transfer to a hospital because of a complication from an abortion procedure. In that event, UT treats the patient for the complication. Under Ohio law, UT, as a public facility, cannot and does not provide abortion care except when necessary to protect a woman's life or when the pregnancy resulted from rape or incest. Ohio Rev. Code Ann. §§ 9.04, 5101.57. Nothing in a transfer agreement changes UT's obligations under this or any other Ohio law; therefore, nothing in a transfer agreement changes the very limited circumstances under which UT provides or pays for abortion services.¹

¹ The fact that abortion provider clinics must have such transfer agreements in order to operate under Ohio law also does not implicate UT in “taxpayer funding for abortion.” Indeed,

Second, far from violating the letter or spirit of state law, a transfer agreement merely memorializes what is already required by federal law: under the Emergency Medical Treatment and Active Labor Act (EMTALA), UT must provide care to any woman suffering from an emergency condition, including a condition that results from an abortion complication. 42 U.S.C. § 1395dd(b). Thus, with or without a written transfer agreement, UT will continue to provide the same care to patients.² Moreover, the state of Ohio has claimed that written transfer agreements may in some instances improve continuity of care. Therefore, while canceling the written transfer agreements does not mean that UT will decline to provide care to patients in emergent conditions, if Ohio's claim is true, the cancellation could potentially compromise the quality of the care that UT is required by federal law to provide.

Because Ohio law requires the clinics to have transfer agreements in order to operate, UT's withdrawal or withholding of the agreements will shut the clinics down. As ORTL itself asserted, "Without this transfer agreement, this abortion clinic could not legally operate in Ohio." ORTL, University of Toledo In Contract with Abortion Clinic, March 26, 2013, available at <http://www.ohiolife.org/press-releases/2013/3/26/university-of-toledo-in-contract-with-abortion-clinic.html> (last visited April 17, 2013). And as ORTL similarly asserted, UT's non-renewal of its agreement with one clinic and its rupture of negotiations for an agreement with the other clinic "would not have happened without the leadership of State Representative Lynn Wachtmann, Greater Toledo Right to Life and other elected officials." ORTL, University of Toledo Terminates Contract with Abortion Clinic, April 4, 2013, available at <http://www.ohiolife.org/press-releases/2013/4/4/university-of-toledo-terminates-contract-with-abortion-clini.html> (last visited April 17, 2013).

the clinics rely on the police, fire, and public utilities departments in order to operate, but those public services are clearly not thereby involved in the provision of abortion services.

² Moreover, a transfer agreement in no way "violates the conscience rights of Ohio taxpayers," as ORTL claims. ORTL, University of Toledo In Contract with Abortion Clinic, March 26, 2013, available at <http://www.ohiolife.org/press-releases/2013/3/26/university-of-toledo-in-contract-with-abortion-clinic.html> (last visited April 17, 2013). First, as just explained, the transfer agreements do not directly or indirectly constitute the expenditure of taxpayer dollars for abortion services. Second, even if they did, Courts have repeatedly rejected the argument that taxpayers asserting conscientious objections can control or prevent state expenditures, including expenditures for abortion care. Indeed, the claim ORTL asserts here is far more attenuated than claims that courts routinely reject. *See, e.g., Tarsney v. O'Keefe*, 225 F.3d 929 (8th Cir. 2000) (holding that taxpayers lacked standing to bring Free Exercise challenge to the direct expenditure of state funds for indigent women's abortion care); *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996) (dismissing claims of public university students who objected to paying student registration fee because it subsidized student health insurance policy covering abortion care), *abrogated on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997).

Hence, UT acted under pressure from a lobbying group and politicians *whose explicit purpose was to shut down abortion care in Toledo*. This raises serious legal concerns. Regardless of whether requiring transfer agreements “has the incidental effect of making it more difficult or more expensive to procure an abortion,” Ohio is free to impose that requirement *if* doing so “serves a *valid purpose*,” such as to “foster the health of a woman seeking an abortion.” *Planned Parenthood v. Casey*, 505 U.S. 833, 874, 878 (1992) (emphasis added). But what the Constitution clearly prohibits UT from doing is acting with the *purpose* of eliminating abortion care: “A stat[e action] with this purpose is invalid.” *Id.* at 877. That was exactly the purpose of ORTL’s lobbying, to which UT acquiesced.

In sum, the result of cancelling the written transfer agreements will be to make it impossible for the Toledo clinics to remain open. This result is not required by Ohio law, and it runs counter to the interests of Ohio citizens. We therefore urge UT to reconsider its reasoning and to reject the severely flawed legal analysis that led it to this decision.

Sincerely,

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