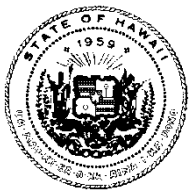
DAVID Y. IGE
GOVERNOR

RACHAEL WONG, DrPH
DIRECTOR

PANKAJ BHANOT
DEPUTY DIRECTOR



STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
P. O. Box 339
Honolulu, Hawaii 96809-0339

February 6, 2015

TO: The Honorable Josh Green, M.D., Chair
Senate Committee on Health

The Honorable Rosalyn H. Baker, Chair
Senate Committee on Commerce and Consumer Protection

FROM: Rachael Wong, DrPH, Director

SUBJECT: **S.B. 768- RELATING TO IN VITRO FERTILIZATION INSURANCE COVERAGE**

Hearing: Friday, February 6, 2015; 1:15 p.m.
Conference Room 414, State Capitol

PURPOSE: The purpose of this bill is to provide insurance coverage equality for women who are diagnosed with infertility by making available to them expanded treatment options, ensuring adequate and affordable health care services.

DEPARTMENT'S POSITION: The Department of Human Services (DHS) provides comments for consideration on this measure as the DHS is unclear if the requirements in this bill would also apply to the Medicaid Program.

As stated in testimony on the similar measure S.B.789, Medicaid does not cover treatment for infertility. If DHS is required to cover these proposed services, federal Medicaid funds will not be available for this service and state funds would need to be appropriated to DHS. Alternatively and to provide clarity, the DHS respectfully recommends that the measure specify that Medicaid is excluded from this bill's requirements.

Thank you for the opportunity to testify on this measure.

DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
335 MERCHANT STREET, ROOM 310
P.O. Box 541
HONOLULU, HAWAII 96809
Phone Number: 586-2850
Fax Number: 586-2856
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CATHERINE P. AWAKUNI COLÓN
DIRECTOR

JO ANN M. UCHIDA TAKEUCHI
DEPUTY DIRECTOR

TO THE SENATE COMMITTEES ON HEALTH AND
COMMERCE AND CONSUMER PROTECTION

TWENTY-EIGHTH LEGISLATURE
Regular Session of 2015

Friday, February 6, 2015
1:15 p.m.

TESTIMONY ON SENATE BILL NO. 768 – RELATING TO IN VITRO FERTILIZATION INSURANCE COVERAGE.

TO THE HONORABLE JOSH GREEN, M.D. AND ROSALYN H. BAKER, CHAIRS, AND MEMBERS OF THE COMMITTEES:

My name is Gordon Ito, State Insurance Commissioner, testifying on behalf of the Department of Commerce and Consumer Affairs ("Department"). The Department takes no position on this bill.

The purpose of this bill is to provide in vitro fertilization insurance coverage equality for women who are diagnosed with infertility by requiring non-discriminatory coverage.

We thank the Committee for the opportunity to present testimony on this matter.

KAISER PERMANENTE®

Testimony of
John M. Kirimitsu
Legal & Government Relations Consultant

Before:
Senate Committee on Health
The Honorable Josh Green, Chair
The Honorable Glenn Wakai, Vice Chair
and
Senate Committee on Commerce and Consumer Protection
The Honorable Rosalyn Baker, Chair
The Honorable Brian T. Taniguchi, Vice Chair

February 6, 2015
1:15 pm
Conference Room 414

Re: SB 768 Relating to In Vitro Fertilization Insurance Coverage

Chairs, Vice Chairs, and committee members, thank you for this opportunity to provide testimony on this measure regarding expanded in vitro fertilization insurance coverage.

Kaiser Permanente Hawaii supports the intent of this bill, but would like to offer comments.

It is widely recognized that the ACA was enacted with the goals of increasing the quality and affordability of health insurance, lowering the uninsured rate by expanding insurance coverage, and reducing the costs of healthcare for individuals and the government. Done correctly, health care reform can reduce costs while simultaneously improving the quality of care. However, this will not happen if the emphasis is shifted to costly mandates that inevitably drive up the price of health insurance.

That being said, Kaiser Permanente has already taken steps to remove the "spouse" requirement for its in vitro fertilization coverage. This benefits modification will allow for non-discriminatory coverage and ensuring quality of care in the diagnosis and treatment of infertility for all Kaiser Permanente members.

Kaiser Permanente acknowledges that the American College of Obstetricians and Gynecologists (ACOG) and American Society of Reproductive Medicine (ASRM) define "infertility" as not

711 Kapiolani Blvd
Honolulu, Hawaii 96813
Telephone: 808-432-5224
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Mobile: 808-282-6642
E-mail: John.M.Kirimitsu@kp.org

becoming pregnant after one year of having regular sexual intercourse without birth control. However, this standard "infertility" definition does not include the shorter 6 month period for women older than 35 years. Rather, both national organizations merely recommend that infertility evaluations should begin after 6 months for those women 35 years or older.

Thank you for the opportunity to comment.

TO: **SENATE COMMITTEE ON HEALTH**
The Honorable Josh Green, Chair
The Honorable Glenn Wakai, Vice Chair

SENATE COMMITTEE ON COMERCE AND CONSUMER PROTECTION
The Honorable Rosalyn H. Baker, Chair
The Honorable Brian T. Taniguchi, Vice Chair

FROM: Na'unanikina'u Kamali'i

SUBJECT: **HB 864 – RELATING TO IN VITRO FERTILIZATION COVERAGE**

Hearing: Friday, February 6, 2015
Time: 1:15 p.m.
Place: Conference Room 414

This testimony is in **strong support of SB 768**. This measure provides in vitro fertilization coverage equality for all women who are diagnosed with infertility by requiring non-discriminatory coverage and by providing a definition of infertility which is consistent with the current medical definition utilized in the medical community and by the American Society of Reproductive Medicine. For over 28 years the Hawaii in vitro fertilization health insurance law mandated insurance coverage within a discriminatory framework. The discriminatory language must be corrected by the legislature, even though health insurance companies make such changes voluntarily. In vitro fertilization coverage is an Essential Health Benefit (EHB) and as of **January 1, 2014** strict federal prohibitions against discriminatory practicices apply to EHBs. More importantly, the measure will be brought in compliance with the Hawaii State Consitution.

I am submitting testimony in my individual capacity **in support of SB 768** for several reasons. **SB 768** provides for in vitro fertilization coverage equality for all women diagnosed with infertility. In short, the measure does the following:

1) Brings the existing Hawaii IVF mandate into compliance with the Hawaii State Constitution's Privacy Clause;
2) Mandates in vitro fertilization coverage equality for all women diagnosed with a medical condition of infertility by removing discriminatory language based on marital status;
3) Ends class discrimination among women with employer health benefits;
4) Defines "infertility" consistent with the American Society of Reproductive Medicine (ARSM);
5) Recognizes that infertility is a disability that is protected under the Americans with Disabilities Act (ADA); and
6) Addresses ACA prohibitions against discrimination.

Comments:

1. **Violation of the Privacy Clause.** Under the IVF mandated benefit, the IVF treatment requires that the woman's eggs be fertilized by her spouse's sperm. The marital requirement is unconstitutional as violative of the Privacy Clause of the Hawaii State Constitution. The marital restriction placed on infertility coverage arguably imposes an undue burden on a woman's right to privacy as provided under the Privacy Clause, which states that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. Haw. Const. of 1978, art. I, §§ 5,6. Under the constitutional right to privacy, "among the decisions that an individual can make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Doe v. Doe,* 172 P.3d 1067 (Haw. 2007) Because the use of infertitlity treatments to bear a child protected, the marital status restrictions placed on insurance coverage will be found unconstitutional. Unmarried women, unmarried couples, divorced women, widowed women are all excluded under the current IVF mandated benefit and as a result, it imposes an undue burden on their constitutional right and should be corrected to remove any unconstitutional language. **SB 768** provides the appropriate revisions to the Hawaii IVF mandate and should pass out of committee without amendment. See generally, Jessie R. Cardinale, *The Injustice of Infertility Insurance Coverage: An examination of Marital Status Restrictions Under State Law, 75 Alb. L. Rev. 2133, 2141 (2012).*

2. **Marital Status requirement.** The Hawaii State legislature has provided no compelling state interest for the marriage requirement. When the IVF mandated benefit was enacted in 1987, the purpose of the bill was to "require individual and group health insurance policies and individual and group hospital or medical service contracts, which provide pregnancy-related benefits to allow a one-time only benefit for all one-patient expenses arising from in vitro fertilization procedures performed on the insured or the insured's dependent spouse. … The legislature finds that infertility is a significant problem for many people in Hawaii, and that this bill will encourage appropriate medical care. Additionally, this bill limits insurance coverage to a one-time only benefit, thereby limiting costs to the insurers. This bill will be a significant benefit to those married couples who have in vitro fertilization as their only hope for allowing pregnancy. " SCRep. 1309, Consumer Protection and Commerce on S.B. 1112 (1987)

3. **Denial of coverage if not married.** Women who do not meet the marriage requirement are denied IVF coverage irrespective of their diagnosis of infertitlity. As reflected in HMSA's Notice of Medical Denial, attached hereto, the first requirement that must be met is that "the patient and spouse are legally married according to the laws of the State of Hawaii." For personal, cultural and religious purposes, some couples <u>will not</u> marry and should not be forced by the government to marry to meet the eligibility requirements for the IVF benefit. It is a practice by health insurance companies during the precertification process to ask whether the woman who is not married whether she is gay and then to inform her that the

treatment is covered if she has a civil union or is legally married to her partner. This "outing" process is an infringement on the woman's right to privacy. The government is ineffect defining family by requiring licensed recognized relationship and determining which kinds of relationships are deserving of the IVF treatment, which is a private matter and protected under the constitution. The IVF law is reminiscent of unconstitutional laws, which permitted only married couples access to contraceptives.

4. **Equality for all women** The purpose of **SB 768** is to provide in vitro fertilization insurance coverage equality for all women who are diagnosed with infertility by requiring non-discriminatory coverage and ensuring quality of care in the diagnosis and treatment of infertility. Equality not just amongst married women, but also for all women who are diagnosed with a condition of infertility. The corrective action by the legislature to eliminate the discriminatory marital status requirement is long overdue. The overriding corrective measure should prevail over any cost consideration to address prohibited discriminatory practices. The focus must again be on a diagnosis of infertility as a determinant on whether coverage will be provided.

5. **Discriminatory provisions** The current IVF coverage law wrongfully creates two "classes" of premium paying members and is discriminatory on its face under ERISA, ADA, and ACA. Health plans have deliberately upheld discriminatory provisions which have called for a member to be married and use her husband`s sperm and have reaped a prohibited premium savings from the practice. In application, employed health plan members who are single, divorced, widowed, partnered or otherwise "not married" women, pay premiums just like married members diagnosed with infertility yet, ARE NOT eligible for the IVF coverage. The "marital status" requirement appears to rest squarely on moral grounds and is violative of the Hawaii constitution because the State has not provided any compelling interest for the restrictive and limiting mandated IVF benefit.

6. **Definition of infertility.** In its guidance to patients, the American Society of Reproductive Medicine defines infertility as the inability to achieve pregnancy after one year of unprotected intercourse. If the individual has been trying to conceive for a year or more, she should consider an infertility evaluation. However, if she is 35 years or older, she should begin the infertility evaluation after about six months of unprotected intercourse rather than a year, so as not to delay potentially needed treatment. The Hawaii mandated benefit requires a five-year history that is arbitrary and not in line with the current definition of infertility and treatment protocols. The measure applies the corrected definition of infertility that is desired and supported.

7. ACA prohibitions on discrimination

The ACA prohibits discrimination as set forth in Title 45 of Code of Federal Regulations Part 156. Two sections in particular, which prohibit discrimination,

are 45 CFR §156.125 and §156.200(e) of the subchapter and also in the Federal Register Vol. 78, No. 37(February 25, 2013). The marital status provision in the current IVF coverage law, which requires that the member be married in order to received treatment creates two classes of members and is in violation of the prohibitions on discrimination. Even if the legislature disagrees with the assertion that it is in violation with the ACA or other federal laws, marriage should not be a defining factor that prohibits access to this benefit for women who have been diagnosed with infertility disability. Equal access should be afforded to all women. The statutory sections referenced herein are provided here.

45 CFR §156.125 Prohibition on discrimination.

(a) An issuer does not provide EHB if its benefit design, or the implementation of its benefit design, discriminates based on an individual's age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions.

(b) An issuer providing EHB must comply with the requirements of §156.200(e) of this subchapter; and

(c) Nothing in this section shall be construed to prevent an issuer from appropriately utilizing reasonable medical management techniques.

45 CFR §156.200 (e) ***Non-discrimination.*** A QHP issuer must not, with respect to its QHP, discriminate on the basis of race, color, national origin, disability, age, sex, gender identity or sexual orientation.

hmsa

An Independent Licensee of the Blue Cross and Blue Shield Association

HMSA No:
Servicing Provider:
Service:
Case ID:

NOTICE OF MEDICAL DENIAL

On your behalf, . sent us a precertification request for Complete in In Vitro Fertilization. Our review found that In Vitro Fertilization is not eligible for payment. This letter explains why.

As stated in your Guide to Benefits, Chapter 1: Important Information, your plan covers care that is medically necessary when you are sick or hurt. This means that the service or supply must meet HMSA's Payment Determination Criteria and be consistent with HMSA's medical policies.

HMSA has a medical policy for In Vitro Fertilization (IVF). It is covered when all of the following criteria are met:

1. *The patient and spouse are legally married according to the laws of the State of Hawaii.*
2. *The couple has a five-year history of infertility, or infertility associated with one or more of the following conditions:*
   a. Endometriosis
   b. Exposure in utero to diethylstilbestrol (DES)
   c. Blockage or surgical removal of one or both fallopian tubes.
   d. Abnormal male factors contributing to the infertility.
3. *The patient and spouse have been unable to attain a successful pregnancy through other infertility treatments for which coverage is available.*

Or for female couples:

1. *The patient and civil union partner are legally joined according to the laws of the State of Hawaii.*
2. *The patient, who is not known to be otherwise infertile, has failed to achieve pregnancy following 3 cycles of physician directed, appropriately timed intrauterine insemination (IUI). This applies whether or not the IUI is a covered service.*

Our Medical Director, Stephen Lin, M.D., has reviewed the clinical information provided. Documentation does not support that the above criteria have been met. Therefore, we are unable to approve this request.

A copy of the benefit provision that was the basis for this decision can be provided to you upon request. If you disagree with this decision, you may request an appeal in accordance with the procedures and timeframes described in your participating provider agreement.

Please call Customer Service on Oahu at 948-6111 for PPO members, 948-6372 for HPH members or 1 (800) 776-4672 if you have any questions regarding this matter. Representatives are available Monday through Friday, from 8 a.m. to 4 p.m., Hawaii Standard Time.

Attachment

SL/mri

attributable to good cause or matters beyond HMSA's control: 4) in the context of an ongoing good-faith exchange of information: and 5) not reflective of a pattern or practice of non-compliance.

For more information regarding an external IRO request, including the documents which must be submitted with your request, please contact HMSA at one of the numbers listed above or contact the Insurance Commissioner at (808) 586-2804.

Hawaii Insurance Division
Attn: Health Insurance Branch – External Appeals
335 Merchant Street, Room 213
Honolulu, HI 96813

Arbitration:
Request arbitration before a mutually selected arbitrator within one year of the decision of your appeal to the address listed below. If you choose arbitration, your request for arbitration shall be voluntary and your decision as to whether or not to arbitrate will have no effect on your right to any other benefits under this plan. HMSA waives any right to assert that you have failed to exhaust administrative remedies because you did not select arbitration. You must have fully complied with HMSA's appeal procedures to be eligible for arbitration, and we must receive your request your request within one year of the decision of your appeal. The following information is provided to assist you in deciding whether submit your dispute to arbitration:

- In arbitration, one person (the arbitrator) reviews the positions of both parties and makes the final decision to resolve the disagreement.
- You have the right to representation during arbitration proceedings and to participate in the selection of the arbitrator.
- The arbitration hearing shall be in Hawaii.
- HMSA will pay the arbitrators fee.
- You must pay your attorney's or witness' fees, if you have any, and we must pay ours.
- The arbitrator will decide who will pay all other costs of the arbitration.
- The decision of the arbitrator is final and binding and no further appeal or court action can be taken.

HMSA Legal Services
P.O. Box 860
Honolulu, HI 96808-0860

Lawsuit:
File a lawsuit against HMSA under section 502(a) of ERISA.

Information Available From Us
HMSA will provide upon your request and free of charge, reasonable access to and copies of all documents, records, and other information relevant to your claims as defined by ERISA. You may also request and we will provide the diagnosis and treatment codes, as well as their corresponding meanings, applicable to this notice, if available.

Information Available From Us
For question about your appeal rights, this notice, or for assistance, you can contact the Employee Benefits Security Administration at 1-866-444-EBSA (3272).

MEMBER APPEAL RIGHTS AND PROCESS

For more information about your appeal rights, call Customer Service or see your Guide to Benefits handbook.

How To File An Appeal

You have a right to appeal any decision not to provider you or pay for an item or service. Your request must be in writing (except for an expedited appeal) and must be received within one year form the date we first informed you of the denial of coverage for any requested service or supply. Your **written request** must be mailed or faxed to the following:

HMSA Member Advocacy & Appeals
P.O. Box 1958
Honolulu, HI 96805-1958
FAX NO.: (808) 952-7546 or (808) 948-8206

If you have any questions regarding appeals, you may call the following numbers:

O'ahu: (808) 948-5090
Toll free: 1 (800) 462-2085

The review of your appeal will be conducted by individuals not involved with the previous decision.

What Your Request Must Include

To be recognized as an appeal, your request must include all of the following information:

- The date of your request
- Your name
- Your date of birth
- The date of our denial of coverage for the requested service or supply (may include copy of denial letter)
- The subscriber name from your membership card
- The provider name
- A description of facts related to your request and why you believe our decision was in error
- Any other information relating to the claim for benefits including written comments, documents, and records you would like us to review.

To assist us with processing your appeal, please also include your telephone number and the address of member to received services.

You should keep a copy of your request for your records.

Types of Appeals You Can File

Standard

Pre-certification- We will respond to your appeal as soon as possible given the medical circumstances of your case but not later than **30 days** after we receive your appeal.

Post-Service – We will respond to your appeal as soon as possible but not later than **60 days** after we receive your appeal.

Expedited

You may request an expedited appeal if application of the pre-certification (30 days) time period may:

- Seriously jeopardize your life or health,
- Seriously jeopardize your ability to gain maximum function, or
- Subject you to severe pain that cannot be adequately managed without the care or treatment that is the subject of the appeal.

You may also request an **expedited** appeal by phone at the following number s:

O'ahu: (808) 948-5090
Toll free: 1 (800) 462-2085

We will respond to your expedited appeal request as soon as possible taking into account your medical condition but not later than **72 hours**
after all information sufficient to make a determination is provided to us.
You may also begin an external review at the same time as the internal appeals process if this is an urgent care situation or you are in an ongoing course of treatment.

What Your Request Must Include

will Either you or your authorized representation may request an appeal. An authorized representative includes:

- Any person you authorize to act on your behalf provided you follow our procedures, which include filing a form with us.
- A court appointed guardian or an agent under a health care proxy.

To obtain a form to authorized a person to act on your behalf, call on O'ahu 948-5090 or toll free 1 (800) 462-2085.

What Happens Next

If you appeal, we will review our decision and provider you with a written determination. If you disagree with HMSA's appeal decision, you have additional appeal rights. You may request a review by an Independent Review Organization, request arbitration or file a lawsuit against HMSA. Please see details below.

Independent Review Organization:

If the services request did not meet payment determination criteria, did not meet medical policy or was determined to be investigative or experimental, you may request an external review by an Independent Review Organization (IRO) selected by the Insurance Commissioner, who will review the denial and issue a final decision. You must submit your request to the Insurance Commissioner, at the address indicated below, within 130 days of HMSA's decision to deny or limit the service or supply. Unless you qualify for expedited external review of our initial decision, before requesting review, you must have exhausted HMSA's internal appeals process or show that HMSA violated federal rules related to claims and appeals unless the violation was 1)de minimis: 2) non-prejudicial; 3)

This document contains important information about your HMSA health plan. To ensure that you fully understand its contents, you may have it orally interpreted at no charge to you. At your request, this document may be interpreted into several languages: Chinese, Japanese, Korean, Ilocano, Tagalog, Spanish, Navajo or Samoan. Please contact us at 1-800-776-4672.

CHINESE: 中文: 如果您需要中文翻譯，請致電 1-800-776-4672.

JAPANESE (日本語): このレポートにつきまして、日本語による通訳をご利用できます。1-800-776-4672. までお電話ください。

KOREAN 한국어 : 1-800-776-4672으로 전화하시면 무료 한국어 통역 서비스를 받으실 수 있으십니다.

ILOCANO Ilocano : No masapul yo a tulong in ILOCANO awagan yo a 1-800-776-4672.

TAGALOG Tagalog : Tulong sa pagpapaliwanag sa salitang TAGALOG, tawagan ang numero 1-800-776-4672.

SPANISH Español : Para obtener asistencia en Español, llame al 1-800-776-4672.

NAVAJO Dine : Dinek'ehgo shika at'ohwol ninisingo, kwiijigo holne' 1-800-776-4672

SAMOAN: A mana'o mua se fesoasoani I le Gagana Fa'asamoa Fa'amolemole valaau mai I le telefoni e 1-800-776-4672.

TO: **SENATE COMMITTEE ON HEALTH**
The Honorable Josh Green, Chair
The Honorable Glen Wakai, Vice Chair

FROM: Pi`ilani Smith

SUBJECT: **SB 768 – RELATING TO IN VITRO FERTILIZATION INSURANCE COVERAGE**

Hearing: Wednesday, February 6, 2015
Time: 1:30 p.m.
Place: Conference Room 414

"[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right cannot infringe upon without a compelling state interest."

Haw. Const. Art I, § 6.

This testimony is in **strong support of SB 768**, **with no amendments**. SB 768 provides for in vitro fertilization insurance coverage equality for women diagnosed with infertility, by requiring non-discriminatory coverage and ensuring quality of care in the diagnosis and treatment of infertility. **SB 768 is a corrective measure**, bringing the existing Hawaii IVF mandated benefit into compliance with the Hawai`i State Constitution, U.S. Constitution, federal and state law, and the medical standard definition of infertility by the the American Society of Reproductive Medicine (ASRM). **The existing in vitro fertilization (IVF) mandate (HRS 431:10A-116.5 and HRS 432:1-604) is discriminatory**, wrongfully denying women with an employer's health plan equal access to its member's health plan based on marital status. Therefore, this measure provides the citizens of Hawaii its right of privacy protected under the Hawai`i State Constitution which the Hawai`i State Legislature is obligated to uphold. Furthermore, the Hawaii Supreme Court has affirmed and reaffirmed this right in several cases.

I strongly urge this committee to pass SB 768 without amendments, which makes the following necessary changes that are timely and withstand legal and medical scrutiny by:

1) Bringing the existing Hawaii IVF mandate into compliance with the Hawai`i State Constitution, Privacy Clause;
2) Ending class discrimination amongst women with an employer health plan, paying the same premium;
3) Updating the definition of "infertility" consistent with the American Society of Reproductive Medicine (ASRM);

4) Recognizing that infertility is a disability that is protected under the Americans with Disabilities Act (ADA); and
5) Complying with Federal ACA requirements which the State of Hawaii is not exempt from under the Hawaii Prepaid Health Care Act.

Comments:

1. **Violation of the Hawaii State Constitution Privacy Clause – Unjustified Government Interference.** The Hawaii Revised Statute (HRS) 431:10A-116.5 regarding in vitro fertilization procedure coverage requires that a woman's eggs be "fertilized with the patient's spouse's sperm." This marital status requirement legislated in health insurance coverage imposes an undue burden on its citizen's right of privacy as provided for under the Privacy Clause of the Hawai`i State Constitution, which states that:

> "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." Haw. Const. Art I, § 6.

In the case of State v. Mueller, the Hawaii Supreme Court held "that only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in this guarantee of personal privacy." State v. Mueller, 671 P.2d 1351 (Haw. 1983). This decision was reaffirmed by and further clarified in Baehr v. Lewin, that if a right is considered fundamental then it is "subject to interference only when a compelling state interest is demonstrated." Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). [1]

In determining which rights are fundamental, the Hawai`i Supreme Court in State v. Mallan, 950 P.2d 178 quoting Baehr, 852 P.2d at 57 "look[ed] to the "traditions and collective conscience of [the] people to determine whether a principle is so rooted there as to be ranked as fundamental." The court relied on federal case law, finding that rights that "emphasize protection of intimate personal relationships such as those concerning marriage, contraception, and the family" to be fundamental, and thus protected under the right to privacy. Mallan, 950 P.2d at 182. The Hawaii Supreme Court reinforced the notion of family decisions are afforded protection in Doe v. Doe, 172 P.3d 1067 (Haw. 2007) stating:

> Parents' right to raise their children is protected under article I, section 6 of the Hawai'i Constitution, which requires the showing of a compelling state interest prior to infringing on privacy rights. Under the constitutional right to privacy, "**among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education**." Id. at 1078 (quoting Mallan, 950 P.2d at 233)[2]

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[1] Jessie R. Cardinale, *The Injustice of Infertility Insurance Coverage: An Examination of Marital Status Restrictions Under State Law*, 75 Alb. L. Rev. 2133, 2141 (2012)

[2] Cardinale, *supra* n. 86 at 2142.

In the case of the State v. Kam, the Hawai`i Supreme Court applied the protection under the right of privacy is protected under the United Sates Constitution First Amendment. State v. Kam, 748 P.2d 372 (Haw. 1988). In this case, the court based its holding on the United States Supreme Court's ruling in State v. Georgia, 394 U.S. 557 (1969) which held that the right to view pornographic material in one's home is protected by the First Amendment. Id. at 568. Therefore, the State cannot interfere with these rights unless a compelling state interest is shown. Kam, 748 P.2d at 380.[3]

The decision by a woman to utilize infertility treatments to have a family and procreate involves intimate decision-making, protected under the right of privacy. The limitation on insurance coverage excludes certain groups such as single women (unmarried, divorced, and widowed), unmarried couples, and married women unable to use her husband's sperm from exercising their right of privacy Therefore the marriage requirement infringes on and imposes an undue burden on one's constitutional right and thus, unconstitutional.

2. **CLASS DISCRIMINATION** - Marital status has no bearing regarding the treatment of a medical diagnosis and condition of infertility. The present Hawai`i IVF mandated benefit imposes the framework of the patriarchal nuclear family, and as a result, violates a citizens protected right to privacy

. related to marital status, thus creating two classes of members, violating ACA Title 45 of the Code of Federal Regulations Part 156, 445 CFR §156.200(e) of the Federal Register Vol. 78 No. 37 (Feb. 25, 2013) by discriminatorily providing IVF treatment of infertility to one class of female members who are married and prohibiting another class of female members who are single, divorced, widowed, never married, or married and unable to use her spouse's sperm from the same IVF health benefit, while charging both classes of female members the same premium.

The health plans are aware of this discrimination and have been wrongfully collecting on two classes of members while resting of this discriminatory law. For 28 years, the women of Hawaii with employer health plans have wrongfully endured this class discrimination. From personal experience, HMSA aggressively denies its discriminatory practice through its IVF health insurance coverage, as well as the denying the members right to appeals on the medical benefit due to failure of meeting the "administrative" requirement of marriage or civil union, because of the existing law.

Strong legal arguments on this issue by women with legal standing such as myself, pose inevitable litigation and potential class action suit against the State of Hawai`i and the Hawaii`i health plans, resulting in court sanctions, damages and federal fines. HMSA and Kaiser lobby and vigorously defend the existing law, here, at the Hawaii Legislalture.

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[3] Cardinale, supra n. 91 at 2143.

o that as of January 1, 2015, HMSA was removed the marriage requirement, after a member raised an internal appeal of discrimination. Likewise, Kaiser has stated that they will also be removing the marriage requirement in January of 2016. Kaiser has gone so far as to argue that the state need not remove the marriage requirement because the health plans are doing it on their own. This statement was made by Phyllis Dendle of Kaiser Permanente.

The marriage requirement cannot stand legal scrutiny of the Hawaii Constitution, constitutionality of Equal Rights, Religious Freedom and the Affordable Care Act. Both HMSA and Kaiser deny that they are in violation of these laws and regulations, by resting on the present antiquated discriminatory Hawaii IVF mandated law. The obligation to make sure that laws passed uphold the Hawaii Constitution, Federal Constitution, as well as state and federal laws belongs to the Hawaii Legislature. Therefore, despite the health plans insistence that the legislature need not get rid of the discriminatory language in the existing IVF mandate because the health plans are making the change on their own, the legislature has a legal obligation to its citizens that cannot be assumed by a third party. Thus, this committee and the legislature must pass HB 864 without amendments.

3. **DEFINITON OF INFERTILITY (ASRM) -** The proposed definition of infertility in this measure is consistent with the definition of infertility by the American Society for Reproductive Medicine, and has been adopted as the standard definition of infertility amongst the reproductive medical community throughout the U.S.. The states five year infertility history requirement is a risk barrier placed upon its citizens diagnosed with infertility by imposing this unreasonable delay without any basis. To delay a woman diagnosed at 35 years old, would require her to wait until she is 40 years old to qualify, if her condition is not one of the four limiting conditions included in the existing law. This definition must be adopted, in order to bring the archaic and outdate law mandate up-to-date with the present medical standard.

4. **INFERTILITY PROTECTED UNDER THE AMERICANS WITH DISABILITIES ACT (ADA)** - Pursuant to the ADA, reproduction is a major life activity included in the definition of a disability. The act states:

> The term "disability" means, with respect to an individual--
>
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment (as described in paragraph (3)).
>
> (2) Major life activities
>
> (B) Major bodily functions
>
> For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C.A. § 12102

5. **ACA PROHIBITIONS ON DISCRIMINATION -** The ACA prohibits discrimination as set forth in Title 45 of Code of Federal Regulations Part 156. Two sections in particular, which prohibit discrimination, are 45 CFR §156.125 and §156.200(e) of the subchapter and also in the Federal Register Vol. 78, No. 37(February 25, 2013). The marital status provision in the current IVF coverage law, which requires that the member be married in order to receive treatment creates two classes of members and is in violation of the prohibitions on discrimination. Even if the legislature disagrees with the assertion that it is in violation with the ACA or other federal laws, marriage should not be a defining factor that prohibits access to this benefit for women who have been diagnosed with infertility disability. Equal access should be afforded to all women. The statutory sections referenced herein are provided here:

> **45 CFR §156.125 Prohibition on discrimination.**
>
> (a) An issuer does not provide EHB if its benefit design, or the implementation of its benefit design, discriminates based on an individual's age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions.
>
> (b) An issuer providing EHB must comply with the requirements of §156.200(e) of this subchapter; and
>
> (c) Nothing in this section shall be construed to prevent an issuer from appropriately utilizing reasonable medical management techniques.
>
> **45 CFR §156.200 (e)** ***Non-discrimination.*** A QHP issuer must not, with respect to its QHP, discriminate on the basis of race, color, national origin, disability, age, sex, gender identity or sexual orientation.

As a employed, unmarried woman denied access to my IVF health benefit by HMSA because of the existing IVF law, I have first hand experience of the discrimination this mandate imposes by:

- Having to pay out of pocket for a IVF treatment, when married woman receive the coverage;
- Being required to do 3 IUI's under the present (HMSA policy) because I am not married and have a PPO, when HMO members are only required to do 1 IUI because IUI is a covered benefit under a HMO plan;
- Being required to do 3 IUI's against my fertility specialists advisement, as IUI is not a viable option for my condition; and most importantly
- Having my privacy infringed upon regarding my sexual orientation because I was not married, and using donor sperm.

SB 768 represents and expresses that all women, and families suffering with infertility are respected. **Pass SB 768 without amendments.**

One woman, all women.
One family, all families.
One child, all children.

HAWAII CATHOLIC CONFERENCE

The Public Policy Voice for the Roman Catholic Church in the State of Hawaii

HEARING: Senate HTH/CPN Committee on February 6, 2015 @ 1:15 p.m. #414.

SUBMITTED: February 3, 2015

TO:

Senate Committee on Health	Senate Committee on Commerce & Consumer Protection
Sen. Josh Green, Chair	Sen. Rosalyn Baker, Chair
Sen. Glenn Wakai, Vice Chair	Sen. Brian Taniguchi, Vice Chair

FROM: Walter Yoshimitsu, Executive Director

RE: Opposition to SB 768 & Relating to In Vitro Fertilization (no religious exemption)
Comments on SB 789 (contains religious exemption)

Honorable Chairs and members of the Senate Committee on Health & Consumer Protection, I am Walter Yoshimitsu, **representing the Hawaii Catholic Conference**. The Hawaii Catholic Conference is the public policy voice for the Roman Catholic Church in the State of Hawaii, which under the leadership of Bishop Larry Silva, represents Roman Catholics in the State of Hawaii. Although the Catholic Church opposes in-vitro fertilization, SB 789 includes the following language:

> **"It is the intent of the legislature to exempt religious institutions and organizations that believe the covered procedures violate their religious and moral teachings and beliefs."**

As problems of infertility and sterility become more evident, people turn to medical science for solutions. Modern science has developed various techniques such as artificial insemination and in vitro fertilization. In addition, there are also ancillary techniques designed to store semen, ova, and embryos. The fact that these techniques have been developed and have a certain success rate does not make them morally acceptable. The ends do not justify the means. In this case, the ends are very noble: helping an infertile couple to become parents. The Church, however, cannot accept the means.

The "Catechism of the Catholic Church" addresses those cases where the techniques employed to bring about the conception involve exclusively the married couple's semen, ovum, and womb. Such techniques are "less reprehensible, yet remain morally unacceptable." They dissociate procreation from the sexual act. The act which brings the child into existence is no longer an act by which two persons (husband and wife) give themselves to one another, but one that "entrusts the life and identity of the embryo into the power of the doctors and biologists, and establishes the domination of technology over the origin and destiny of the human person. Such a relationship of domination is in itself contrary to the dignity and equality that must be common to parents and children" (#2377).

In vitro fertilization puts a great number of embryos at risk, or simply destroys them. These early stage abortions are never morally acceptable. Unfortunately, many people of good will have no notion of what is at stake and simply focus on the baby that results from *in vitro* fertilization, not adverting to the fact that the procedure involves creating many embryos, most of which will never be born because they will be frozen or discarded.

The Church's teaching on the respect that must be accorded to human embryos has been constant and very clear. The Second Vatican Council reaffirms this teaching: "Life once conceived must be protected with the utmost care." Likewise, the more recent "Charter of the Rights of the Family," published by the Holy See reminds us that: "Human life must be absolutely respected and protected from the moment of conception." We oppose SB 768, without a religious exemption, because it would force the Catholic Church to provide services which are contrary to the tenets of our faith. At least SB 789 documents the intent not to force the practice on our institution. Mahalo for the opportunity to testify.

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