



The *Ayotte* Opinion: Implications for New Hampshire and Other States

On November 30, the U.S. Supreme Court heard oral arguments in *Ayotte v. Planned Parenthood of Northern New England*,¹ a case involving a New Hampshire statute that requires parental notification before a minor can receive an abortion. Just two months later, on January 18th, 2006, the court issued a unanimous decision, taking an approach that was a surprise to advocates on both sides of the issue.

The district court, using an “undue burden” standard of review, had found New Hampshire’s abortion law unconstitutional because it lacked a health exception—an exception waiving notification when necessary to protect a minor’s health. The First Circuit upheld this decision. As presented to the Supreme Court, the case involved two questions: first, whether the New Hampshire law violated the U.S. Constitution by failing to provide a health exception, and second, whether “undue burden” was the appropriate standard to apply in making this determination.²

Adolescent health advocates were concerned that the Supreme Court might use this case to adopt a stricter standard of review in abortion litigation—a standard that effectively would make challenges to abortion laws much more difficult to bring.³ To their relief, the court did no such thing. In fact, writing for the court, Justice Sandra Day O’Connor surprised many by not even addressing the question

of standard, or the health exception question for that matter. She summarily disposed of them by stating that all parties agree New Hampshire’s statute would be unconstitutional in certain contexts, given Supreme Court precedent.⁴

O’Connor said the court granted *certiorari* in this case not to review the constitutional questions, but rather to review the appropriateness of the relief granted in the lower courts.⁵ When the lower court found the lack of a health exception unconstitutional, it invalidated the New Hampshire law in its entirety.

Although in a prior case the Supreme Court also invalidated an abortion statute *in toto* upon finding it failed to include a health exception,⁶ the Court stated that invalidating an entire statute for its lack of a health exception is not always necessary. It said courts must assess whether crafting a more “modest” remedy, one that addresses the unconstitutional provisions of a law while preserving the law’s constitutional aspects, would be possible. O’Connor laid out “three interrelated principles” that should inform remedies assessment.⁷

First, O’Connor said, a court should “try not to nullify more of a legislature’s work than is necessary.” Second, the court should not “rewrite[e] state law to conform it to constitutional requirements’ even as [the court] strive[s] to salvage [the law].” And third, O’Connor

wrote, “the touchstone for any decision about remedy is legislative intent, for a court cannot ‘use its remedial powers to circumvent the intent of the legislature.’ ... [Upon] finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?”⁸ After laying out these principles, O’Connor stated that limited relief is possible in this case; however, “there is some dispute as to whether New Hampshire’s legislature intended the statute to be susceptible to such a remedy.” She remanded to the First Circuit to determine the appropriate relief.⁹

Effect on New Hampshire Adolescents

Until the First Circuit issues a new ruling, no part of New Hampshire’s Parental Notification Act can be implemented. Per the Supreme Court’s directive, on remand, the court’s first focus will be to decide whether the legislature that voted for this statute would have preferred the statute be struck *in toto* rather than enjoined in part. If the court decides that the Legislature would have wanted the act to be salvageable, the court then must address the respondents’ other objections to the act¹⁰ and attempt to construct the appropriate limited injunction based on these findings.

How the court might shape an injunction that prohibits only unconstitutional applications of this law but

1 *Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961 (2006).

2 See Rebecca Gudeman, *Ayotte Case Hinges on Procedural Question*, Youth Law News, Jul.–Sep. 2005.

3 *Id.*

4 *Ayotte*, 126 S.Ct. at 967. (“New Hampshire has conceded that, under our cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks.”)

5 *Id.* at 966.

6 *Stenberg v. Carhart*, 120 S.Ct. 2597, 530 U.S. 914 (2000) (invalidating an abortion statute *in toto* for its lack of health exception).

7 *Ayotte*, 126 S.Ct. at 967.

8 *Id.* at 967-968.

9 *Id.* at 969.

10 *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 65 (1st Cir. 2004). Because the court invalidated the statute in its entirety upon finding its lack of health exception unconstitutional, it never addressed these objections in the original decision.

leaves the rest intact is a big question. If a statute has a provision that is unconstitutional, it is not so difficult to simply excise it and in this way craft limited relief. However, when a statute is missing a constitutionally mandated provision, such as a health exception, it may be more difficult to concoct limited relief, particularly when courts are prohibited from redrafting law.

The Ninth Circuit faced this issue in an adolescent abortion case and decided that it was impossible to save any part of an act that was lacking a constitutionally mandated medical emergency exception.¹¹ If the First Circuit does issue a partial injunction, a challenge to the injunction itself would not be surprising. So, while New Hampshire adolescents may face some form of parental notification rule in the future, it may be awhile in coming.

Effect on Adolescents in Other States

This case likely will affect adolescent abortion rights in other states as well. In the last few years, several states have had statutes restricting adolescent abortion struck down in their entirety for lack of a health exception.¹² Some experts argue that *Ayotte* will encourage state legislatures to enact these and related laws again, knowing that any reviewing court now must attempt to salvage the statutes' constitutional aspects.¹³ Ultimately, though, how much *Ayotte* will change the landscape of adolescent abortion legislation will depend mostly on how

courts interpret and apply the principles laid out by the Supreme Court. If courts take very different approaches to granting relief, as many expect, we likely will see more litigation on this issue in the future.

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Foster Children in Georgia Guaranteed Right to Counsel

Recent settlement agreements in *Kenny A. v. Perdue*, a civil rights class action lawsuit to reform the Georgia child welfare system, requires that Fulton and DeKalb counties, the two largest counties in Georgia, provide "adequate and effective" legal representation to all abused and neglected children.

"In a dramatic turn from just a few years ago, every one of these children will now have their own lawyer with the time and skills to zealously help protect them while in state custody," said Ira Lustbader, associate director of Children's Rights, the national child advocacy organization that filed the *Kenny A.* lawsuit in 2002. "This is a major improvement to the system."

In February 2005, Senior U.S. District Court Judge Marvin Shoob issued a landmark ruling that abused and neglected children in Georgia have a constitutional right to legal representation at every stage of their experience in state custody. Judge Shoob's decision paved the way for the settlement with DeKalb County in March and Fulton County in February.

The "right to counsel" settlements with DeKalb and Fulton counties enhance the protections in an October 2005 consent decree negotiated with Georgia state officials in the same *Kenny A.* lawsuit. Plaintiffs won systemic reform and greatly increased safety protections and services for approximately 3,000 children in the child welfare system in both Fulton and DeKalb counties, including limits on caseloads of case workers assigned to children, and guaranteed medical, dental, and mental health screenings and treatment. The claims against the DeKalb

and Fulton County governments for failing to provide adequate and effective legal counsel to abused and neglected children were pursued in tandem with the claims against state officials to improve child welfare services and safety.

The settlement with DeKalb County creates a limit on the caseload of any individual lawyer representing children at no more than 130 children per lawyer. Under the settlement, DeKalb County will more than double its full time attorney staff from four to nine within 120 days, and will hire two more by March of 2007. The settlement with DeKalb County also spells out in detail the lawyers' responsibilities, including establishing contact with the child, attending court appearances, filing necessary legal papers, advocating for the child's interests, and staying informed of the child's needs and status in foster care.

Under the settlement, Atlanta attorney Karen Baynes will serve as the court-appointed monitor responsible for documenting the county's performance and issuing public reports every six months. Plaintiffs can bring DeKalb County back to court to enforce the agreement if children are not receiving adequate legal counsel.

"We got involved in this lawsuit to help bring rapid improvement in the lives of some of Atlanta's most vulnerable citizens," said Corey Hirokawa, a lawyer at the Atlanta firm of Bondurant, Mixson and Elmore, co-counsel in the case along with Children's Rights. "If DeKalb and Fulton counties, along with state officials, comply with their many obligations in these settlements, these children's lives will improve."

11 *Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 935-937 (9th Cir. 2004)(invalidating *in toto* a statute restricting adolescent abortion because it contained an unconstitutional medical emergency exception).

12 See, e.g., *Wasden*, 376 F.3d 908 (9th Cir. 2004); *Planned Parenthood of the Rocky Mountain Services v. Owens*, 287 F.3d 910 (10th Cir. 2002).

13 *Court Plays It Safe with Abortion Law*, The California Recorder, Jan. 19, 2005, at 1; *Supreme Court's Decision in Ayotte v. Planned Parenthood: Unanimous Court Sends Abortion Decision Back to Lower Court*, The Pew Forum Legal Background, Feb. 2006, <http://pewforum.org/publications/reports/ayotte-abortion-decision.pdf>.