



May 20, 2020

Recently a letter was published in the media citing concerns over the language of an amendment to Senate Bill 1, sponsored by Senators Rob McColley of Defiance and Kristina Roegner of Hudson. The amendment, which was added in the House, is geared toward giving Ohio's elected lawmakers greater oversight on the powers of an Executive branch agency, the Ohio Department of Health (ODH), in a declared emergency context. The usage of these powers under this section by the Department of Health and its Director, Dr. Amy Acton, in Ohio's current novel coronavirus outbreak has raised concerns of Ohio's legislators to the point of action.

The apparent concern of the letter was that the amendment could somehow be used to prohibit the enforcement of statutes relating to the removal of licenses from an ambulatory surgical facility (in this context an abortion provider) for violations of their licensure requirements.

The Right to Life Action Coalition of Ohio has reviewed these claims, and do not find the same concerns.

The amendment addresses Ohio Revised Code Section 3701.13, which establishes the powers of the Ohio Department of Health. The amendment adds a provision, division (C) of the section, which requires any orders of the ODH to be limited to 14 days duration unless: a) given approval for a period exceeding 14 days by the Joint Committee on Agency Rule Review, a bicameral, bi-partisan legislative committee that acts as a check on executive rule-making authority; b) the order includes an effective period that exceeds 14 days; or c) the substance of the order is contained in multiple subsequently issued orders whose combined effective period exceeds 14 days.

The amendment also requires that the general power of the ODH enumerated in division (A) of Section 3701.13 which grants "supervision of all matters relating to the preservation of the life and health of the people" and "ultimate authority in matters of quarantine and isolation, which it may declare and enforce, when neither exists, and modify, relax, or abolish, when either have been established" be subject to the above-mentioned division (C) of the section. Division (B) allows for the Department to also make special or standing orders in the areas of preventing use of fluoroscopes for non-medical purposes, preventing the spread of contagious or infectious diseases, governing receipt and conveyance of human remains, and sanitary matters best controlled by a general rule. All of these rule-making powers are also subject to division (C) of this section.

It is apparent from the actual language of the amendment that the ODH can issue orders and rules that have greater than a 14 day duration, and it also appears that the 14 day restriction is intended for orders or rules promulgated under this section of Ohio's laws, in essence, order or rules relative to preventing the spread of contagious or infectious diseases.

This is not the section of Ohio's statutes where the laws regarding licensure of an abortion facility (considered an ambulatory surgical facility under law) or the suspension or revocation of said licensure are located.

The licensure provisions are in Section 3702.30 of the code, with specific language relative to what the content of the rules for licensure of ambulatory surgical facilities must contain, including provisions to govern applications, renewals, suspension and revocation of licenses, along with imposing civil penalties for violations of the section or rules adopted under this section, which are found under Ohio Revised Code Section 3702.32. This section provides a series of actions the ODH may take against a facility that is either operating without a license or have violated any of the rules generated under Section 3702.30. None of these provisions regarding rules rely on Section 3701.13 for authorization.

Ohio Revised Code Section 3701.341 (also under the auspices of the ODH) grants the authority for the Department to set rules related to abortion, post-abortion procedures protecting a woman's health, pathological reports, humane disposition of fetal remains, and counseling. This section also does not rely on Section 3701.13 for authorization regarding rules.

Both Sections 3702.32 and 3701.321 have provisions for the Director of the Department of Health to apply to the Court of Common Pleas for temporary or permanent injunctions to restrain a violation or threat of violation of their rules. In both cases, it is written that the seeking of injunctive relief is an "additional remedy not dependent on the adequacy of the remedy at law".

It is under these rules that the Department has handled previous licensure suspensions and revocations, including those of Martin Haskell's Women's Med Center, Dayton, and Capital Care Network of Toledo. It would be reasonable to believe that this is the same methods that would be used in future instances. Again, neither set of rules relies on authorization under Section 3701.13, so it is also reasonable to believe that the changes proposed in the amendments to that section would not have impacts on the ability for the ODH to continue to address the violations of abortion facilities.

Whatever way the Ohio Senate determines to handle their responsibility to review the House-crafted changes to Senate Bill 1, whether to concur and approve the changes or to not concur and ask for a Committee of Conference with the House to make changes, it should not be decided upon the assumption that somehow the language of the amendment which changes Section 3701.13 would cause impediment to the ability to regulate and bring sanctions against a provider of abortion.