

**STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES**

P. O. Box 339
Honolulu, Hawaii 96809-0339

March 22, 2015

TO: The Honorable Della Au Belatti, Chair
House Committee on Health

FROM: Rachael Wong, DrPH, Director

SUBJECT: **S.B. 768 SD1- RELATING TO IN VITRO FERTILIZATION
INSURANCE COVERAGE**

Hearing: Wednesday, March 25, 2015; 8:45 a.m.
Conference Room 329, State Capitol

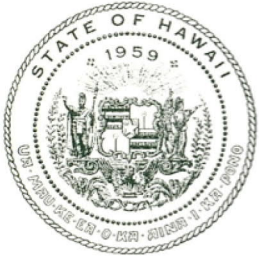
PURPOSE: The purpose of this bill is to provide insurance coverage equality for women who are diagnosed with infertility by making available to them expanded treatment options, ensuring adequate and affordable health care services.

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.

The DHS does not cover treatment for infertility under Medicaid. If the Medicaid program is required to cover these services through this measure, federal funds will not be available for this service. The new service would need to be funded with 100% state funds. 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.

HAWAII
STATE
COMMISSION
ON THE
STATUS
OF
WOMEN



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LESLIE WILKINS

COMMISSIONERS:

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CARMILLE LIM
AMY MONK
LISA ELLEN SMITH
MARILYN LEE
JUDY KERN

Executive Director
Cathy Betts, JD

Email:
Catherine.a.betts@hawaii.gov
Visit us at:
humanservices.hawaii.gov
/hscsw/

235 S. Beretania #407
Honolulu, HI 96813
Phone: 808-586-5758
FAX: 808-586-5756

March 24, 2015

To: Representative Della Au Belatti, Chair
Representative Richard Creagan, Vice Chair
Members of the House Committee on Health

From: Cathy Betts, Executive Director
Hawaii State Commission on the Status of Women

Re: Testimony in Support, SB 768, SD1, Relating to In Vitro Fertilization Insurance Coverage

On behalf of the Hawaii State Commission on the Status of Women, I would like to express my support my support for SB 768, SD1, which would revise the current statute to allow equal coverage for in vitro fertilization treatment and procedures.

Women are widely affected by infertility. In fact, 7 million women and their partners are affected by infertility in the United States. Our changing workplace demographics and the breadth of diversity found in families should be reflected in our policies. Women of all ages make personal decisions about whether they will choose to have children. Many women will delay attempting to get pregnant until later in life. Additionally, many medical reasons prevent women from being able to become pregnant. Coverage for fertility treatment should be equal, regardless of marital status or sexual orientation.

The statute, as written, requires a woman to show 5 years of difficulty getting pregnant in order to receive coverage for infertility. By the time many women begin considering fertility treatment, time is of the essence, and waiting five years will eliminate all chances of becoming pregnant. Additionally, as written, the statute prohibits lesbian couples or unmarried couples from obtaining coverage. This is inherently discriminatory on its face.

The Commission supports SB 768, SD1 and urges this Committee to pass this important measure.



An Independent Licensee of the Blue Cross and Blue Shield Association

March 25, 2015

The Honorable Della Au Belatti, Chair
The Honorable Richard P. Creagan, Vice Chair
House Committee on Health

Re: SB 768, SD1 – Relating to In Vitro Fertilization Insurance Coverage

Dear Chair Au Belatti, Vice Chair Creagan and Members of the Committee:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on SB 768, SD1, which would require health insurance coverage for women who are diagnosed with infertility by making available to them expanded treatment options. HMSA would like to offer comments on this Bill.

We are aware and empathetic to the situations under which the procedures would be conducted. In fact, HMSA already offers coverage for IVF services, and we agree with the provision in SB 768, SD1, that deletes the current spousal requirement. We already have eliminated a spousal requirement in our medical policies, and this amendment would comport with practice.

That said, this Bill raises issues that need to be considered, and we have attached a proposed SB 768, HD 1, for consideration. Specifically, we are concerned that:

- (1) While we agree that references to “spouse” should be deleted, the Bill should retain existing language requiring the patient’s oocytes to be fertilized. That is a necessary condition for the IVF procedure. [Page 3, Lines 1 – 2; and Page 5, Lines 12 – 13]
- (2) The definition of “infertility” should exclude voluntary sterilization or natural menopause. [Page 4, Lines 11 – 14; and Page 7, Lines 1 – 4]
- (3) We are concerned about the amendments both to Section 431:10A-116.5(4), HRS, [Section 2 of the Bill] and to Section 432:1-604(4), HRS [Section 3 of the Bill]. First, the change from “is available” to “shall be available” may result in an expansion of the coverage mandate to non-IVF services. As such, it would be considered a new mandate under the Affordable Care Act and the cost of such services would be the financial responsibility of the State. [Page 3, Line 17; and Page 6, Line 10]

Additionally, we are concerned about the addition of the phrase, “unless the individual’s physician determines that those treatments are likely to be unsuccessful. This amendment effectively diminishes the authority of a plan’s medical panel to review medical necessity. [Pages 3, Line 20 to Page, 4 Lines 1 -2; and Page 6, Lines 11 – 13]

Thank you for allowing us to testify on SB 768, SD1, and your consideration of the concerns we have raised is appreciated.

Sincerely,

Jennifer Diesman
Vice President, Government Relations

Attachment

A BILL FOR AN ACT

RELATING TO IN VITRO FERTILIZATION COVERAGE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that infertility is a disease of the reproductive system
2 that impairs and substantially limits an individual's major life activity of reproduction. In the
3 United States, infertility affects approximately seven million women and their partners, and
4 approximately twelve per cent of women of childbearing age have used an infertility
5 service. Since 1978, in vitro fertilization has provided a necessary solution for many diagnosed
6 with infertility who desire to have a child and be a parent.

7 The legislature further finds that since 1987, Hawaii has required insurance coverage for the
8 treatment of infertility through in vitro fertilization. The current law only provides for a one-
9 time benefit; applies only to the insured or insured's spouse; requires fertilization with the sperm
10 from the patient's spouse; requires a history of infertility for at least five years; requires previous
11 attempts at pregnancy through other applicable infertility treatments for which coverage is
12 available; and applies only to a limited number of medical conditions associated with infertility.

13 The purpose of this Act is to provide in vitro fertilization insurance coverage equality for
14 women who are diagnosed with infertility by requiring non-discriminatory coverage and
15 ensuring quality of care in the diagnosis and treatment of infertility.

16 SECTION 2. Section 431:10A-116.5, Hawaii Revised Statutes, is amended to read as
17 follows:

18 "**§431:10A-116.5 In vitro fertilization procedure coverage.** (a) All individual and group
19 accident and health or sickness insurance policies which provide pregnancy-related benefits shall
20 include in addition to any other benefits for treating infertility, a one-time only benefit for all
21 outpatient expenses arising from in vitro fertilization procedures performed on the insured or the
22 insured's dependent [~~spouse~~]; provided that:

23 (1) Benefits under this section shall be provided to the same extent as the benefits provided
24 for other pregnancy-related benefits;

25 (2) The patient is the insured or covered dependent of the insured;

26 (3) The patient's oocytes are fertilized [~~with the patient's spouse's sperm~~];

S.B. NO.

1 (4) The:

2 (A) Patient [~~and the patient's spouse have~~] has a history of infertility of at least [~~five years'~~
3 ~~duration;~~] twelve months; or

4 (B) Infertility is associated with one or more of the following medical conditions:

5 (i) Endometriosis;

6 (ii) Exposure in utero to diethylstilbestrol, commonly known as DES;

7 (iii) Blockage of, or surgical removal of, one or both fallopian tubes (lateral or bilateral
8 salpingectomy); or

9 (iv) Abnormal male factors contributing to the infertility;

10 (5) The patient has been unable to attain a successful pregnancy through other applicable
11 infertility treatments for which coverage is available under the insurance contract; and

12 (6) The in vitro fertilization procedures are performed at medical facilities that conform to
13 the American College of Obstetricians and Gynecologists guidelines for in vitro fertilization
14 clinics or to the American Society for Reproductive Medicine minimal standards for programs of
15 in vitro fertilization.

16 (b) For the purposes of this section, the term [~~"spouse" means a person who is lawfully~~
17 ~~married to the patient under the laws of the State.~~] "infertility" means a disease, defined by the
18 failure to achieve a successful pregnancy after at least twelve months of appropriately timed
19 unprotected intercourse or therapeutic donor insemination; provided that infertility shall not
20 include voluntary sterilization or natural menopause.

21 (c) The requirements of this section shall apply to all new policies delivered or issued for
22 delivery in this State after June 26, 1987."

23 SECTION 3. Section 432:1-604, Hawaii Revised Statutes, is amended to read as follows:

24 "**§432:1-604 In vitro fertilization procedure coverage.** (a) All individual and group
25 hospital or medical service plan contracts which provide pregnancy-related benefits shall include
26 in addition to any other benefits for treating infertility, a one-time only benefit for all outpatient
27 expenses arising from in vitro fertilization procedures performed on the subscriber or member or
28 the subscriber's or member's dependent [~~spouse~~]; provided that:

S.B. NO.

1 (1) Benefits under this section shall be provided to the same extent as the benefits provided
2 for other pregnancy-related benefits;

3 (2) The patient is a subscriber or member or covered dependent of the subscriber or member;

4 (3) The patient's oocytes are fertilized ~~[with the patient's spouse's sperm];~~

5 (4) The:

6 (A) Patient ~~[and the patient's spouse have]~~ has a history of infertility of at least ~~[five years'~~
7 ~~duration;]~~ twelve months; or

8 (B) Infertility is associated with one or more of the following medical conditions:

9 (i) Endometriosis;

10 (ii) Exposure in utero to diethylstilbestrol, commonly known as DES;

11 (iii) Blockage of, or surgical removal of, one or both fallopian tubes (lateral or bilateral
12 salpingectomy); or

13 (iv) Abnormal male factors contributing to the infertility;

14 (5) The patient has been unable to attain a successful pregnancy through other applicable
15 infertility treatments for which coverage is available under the insurance contract; and

16 (6) The in vitro fertilization procedures are performed at medical facilities that conform to
17 the American College of Obstetricians and Gynecologists guidelines for in vitro fertilization
18 clinics or to the American Society for Reproductive Medicine minimal standards for programs of
19 in vitro fertilization.

20 (b) For the purposes of this section, the term ~~["spouse" means a person who is lawfully~~
21 ~~married to the patient under the laws of the State.]~~ "infertility" means a disease, defined by the
22 failure to achieve a successful pregnancy after at least twelve months of appropriate, timed
23 unprotected intercourse or therapeutic donor insemination; provided that infertility shall not
24 include voluntary sterilization or natural menopause.

25 (c) The requirements of this section shall apply to all hospital or medical service plan
26 contracts delivered or issued for delivery in this State after June 26, 1987."

27 SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory
28 material is underscored.

SB 768, SD1 PROPOSED HD1

SB 768, SD1 PROPOSED HD1

SB 768, SD1 PROPOSED HD1

1 SECTION 5. This Act shall take effect on July 1, 2015.

2

INTRODUCED BY: _____

S.B. NO.

Report Title:

[Click here and type **Report Title** (1 line limit)]

Description:

[Click here and type **Description** (5 line limit)]

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



March 25, 2015

To: Representative Della Au Belatti, Chair
Representative Richard Creagan, Vice Chair and
Members of the Committee on Health

From: Jeanne Y. Ohta, Co-Chair

RE: SB 768 SD1 Relating to In Vitro Fertilization Insurance
Hearing: Wednesday, March 25, 2015, 8:45 a.m., Room 329

POSITION: Strong Support

The Hawai'i State Democratic Women's Caucus writes in strong support of SB 768 SD1 Relating to In Vitro Fertilization Insurance which would end the discrimination of eligible patients based on marital status and bring equality into the insurance coverage for all women who are diagnosed with infertility.

The Hawai'i State Democratic Women's Caucus is a catalyst for progressive, social, economic, and political change through action on critical issues facing Hawaii's women and girls it is because of this mission that the Caucus strongly supports this measure.

This measure will correct outdated language on marital status that was written approximately 28 years ago and is discriminatory based on that status.

We ask the committee to pass this measure and we thank the committee for the opportunity to provide testimony.



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

HEARING: House Health Committee on Wednesday, March 25, 2015 @ 8:45 a.m. in room 329.

SUBMITTED: March 23, 2015

TO: House Committee on Health
Rep. Della Au Belatti, Chair
Rep. Richard Creagan, Vice Chair

FROM: Walter Yoshimitsu, Executive Director

RE: Opposition to SB 768 SD1 Relating to In Vitro Fertilization

Honorable Chairs and members of the House Committee on Health, 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. We oppose SB 768 SD1.

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 SD1 because we are opposed to in-vitro fertilization but also because it will force the Catholic Church to provide services which are contrary to the tenets of our faith. At least SB 789 documented the intent not to force the practice on our institution. If you must pass this legislation, we ask that, at the very least, you add a strong religious exemption.

Mahalo for the opportunity to testify.



March 24, 2015

Representative Della Au Belatti, Chair
House Committee on Health
Hawaii State Capitol

**Re: S.B. 768, SD1 Relating to In Vitro Fertilization Insurance Coverage
Wednesday, March 25, 2015 at 8:45 a.m.**

Dear Chair Au Belatti and Members of the Committee on Health:

Hawaii Women Lawyers submits this testimony in **strong support** of S.B. 768, S.D.1, which would amend insurance coverage for in vitro fertilization and expanded applicability to all women who are diagnosed with infertility.

Based on the conditions imposed in the current law, single and unmarried women, as well as lesbian women (even if married) cannot receive treatment for infertility. This policy, which has been in existence for over two decades, is discriminatory. With changes occurring in workplace demographics and more women working and obtaining higher education degrees, there are increasing numbers of women who are older when they decide to have children.

The current policy penalizes older women and single women by denying coverage under the law, and should be amended to provide equal access to treatment for all women.

Hawai'i Women Lawyers is committed to enhancing the status of women and providing equal opportunities for all of Hawai'i's people, and believes this measure will end a discriminatory policy that has prevented women from receiving equal access to an important medical treatment.

Thank you for the opportunity to submit testimony in strong support of this bill.

Sincerely,

Tricia M. Nakamatsu, President

TO: **COMMITTEE ON HEALTH**
The Honorable Della Au Belatti,, Chair
The Honorable Richard P. Creagan, Vice Chair

FROM: Na'unanikina'u Kamali'i

SUBJECT: **SB 768 SD1- RELATING TO IN VITRO FERTILIZATION COVERAGE**

Hearing: Wednesday, March 25, 2015
Time: 8:45 a.m.
Place: Conference Room 329

This testimony is in **strong support of SB 768 SD1**. This measure provides in vitro fertilization coverage equality for all women who are diagnosed with infertility by requiring non-discriminatory coverage. The measure also provides a definition of infertility which is consistent with the current medical definition 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 under the Hawaii constitution and federal law, even though one health insurance company may make such changes voluntarily.

The In vitro fertilization (IVF) procedure coverage law, HRS §431:10A-116.5 and §432:1-604, enacted on or before December 31, 2011, is included as an Essential Health Benefit (EHB). As of **January 1, 2014**, strict federal prohibitions against discriminatory practices apply to EHBs. More importantly, the measure will be brought in compliance with the Hawaii State Constitution privacy clause.

In short, the measure (SD1) does the following:

- 1) Brings the existing Hawaii IVF mandate into compliance with the Hawaii State Constitution's Privacy Clause and some federal regulations;
- 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) Defines "infertility" consistent with the American Society of Reproductive Medicine (ARSM);
- 4) Removes arbitrary wait time requirements;
- 5) Ends class discrimination among women with employer health benefits;
and
- 6) Brings the law into compliance with ACA prohibitions against discrimination and pre-existing conditions.

Comments:

1. **Violation of the Privacy Clause.** Under the IVF state-required benefit, the IVF treatment requires that the woman's eggs be fertilized by her spouse's sperm. The "marital requirement" is unconstitutional and violates 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 infertility treatments to bear a child is protected, the marital status restrictions placed on insurance coverage will be found unconstitutional. Unmarried women, unmarried couples, divorced women, widowed women are all not eligible for coverage under the current IVF mandated benefit and as a result, the state-required benefit imposes an undue burden on their constitutional right of privacy. 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. **No Compelling State Interest for 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 legislature stated that 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 that have in vitro fertilization as their only hope for allowing pregnancy." *SCRep. 1309, Consumer Protection and Commerce on S.B. 1112 (1987)*. The cost limitation for insurers is the "one-time only benefit" language. The State of Hawaii fails to show any compelling state interest for limiting eligibility for the IVF coverage benefit to only married couples who use the husband's sperm.

3. **Denial of coverage if not married.** Women who do not meet the marriage requirement are denied IVF coverage irrespective of a diagnosis of infertility and even where the diagnosis is one of the statutorily stated conditions for infertility. 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, many couples choose not to marry. Consent to marriage is a constitutionally protected right. The Hawaii state government infringes on the constitutional right to consent

to marriage, when it requires couples to marry as a condition of eligibility for the IVF coverage benefit. Infringement on a woman's right to marry is practiced during the pre-certification process. Insurance company policy requires the woman's physician to disclose her marital status in the pre-certification process. Further, insurance companies typically inform women who are not married, whether single, coupled or gay, 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 consent to marriage and privacy. Government in effect defines "family" by requiring a licensed governmentally recognized relationship. The right to consent to marriage is a constitutionally protected right. Member health benefits should never be a conditioned on marriage. All members, whether subscriber or dependent member, shall be provided non-discriminatory health coverage when it is a benefit of an employment.

4. Equality for all women The purpose of **SB 768 SD1** 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, particularly here, where there is no cost consideration for the corrective measure 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 provision violates federal and state laws The current IVF coverage law wrongfully creates two "classes" of premium paying members and is discriminatory on its face under ERISA, ADA, and ACA and employment practices. Health plans have deliberately upheld discriminatory provisions which have called for a member to be married and use her husband's sperm and enforced an arbitrary wait time requirement while reaping 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, which violates the Hawaii constitution. The State has not provided any compelling interest for the restrictive and limiting mandated IVF coverage benefit.

6. Definition of infertility. In its guidance to patients, the American Society of Reproductive Medicine defines infertility as:

"a disease, defined by the failure to achieve a successful pregnancy after 12 months or more of appropriate, timed unprotected intercourse or therapeutic donor insemination. Earlier evaluation and treatment may be justified based on medical history and physical findings and is warranted after 6 months for women over age 35 years."

The Hawaii mandated benefit requires a five-year history that is arbitrary and not consistent with the current definition of infertility and treatment protocols. The measure reflects definition of infertility used by ACOG, (a one year wait requirement) and not ASRM, which 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 because it violates the Hawaii state constitution. 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.

8. No ACA State liability and or Cost Considerations

According to the federal Health and Human Services (HHS) Office of Legislation, the regulation at 45 CFR §155.170 (a)(2), provides that “state-required benefits enacted on or prior to December 31, 2011 are not considered in addition to the essential health benefit”, and thus, are included as an EHB. Further, under 45 CFR §155.170 (b), “states are expected to defray the cost of additional required benefits specified in paragraph (a)” i.e. state-required benefits enacted on or after

January 1, 2012. In HHS's response to comments on the regulation (45 CFR §155.170), HHS clarified that "**only new State-required benefits enacted on or prior to December 31, 2011 are included as EHB, and States are expected to continue to defray the cost of State-required benefits enacted on or after January 1, 2012 unless those State required benefits were required in order to comply with new Federal requirements.**" See 80 Fed. Reg. 10750, 10813 (February 27, 2015) ¹

This measure, SB 768 SD1, eliminates discrimination based on marital status, limiting conditions of infertility, and arbitrary wait time requirements. There is no cost liability to the State of Hawaii on this measure for the following reasons:

- A. The IVF coverage benefit was enacted before December 31, 2011, and is not considered in addition to the essential health benefit;
- B. The measure brings the IVF procedure coverage law, HRS §431:10A-116.5 and §432:1-604, into compliance with the Hawaii State Constitution and new federal requirements prohibiting discrimination under the ACA Non-Discrimination Clause, 45 CFR §156.125 cited herein above; and
- C. The measure makes no changes to existing cost limiting language which provides for a "one-time only benefit for all out patient expenses arising from in vitro fertilization procedures"... . Proposed amendments expand accessibility and availability and do NOT expand treatment options.

Therefore, there is no state liability for costs associated with the measure to bring the law into compliance with the Hawaii State Constitution and the Affordable Care Act. Furthermore, the State of Hawaii is required under federal law to bring all state-required benefit mandates into compliance.

Related Code of Federal Regulations and Federal Register provisions are as follows:

45 CFR §155.170 Additional required benefits.

(a) Additional required benefits.

(1) A State may require a QHP to offer benefits in addition to the essential health benefits.

(2) A State-required benefit enacted on or before December 31, 2011 is not considered in addition to the essential health benefits.

(3) The Exchange shall identify which state-required benefits

¹ The Notice of Benefit and Payment Parameters, published on February 27, 2015, allows states to elect new benchmarks from the 2014 plan year to serve as the new EHB benchmark plan for the 2017 plan year. See 80 Fed. Reg. 10750, 10813 (February 27, 2015).

are in excess of EHB.

(b) *Payments.*

The State must make payments to defray the cost of additional required benefits specified in paragraph (a) of this section to one of the following:

- (1) To an enrollee, as defined in §155.20 of this subchapter; or
- (2) Directly to the QHP issuer on behalf of the individual described in paragraph (b)(1) of this section.

(c) *Cost of additional required benefits.*

(1) Each QHP issuer in the State shall quantify cost attributable to each additional required benefit specified in paragraph (a) of this section.

(2) A QHP issuer's calculation shall be:

- (i) Based on an analysis performed in accordance with generally accepted actuarial principles and methodologies;
 - (ii) Conducted by a member of the American Academy of Actuaries; and
 - (iii) Reported to the Exchange.
- [78 FR 12865, Feb. 25, 2013]

HHS Comment and Response to concerns raised by States:

Comment: Several States and other commenters requested further clarification regarding how new benchmark plan selection will affect our policy at § 155.170 pertaining to State required benefits.

Response: We did not propose any changes to § 155.170. Therefore, only new State-required benefits enacted on or prior to December 31, 2011 are included as EHB, and States are expected to continue to defray the cost of State-required benefits enacted on or after January 1, 2012 unless those State required benefits were required in order to comply with new Federal requirements. HHS intends to continue to publish a list of non-EHB State required benefits on its Web site on an annual basis. See 80 Fed. Reg. 10750, 10813 (February 27, 2015)



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 provide 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 from 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 receive 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

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 authorize 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 provide 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 전화해서 문의하시면 한국어 통역 서비스를 받으실 수가 있습니다.

ILOCANO (Ilocano): No masapulo o tulongin ILOCANO awaganyo ni 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): Diné'ehgo shika adóhíí'ni nínáíngó, k'wáíngó hóí'ni! 1-800-776-4672.

SAMOAN (A mana'o ma se fesosoani I le Ganana Fa'asamoa Fa'amolemole valaap ma'i I le telefoni e 1-800-776-4672).