

Virginia Coalition to Protect Women's Health

September 7, 2012

Dear Commissioner Remley and Members of the Virginia Board of Health,

We, the consortium known collectively as the Virginia Coalition to Project Women's Health – a group of physicians and medical professionals, community members and advocates – are writing to provide you with helpful information as you prepare to reconvene on September 14 to consider the draft permanent regulations of women's health care centers that provide first-trimester abortion in Virginia. In this spirit, we have prepared the enclosed packet of materials.

As your fellow public health and consumer colleagues, we feel very sincerely that Virginia's Board of Health must be equipped with accurate, sound, clear information to continue to act within the mission of this body – to protect the health of Virginians, and to do so independently of other government entities, as is the Board's right and mandate to do. We offer here some helpful facts to counter inaccurate information that has been provided to the Board of Health over the past few months.

But first, some context to explain our materials: On June 15, you and your fellow members of the Virginia Board of Health voted on a number of provisions regarding the draft permanent regulations of women's health care centers that provide first-trimester abortion. As you know, one month later, on July 16, the office of Attorney General Ken Cuccinelli sent a memo to Virginia Health Commissioner, Dr. Karen Remley, stating that the Attorney General would not "certify" your amendments, including a crucial decision to grandfather in existing women's health care centers instead of subjecting them to inappropriate building construction.

To be blunt, the Board of Health has been led to believe that its decisions of June 15 were not legal. Quite simply, this is not true on any level. The Board acted precisely within its jurisdiction, its mission, and its expertise – independently. The Attorney General and his office have no legal authority to dictate the precise, explicit letter of *public health regulations* that uphold patient safety in Virginia. The Board acted appropriately.

With this in mind, as citizens and medical professionals, we are concerned that the Board of Health will reconvene on September 14 without the benefit of the facts. In this light, we have prepared the following documents, and we encourage you to examine all of the direct primary sources offered in these documents – evidence that we are offering you only the facts:

1) Fact-checked Attorney General memo of July 16

This provides a deep look at the facts in the memo, along with the links to Virginia law and medical documentation to correct the misinformation in this memo.

2) Legal & public health fact sheet about the Board of Health's role in the regulations

This document provides the straight facts – with Virginia law and medical information – about the role and decision-making power of the Board of Health, the Attorney General's role, and more.

3) Editorials from Virginia's newspapers

Public opinion strongly supports the Board of Health's integrity in this scenario; we've attached editorials from across Virginia.

We respect the Virginia Board of Health as an independent entity that will continue to act within its responsibility and its mandate to make decisions solely on the basis of evidence-based public health and consideration of patients. This public health board cannot succumb to bullying and intimidation by one government office – the slippery slope and political and ideological intrusion into medical and public health decision-making is far too perilous.

Please do not hesitate to contact us if we can be of assistance or provide further information. Thank you for considering these materials.

Respectfully,

The Virginia Coalition to Protect Women's Health

FACTUAL BREAKDOWN

Attorney General Cuccinelli's Letter (July 16, 2012) to Va. Dept. of Health Commissioner Dr. Karen Remley on Board of Health's June 15 Vote
(See [full text](#) of the original letter.)

MEMO:

"I have reviewed the amendments to the Regulations for Licensure of Hospitals in Virginia, 12 VAC 5-410-10 et seq., and the Regulations for Licensure of Abortion Facilities, 12 VAC 5-412-10 et seq., that were adopted by the State Board of Health on June 15, 2012."

FACT CHECK:

- The Regulations for Licensure of Hospitals in Virginia, 12 VAC 5-410-10 et seq, are the entirety of the regulations approved by the Board of Health on June 15, 2012. These regulations include, in part, the provision that "grandfathered in" existing women's health centers, rather than subject them to building requirements that are only meant for the construction of new facilities.
- These regulations also include, in part, provisions that leave several important loopholes in the protections for provider and patient safety and confidentiality.

MEMO:

"The Board does not have the statutory authority to adopt these Regulations."

FACT CHECK:

- Virginia law, [§ 32.1-127\(A\)](#), directs the Board's statutory authority. This law directs the Board of Health to create regulations for health care facilities that conform solely to standards established by medical and health professionals. Courts in Virginia have consistently upheld this role to create and approve health regulations established by medical experts.¹
- The original draft of the regulations for women's health centers did not conform to that statute's purpose. Instead, imposing requirements meant only for new construction on existing facilities contradicted what medical and health professionals and specialists recommended. In fact, the specialists who authored the Guidelines for Design and Construction of Health Care Facilities themselves stated that the Guidelines are intended to apply only to new construction, not to existing facilities.
- Thus, it is actually the *original draft* of regulations for women's health centers that exceeded the Board's authority. In amending the regulations to "grandfather in" existing women's health centers, the Board of Health recognized that inconsistency and amended the regulations to apply construction requirements as the experts intended.

¹ See, e.g., *Brown v. United Airlines, Inc.*, 540 S.E.2d 521, 522 (Va. Ct. App. 2001); see also *Avalon Assisted Living Facilities, Inc. v. Zager*, 574 S.E.2d 298, 306 (Va. Ct. App. 2002)

MEMO:

“Because proposed 12 VAC 5-412-370 conflicts with Virginia Code § 32.1-127.001, the Board has exceeded its authority.”

FACT CHECK:

- 12 VAC 5-412-370 is the provision of the regulations allowing for existing women’s health centers to be “grandfathered in,” rather than subjected to three chapters of a manual called [2010 Guidelines for Design and Construction of Health Care Facilities](#).
- The Attorney General asserts that 12 VAC 5-412-370 is in conflict with Virginia Code § 32.1-127.001 because § 32.1-127.001 states that the Board of Health shall issue regulations for health care facilities “that shall include minimum standards for the design and construction of hospitals, nursing homes, and certified nursing facilities consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities issued by the American Institute of Architects Academy of Architecture for Health.”
- The Attorney General’s office is incorrect about the Board’s obligations in [Virginia Code § 32.1-127.001](#). That section of the Virginia Code, enacted in 2005, has never been interpreted to require existing facilities to meet new construction standards, and a fair reading of its plain text provides no support for such a requirement. While § 32.1-127.001 states that the Board shall issue regulations for health care facilities, “consistent with the current edition of the 2010 Guidelines for Design and Construction of Hospital and Health Care Facilities,” the Guidelines explicitly state that they are “intended as minimum standards for designing and constructing *new* health care facility projects.” Thus, the Board’s refusal to apply the Guidelines to existing facilities is “consistent with” the Guidelines.

MEMO:

“Thus, this Office cannot certify these Regulations.”

FACT CHECK:

- The Attorney General has the responsibility to review proposed regulations to determine if the Board has the authority to adopt them.
- Virginia law does not give the Attorney General’s office veto power over the Board’s policy decisions about what to include in the final rules.
- As an elected official without medical expertise, the Attorney General does not have – and has never had – the legal authority to decide upon the specifics of public health and medical regulations.

LEGAL & PUBLIC HEALTH FACT SHEET
Proposed Regulation of First-Trimester Abortion in Virginia
August 2012

FACT: The Board of Health's June 15 vote was legally sound and medically correct.

- On June 15, 2012, the Virginia Board of Health voted to exempt existing women's health care centers from the part of the draft permanent regulations that focus on the 2010 Guidelines for Design and Construction of Health Care Facilities. In its vote, the Board of Health correctly upheld the building guidelines, which are "intended as minimum standards for designing and constructing new health care facility projects" ([2010 Guidelines for Design and Construction of Health Care Facilities](#)).
- On July 16, 2012, a [letter from Attorney General Cuccinelli's office to Dr. Karen Remley](#), commissioner of the Virginia Dept. of Health, stated that his office refused to certify the Board's vote in this matter because the Board had "exceeded its authority."
- In fact, the Board acted precisely within its authority as conferred by Virginia law: Because the Board's vote upheld medical opinion and the appropriate application of the building guidelines, the Board's June 15 vote was legally appropriate.

FACT: The Board of Health has *not* exceeded its authority – it has acted precisely within its legal and public health authority.

- [Virginia Code § 32.1-127.001](#) (enacted in 2005) directs the Board of Health to promulgate regulations "consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities" – for new health care facilities. On June 15, the Board's refused to apply the guidelines to *existing* facilities; this decision is consistent with the guidelines as written.
- The Virginia Board of Health, under its legal authority, has the power and ability to disagree with the Attorney General in every subsequent Board of Health vote – as long as it is meeting its legal duties to uphold medical counsel and appropriate interpretation of Virginia law. The mission of the Board of Health is to "promote and protect the health of all Virginians," according to the [Virginia Dept. of Health](#).
- Virginia law, [§ 32.1-127\(A\)](#), directs the Board's statutory authority. This law directs the Board of Health to create regulations for health care facilities that conform solely to standards established by medical and health professionals. Courts in Virginia have consistently upheld this role to create and approve health regulations established by medical experts.²
- A panel of Virginia doctors was asked to participate in drafting the proposed regulations. Several of these physicians, including Dr. James Ferguson (chair of the OB/GYN Dept. at

² See, e.g., *Brown v. United Airlines, Inc.*, 540 S.E.2d 521, 522 (Va. Ct. App. 2001); see also *Avalon Assisted Living Facilities, Inc. v. Zager*, 574 S.E.2d 298, 306 (Va. Ct. App. 2002)

UVA's School of Medicine) have since [publicly denounced the regulations](#) as not medically appropriate.

FACT: The Attorney General's office does not have "veto power" over the Board of Health's decisions.

- Virginia law does not give the Attorney General's office veto power over the Board's policy decisions about what to include in the final rules.³ (Source: [Va. Code § 2.2-4013 \(A\)](#)) By threatening to refuse to "certify" the Board's authority, the Attorney General has claimed veto power over the Board's policy decisions.
- As an elected official without medical expertise, a Virginia Attorney General (and his/her office) does not have the legal authority to decide upon the specifics of public health and medical regulations. (Source: [Va. Code § 2.2-4013 \(A\)](#))
- In this scenario, the Attorney General only has the responsibility to "certify" on the public record whether the Board has the authority to adopt rules under consideration.

FACT: Abortion is already regulated in Virginia by the Virginia Board of Medicine.

- All Virginia doctors who provide abortion in Virginia are regulated by the [Virginia Board of Medicine](#) (see "Laws Governing Medicine"). Virginia doctors who provide abortion must meet the same medical standards as similar outpatient procedures performed in the state, including some dental procedures, colonoscopies, and some cosmetic procedures.

FACT: Abortion is considered one of the safest outpatient medical procedures in the U.S.

- Nationally, abortion is one of the safest outpatient medical procedures performed in the U.S. today. "Fewer than 0.3% patients experience a complication that requires hospitalization" ([Guttmacher Institute Fact Sheet, 2011](#)).

FACT: The 2010 Guidelines for Design and Construction of Health Care Facilities manual only applies to new facilities, not existing ones.

- At the heart of the proposed regulations of first-trimester abortion in Virginia is the [2010 Guidelines for Design and Construction of Health Care Facilities](#).⁴ This manual provides guidance for new hospitals to meet particular building requirements, such as size of hallways and particular ventilation systems. This manual does not apply to existing health care facilities.

³ The Governor's Executive Order states that the AG and the governor must certify and approve, respectively, the regulations before they can move to the next step of the process. [Va. Code §§ 4013 \(A\)](#) states that "The Governor shall adopt and publish procedures by executive order for review of all proposed regulations" that include AG and governor review. In sum, the governor is allowed under this code to adopt procedures by executive order, but *not* procedures that override the statute itself.

⁴ The Guidelines for Design and Construction of Health Care Facilities, published by the Facility Guidelines Institute and formerly published by the American Institute of Architects, are relied on by many regulatory agencies in creating new regulations for health care facilities.

- The McDonnell administration’s draft permanent regulations of women’s health care centers in Virginia that provide first-trimester abortion attempted to apply these guidelines to existing women’s health care centers, not just new ones. The Board of Health, under Virginia law, has never applied the guidelines in this way – in each and every past instance, the Board has applied the guidelines *only* to new buildings. (Source: [Virginia Dept. of Health](#).⁵ Additional information [here](#), also from Va. Dept. of Health.)

What will happen next?

The draft regulations will go back to the Board of Health for another vote at its next meeting on Friday, September 14. A Department of Health official, Joe Hilbert, has confirmed that the proposed regulations of first-trimester abortion facilities will be on the agenda for this meeting.

- If the Board of Health votes in the same way (as the June 15 vote), and the attorney general’s office does not certify them again, the process will continue in a loop.

The Board of Health will be acting precisely in its legal and public health authority if it votes as it did on June 15. This back-and-forth process can continue until the draft temporary regulations expire on December 31, 2012; the governor can opt to extend them until June 30, 2013.

⁵ In each and every instance in which the Board of Health has regulated health care facilities since Virginia Code § 32.1-127.001 was enacted, it has applied the Guidelines only to “all construction of new buildings and additions, alterations or repairs to existing buildings,” not to existing facilities that are not undergoing significant construction, *see* Virginia Department of Health, Office of Licensure and Certification, *Design and Construction of Health Care Facilities* (July 1, 2006), available at: http://townhall.virginia.gov/1/GetFile.cfm?File=E:\townhall\docroot\GuidanceDocs\601\GDoc_VDH_2991_v1.pdf

Editorials from Virginia's Newspapers:

Richmond Times-Dispatch: Proposed Regulations are Bad Law, Bad for Women

June 12, 2012

<http://www2.timesdispatch.com/news/oped/2012/jun/12/tdopin02-harbach-proposed-regulations-are-bad-law--ar-1980036/>

Roanoke Times: Virginia's Assault on Women

June 15, 2012

<http://www.roanoke.com/editorials/wb/310214>

Roanoke Times: Cuccinelli's Head Games

July 20, 2012

<http://www.roanoke.com/editorials/wb/311799>

Washington Post: Mr. Cuccinelli's Abortion Crusade

July 27, 2012

http://www.washingtonpost.com/opinions/mr-cuccinellis-abortion-crusade/2012/07/27/gIQAAdv8mEX_print.html