



*Senator Stennett  
Attachment 3*

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WARDEN

March 17, 2016

The Honorable Michelle Stennett  
Idaho State Senator  
Statehouse  
VIA HAND DELIVERY

Re: SB 1404 –Idaho Unborn Infants Dignity Act – Our File No.-16-54196

Dear Senator Stennett:

This letter addresses your inquiry regarding whether the concerns outlined in our letter dated February 18, 2016 to Representative Crane are still applicable to the revised proposed SB 1404.

The legislative finding in proposed Idaho Code § 39-9302(1)(a) could be construed as an attempt to elevate deceased unborn infants to the status of other deceased human beings through the use of the word “other.” In order to eliminate the use of the legislative purpose as a potential obstacle to the defensibility of the statute, the word “other” could be deleted from proposed Idaho Code § 39-9302(1)(a), as follows:

(a) Deceased unborn infants deserve the same respect and dignity as ~~other~~ deceased human beings.

By limiting the requirement that a mother or her representative be informed that the mother has a “right to receive and dispose of her deceased unborn infant’s bodily remains” in Idaho Code § 39-9304 to still births and miscarriages, the constitutional concerns previously raised by this Office are eased with respect to that provision. However, to clear up any potential ambiguity based challenge to proposed Idaho Code § 39-9304 regarding the receipt and disposal of fetal remains by the mother, the following amendment could be made:

In the case of still birth or miscarriage, every instance of fetal death, regardless of the duration of the pregnancy, the individual in charge of the institution where the bodily remains of the deceased unborn infant were expelled or extracted shall notify the mother’s authorized representative that the mother has a right to direct the receipt and disposition ~~receive and dispose~~ of her deceased unborn infant’s bodily remains.

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The potential vagueness challenge concerns regarding the definition of "experimentation" have similarly eased through the limitation imposed by the amendment of "experiment" and "experimentation" to "the use of an unborn infant intended to be aborted" and the inclusion of a definition of "pathological" in proposed Idaho Code § 39-9303(8).

You also raised an issue not previously addressed by this office, namely, whether the exception in proposed Idaho Code § 39-9306(5) is too narrow and vague based upon the use of the term "medical waste facility." We believe this term, literally construed, includes any facility lawfully authorized to dispose of medical waste. Nevertheless, to address your concern the subsection could be amended to read:

(5) The terms "transfer," "accept," and "acceptance" as used in this ~~chapter~~ section do not apply to the transfer or acceptance of the body or bodily remains of an aborted infant ~~to a medical waste disposal facility~~ for the sole purpose of lawfully disposing of the body or bodily remains of an aborted infant."

The remaining concerns raised in the attachment to your email do not amend our opinion that the remainder of the revised legislation is legally defensible in light of the revisions made to SB. 1404. Inclusion of the above amendments likely makes SB. 1404 more defensible, but if those amendments are not adopted, a constitutional defense of SB. 1404 could still be advanced.

Sincerely,



BRIAN KANE  
Assistant Chief Deputy

BK/tjn