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September 3, 2022

(via email: david.mccay@la.gov)

David McCay
Louisiana Department of Health
P.O. Box 3836
Baton Rouge, LA 70821

Dear Mr. McCay:

Please consider this written comment on the recent LDH/OPH Emergency Rule establishing a list of conditions that define “medically futile” pregnancies. The list is both overinclusive and underinclusive and should be amended in the Final Rule.

Overinclusive: The list erroneously includes Trisomy 13 and Trisomy 18. While these conditions are profound and irremediable, they are not “incompatible with sustaining life after birth.” See, e.g., John D. Lantos, *Trisomy 13 and 18: Treatment Decisions in a Stable Gray Zone*, 316 JAMA 396 (2016). The statutory exception for “medically futile” pregnancies is intended to exclude only conditions that are uniformly lethal. It is not intended to permit physicians and parents to make value-laden quality-of-life judgments. Including Trisomy 13 and Trisomy 18 on this list indicates a bias against certain disabilities that is inconsistent with the life-protecting purpose of the statute.

Underinclusive: The list omits “acrania.” As the recent controversy concerning Nancy Davis illustrates, hospitals are uncertain and risk-averse about what conditions qualify as “medically futile.” On the one hand, this highlights the importance and value of the LDH/OPH list. On the other hand, it also illustrates the importance of ensuring the list’s accuracy and completeness. Notwithstanding the catch-all at the end of the list, many physicians, like those at Woman’s Hospital in Baton Rouge, may be reluctant to offer abortions for conditions not specifically included on the list.

Sincerely,



Thaddeus Mason Pope
Professor of Law