IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Capital Care Network of Toledo,		
Appellant,		Case No. CI0201403405
vs.		OPINION AND JUDGMENT ENTRY
State of Ohio Department of Health,		Hon. Myron C. Duhart
Appellee.		

This R.C. 119.12 administrative appeal is before the Court now for a decision on the merits. The Court finds that the request for additional evidence made by the Appellant, Capital Care Network of Toledo ("Capital Care"), is not well-taken and is denied. Upon review of the notice of appeal, administrative record,[1] transcript of proceedings below ("Tr. __."), arguments of counsel, and applicable law, the Court will reverse the "Adjudication Order" issued by the interim Director of the Appellee, the State of Ohio Department of Health ("Department"), in which the Department "refus[ed] to renew and revok[ed] [Capital Care's] health care facility license." (*See* Adjudication Order.)

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[1] The record includes the June 12, 2014 "Report and Recommendation" ("Report") of the administrative hearing examiner, and the July 29, 2014 "Adjudication Order" of the Department's then-interim Director.

I. ISSUE FOR APPEAL - "LOCAL-HOSPITAL" RULING

In its notice of appeal, Capital Care "gives notice that it appeals * * * from the [Departments's] Adjudication Order dated July 29, 2014 proposing to revoke and not renew Appellant's ambulatory surgical license for ***failing to have a written transfer agreement with a local hospital.***" (Emphasis added.) (Notice of Appeal p.1.)

The Department argues that "[r]eliable, probative and substantial evidence supported the conclusion that [Capital Care] ***failed to have a written transfer agreement with a local hospital.***" (Emphasis added.)[2] (Appellee's Brief p.17.)[3]

II. INTRODUCTION

It is now well-established in this country that "it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 869, 112 S.Ct. 2791, 120 L. Ed.2d 674 (1992) The Supreme Court has "conclude[d] that the basic decision in [*Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973)], was based on a constitutional analysis which we cannot now repudiate." *Casey* at 869. Nonetheless, the states have an "important and legitimate interest in potential life." *Roe v. Wade*, 410 U.S. at 163.

Indeed, in our state, the General Assembly has declared it the public policy for Ohio to favor "childbirth."

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[2] The testimony of the former Director of the Department indicates that he based his decision to revoke and not-renew solely on the statute's "local" hospital requirement. (See Hearing Transcript pp.67-99.)

[3] The Court notes that the Department permits an ASF seeking licensure to take more than one month to obtain a written transfer agreement. (*See* Tr.28 ["We have allowed facilities -- because of the change of law * * * some time beyond 30 days to get an agreement [[and]] make sure it was in effect within two years * * *"].) Thus, the Court finds it to have been proper that the period between August 1, 2013 and January 20, 2014 was not a basis upon which the Department, ultimately, grounded its revocation/non-renewal determination.

> It is the public policy of the state of Ohio to ***prefer childbirth over abortion*** to the ***extent that is constitutionally permissible***. (Emphasis added.) R.C. 9.041.

Thus, the Supreme Court has established the constitutional limits on a state's ability to prefer childbirth over abortion. *See Women's Med. Professional Corp. v. Baird*, 438 F.3d 595, 609 (6th Cir.2006), citing *Roe v. Wade*, 410 U.S. at 153; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. at 869. Generally, a state may not place an "undue burden" on a woman seeking a pre-viability abortion. *Baird* at 603, *citing and following Casey*. The Sixth Circuit Court of Appeals, in *Baird,* held that this "undue-burden" standard is directly applicable to the precise situation involved in this very case -- the *Baird* court "evaluate[d] the [State of Ohio's] written transfer agreement requirement as applied to the [abortion clinic in that case] under the undue burden framework enunciated in *Casey*." *Baird* at 603.

Both parties in this case focus on the *Baird* case.

> "A finding of an ***undue burden*** is a shorthand for the conclusion that a state regulation has ***the purpose or effect of placing a substantial obstacle*** in the path of a woman seeking an abortion of a nonviable fetus." [*Casey*] at 877. As relevant to this case, "***regulations designed to foster the health of a woman seeking an abortion are valid*** if they do not constitute an undue burden." Id. at 878. However, "***unnecessary health regulations*** that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion ***impose an undue burden on the right***." (Emphasis added.) *Baird*, 438 F.3d at 603, quoting *Casey*, 505 U.S. at 877.

The instant administrative appeal calls on the Court to review whether the State's attempt to exercise its "important and legitimate interest in potential life" unduly burdens the "constitutional liberty" to terminate pregnancy. *See generally Roe* at 163; *Casey* at 869. The State may regulate "potential life," but the State must not go too far. *See Baird* at 603 (determining whether Ohio's original regulatory scheme of abortion centers created an undue burden).

In this case, the Court finds that the State has exceeded its constitutional authority in applying to Capital Care the current statutory scheme for licensing abortion centers contained in R.C. 3702.303 and 3702.304.

III. R.C. 119.12 STANDARD OF REVIEW

R.C. 119.12 governs the administrative appeal here.[4] *See Ohio Historical Soc. v. State Employment Relations Bd.*, 66 Ohio St.3d 466, 470, 613 N.E.2d 591 (1993). Under the R.C. 119.12 standard, courts are to make "***two inquiries***." (Emphasis added.) *Id.* ***First***, the court is to determine whether the administrative decision, under the applicable law, is supported by evidence that is "reliable, probative, and substantial." *Id.* at 470-471. In making this

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[4] R.C. 119.12 reads in pertinent part as follows:

Any party adversely affected by any order of an agency issued pursuant to an adjudication denying * * * renewal of a license or * * * revoking * * * a license * * * may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located * * *.

* * *

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is ***not supported by reliable, probative, and substantial evidence and is not in accordance with law***. * * *.

* * *

Unless otherwise provided by law, in the hearing of the appeal, ***the court is confined to the record as certified to it by the agency***. Unless otherwise provided by law, the court may ***grant a request for the admission of additional evidence*** when satisfied that the additional evidence is [1.] ***newly discovered*** and [2.] ***could not with reasonable diligence have been ascertained prior to the hearing*** before the agency.

The court shall conduct a hearing on the appeal * * *. * * *. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to a civil action. ***At the hearing, counsel may be heard on oral argument, briefs may be submitted, and evidence may be introduced if the court has granted a request for the presentation of additional evidence***.

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it ***may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law***. * * *.

* * *. (Emphasis added.) R.C. 119.12.

determination,[5] the court is to presume that the administrative findings of fact are correct. *Id.* at 471. The court should defer to these findings "unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Ohio Historical Soc.* at 471.

Second, is "a purely legal inquiry." Id. at 470. "To the extent that an agency's decision is based on construction of the state or federal Constitution, a statute, or case law, the common pleas court must undertake its R.C. 119.12 reviewing task completely independently." *Ohio Historical Soc.* at 471. As a matter of law, the court "must construe the law on its own," rather than defer to the administrative agency's construction. *Id.*

IV. PRELIMINARY MATTER -- ADDITIONAL EVIDENCE

Capital Care submits an affidavit with additional evidence to support its appeal. As a general proposition, R.C. 119.12 provides in pertinent part that "[u]nless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency." R.C. 119.12 (eleventh paragraph). *And see Beach v. Ohio Bd. of Nursing*, 10th Dist. No. 10AP-940, 2011-Ohio-3451 at ¶16 (discussing additional evidence). The statute does permit admission in limited situations. *Beach* at ¶16. Thus, a court may "grant a request for the admission of additional evidence when satisfied that the additional evidence is ***newly discovered*** and ***could not with reasonable diligence have been ascertained prior to the hearing*** before the agency." (Emphasis added.) R.C. 119.12. *And see Beach* at ¶16.

[5] "The evidence required by R.C. 119.12 can be defined as follows: (1) '***Reliable***' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) '***Probative***' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) '***Substantial***' evidence is evidence with some weight; it must have importance and value." (Emphasis added.) *Our Place, Inc. v. Ohio Liquor Control Com.*, 63 Ohio St.3d 570, 571, 589 N.E.2d 1303 (1992).

Additionally, "[n]ewly discovered evidence under R.C. 119.12 refers to evidence that existed at the time of the administrative hearing; it does not refer to evidence ***created after the hearing***." (Emphasis added.) *Burden v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 11AP-832, 2012-Ohio-1552, at ¶36. Whether to admit additional evidence is within the discretion of the trial court. *Id.*

In *Beach*, the court concluded that an affidavit created after the administrative hearing fails to meet the standard for additional evidence. *Id.* at ¶17. In this case, the evidence suggested and proffered by Capital Care arose after the administrative hearing in this case.

Accordingly, the Court will deny Capital Care's request for additional evidence.

V. BACKGROUND

Appellant Capital Care provides abortions in Toledo, Lucas County, Ohio. Capital Care is a free-standing, out-patient surgical facility governed by R.C. 3702.30. Such a facility is denominated by statute as an "ambulatory surgical facility" ("ASF"). R.C. 3702.30(A)(1). Capital Care is unaffiliated with any inpatient hospital. (*See* Tr.142.) R.C. 3702.30 requires ASFs to have licenses through the Department in order to operate lawfully in Ohio. R.C. 3702.30(E)(1); *Women's Med. Professional Corp. v. Baird*, 438 F.3d at 598. The General Assembly requires outpatient facilities which perform abortions to be licensed as ASFs. *Id.* at 598-599. Thus, Capital Care, as an ASF, must be licensed by the Department. And, in order to obtain a license, an ASF must have a "written transfer agreement" ("transfer agreement") with a hospital, or, instead, obtain a "variance." *Baird* at 598-599. *See also* R.C. 3702.303 (addressing transfer agreement); R.C. 3702.304 (addressing variance).

Capital Care has been licensed by the Department as mandated by Ohio law since at least 2010. (Tr.142-143.) Before 2012, Capital Care did not have a transfer agreement; instead, Capital Care's licensure was based on an agreement with a physician who would admit patients in need of inpatient care to a hospital. (Tr.143-144.) In 2011, the Department notified Capital Care that the agreement with a physician was insufficient to support a proper license. (Tr.154.)

In 2012, after six months of approaching and being rejected by hospitals in the Toledo area, Capital Care secured a transfer agreement with The University of Toledo Medical Center ("University of Toledo") effective August 1, 2012. (Tr.145-146; *and see* Transcript, Capital Care Exhibit A ["CC.Exh.A"] the "Toledo transfer agreement".) The Toledo transfer agreement was for a one-year term with "automatic[] renew[al] for successive 1-year periods unless terminated by either party in writing upon 60 days' written notice." (CC.Exh.A,para.10.) The Toledo transfer agreement allowed Capital Care to obtain a license. (*See* Tr.148-149.)

By letter dated April 4, 2013, the University of Toledo issued a timely notice of termination of the Toledo transfer agreement effective at the end of the one-year term -- July 31, 2013. (CC.Exh.B.) The University of Toledo termination letter coincided with legislative action, beginning in 2013, prohibiting public hospitals from entering into transfer agreements with abortion centers. Thus, being a public hospital, the University of Toledo no longer could enter into a transfer agreement with Capital Care. (Tr.32; *and see* Hearing Examiner Report, March 26, 2014 p.4,para.13 ["Report _."].)

With the Toledo transfer agreement expiring on July 31, 2013, the Department notified Capital Care by letter dated July 30 that the Department would require Capital Care to have a new transfer agreement on or before July 31. (Tr.19-20.)

Thereafter Capital Care contacted all of the hospitals in the Toledo area, and each facility refused to provide a transfer agreement. (Tr.51,162.) Capital Care did not have a transfer agreement from July 31, 2013 through January 20, 2014. (Tr.46.) Capital Care secured a transfer agreement ("Michigan transfer agreement") with The University of Michigan Health System ("University of Michigan"), in Ann Arbor, Michigan, effective January 20, 2014. (*Id.*) The University of Michigan is located 52 miles from the Capital Care facility. (Tr.46.)

By letter dated February 18, 2014, the former Director of the Department informed Capital Care that the Michigan transfer agreement violated the statutory licensing provisions of R.C. 3702.303(A). (State Exh.H.) The statute contains the new requirement that an ASF have a transfer agreement with a "local" hospital. R.C. 3702.303(A). The Director interpreted "local" as precluding a transfer agreement between Capital Care and the distant University of Michigan. (State Exh.H.) Thus, the Department proposed to revoke and not renew Capital Care's ASF license. (*Id.*)

Following receipt of the February 18 letter, Capital Care took steps to obtain a "variance" from the Department as a proper statutory alternative to a transfer agreement. (Tr.162-163.) Capital Care made several attempts to locate a backup physician with admitting privileges, in conformity with the new requirements, but Capital Care was unsuccessful. (Tr.163.) Without a backup physician, Capital Care was unable to submit a "complete variance application" to the Director as contemplated under R.C. 3702.304. (Tr.163.)

Capital Care made a timely request for an administrative hearing in order to challenge the former Director's proposed non-renewal/revocation of its ASF license. Capital Care challenged the proposed non-renewal/revocation on two bases. First, on the merits, arguing that the Department wrongly determined that the Michigan transfer agreement did not comply with the requirements of R.C. 3702.303(A); second, on the grounds that the ASF/transfer-agreement licensing scheme was unconstitutional. (Report p.11.) A hearing examiner for the Department heard the matter on March 26, 2014. The hearing examiner issued his Report on or about June 10, 2014. The examiner concluded "that the [former] Director's proposed [non-renewal and] revocation of the licensure of Capital Care Network of Toledo is in accordance with the rules adopted under [Ohio Administrative Code Chapter 3701] and R.C. 3702.303(A) and * * * THEREFORE * * * the proposed non-renewal and revocation of Capital Care's license are valid as a matter of law." (Report pp.10-11.)

The interim Director agreed with the hearing examiner's recommendation. The interim Director issued his Adjudication Order which is the subject of the instant appeal. The interim Director concluded: "Based upon these findings [of the hearing examiner], and in accordance with R.C. 3702.30, R.C. 3702.303(A), R.C. Chapter 119, and [Ohio Adm.Code] 3701-83-19(E), I hereby issue this Adjudication Order refusing to renew and revoking [Capital Care's] health care facility [ASF] license." (Adjudication Order p.2, July 29, 2014.)

Capital Care timely appealed the Adjudication Order.

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VI. DISCUSSION

In its notice of appeal, Capital Care asserts that the Adjudication Order is wrong under both of the R.C. 119.12 inquiries. ***First***, the decision is unsupported factually, and, ***second***, the decision is contrary to law.

A. FACTUAL INQUIRY

Capital Care specifically argues that the Adjudication Order is not supported by reliable, probative and substantial evidence because: (1.) Capital Care ***does*** have a transfer agreement -- the Michigan transfer agreement -- with a "local" hospital; and (2.) the transfer agreement ***does*** "adequately protect[] patient safety thus fulfilling the purpose of the [R.C. 3702.303(A) transfer-agreement] requirement." (Appellant's Brief p.9.) These arguments implicate both Capital Care's contention that the interim Director's interpretation of the statutory requirements for licensure was not "reasonable," and that the "local" standard contained in R.C. 3702.303(A) is unconstitutionally vague as applied in this case.[6]

In his Adjudication Order, the interim Director "approve[d] the hearing examiner's Report and Recommendation." (Adjudication Order p.2.) The interim Director stated in relevant part as follows:

> The hearing examiner's Report and Recommendation found that, as of the time of the hearing [March 26, 2014], CCN [Capital Care] did not have a written transfer agreement as required by [Ohio Administrative Code ("OAC")] 3701-83-19(E) prior to January 20, 2014 when CCN submitted a transfer agreement with the University of Michigan Health System in Ann Arbor, Michigan. The hearing examiner's Report and Recommendation found that the transfer agreement submitted by CCN on January 20, 2014 ***did not comply with the requirements of R.C. 3702.303(A)***. The hearing examiner concluded that because ***CCN does not have an acceptable written transfer agreement with a local hospital or a variance***, it does not meet the licensing requirements. The hearing examiner further concluded that because CCN does not meet the licensing requirements

[6] The parties agree that the statute does not define "local." (*See* Report Finding 8.)

> of [R.C.] 3702.30, the Director's decision not to renew, or to revoke the license of CCN, is valid. Based upon these findings, and in accordance with R.C. 3702.30, R.C. 3702.303(A), R.C. Chapter 119, and OAC 3701-83-19(E), I hereby issue this Adjudication Order refusing to renew and revoking CCN's health care facility license. (Emphasis added.) (Adjudication Order p.2.)

Thus, the interim Director based the Adjudication Order on the findings of the hearing examiner that, Capital Care did not meet licensing requirements, and its license was subject to revocation and/or non-renewal because Capital Care did not have "[1.] an acceptable written transfer agreement with a ***local*** hospital or [2.] a ***variance***." (Emphasis added.) (*Id.*)

In concluding that the "local" requirement of the statute was proper as applied to Capital Care, the hearing examiner based his determination on: (1.) the actual fifty-two mile distance between Capital Care and the University of Michigan in Ann Arbor; (2.) the testimony of the former Director that "high quality patient care and safety" requires that the alternative-care hospital must be within thirty minutes of the facility (Report pp.8,9 [conclusions 7-10])[7]; (3.) the testimony of a Department official that, in the absence of any hospital closer to a facility than fifty miles, a transfer agreement with a hospital of the distance of fifty to sixty miles (*i.e.,* the distance to the University of Michigan) might be acceptable (Report p.7; Tr.27-29); and (4.) the presence of seven or eight hospitals within the "immediate area of Capital Care" (Report Finding 12).

1. <u>Reasonable Interpretation</u>

Capital Care's arguments call into question the hearing examiner's (and the interim Director's) interpretation of the language in the transfer agreement statute, R.C. 3702.303(A). The relevant provisions of the statute read as follows:

[7] *See* Tr.66 (noting the importance of the thirty-minute rule to patient safety).

> "an ambulatory surgical facility shall have a ***written transfer agreement*** [1.] with a ***local*** hospital [2.] that ***specifies an effective procedure*** for the [a.] ***safe*** and [b.] ***immediate*** transfer of patients from the facility to the hospital [3.] when ***medical care beyond the care that can be provided at the ambulatory surgical facility is necessary, including when emergency situations*** occur or medical complications arise." (Emphasis added.) *Id.*

R.C. 3702.303(A) contains: (1.) a "***local***" component; (2.) an "effective procedure for * * * ***safe*** and ***immediate*** transfer" component; and (3.) a "***beyond the care*** that can be provided" component.

Courts reviewing agency determinations of statutory language are to first determine whether the agency has made a "reasonable interpretation" of the statute. *See Lorain City School Dist. Bd. of Educ. v. State Employment Relations Bd.*, 40 Ohio St.3d 257, 262, 533 N.E.2d 264 (1988). Thus, courts should "courts must accord due deference to the [agency's] interpretation." *Leon v. Ohio Bd. of Psychology*, 63 Ohio St.3d 683, 687, 590 N.E.2d 1223 (1992). In conformity with R.C. 1.42,[8] courts will refer to dictionary definitions when "confusion arises based upon the use by the General Assembly [of a] word." *Lorain*, at 262.

The Court notes no disagreement between the parties as to the third component -- "beyond the care that can be provided." As to the first component, "local," the hearing examiner defined the term as "relating to a city, town or district rather than a larger area." (Report p.7.)[9] The second component, the phrase "safe and immediate transfer," was not focused on by the hearing examiner. Nonetheless, the second component is highly relevant.

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[8] R.C. 1.42 reads as follows:

Words and phrases shall be read in context and ***construed according to the rules of grammar and common usage***. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. (Emphasis added.)

[9] From American Heritage Dictionary 795 (3Ed.2000). The Court notes a similar definition from a different dictionary: "primarily serving the needs of a particular limited district, often a community or minor political subdivision." Webster's Third New International Dictionary 1327 (1993).

The Court finds that the qualifier "***safe***" -- "secure from threat of danger, harm, or loss"[10] -- along with the qualifier "***immediate***" -- "occurring, acting, or accomplished without loss of time : made or done at once : INSTANT"[11], combine to make a clear and plain requirement that a transfer must be (1.) free from outside risk and (2.) be reasonably instantaneous. The Court finds that the hearing examiner's conclusion (*i.e.*, that the Department properly used the thirty-minute rule) is a reasonable interpretation of the statute.

2. Vagueness

Capital Care challenges the "local" provision in R.C. 3702.303(A) as being unconstitutionally vague. While the hearing examiner did not rule on Capital Care's constitutional arguments (these arguments being "beyond the jurisdiction of the Hearing Examiner," [Report p.10]), the Court will address "vagueness" here, because the argument is closely related to the fact-based "reasonableness" discussion above.

The parties cite to *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), for the standard of review. As a general rule, a law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* at 108. A statute is not void for vagueness simply because the legislature might have drafted it more clearly. *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶86.

> The critical question in all cases is whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law; those laws that do not are void for vagueness. *Norwood* at ¶86.

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[10]"1[S]afe,(2)." Webster's Third New International Dictionary 1998 (1993).
[11]"[I]mmediate,(3a)." Webster's Third New International Dictionary 1327 (1993).

In this case, while the hearing examiner did not expressly apply a void-for-vagueness test, he did determine that the Department's thirty-minute rule was "reasonable." (Report Conclusion 8.) The Court has concluded above that the "local" and the "safe and immediate transfer" components of R.C. 3702.203(A) adequately combine to make a clear and plain requirement -- that a transfer must be (1.) free from outside risk and (2.) reasonably instantaneous.

Capital Care does not dispute that it attempted, first, to obtain a transfer agreement from the hospitals within Toledo before looking outside the area. Capital Care does not argue that a hospital which is fifty miles from Toledo is preferable to or would protect patient safety better than a hospital in Toledo.

Thus, the Court now finds that the components of R.C. 3702.303(A) "afford[] a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law." *Norwood* at ¶86. Thus, the Court finds that these components combine to plainly and clearly require a transfer that is free from outside risk and is reasonably instantaneous.

B. LEGAL INQUIRY

Capital Care argues that the ASF licensing scheme is unconstitutional on two grounds. First, **Improper Delegation** -- the current ASF licensing scheme embodied in R.C. 3702.303, 3702.304, and 3727.60 is unconstitutional because that scheme, as applied to Capital Care, constitutes an unconstitutional delegation of the State's licensing authority of abortion clinics. Second, **Single-Subject** -- the current licensing scheme is unconstitutional because it was improperly enacted as part of a huge appropriations bill, "HB 59," and, thus, the ASF

licensing scheme contained in HB 59 runs afoul of the so-called "single-subject" rule embodied in the Ohio Constitution.

In opposition, the Department argues, first, this ASF "licensing scheme" was upheld as ***constitutional*** by the Sixth Circuit, in *Women's Med. Professional Corp. v. Baird*, 438 F.3d at 609. (*See* Appellee's Brief p.14.) Second, the Department asserts that HB 59 does not violate the single-subject rule.

The Court must first discuss the change of law in licensing requirements for abortion centers. Then, the Court will address the improper-delegation question and the single-subject issue in their turn.

1. <u>Change In Licensing Schemes/Third-Party-Delegation</u>

a. "Original Scheme"

The General Assembly has empowered the Department to "establish quality standards" for ASFs. R.C. 3702.30(B); *see Baird* at 599. Since at least 2002, the Department first operated under regulation-based quality standards it established (these constitute the "Original Scheme"). Under the Original Scheme, in order to obtain an ASF license, the Department required all ASFs to have a written transfer agreement ("transfer agreement") with a hospital. Ohio Adm.Code 3701-83-19(E); *Baird* at 599, fn.2 (license issued in 2002). The text of departmental rule governing transfer agreements, reads in relevant part as follows:

> (E) The ASF shall have a ***written transfer agreement*** with a hospital for transfer of patients in the event of ***medical complications, emergency situations, and for other needs as they arise***. * * *. (Emphasis added.) Ohio Adm.Code 3701-83-19.

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"The transfer agreement requirement ensures that the ASF can transfer patients 'in the event of medical complications, emergency situations, and for other needs as they arise.'" *Baird* at 599, quoting Ohio Adm.Code 3701-83-19(E).

As an alternative to the transfer-agreement requirement for licensure under the Original Scheme, the Department granted its Director the authority to issue a "waiver" or "variance" pursuant to Ohio Adm.Code 3701-83-14. *Baird* at 599, referring to Ohio Adm.Code 3701-83-14.[12] At that time, "[t]he director [could] grant a ***waiver*** only if 'the ***director*** determine[d] that the strict application of the license requirement would ***cause an undue hardship*** to the [ASF] and that granting the waiver ***would not jeopardize the health and safety of any patient.***'" (Emphasis added.) *Baird* at 599, quoting Ohio Admin. Code 3701-83-14(C)(2). "The director [could] approve a ***variance*** if 'the director determine[d] that the requirement has been ***met in an alternative manner.***'" (Emphasis added.) *Baird* at 599, quoting Ohio Adm.Code 3701-83-14(C)(1).

b. "Current Scheme"

On or about June 30, 2013, the General Assembly enacted HB 59 through which the legislature added multiple new sections to the Revised Code, and amended numerous other sections of the Revised Code.[13] *See* 2013 HB 59. Relevant to this case are the following sections of HB 59: R.C. 3702.303; 3702.304; and 3727.60 ("Current Scheme"). These statutory components of the Current Scheme conform to the general framework of the Original Scheme: ASFs must be licensed; licensing requires a transfer agreement; and a variance is available as an

[12] Ohio Adm.Code 3701-83-14 permits either a "waiver" or a "variance." The Current Scheme, in R.C. 3702.304, eliminates the "waiver" option, but maintains the restricted option of a "variance." *See* discussion of R.C. 3702.304 below.

[13] *See* "Single-Subject Rule" discussion, infra, for a partial recitation of other sections of HB 59.

alternative under certain circumstances. However, a reading of the plain and ordinary language of the Current Scheme reveals the imposition of new limits on the availability of abortions in Ohio that were not part of the Original Scheme. (*See* below.) HB 59 became effective September 29, 2013.

R.C. 3727.60, "Limitations on public hospital transfer agreements," places restrictions on the ASF requirements arising from R.C. 3702.30. The new restrictions impact on the concurrently-enacted new transfer-agreement law (R.C. 3702.303) and new variance law (R.C. 3702.304). In R.C. 3727.60(B), the legislature has prohibited any "public hospital" from either: (1.) entering into a transfer agreement with an ASF abortion clinic; or (2.) permitting a physician who has staff privileges at the "public hospital to use * * * those privileges * * * for purposes of a ***variance application*** described in section 3702.304 of the Revised Code that is submitted to the director of health by [an abortion] facility * * *." (Emphasis added)

R.C. 3702.303, "Transfer agreements between surgical facilities and hospitals," establishes the legislature's own version of the transfer-agreement rule; the statutory version adds an additional restriction to the regulations of the Original Scheme, (*i.e.*, Ohio Adm.Code 3701-83-19). Under the provisions of R.C. 3702.303(A), an ASF's transfer agreement must be with a "***local hospital***" and must ensure "an effective procedure for the ***safe and immediate*** transfer of patients from the [ASF] to the hospital when medical care beyond the care that can be provided at the [ASF] is necessary, including when emergency situations occur or medical complications arise." (Emphasis added.) R.C. 3702.303(A).

R.C. 3702.304, "Variance from written transfer agreement," establishes a new statutory "variance" rubric (augmenting the requirements of Ohio Adm.Code 3701-83-14)

which now is alternative means of licensure to the new transfer-agreement statute, R.C. 3702.303. *See* R.C. 3702.304. If an ASF submits a "complete variance application," the director may grant a variance if she/he determines the variance "is capable of achieving the purpose of a written transfer agreement," as required in R.C. 3702.303; that purpose being: providing for "safe and immediate * * * medical care beyond the care that can be provided at the [ASF] [when such care] is necessary." *See* R.C. 3702.303.

2. Delegation of Licensing Authority: *Women's Med. Professional Corp. v. Baird*

a. "Undue-Burden" Standard

As discussed above, the Court finds that the "undue-burden" standard, addressed in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. at 877, applies to the Court's inquiry into the constitutionality of the Current Scheme. *See Women's Med. Professional Corp. v. Baird*, 438 F.3d at 603 (applying *Carey's* undue-burden standard to a challenge to the Original Scheme). Under the undue-burden standard, the court must determine if the state regulation at issue "places a 'substantial obstacle' in the path of a woman seeking an abortion." *Baird* at 604.

> Numerous forms of state regulation might have the ***incidental effect*** of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the ***incidental effect*** of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. ***Only where the state regulation imposes an undue burden on a woman's ability to make this decision*** does the power of the State reach into the heart of the liberty protected by the Due Process Clause. (Emphasis added.) *Carey* at 874.

b. Improper Delegation

It is well-established that, "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician

and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

The *Reizen* and *Hallmark* case. Capital Care cites to both, *Birth Control Ctrs. v. Reizen*, 508 F.Supp. 1366 (E.D.Mi.1981), and *Hallmark Clinic v. North Carolina Dept. of Human Resources*, 380 F.Supp. 1153 (E.D.N.C.1974), in support of its argument that a written-transfer-agreement scheme, which leaves the decision to grant such agreements up to individual hospitals, is an unconstitutional delegation of licensing authority. *See Reizen* at 1374-1375; *Hallmark* at 1158-1159. Such a system is an "impermissible delegation of state power, since it confer[s] upon hospitals the ability to arbitrarily veto the operation of abortion clinics by ***withholding transfer agreements*** or ***denying staff privileges***." (Emphasis added.) *Reizen* at 1374, citing *Hallmark*.

> The defect lies in the ***delegation of unguided power to a private entity***, whose self-interest could color its decision to assist licensure of a competitor. Similar delegations of licensing functions have met with judicial disapproval.* * *
>
> The ***power to prohibit licensure may not constitutionally be placed in the hands of hospitals***. Such an impermissible delegation ***without standards or safeguards*** to protect against unfairness, arbitrariness or favoritism is void for lack of due process. (Emphasis added.) *Reizen* at 1375.

See also Hallmark at 1158-1159 ("By conditioning the license on a transfer agreement, the state has given hospitals the arbitrary power to veto the performance of abortions for any reason or no reason at all. The state cannot grant hospitals power it does not have itself").

The Department asserts that the *Reizen* and *Hallmark* cases are properly distinguishable. In both cases, the provisions at issue left the final decision for abortion-clinic licensure in the hands of hospitals rather than in a state decision-maker. The Sixth Circuit, in

Baird, noted this proper distinction. See *Baird*, 438 F.3d at 610 (*Reizen* and *Hallmark* were distinguishable). Thus, the *Baird* court upheld Ohio's Original Scheme -- R.C. 3702.30, Ohio Adm.Code 3701-83-14 and 3701-83-19. *See Baird,* at 610.

The *Baird* case. The parties differ strongly over what they see as the proper role of *Baird* for guiding the Court here. The *Baird* case involved a challenge by an ASF-abortion clinic (the "Clinic") to the Original Scheme. *See id.* at 598 (citing the provisions of the Original Scheme). The court noted that: R.C. 3702.30 required ASFs to be licensed; Ohio Adm.Code 3701-83-19 required the Clinic to have a transfer agreement; and Ohio Adm.Code 3701-83-14 permitted the Director, in his/her absolute discretion, to issue a waiver or variance to an ASF. *Baird* at 598-599. The *Baird* court then distinguished *Reizen* and *Hallmark*, noting that Ohio's waiver/variance provisions of Ohio Adm.Code 3701-83-14 saved the Original Scheme from unconstitutionality because the Director retained discretion. *Baird* at 610. The court stated:

> We need not decide today whether *Hallmark Clinic* and *Reizen* were correctly decided because this [Ohio's] ***licensing scheme contains an important feature that the laws at issue in those cases did not***. In this case, unlike those, ***Director Baird retains authority to grant a waiver of the transfer agreement requirement. His ability to grant a waiver of this requirement means that the area hospitals do not necessarily have the final veto on whether an abortion clinic is licensed***. (Emphasis added.) *Baird* at 610.

In support of the *Baird* court's conclusion regarding the "important-feature" -- the Director's absolute discretion -- the *Baird* court cited with approval to *Greenville Women's Clinic v. Commissioner, South Carolina Department of Health & Environmental Control,* 317 F.3d 357 (4th Cir. 2002). *Baird* at 610, fn.9. The *Greenville* court upheld the state's abortion-regulatory scheme because state rules protected the state's regulatory control; the rules both ***permitted a waiver***, and ***required "public hospitals not act unreasonably***, arbitrarily, capriciously, or

discriminatorily" in their decision-making. *Id.* at 362-363. Thus, finding *Greenville* persuasive, the *Baird* court concluded:

> We agree with Director Baird's argument and hold that ***his ability to grant a waiver from the transfer agreement requirement prevented the hospitals from having an unconstitutional third-party veto*** over [the Clinic's] license application. Because the waiver procedure ***allows the state to make the final decision*** about whether ASFs obtain a license, there was ***no impermissible delegation of authority to a third party***. (Emphasis added.) *Baird*, 438 F.3d at 610.

As this Court noted above, and as Capital Care properly observes, the *Baird* court addressed the constitutionality of the Original Scheme. Again, the *Baird* court stated, "[the director's] ***ability to grant a waiver*** of this requirement ***means that the area hospitals do not necessarily have the final veto*** on whether an abortion clinic is licensed." (Emphasis added.) *Id.* at 610. The *Baird* court quoted the ***decision-making authority*** of the director, stated in Ohio Adm.Code 3701-83-14, of the Original Scheme. *Id.* at 599. These provisions permitted the director, "[u]pon a ***written request***," to grant a ***"waiver if the director determines*** that the strict application of the license requirement would cause an undue hardship to the [health care facility] and that granting the waiver would not jeopardize the health and safety of any patient." (Emphasis added.) *Baird* at 599, quoting Ohio Adm.Code 3701-83-14[C](2).[14] In order for an ASF ***to request a variance*** under the Original Scheme, the Ohio Adm.Code had required:

> **(B)** An HCF seeking a variance or waiver must ***submit a written request*** to the director. ***Such written request must include*** the following information:
> **(1)** The specific ***nature of the request***, and the rationale for the request;
> **(2)** The specific building or ***safety requirement in question***, with a reference to the relevant administrative code provision;

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[14]Ohio Adm.Code 3701-83-14 reads in pertinent part as follow: "(C) ***Upon written request of the HCF [ASF] the director may grant***:(1) A ***variance*** if the director determines that the requirement has been met in an alternative manner; or
(2) A ***waiver*** if the director determines that the strict application of the license requirement would cause an undue hardship to the HCF and that granting the waiver would not jeopardize the health and safety of any patient." (Emphasis added.)

(3) The ***time period*** for which the variance or waiver is requested;
(4) If the request is for a variance, ***a statement of how the HCF will meet the intent of the requirement*** in an alternative manner; and
(5) If the request is for a waiver, ***a statement regarding why application of the requirement will cause undue hardship*** to the HCF and why granting the waiver will not jeopardize the health and safety of any patient. (Emphasis added.)

As noted by the *Baird* court, these provisions are "***solely within the director's discretion*** as to whether a variance or waiver should be granted." (Emphasis added.) *Baird* at 599. A plain reading of these requirements for the "written request" portion further reveals that all requirements for submitting a "written request" are within the control of the ASF -- not a third-party. Neither hospital nor physicians held a "final veto" under the Original Scheme. *Baird* at 610.

In contrast to the Ohio Adm.Code 3701-83-14 waiver/variance requirements of the Original Scheme (which leave control in the hands of the Director and the applicant) are the requirements contained in R.C. 3702.304 of the Current Scheme. The new statute establishes a new "variance" rule (augmenting the requirements of Ohio Adm.Code 3701-83-14). *See* R.C. 3702.304. Only if an ASF submits a "***complete variance application,***" may the director entertain a variance request; and, in such a case the Director may grant the variance if she/he determines the variance "is capable of achieving the purpose of a written transfer agreement," as required in R.C. 3702.303(A).[15] These "complete-variance-application" provisions of the new variance statute, R.C. 3702.304, read in relevant part as follows:

> (A) The ***director of health may grant a variance*** from the written transfer agreement requirement of section 3702.303 of the Revised Code ***if the ambulatory surgical facility submits to the director a complete variance application***, * * *. The director's determination is final.

[15] That purpose being, providing for "safe and immediate * * * medical care beyond the care that can be provided at the [ASF] [when such care] is necessary," as mandated in R.C. 3702.303.

(B) A variance ***application is complete*** for purposes of division (A) of this section if it ***contains or includes as attachments all of the following***:

(1) ***A statement explaining*** why application of the requirement would cause the facility ***undue hardship*** and why the variance ***will not jeopardize*** the health and safety of any patient;

(2) A letter, contract, or memorandum of understanding signed by the facility and ***one or more consulting physicians who have admitting privileges at a minimum of one local hospital***, memorializing the physician or physicians' agreement to provide back-up coverage when medical care beyond the level the facility can provide is necessary;

(3) ***For each consulting physician*** described in division (B)(2) of this section:

(a) A signed statement in which the physician attests that the physician is ***familiar with the facility*** and its operations, and agrees to provide notice to the facility of any changes in the physician's ability to provide back-up coverage;

(b) The ***estimated travel time*** from the physician's main residence or office to each local hospital where the physician has admitting privileges;

(c) Written verification that the facility has a record of the ***name, telephone numbers***, and practice specialties of the physician;

(d) Written verification from the state medical board that the physician possesses a ***valid certificate to practice medicine*** and surgery or osteopathic medicine and surgery issued under Chapter 4731. of the Revised Code;

(e) ***Documented verification that each hospital at which the physician has admitting privileges has been informed in writing by the physician that the physician is a consulting physician for the ambulatory surgical facility*** and has agreed to provide back-up coverage for the facility when medical care beyond the care the facility can provide is necessary.

(4) ***A copy of the facility's operating procedures*** or protocols * * *.

(C) The ***director's decision to grant, refuse, or rescind a variance is final***.

(D) The ***director shall consider each application for a variance independently*** without regard to any decision the director may have made on a prior occasion to grant or deny a variance to that ambulatory surgical facility or any other facility. (Emphasis added.)

The former Director, himself, testified that he had no ability to influence, nor any right to control, either a hospital's decision to deny a transfer agreement or admitting privileges much less a physician's decision to act as a back-up for purposes of a variance. (Tr.104-106.)

Some Control. The Court finds that the Current Scheme of R.C. 3702.304 ***does give*** the Director ***some control***. Paragraph (A) gives authority to the director to "grant a

variance." Paragraph (C) makes the Director's decision in that regard "final" and not reviewable. And, paragraph (D) gives the Director the discretion to treat each application "independently."

Not Enough Control. However, the Court also finds that the statute, nonetheless, ***does not give*** the Director ***adequate control.*** Rather, R.C. 3702.304 conditions the Director's "final" authority to "grant" or deny a variance on paragraph (B) -- *i.e.,* the Director's receipt of a "variance application [that] is complete." The Director has ***no control*** over several items required for a "complete variance application." These are: whether any physician would agree to serve as backup for an abortion clinic -- subparagraph (B)(2); and whether an agreeing physician will be granted and/or allowed to maintain admitting privileges at a local hospital after the physician notifies the hospital of her/his agreement with the abortion clinic-- subparagraphs (B)(2) and (B)(3)(e).

Indeed, in this case, Capital Care contacted all hospitals in the Toledo area, and all refused to grant Capital Care a transfer agreement. Capital Care also contacted "several" doctors for backup with admitting privileges, and it had no success with any. (Tr.163.) The evidence in this case is unequivocal that third-parties -- Toledo area hospitals and "several" physicians -- precluded Capital Care from both: (1.) obtaining a transfer agreement; and (2.) having the ability to submit a "complete variance application." Capital Care was prevented by third parties from submitting a proper variance application to the Director. The Court finds, under the Current Scheme, an ASF's access to both a transfer agreement and a variance are subject to "an unconstitutional third-party veto." *Baird* at 610.

Based on the foregoing, the Court finds that the Current Scheme, embodied in R.C. 3702.303, 3702.304 and 3727.60, is unconstitutional as applied to Capital Care because the transfer agreement and variance provisions contain unconstitutional delegations of licensing authority. *See Reizen* at 1374 (unconstitutional delegation of transfer-agreement and staff-privilege decision-making).

3. Single-Subject Rule

Capital Care argues that the Current licensing Scheme, as enacted in HB 59, violates the single-subject rule of the Ohio Constitution. *See* Ohio Constitution Art. II, Section 15(D).

> (D) No bill shall contain more than ***one subject, which shall be clearly expressed in its title***. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed. *Id.* (Emphasis added.)

a. General Provisions

"The one-subject rule is * * * a product of 'the drafters' desire to place checks on the legislative branch's ability to exploit its position as the overwhelmingly pre-eminent branch of state government prior to 1851.'" *State ex rel. Ohio Civil Serv. Employees Assn, Local 11 v. State Empl. Rels. Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688 (the "*OCSEA*" decision), *quoting State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 495, 1999-Ohio-123, 715 N.E.2d 1062 (1999). The courts' role in enforcing the single-subject rule is limited, however. *OCSEA* at ¶27. "Thus, the mere fact that a bill embraces more than one topic is not fatal, as long as a ***common purpose*** or relationship exists between the topics." (Emphasis added.) *Sheward*, 86 Ohio St.3d at 496. To conclude that a bill violates the one-subject rule, a court must determine that the bill includes a disunity of subject matter such that

there is "no discernible practical, rational or legitimate reason for combining the provisions in one Act." *OCSEA* at ¶28.

> In determining whether a legislative enactment violates Ohio's one-subject rule, ***a court analyzes the particular language and subject matter of the act***, rather than extrinsic evidence of fraud or logrolling; in order to effectuate the purposes of the rule it ***must invalidate an act that contains unrelated provisions***. (Emphasis added.) *Akron Metro. Hous. Auth. Bd. of Trs. v. State*, 10th Dist. No.07AP-738, 2008-Ohio-2836, at ¶19.

In *Akron Metro.*, the court reviewed a bill addressing "three topics": (1.) member-composition of metropolitan housing boards, (2.) changes in county/township zoning regulations, and (3.) creation of rights for charter school students to participate in public-school extra-curricular activities. *Id.* at ¶20. The proponent of the bill, the State, explained the "common thread" as "modifying local authority." *Id.* at ¶21. The *Akron Metro* court concluded, however, that "the state's argument stretches the one-subject concept too far, in effect rendering it meaningless." *Id.* at ¶23, citing *OCSEA* at ¶33.

b. Appropriations Bills

When a piece of legislation is contained in an appropriations bill, the court should assess whether the pieces are "all bound by the thread of appropriations." *OCSEA* at 30. The court, in *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 15, 1999-Ohio-77, 711 N.E.2d 203 (1999), addressed the one-subject rule in the context of an appropriations bill. In that case, the court "considered whether the Ohio School Voucher Program should be stricken from an appropriations bill as violative of the one-subject rule." *OCSEA*. at ¶30, quoting *Simmons-Harris v. Goff*, 86 Ohio St.3d at 15.

> Nevertheless, we held in *Simmons-Harris* that there was "a '***blatant disunity between' the School Voucher Program and most other items contained in [the Act***]" and that there was "'***no rational reason for their combination***.'" * * *. In support of our conclusion, we noted that the program "was created in a general appropriations bill

> consisting of over one thousand pages, of which it comprised only ten pages." * * *. Such legislation, we reasoned, was ***little more than a "rider***"--a provision included in a bill that is "'so certain of adoption that the rider will secure adoption not on its own merits, but on [the merits of] the measure to which it is attached.'" (Citations omitted; emphasis added.) *OCSEA* at ¶31.

The state should "offer [more specific] guidance regarding the manner in which the [scrutinized provision] affects the state budget, [than merely a] ***general averment*** that the [provision] 'is related to [appropriations].'" (Emphasis added.) *OCSEA* at ¶34. Thus, if "the record is ***devoid of any explanation*** whatever as to the manner in which the [legislation under scrutiny] will ***clarify or alter*** the appropriation of state funds," then courts properly should "discern ***no common purpose*** or relationship between the budget-related items" and the scrutinized legislation. (Emphasis added.) *OCSEA* at ¶34. Absent an adequate "explanation," *id.* at ¶34, the scrutinized legislation "violates the one-subject rule," *id.* at ¶36.

c. Department's Explanation?

In this case, the Department argues that the Court must defer to the legislature, giving the General Assembly "great latitude." *See OCSEA*, 104 Ohio St.3d at ¶27 (quoted in Opposition Brief p.16). The Department contends that there is a "common purpose or relationship [that] exists between the topics" in HB 59. *See Hoover v. Bd. of Cty. Commrs.*, 19 Ohio St.3d 1, 5, 482 N.E.2d 575 (1985) (quoted in Opposition Brief p.16). The Department describes the "unity of purpose of the bill" (Opposition Brief p.16) as follows:

> [T]o make ***operating appropriations*** for the biennium and to ***provide authorization and conditions for the operation of programs***, including reforms for the ***efficient and effective operation of state and local government***. As such, these provisions properly fall within the appropriations bill's purpose of "deal[ing] with the operations of the state government." (Emphasis added.) (Opposition Brief p.16 [*quoting ComTech Systems, Inc. v. Limbach*, 59 Ohio St.3d 96, 99, 570 N.E.2d 1089 (1991)].)

The Court agrees that deference to the legislature is proper in the proper case. *See OCSEA* at ¶34 ("Of that there can be no doubt"). However, in *OCSEA*, the court addressed just this type of a general, and conclusory statement of proposed common-purpose; the court found the statement uncompelling.

> This [type of] argument, however, ***stretches the one-subject concept to the point of breaking***. Indeed, SERB's position is based on the notion that ***a provision that impacts the state budget, even if only slightly, may be lawfully included in an appropriations bill merely because other provisions in the bill also impact the budget. Such a notion, however, renders the one-subject rule meaningless in the context of appropriations bills because virtually any statute arguably impacts the state budget, even if only tenuously***. We flatly rejected this proposition in *Simmons-Harris*. * * *. (Emphasis added.) *OCSEA* at ¶33.

And see Akron Metro. Hous. Auth. Bd. of Trs. v. State, supra, 2008-Ohio-2836, at ¶23.

d. Provisions Contained In HB 59.

The former Director, who was involved in the negotiations over HB 59, referred to the bill as "a huge bill," and a "budget bill." (Tr.96.)

Certain portions of HB 59 include the following:

"Information" -- R.C. 2317.56, 2919.19, 2919.191, 2919.192 and 4731.22 address "information to be provided" to and/or about women prior to getting abortions.

Current Scheme -- R.C. 3702.30 et seq. and 3727.60 embody the Current Scheme.

"Parenting Programs" -- R.C. 5101.80, 5181.801, and 5101.804 address funding to Ohio's parenting and pregnancy programs, and state that such programs are not "assistance" programs.

Appropriations – These are the bulk of HB 59. R.C. 107.033 addresses state appropriation limitations in the Governor's budget. R.C. 126.14 appropriates money for state

purchasing of real estate. R.C. 152.09, "Issuance of obligations," addresses the state issuing bonds, notes, and the like. R.C. 154.23 addresses state bond issues for cultural facilities, sports facilities and the like.[16]

e. No Common Purpose

Now, the Court finds that the Department has failed to present an adequate "explanation" as to how the Current Scheme provisions are part of a "common purpose" contained in the bulk of HB 59 provisions. *See OCSEA,* 104 Ohio St.3d at ¶34. The Department's "general averment" fails to indicate the "manner in which the [Current Scheme provisions] will clarify or alter the appropriation of state funds." *Id.* at ¶34. Thus, the Court cannot say that the restrictive provisions at issue in this case were "little more than a 'rider'-- a provision included in a bill that is ""'so certain of adoption that the rider will secure adoption ***not on its own merits***, but on [the merits of] the measure to which it is attached."'" (Citations omitted; emphasis added.) OCSEA at ¶31.

Based on the foregoing, the Court concludes that the Current Scheme for licensing abortion-center ASFs, at issue here, violates the single-subject rule.

(The Court intentionally leaves the remainder of this page blank.)

[16] **Other HB 59 appropriation sections** include: R.C. 123.27; R.C. 125.27; R.C. 151.11; R.C. 173.43; R.C. 183.33; R.C. 2505.02; R.C. 3314.082; R.C. 3319.57; R.C. 3326.38; R.C. 3333.124; R.C. 3333.613; R.C. 3350.15; R.C. 3734.901; R.C. 5112.11; R.C. 5119.186; and R.C. 5910.08.

JUDGMENT ENTRY

The Court hereby ORDERS the appellant's request for additional evidence is denied. The Court further ORDERS that the July 29, 2014 "Adjudication Order" decision of the interim Director, "refusing to renew and revoking [the Appellant's] health care facility license," is not in accordance with law. The Court further ORDERS that the decision contained in that Adjudication Order is reversed. The Court finds no just reason for delay.

6/19/15

M. Duhart

Myron C. Duhart, Judge

Distribution: Terry J. Lodge
Jennifer L. Branch
Lyndsay Nash