

Empire State Stem Cell Board
Ethics Committee Meeting Minutes
March 16, 2009

The Empire State Stem Cell Board Ethics Committee held a meeting on Monday, March 16, 2009, at the Department of Health offices, 90 Church Street, New York, New York. Commissioner Richard F. Daines, M.D., presided as Chairperson.

Ethics Committee Members Present:

Dr. Richard F. Daines, Chairperson
Fr. Thomas Berg
Ms. Nancy Neveloff Dubler
Ms. Brooke Ellison
Dr. Samuel Gorovitz
Dr. Robert Klitzman
Rev. H. Hugh Maynard-Reid
Dr. Samuel Packer
Dr. Daniel Sulmasy
Mr. Robert Swidler

Ethics Committee Members Absent:

Dr. David Hohn
Dr. Vivian Lee

Department of Health Staff Present:

Mr. Marty Algaze
Ms. Judy Doeschate
Ms. Amy Nickson
Ms. Beth Roxland
Ms. Lokia Rucker
Dr. Lawrence Sturman
Ms. Linda Tripoli
Dr. Ann Willey

Observers Present:

Ms. Jana Bassman
Ms. Deborah Branch
Ms. Ciarra Boyd
Ms. Katayoun Chamany
Ms. Charnell Covert
Mr. Ed Ellison
Ms. Jean Ellison
Mr. Joseph Feldman
Ms. Caroline Ferguson
Ms. Ruth Fischbach
Mr. Ma Hongbao
Ms. Barbara Meara
Ms. Kelly Ryan

Opening Remarks and Introductions

Chairman Daines called the meeting to order and welcomed Board members, staff and the public. Dr. Daines reported that President Obama signed an Executive Order lifting President Bush's limitations on federal funding of human embryonic stem cell (hESC) research and that the National Institutes of Health (NIH) had been asked to develop standards for federally funded stem cell research. Ms. Roxland provided members with a brief history of federal policies on stem cell research over the past two administrations. Dr. Daines noted that New York's biomedical research community is well positioned to take full advantage of additional federal funding being made available under the federal stimulus act due in part to the groundwork laid by the Empire State Stem Cell Board.

Dr. Daines also reported that Governor Paterson had announced \$101.8 million in awards to one hundred and seven researchers and institutions, seventy-eight of which will support wide-ranging generic studies of stem cells; nineteen of which are targeted to new methods of deriving stem cell lines; and nine of which will support the acquisition of equipment and shared research facilities.

Dr. Daines then asked Committee members and staff to introduce themselves.

Approval of Minutes of the January 26, 2009 Meeting of the Ethics Committee

Dr. Daines directed members to the draft minutes for the January 26, 2009, meeting of the Ethics Committee included in their agenda books and inquired if members had a chance to review them. Dr. Gorovitz noted that the word "a" should be inserted into a sentence on page 6 so it would read: "...because their agreement to donate could arise out of *a* sense of trust." Ms. Dubler and Fr. Berg both expressed their appreciation for the thoroughness of the minutes.

Mr. Swidler then moved to approve the minutes for the January 26, 2009, meeting of the Ethics Committee, with the changes as noted. Dr. Packer seconded the motion. The motion passed, with Fr. Berg abstaining.

Report on Funding Committee Activities

Dr. Daines advised members that the Funding Committee met on February 12th and approved the issuance of four new Requests for Applications (RFAs) that included a recurring RFA to support investigator-initiated research, an RFA targeted to research involving the derivation of new hESC lines, an RFA to develop more shared research facilities and an RFA to support promising young investigators in their transition from fellow to faculty.

Dr. Daines advised members that Ms. Roxland had reviewed proposed changes to Appendix A-2 and the draft informed consent forms with the Funding Committee and would be providing information regarding their comments later in the meeting.

Dr. Daines also reported that the Funding Committee reviewed an outline of the 2008-09 annual report and offered suggestions to make the document more robust and informative.

Program Update

Dr. Sturman advised members that \$8.2 billion of the funds appropriated to NIH under the American Recovery and Reinvestment Act will be used to support NIH research priorities. He noted that \$200 million of additional funds will be used for “Challenge Grants” of two years duration in several areas, including stem cell research. He stated that NIH has reported that it is funding all types of stem cell research up to an estimated \$938 million, of which approximately \$88 million supports hESC research.

Dr. Sturman provided information on the status of all awards made to date. He noted that the consortia planning awards are just getting underway and that a forum is being planned between late August and early September to discuss these awards. He also advised members that the undergraduate curriculum RFA will be posted in the *State Register* soon and that the undergraduate internship RFA will follow shortly thereafter. Dr. Sturman reported that staff is continuing to work on the June 12th grantees conference.

In response to questions, Dr. Sturman advised members that Dr. Friedman’s January 26th presentation to the Ethics Committee will be shown to the Funding Committee at its next meeting and that staff expects to be following up with the Board with regard to support for formal and informal education programs.

Dr. Sturman also advised members that a workgroup had been established to address intellectual property and economic development issues. Committee members expressed support for including consideration of justice issues in those discussions or potentially creating another workgroup to focus on those issues.

Development of the NYSTEM Annual Report

Dr. Sturman noted that the Board is required to issue an annual report that provides the public with information about the Board’s activities, standards, grants awarded, grants in progress, research accomplishments and future program directions. He stated that Funding Committee members suggested the report should highlight progress in stem cell research, especially activities in New York State supported by the Board. He then turned the floor over to members for their suggestions.

Dr. Gorovitz expressed concern that the draft outline lacked any reference to educational activities or programs, such as the curriculum development and internship RFAs in progress. He emphasized the need to include these in the report from the beginning.

Dr. Sulmasy inquired about the process for development of the annual report and noted that the last version omitted a footnote that the full Board agreed to that would have included the definition for embryo set forth in the Strategic Plan. Dr. Sturman stated he would have to look back into how that occurred.

Mr. Swidler noted the Committee has made the greatest amount of progress on the evaluation of the ethical, scientific, medical, legal and social issues and suggested that the report should include information on the discussions regarding informed consent, donor payment and other issues.

Fr. Berg recommended adding charts or electronic links that would allow people to quickly identify who is doing different types of research. Dr. Sturman noted that since the report will be distributed electronically, it should be easy to add a link to the on-line directory.

Dr. Klitzman suggested the Commissioner or Dr. Sturman should address the issue of the importance of ongoing state funding in light of the federal funding changes.

Respect for the Embryo

Ms. Roxland reminded members that the Committee had discussed the issue of the status of the embryo at its April 1st and May 13th meetings and reached a consensus that human embryos deserve respect. She also noted that the Committee had agreed with the following statement in the Board's Strategic Plan:

“Some people believe that since human embryos are living organisms, they possess moral status. Many others believe that embryos deserve special protection and have distinct and special characteristics.”

Ms. Roxland reminded members that the Committee had expressed an interest in returning to this subject to determine if it could reach a consensus on what is meant by “respect for the human embryo.” She then opened the floor up to discussion.

Dr. Sulmasy opened the discussion by referring to Steven Darwall's 1977 article entitled *Two Kinds of Respect*. He said the article distinguishes between “appraisal respect” which is engendered by a positive appraisal of some sort of excellence or quality in a person and “recognition respect,” which is based upon an appropriate weighing of some feature of a thing and setting moral limits accordingly. Dr. Sulmasy suggested that the embryo engenders “recognition respect” and not “appraisal respect.” He suggested this distinction could provide a framework and focus for the Committee's discussion.

Dr. Gorovitz agreed that it was a good starting point, but observed that there is not a bright line between “appraisal respect” and “recognition respect.” He stated he views original editions of great manuscripts with a certain sense of respect and that if he owned one he would feel morally constrained as to what would be appropriate to do with it. He said they are valuable partly because of their relationship to what people think about them and how people regard them, but that the “respect” given to them does not have anything to do with their status as living beings, because they are not. He said that although he does not think embryos are people, he thinks there is an obligation to treat them in respectful ways. He said it is not clear to him what should or should not be allowed to be done with them, but noted that the respect due to them is not necessarily because they are living things since things don't have to be people, or even be alive, to warrant a respectful attitude and respectful treatment.

Fr. Berg suggested that when people have difficulty understanding something, it can be helpful to think about it from an outer limit and get closer to what you are getting at. He asked whether there is anything the Committee would agree that it would never want to see done with a human embryo. Dr. Gorovitz responded, citing as an example, that he would not want an embryo served in a cutting-edge restaurant as a kind of caviar. Ms. Ellison offered that she would not want them to be used to clean floors or power cars, but pointed out that the Committee was engaged in a very critical discussion about using them to develop potential

therapies and save lives. She noted that no one was arguing that they are not deserving of respect.

Ms. Dubler suggested that the Committee should broaden its notion of respect for embryos and the stakeholders. She noted that since the vast majority of embryos are used to create babies via *in vitro* fertilization (IVF), what the Committee says will only have a limited impact on existing embryos. She suggested that how respect is demonstrated in research could serve as a good rule for how respect should be demonstrated in clinical care. Ms. Dubler suggested that the stakeholders are not merely the embryos, but also the residents of the State who think that embryos have a special status. She encouraged the Committee to think differently about serving the needs of that stakeholder population by creating a model for how embryos might be destroyed after they are not needed in the clinical setting. She also stated that she thought that the Committee needed to be certain that the citizens of New York who want to be protected from inadvertent participation in embryo research have their sensibilities regarded. She ended by noting that although Dr. Sulmasy had focused on the definition of respect, she was thinking about it in the context in which respect is shown.

Dr. Klitzman pointed out that the law already prohibits the Committee from funding research that uses embryos in reproductive cloning. Dr. Klitzman also noted that while broad-ranging discussions might be beneficial, Ms. Roxland had suggested the Committee should focus on outcomes related to the Committee's charge. He observed that the Committee will have accomplished a lot if it is able to figure out the issues with regard to research.

Dr. Daines stated that something he thought should not be done with embryos would be to bar their use in valid research that might increase scientific understanding and therapies. He suggested that it would be disrespectful to not put embryos to their greatest possible use.

Fr. Berg observed that there appears to be a greater degree of comfort with the idea of using the lowest number of possible embryos for research purposes. He stated that he thought the change in federal policy could incentivize the creation of embryos for research purposes outside the IVF setting. He noted that it may become very lucrative for IVF companies to sell embryos or cell lines developed from embryos that carry certain genetic diseases. He asked the Committee how it would feel about the potential demand for industrial quantities of human embryos being used in research and possibly feeding real therapeutic advances.

Mr. Swidler noted that there is a powerful argument to be made for using leftover embryos in research because they would be discarded anyway, but that the creation of embryos through somatic cell nuclear transfer (SCNT) for use in research forces the question of whether the embryo has a moral status and how that moral status weighs against the moral value of the proposed research. He stated that he doesn't think that an embryo at the blastocyst stage is a person, but also did not agree with the analogy to a treasured book. He said he thought it is deserving of respect because it is part of the continuum of life where even at the earliest stages there is a certain value that increases over time with consciousness, sentience, the ability to experience emotion, and the potentiality of life. He said another reason for showing respect for the embryo is because it's a pluralistic society and it is important to respect our fellow citizens who believe that this is life. He noted that, for him, another reason to show respect for the embryo is humility; because he recognizes that his own view that a blastocyst is not yet life could be wrong. He concluded by saying that he would not want to see embryo-destructive

research except for the most compelling reasons and that he thought those compelling reasons were present in the case of stem cell research.

In response to Fr. Berg's concern about the industrialization of embryo research, Dr. Klitzman noted that clear guidelines have been developed for animal use that require Institutional Animal Care and Use Committee (IACUC) oversight and make it clear that no more animals should be used than are strictly necessary for the research. He suggested these and other similar guidelines could be relevant as the Committee considers these issues.

Dr. Sulmasy returned to Dr. Gorovitz's comments and acknowledged that a person could have both "appraisal respect" and "recognition respect" for something such as a great manuscript and its author. However, he explained that he thought the respect for an embryo is only one of "recognition respect" because the embryo hasn't done anything that commands respect. Dr. Sulmasy encouraged members to identify what it is about the human embryo that commands a level of "recognition respect." He also asked whether there was anything people might not do to a human embryo that they would do to a tadpole for a good scientific purpose.

Dr. Gorovitz stated that it is useful to consider an array of things, books, animals, embryos, embryos that are human, just to try to clarify ways in which they are different as well as ways in which they are alike. He said he was not suggesting that one category is like another, but was using the analogy as a kind of technique for sharpening the Committee's reasoning and thinking. Dr. Gorovitz also expressed puzzlement at the focus on quantity and said he was not sure why it matters whether something would be done on an industrialized scale. He stated that if there is a problem with doing "x" to a thousand embryos, it is not good to do it to one. He said he thought it was a mistake to say a certain kind of activity is wrong if it's widespread and extensive, but okay if it's only occasional and a little bit.

Dr. Packer urged the Committee to focus on the potential for applying ethics and doing something that has an impact. He relayed his experience with the Task Force on Life and the Law's extensive work on IVF issues and his disappointment at how IVF unfolded. He noted that from a justice viewpoint, IVF is a "white person's phenomenon." He said that if the Committee doesn't develop truth and knowledge and the resulting products wind up becoming industrialized without addressing justice and education, the Committee will feel terrible. He stated that he thought the Committee's mandate, to a degree, is to cooperate with researchers and the industry while also expressing the Committee's very complicated concerns to get researchers and others to understand and be mindful of those concerns.

Ms. Dubler stated that she thought there is no way to have a unitary answer to the question of what respect for the embryo entails, because people who hold the position that the embryo is, in fact, life and ending life is a moral wrong will not be comfortable with rules that permit the destruction of the embryo. Ms. Dubler suggested the Committee could develop some bridging rules that had arisen in the conversation, and cited examples: 1. embryos should only be destroyed in pursuit of research that has scientific merit that has been passed upon by a peer review committee; 2. access to the products of the research require consideration of issues of justice; and 3. embryos that are not used for IVF purposes should be treated respectfully.

Dr. Sulmasy suggested the Committee could get further than "agreeing to disagree" because the Committee was having a pretty high level discussion that was valuable and different than the typical kind of conversation on this issue. He noted that Dr. Gorovitz and he appeared to agree on the logic of the quantification issue; i.e., if you don't agree with it on a

large scale, you should question whether you should allow it on a small scale. He also noted that the Committee's discussion on the distinction between "potential" and "potentiality" brought the Committee back to the fundamental questions of what it is about the human embryo that commands respect and what are the limits that then entails. He also stated that he thought that frozen embryos that have died should be buried.

In response to a question from Ms. Dubler, Dr. Sulmasy clarified that he does not agree with Dr. Singer who has suggested that only sentience matters and explained that Dr. Singer suggests that it is better to experiment on people in a persistent vegetative state than on live dogs. He stated that he disagrees profoundly with that, but noted it is a line of reasoning that one could take if one believes that differences between species are a form of "species-ism."

Fr. Berg informed members that a stem cell researcher once explained to him that he would be more careful in protecting Rhesus Macaque embryos than human embryos because the Rhesus Macaque embryos are harder to get, more exotic and more expensive. He responded to Dr. Sulmasy's question by saying that the human embryo is different because of its humanness; the human embryo will not become a Rhesus Macaque or a cod fish. It is enabled and has within all of the potentiality to become an individual human being, and in fact, will only become that which it in some sense already is.

Ms. Ellison commented that although she thought that Dr. Sulmasy's question is interesting, it is not within the Committee's charge and there is no clear cut answer to the question. Ms. Ellison pointed out that the respect attributed to the human embryo should not diminish when a human is actually born. She told the Committee about a friend who had lost her father to diabetes by the age of 23, has an aunt in a nursing home with multiple sclerosis and a cousin with a brain tumor. She stated that no one should be facing those kinds of situations and those types of people are deserving of respect. She asserted that the Committee's charge is to find a cure to these unimaginable situations in the most expeditious way.

Dr. Klitzman returned to Ms. Dubler's suggestion that the Committee focus on the process and suggested that it would be appropriate to require information to be reported about the socioeconomic and medical status of IVF donors, the research and other uses made of leftover embryos and professional conduct and self-monitoring of the industry. He suggested that the Committee should focus on procedural protections since the Committee may not be able to agree why it ascribes a moral status and specialness to the embryo.

Ms. Roxland noted that the time for this agenda item was expiring and suggested that one issue on which the Committee seemed to agree was that embryos should only be destroyed for research that has scientific merit and that has been passed upon by a peer review committee.

Dr. Sulmasy commented that he thought that conclusion was too easy because the same can be said for tadpoles. He challenged members again to identify what is different about a human embryo. Dr. Daines responded by saying that a human embryo is different because it is potentially available for research because of the free informed choice of human individuals, it is available because of some incurring of human risk and discomfort and it has the potential of being uniquely life-saving in that it can actually be the origin of human genomic tissues. He noted that none of those characteristics are present in animal tissues. He stated that he thought it shows disrespect for all of those factors if their use in research is barred.

Dr. Sulmasy responded, saying that was partially addressing the question of respect for the donor, rather than respect for the embryo. Dr. Gorovitz agreed that there is a distinction between respect for the source of the embryo, the potential beneficiaries of the research and the embryo itself. He then noted that one of the reasons why humans care about the human embryo specifically is the very natural and widespread tendency that people have to have special regard for what they see as like themselves. He said that when some event occurs, people often respond differently when they learn that it was a group they identify with, e.g. Sunnis, Catholics, Jews, Red Sox fans. He said that he thought that one of the reasons we care about human embryos is that we understand that we're humans and they are human embryos and "there's a kind of identification that increases the power of our concern." Dr. Gorovitz noted that what follows from that recognition is a separate question, but that one of the reasons we respect human embryos more than tadpole embryos is precisely because we and they are of human origin. He noted that this view is consistent with the Commissioner's view that it would be entirely justifiable to use them in certain limited, constrained and respectful ways in research. He concluded by noting that this is not the only basis for respect, but that it is an ingredient in our attitude of respect.

Mr. Swidler stated that he thought it was important to have the conversation the Committee was having, but that he did not think it was critical to figure out some way, any way, to reach a consensus. He read a few sentences from the fifth chapter of the Board's Strategic Plan that he thought were pretty eloquent and reasonable and still captured the differences in views reflected in the Committee's continuing conversation over the last hour.

Ms. Dubler stated that she thought some additional progress had been made. She suggested that it would be worthwhile to take various aspects that have been elaborated upon and put them into a document that the Committee could offer to people that would do more than cite statements in the Strategic Plan.

Dr. Sulmasy suggested that the Committee might agree with Dr. Gorovitz's formulation, which would bring the Committee much further than it has been with prior discussions. He said it would still leave the Committee with a lot more work to do in terms of identifying what that means in terms of moral limits. However, if the Committee thought about what Dr. Gorovitz said carefully, it might wonder about what someone is doing in a laboratory with a Rhesus Macaque embryo and a human embryo and think in terms other than just the utilitarian benefit. He concluded saying that his degree of respect might be deeper than what is being suggested, but also thought that what Dr. Gorovitz suggested is much deeper than what is typically afforded in these kinds of discussions.

Dr. Daines inquired whether a different conclusion might be reached if an embryo was created from induced pluripotent stem (iPS) cells. Dr. Sulmasy confirmed with Dr. Sturman that iPS cells are not thought to be totipotent, and therefore, incapable of creating an embryo. He acknowledged that if it were possible, "directionality" might matter, but also expressed caution with the idea of pushing an iPS cell back to the full totipotent stage because there would appear to be no therapeutic reason for doing so. Dr. Daines confirmed that Dr. Sulmasy thought an embryo derived from iPS cells might be worthy of respect as an embryo, although Dr. Sulmasy commented that he would need to think about it further. Fr. Berg concurred, saying that although he questioned whether it was feasible, he thought it should be treated in the same manner. Ms. Dubler asked whether an iPS cell would have the same provenance

without bringing the cell back to the totipotent state. Dr. Sulmasy responded saying it would not and confirmed to Ms. Dubler that that is a morally relevant difference.

Dr. Gorovitz inquired how someone could know that a cell that was not derived from a human embryo was functionally equivalent to a cell that was derived from a human embryo unless the cells derived from human embryos were studied thoroughly enough to know precisely what they are like and how they function. He asked whether it would be possible to defend any claim being made without doing the comparison. Fr. Berg acknowledged the validity of Dr. Gorovitz's concern and said that the best test for pluripotency is tetraploid complementation. However, he noted that some people would recognize a huge "red line" that should not be crossed in doing that with human iPS cells or SCNT because you would have to implant them. As a result, people need to rely on reasonable assumptions based upon other animal models.

Dr. Packer suggested another way to look at this issue is to recognize the other non-human entities to be respected: research, knowledge and truth. He noted that if you are doing research, then you don't know the answer and that is something that you have to respect. He noted there are a lot of layers to the discussion, but that people needed to keep in mind that the Committee is talking about research and research isn't something that the industry knows the answer to; it is where knowledge is created.

Dr. Sulmasy asked whether members would support Dr. Gorovitz's formulation that "they are like us and that they therefore increase the power of our concern." In response to a request for a restatement of Dr. Gorovitz's principle, Dr. Gorovitz indicated he would be more comfortable restating it with the minutes in front of him and having the ability to edit those comments while taking into consideration what others found useful or superfluous or irritating.

Dr. Klitzman urged caution in using the phrase "like us" because embryos don't have sentience and are not conscious. Dr. Gorovitz concurred, noting that the adult chimpanzee is much more like us in some ways than the human infants, never mind the embryo. He agreed it was important to address that. He noted that he also said that the tendency to particularly value what we see as like ourselves is double edged; it's not always admirable or justifiable. He emphasized that he only cited it as a partial explanatory hypothesis.

Dr. Daines noted that he views it from the derivation approach, i.e. it is "like us" due to the combining of egg and sperm to produce the embryo, not the nature of the four or eight cells, because not everyone is sure that an embryo created via SCNT would have the same status as one that is derived from the combination of egg and sperm.

Ms. Roxland noted that was a good place to stop for now. Ms. Doesschate agreed to provide the Committee with a copy of the transcript for this discussion as soon as it was edited and available. Dr. Daines suggested Committee members should give some further thought to some of the challenges that had been presented. Ms. Roxland agreed to engage a few members of the Committee in a discussion about how to structure the next steps in the conversation by reconfirming what occurred and identifying the best way to move forward.

Informed Consent for Gamete Donors

Dr. Daines noted that the Committee had made progress in its prior discussions on standards for informed consent of gamete donors and turned the floor over to Ms. Roxland to

review the latest draft with members. Ms. Roxland advised members that she had made some changes since the last draft to increase the clarity of the document and address other issues identified by staff. She advised members that she would also provide them with feedback from the Funding Committee as she reviewed the suggested changes with the Committee.

Ms. Roxland advised members that section F was being relabeled to be subsection 4 of section E of Appendix A-2, to incorporate it into the prior standards developed for human stem cell research. She noted that in paragraph *a* she was proposing that the words “the introductory paragraph of” be inserted in front of “ISSCR Guideline 11.3” to clarify that the focus of the provision is to require compliance with the process of informed consent, rather than all of the substantive provisions of 11.3. The Committee concurred with these changes.

Ms. Roxland noted that paragraph *b*, requiring re-consent to donation at the time of the actual transfer of the gametes to the researcher, remained unchanged from the existing standards that were adopted in March of 2008. She noted that this provision would permit gametes to be used without re-consent if it would be prohibitively difficult to obtain re-consent, but that an initial consent for research uses would still be required. She advised members that this may mean that sperm obtained from anonymous sperm donors and embryos created using that sperm would not be able to be used in research.

In response to questions from Committee members, Dr. Willey confirmed that she had reviewed samples of informed consent forms from a number of gamete banks that acquire and store gametes for IVF purposes and found most do not mention research as a potential use of the gametes. Committee members agreed with the provision as worded, but expressed the hope that they might be able to influence gamete banks to include consent for research uses in their informed consent forms.

Ms. Roxland then explained that she had divided the provision regarding restrictions on the use of donated biological materials into two parts: one permitting donors to restrict the initial research uses of donated materials and the other permitting donors to restrict the transfer of cell lines derived from their biological materials to other researchers, institutions and banks.

Dr. Sulmasy expressed concern that the last sentence implied that donors would not have much of a choice. He suggested this sentence should be changed to: “donations should only be accepted from individuals who understand that they cannot impose restrictions on the types of research done with the cell lines once the line has been created.” Fr. Berg noted that the second sentence required researchers to encourage donors to donate without restrictions and stated he thought that donors should not be pushed in any direction in the donation process. Ms. Roxland explained that the provision was unique in that it required donors to be advised of their ability to impose restrictions, and the purpose of the sentence was to ensure that donors understand it would be most beneficial to research if donors donated biological materials free of restrictions. Mr. Swidler suggested that the word “should” be changed to “may” to make it clear that researchers are permitted to encourage donations to be made free of restrictions. Members agreed with changes suggested by Mr. Swidler and Dr. Sulmasy, with Fr. Berg noting his objection to the limitation.

Ms. Roxland then addressed the second provision that would allow donors to restrict transfers of stem cell lines derived using their biological materials to other researchers and institutions. She advised members that the Funding Committee had significant concerns about this provision because it would prohibit the verification of research results and limit access to

the products of the research conducted with public funds. She noted that this provision was inconsistent with other provisions of Appendix A-2 and ISSCR guidelines that require researchers to make all materials described in invention disclosures, publications or other public forms available to requesting investigators. Committee members discussed the fact that the existing provisions are intended to prevent researchers from hoarding materials, but are not necessarily directed at preventing donors from restricting the uses of donated materials. Concerns were expressed about researchers potentially using the informed consent process to subvert the intent that the results of the research be made available to benefit the public generally. Mr. Swidler suggested that just the first sentence requiring donors to be informed that cell lines may be disseminated to other institutions or researchers be retained, but that the rest of the provision should be eliminated. Members supported this change and merging it with the prior provision.

Mr. Swidler then suggested changing the start of some of the new requirements from “grantees must disclose” to “donors must be informed that” because in some cases grantees may not be involved in the informed consent process. Ms. Roxland agreed.

Mr. Klitzman expressed concern that the provision requiring the donor to be informed that any resulting embryo would not be allowed to develop for longer than fourteen days or until formation of the primitive streak, whichever occurs first, was unnecessarily complicated and suggested the sentence could end with “fourteen days.” He also noted the inconsistency of this provision with the draft informed consent form. Dr. Sulmasy noted that the terms used in the proposed standard are universal and suggested that the form be amended to include the reference to the primitive streak, rather deleting it from the contract language. Several members expressed concerns about whether the inclusion of this information would contribute to the donor’s understanding or whether it could confuse or overwhelm donors. Ms. Roxland advised members that she would include this in the next draft of the informed consent forms with a brief explanation to help the Committee make a final decision as to whether the form should include a reference to the primitive streak. At Ms. Doesschate’s request, members clarified that the language should be retained in the contract language for now.

Ms. Roxland then directed members to paragraph *g* relating to reimbursement for injuries. She advised members that since the State is indemnified by other provisions in the contract, this provision was unnecessary. Ms. Dubler pointed out that the elimination of the provision seemed to suggest that researchers are not required to provide compensation in accordance with the terms of the federal-wide assurance provisions. Ms. Roxland agreed and noted that the indemnification provision for the State was different from the requirement to compensate donors for medical costs for complications arising out of the research. After further discussion, Ms. Roxland advised members that she would review the ISSCR and NAS provisions and include language in the contract to require reimbursement for costs of complications arising from the donation if the NAS and ISSCR provisions do not address this.

Fr. Berg asked for clarification as to whether the costs of medical care would be paid up front, through insurance, as routine reimbursement to the donor, or only after litigation. Ms. Dubler suggested it may depend upon the practices at the institution. Mr. Swidler concurred, noting that it may also depend upon the clinical circumstances, e.g., the donor may become ill before leaving and then would be taken care of at the facility, or the donor may return home and initially seek assistance elsewhere. After discussing the options, the Committee decided not to include specific guidance on this in the contract language.

Ms. Roxland then referred the Committee to paragraph *h* and advised them that she added this provision to make it clear that the new requirements developed by the Committee would not apply to stem cells that were previously derived, so long as the lines were derived in compliance with either NAS or ISSCR. It also grandfathered in the lines approved for use in research funded by the NIH. Mr. Swidler suggested that language should also be added to exempt eggs, gametes or embryos that have been procured prior to the adoption of the standards, but not yet used in the derivation of stem cell lines.

Ms. Roxland advised members that the draft language included in their agenda books did not address the issue of researchers importing stem cell lines from out-of-state. She noted that many stem cell lines derived outside of New York or by New York State institutions without ESSCB funding might be derived in accordance with NAS or ISSCR guidelines, but would not necessarily comply with the Committee's detailed requirements. Ms. Doesschate advised the Committee that she recommended that paragraph *h* be amended to make it clear that the requirements apply to "ESSCB-funded research involving the derivation of new stem cell lines" and that researchers could use stem cell lines derived "without the use of funds provided under this contract so long as the informed consent obtained from a donor adhered to the provisions of NAS or ISSCR guidelines." Dr. Gorovitz clarified that this exemption would not just apply to existing stem cell lines, but also lines derived after the adoption of these standards. Ms. Dubler commented that she thought it made sense to require that all lines used in New York State funded research comply with NAS or ISSCR provisions, but to have higher standards apply to NYSTEM grantees actually procuring gametes with state funds. She noted that the exemption is also important to enable scientists to use materials across state lines. Ms. Roxland confirmed that Committee members agreed with the proposed changes.

Ms. Roxland then asked members if they had any other questions about the proposed language. Ms. Dubler pointed out that where it says "counseling service should be made available upon request," the document implies that it should be made available free, but doesn't say so. Ms. Roxland noted that the language to which Ms. Dubler was referring was the ISSCR language included in the footnotes for reference. Ms. Dubler stated that she thought the requirement for counseling at no cost should be made explicit. Several members questioned whether they could require counseling at no cost, and expressed concern that the requirement was vague as to the purpose. Dr. Gorovitz suggested that language be added to the contract to make it clear that donors should be advised of the availability of counseling services and that, preferably, those services should be made available free of charge. Ms. Ellison suggested that the requirement for counseling also be limited as to purpose. Ms. Roxland then confirmed that the members were comfortable with those changes.

Ms. Roxland then advised Committee members that she also recommended that provisions be added to make it clear that nothing in the contract is intended to contravene state or federal law, and to require the ESCRO committee and Institutional Review Board (IRB) to ensure compliance with the revised requirements. Committee members noted that it is difficult for an ESCRO or IRB to "ensure" compliance and that primary responsibility for that falls with the researcher. Dr. Sulmasy suggested that it may be better to have the document require institutions to conduct reviews through their usual mechanisms. Dr. Willey noted that the issue of IRB review of human subject research is addressed in another section of Appendix A-2, but that it wouldn't hurt to include a reference to the IRB review in this section. Ms. Roxland noted that the NAS and ISSCR language also make similar references, and indicated staff would take a closer look at this to determine whether such a reference is advisable.

The Committee then discussed whether it should approve the document with the changes discussed, or whether they wanted to wait to see all of the changes in writing. Ms. Roxland noted that staff may also need to edit the document for consistency and clarity on some of the points that had been raised. Ms. Doesschate advised the Committee that it could vote on the document with the changes discussed as long as everyone was clear about what the substance of those changes would be. The Committee agreed that it was ready to vote on the document without seeing the revisions in writing. Dr. Gorovitz then made a motion to recommend to the Funding Committee the standards contained in the revised subsection 4 of section E of Appendix A-2 found under tab 3 of their agenda books with the changes noted during the discussion, subject to technical correction. Dr. Packer seconded the motion. The motion passed, with Fr. Berg voting against the motion, and Dr. Sulmasy abstaining.

Ms. Roxland then turned the Committee's attention to the informed consent forms included in their agenda books. Ms. Roxland noted that staff had been discussing who might use the proposed forms to obtain informed consent and that in most cases, the person performing the oocyte retrieval would have established medical consent forms for that process.

Mr. Swidler noted that the ISSCR had issued forms that the workgroup was using as an initial template and he did not feel the development of an informed consent form would interfere with an institution's use of their own form. He noted, however, that the forms can be useful to health care organizations that do not do a lot of research, and he has found other forms developed by the Department of Health to be useful in developing forms for his institution.

At Ms. Roxland's suggestion, Dr. Willey reminded the Committee of some of the existing requirements applicable to the procurement of gametes, which generally must be done in a tissue bank that is licensed by the Department of Health. Dr. Willey noted that the written informed consent document is required to include information about the procedures for collection, storage and foreseeable uses of the donated gametes. It must also include information about the risks of any drugs, surgical procedures and anesthesia used. The regulations require the name and address of the patient to be retained and as well as the authorization for the procedure and all associated testing. Consent forms must disclose all of the ways the reproductive tissue and resulting embryos might be used, and that if the bank accepts the tissue with restrictions, notice that the entity cannot guarantee those restrictions will be followed. She noted there are also records retention requirements and that the identity of the donors cannot be released without the written consent of the donor. She noted that gamete donors are also responsible to pay for costs associated with any injuries.

In response to questions, Ms. Doesschate clarified that if the informed consent form recommended by the Committee included a listing of all of the medical risks associated with the oocyte retrieval process and surgery, the researcher would not be the appropriate person to obtain the donor's signature on the informed consent form. She noted that while it may be appropriate for that person to provide general information about the risks and suggest that the donor discuss certain issues with the medical provider, the researcher could be engaged in the unlawful practice of medicine if he or she explained all of the medical risks and obtained the consent, especially since that person would not be authorized to consider the donor's medical history, order and interpret test results, etc. Additionally, she noted that the person performing the procedure is the person who has the obligation of making sure the patient understands the procedure and all of the attendant risks. Ms. Doesschate also noted that the process of egg retrieval has been going on for over twenty years and the risks to potential egg donors for

research purposes is not substantially different from the risks to egg donors for Assisted Reproductive Technologies (ART) purposes. Consequently, it may not be necessary to engage an expert to create new forms to obtain medical consent for the procedure. She suggested the Committee may want to split the informed consent process into two forms: one for consent to use the gametes in research; and the other to provide informed consent to the medical procedures.

Dr. Packer pointed out the Committee needed to address conflicts of interest and noted that in an ideal world there would be a neutral requestor. He also stated he thought that donation solely for research purposes increased the potential risks in that process.

Dr. Klitzman suggested it would be best to have someone from both the research and the clinical sides participate in the informed consent process. He favored erring on the side of caution and repeating the potential risks of the procedure and suggested both the researcher and the clinician sign the informed consent form as well as the donor. Ms. Roxland noted that both the ISSCR and NAS guidelines suggest the researcher should not to be involved in the informed consent process. Dr. Willey added that the process of obtaining informed consent and the retrieval often does not take place in the same room, institution, or even the same state. She also emphasized that researchers are not the right people to be talking about the anesthesia and surgery. Dr. Packer suggested there could be one form with different sections that travels with the donor as each part of the process is explained.

Mr. Swidler stated that he thought there was a need for a model form because of all the tissue banking regulations, genetic testing requirements, NAS, ISSCR and other requirements. He suggested that staff work on the forms to address these issues. Dr. Gorovitz also noted that some provisions need to be made clearer, e.g., the section on the stem cell collection process could be read as implying that embryos are destroyed in the collection process, rather than in the process of deriving the new lines. He also suggested staff clarify the financial benefits section and the reference to an injury that results “directly from your participation.”

Ms. Dubler noted that the Committee’s discussion emphasized the need to articulate the risks of the process of egg donation when a donation is being made specifically for research purposes and suggested staff should consult with experts to help articulate those risks.

In response to questions regarding the urgency of developing forms, Ms. Doesschate advised members that if the informed standards were adopted by the Funding Committee at its next meeting, they would be included in the RFAs that will be issued in the next few months, but that the contracts for those awards probably would not be executed until the end of the year. Consequently, the Committee has more time to finalize the model informed consent forms.

Payment of Gamete Donors

Ms. Roxland then directed the Committee’s attention to the handout she had provided that set forth three possible options for payment of gamete donors: 1. prohibit all forms of payment, including reimbursements for cost; 2. allow reimbursements only for out-of-pocket expenses, but nothing additional; and 3. reimburse for out-of-pocket expenses and for time and burden, but prohibit valuable consideration for the oocyte themselves. She noted that at its last meeting, the Committee reached a consensus that option two was ethically more acceptable

than the first option since it would not leave women in debt for having donated. She noted this is the language that is frequently used when payments are made in the \$5,000 or \$8,000 range.

Ms. Roxland reminded members that payment for time and burden for egg donation for IVF purposes is permitted in New York State. She noted that the NAS guidelines, California, Massachusetts and other states that have specifically addressed the issue of compensation of gamete donors for research purposes, have not allowed compensation for time and burden. She also noted that the ISSCR guidelines recognize that some jurisdictions allow it and require compliance with local laws. In response to a question from Ms. Dubler, Ms. Roxland confirmed that California had not had any oocyte donors for research purposes.

Fr. Berg asked whether the question before the Committee was whether NYSTEM funds could be used to pay gamete donors, or whether a researcher would be prohibited from paying donors for oocytes used in NYSTEM-funded research. Both Ms. Roxland and Dr. Sulmasy both advised him that it was the latter.

Ms. Ellison noted that the data reflects the need to offer compensation for gamete donation because of the lack of oocytes available for research purposes. She stated that since the Board's charge is to allow this research to move forward in New York State and it is almost unable to move forward without some kind of compensation for oocyte donors, there is a strong case for allowing for compensation of oocyte donors.

Ms. Dubler stated that since the scientific community has said it is important to have eggs donated specifically for research for a number of reasons, including that current policies exclude poor women of color from donating, it is important to have a policy that makes that feasible. She stated that since the empirical data shows that the present policy of not paying research oocyte donors does not yield gametes for research purposes, the Committee should consider permitting expenses for time and burden so that women who might not otherwise consider donation might do so. She stated that the concern that compensating women for time and burden would serve as an undue inducement for poor women to donate is balanced by the argument that poor women have very few options and this increases their options.

Dr. Sulmasy suggested that no one would accept the provision just because scientists want to do something translates into a moral mandate to permit it without further argument. He also stated that the data does not decide the issue because he sees the data as supporting the exact opposite view. He said women have decided that the risks of donating, even for a good cause, outweigh the benefits. He argued that payments would be an undue inducement to get women to donate when they otherwise wouldn't and that is wrong.

Dr. Klitzman noted that the practice of paying for donation of eggs is now commonplace in clinical settings, and there are hundreds of women who decide to donate for an average rate of \$5,000 to \$8,000. He said the fact that people are willing to donate and accept the risks for clinical purposes when they are paid and are not willing to donate when they are not paid, suggests that people do not feel coerced or that the risks are too great. He said women are making economic decisions about the time and inconvenience involved, rather than responding to undue influences. He concluded by saying that he feels strongly that payment for time and burden should be allowed, with a ceiling as to the amount.

Mr. Swidler asked for clarification as to whether current law in New York would support option number three for egg donation, i.e. reimbursement for out-of-pocket expenses

and for time and burden, but prohibit valuable consideration for the oocytes. Ms. Roxland confirmed that it does. Committee members then asked for additional clarification as to whether there are limits on how much could be paid, the extent to which limitations are enforced and how the pricing and payment arrangements work. After some discussion, Ms. Doesschate suggested that staff should ask Dr. Linden, Director of the Department's Blood and Tissue Resources Program, to respond to the Committee's questions. Mr. Swidler then commented that since women are allowed to be reimbursed for out-of-pocket expenses and for time and burden when donating for reproductive purposes and he believes there is a greater social utility in donating for stem cell research purposes, he thinks women donating oocytes for research purposes should be able to be compensated at least on the same basis.

Dr. Sulmasy noted that recent newspaper reports of women donating more eggs during the economic downturn suggests that money may serve as undue inducement and that he believes it is wrong to pay someone \$50,000 for an egg, even if that person is an intelligent, athletic, talented, college student. He noted that an intelligent, talented person could still be exploited.

Ms. Ellison suggested that it is a paternalistic argument to suggest that women are being exploited. She stated she thought it is more a question of moral right and that if women want to donate their eggs for research, but are unable to, that is a more unjust set of circumstances than prohibiting payment.

Dr. Klitzman noted that Ezekial Emmanuel, Chief Bioethicist at NIH, has argued that concerns about undue inducement and paying subjects is unjustified and that a wage model that sees potential subjects as making economic decisions has a lot of validity.

Rev. Maynard-Reid questioned whether there is a specific set of criteria that women donating for research purposes need to meet. In response, members clarified that they would be screened for personal health risks, ability to provide informed consent and possibly genetic predispositions. Dr. Willey also clarified that if they donated for IVF purposes, infectious disease and other testing would be required. Rev. Maynard-Reid then asked what difference it might make if payment for oocyte donors was approved in New York State funded research.

Ms. Dubler noted that many women might be willing to donate for altruistic reasons and that the payments may just serve as a sweetener. She agreed with Dr. Sulmasy that just because scientists want something, doesn't make it incumbent upon the Committee to help them get it. However, she noted that it is relevant to the development of a state policy if there are good, scientific reasons for obtaining certain material, and there are no moral objections to a state policy, and the lack of certain conditions precludes the acquisition of those materials.

Dr. Packer noted that the Committee had been talking about justice and distributive disparities and that a whole population had almost been eliminated from IVF donation and services. He said that he thought there would be consequences for ignoring payment of oocyte donors, but that there could also be consequences if the payment is too high. He commented that populations should not be eliminated because of a lack of reimbursement and thought that payment should be negotiable within reason.

Fr. Berg stated that he hoped no one in the State would benefit politically because New York State became the first State in the union to provide compensation.

In response to questions from members regarding the Funding Committee's sentiments on this issue, Ms. Doesschate advised the Committee that Funding Committee members had expressed an interest in having the Ethics Committee provide guidance on this issue and possibly recommend a ceiling on payments.

Dr. Gorovitz noted that the third option of compensating women for time and burden could mean a lot of things. He suggested the Committee devote some time at its next meeting to understanding the different potential interpretations of the "time and burden" option and what it would mean to implement a version of that option. Dr. Packer suggested the Committee also examine some of its assumptions regarding who might benefit from donor payments and whether any of the methodologies might have discriminatory aspects. Dr. Daines suggested the Committee should have accurate information on what the payment for reproductive oocyte donation is, the average, the deviations and the extremes of compensation.

Discussion of Future Agendas

The Committee then discussed future agenda setting. Dr. Daines stated that the Committee would need to further address donor consent processes and forms, as well as donor payments. Dr. Daines also noted that the Committee expressed an interest in addressing the issue raised by Rev. Maynard-Reid; i.e., that the benefits of medical advances accrue not only to the affluent, but are made available to the larger population.

Fr. Berg suggested the Committee take a look at the appropriateness of having the \$400 million in uncommitted funds re-absorbed into the general fund and used to keep nursing homes and hospitals open. Dr. Daines stated that New York State is currently in the middle of budget negotiations and it was never contemplated that the Ethics Committee would enter into New York State budget discussions.

Dr. Klitzman stated that he is interested in the chimera discussion and a presentation by either Dr. John Gearhart or Dr. Richard Behringer. He also suggested that balancing intellectual property and justice issues would be a good topic to have a speaker address.

In response to questions about the possibility of a subcommittee to address the continuing discussion of respect for the embryo, Ms. Roxland asked interested members to contact her. Dr. Klitzman also volunteered to attend the April 23rd meeting of the Funding Committee to present the Ethics Committee recommendations on informed consent.

Dr. Sulmasy advised members that he had accepted a position with the University of Chicago and would be resigning from the Committee in May because he would no longer live in New York State.

Adjourn

Dr. Daines asked for a motion to adjourn the meeting of the Ethics Committee. Fr. Berg so moved. Dr. Gorovitz seconded the motion. The motion passed unanimously.

Approved: May 12, 2009