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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	re: Gag Rule meeting (2 pages)	05/15	P5
002. note	re: Gag Rule meeting (3 pages)	03/03	P5
003. note	re: Gag Rule meeting (4 pages)	03/08	P5

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
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FOLDER TITLE:
Gag Rule

2012-0254-S
rc684

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
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b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Heather Howard's Files
Office of Policy Development, Domestic Policy Council, First Lady's issues

Box 3 of 4

Gag Rule
- Gag Rule Memos
- Gag Rule Draft Language
- Gag Rule Comment Letters
- Gag Rule 1993

VAWA
Steering Committee to eliminate racial and ethnic disparities in health
RU 486- news articles
CHIP
Ritalin Notebook
Surgeon General's Conference on Ritalin

Enclosures filed in 21197
Oversize Attachments #
NARA # 18381

Sarah Wilson 6-~~[illegible]~~ 2144

Lisa Brown -

Bill Marshall 6-6611

Allison 5-4650

not construed to affect
to consulting
spell out ~~- clarify~~ -
exchange fee, for - (vacating Billing Rights)

3/4/2000 "Dog Rule" mtg.

Name	Office	Number
Allison Herwitz	Cynthia - OIRA/OMB	395-4650
Wendy Taylor	OIRA/OMB OIRA/OMB	395-4815
Carol Conrad	HHS/OGC/PHD	301-443-7844
Marcy Wilder	HHS/OGC	202 690-6318
LaVarne Burton	HHS/ES	690-5627
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Ruby Shamir	DPC	456-5696
Heather Howard	DPC	456-87263
Bill Marshall	W/H Counsel	456-6611
Sarah Wilson	W/H Counsel	456-2147

THE WHITE HOUSE

WASHINGTON

June 30, 2000

MEMORANDUM FOR HILLARY RODHAM CLINTON

FROM: **HEATHER HOWARD**

CC: **MELANNE VERVEER**
SHIRLEY SAGAWA
LISSA MUSCATINE
ANN O'LEARY

SUBJECT: **TITLE X GAG RULE**

I wanted to let you know that the final rule codifying the revocation of the Title X "gag rule" is being made public on June 30th.

BACKGROUND

As you know, in 1993 the President revoked the gag rule, which prevented medical practitioners in Title X family planning clinics from providing abortion information or referrals, even when a woman specifically requested such information. When the President suspended the 1988 gag rule he directed the Secretary of HHS to develop a new rule reinstating pre-1988 policy. The final rule was submitted to OMB for review this winter, and we have been reviewing proposed language.

Instead of merely re-publishing the original pre-1988 rule, many pro-choice groups urged through comment that we make the rule stronger and clearer. Specifically, they recommended moving, from the guidance into the rule, language that defines nondirective counseling and clarifies the right to a referral for an abortion. The groups argued that inclusion of this language in the rule itself is important because 1) they claim that clinics are uncertain about what they can and cannot do and will feel they have more legal protection if the provisions are in the actual rule; and 2) codification would make it harder for a future administration to prevent clinics from providing referrals or to define nondirective counseling in such a way that excludes abortion.

THE FINAL RULE

The final rule being released today reflects these comments. It strengthens Title X policy by clarifying, in the body of the rule rather than the guidance, the requirement that family planning clinics offer patients neutral and nondirective counseling on all of their options: prenatal care and delivery; infant care, foster care or adoption; and pregnancy termination. Consistent with

accepted medical practice, the rule also makes clear that clinics must provide their patients referrals for any of these options, if a patient so requests.

Following is the relevant language:

(a) Projects supported under this rule must

(5) Not provide abortion as a method of family planning.[1] *Each project must offer pregnant women the opportunity to be provided information and counseling regarding:*

(A) prenatal care and delivery;
(B) infant care, foster care or adoption; and
(C) pregnancy termination.

If requested to provide such information and counseling, projects must provide neutral and nondirective counseling, and appropriate referral on request, on each of the options, except for any options about which the pregnant woman indicates that she does not wish to receive information and counseling.

We have worked with HHS on a quiet roll-out of the new rule, to minimize provoking a legislative backlash. HHS has briefed the pro-choice community, which is pleased that the Administration has seized this opportunity to strengthen the Title X program.

[1] The Title X program is statutorily prohibited from paying for abortion services.

OMB talking points

Revocation of the Gag Rule:

HHS "Standards of Compliance for Abortion-Related Services in Family Planning Service Projects"

Q. What does this rule do?

A. This rule finalizes Administration policy regarding the provision of family planning services at clinics that receive federal funding. The rule essentially reinstates longstanding policy from before 1988. In 1988, the "gag order" was imposed to prohibit federally-funded clinics from providing patients information about all medical options legally available to them, including pregnancy termination.

Background: Prior to 1988, clinics that received funding under Title X of the Family Planning Services Act were required to offer non-directive counseling to patients about all medical options. The 1988 rule prohibited clinics from offering patients any factual, non-directive information regarding pregnancy termination and from providing referrals upon request.

President Clinton in January 1993 issued a Presidential Memorandum suspending the 1988 rule and directing the Secretary of Health and Human Services to develop a new rule that would re-establish pre-1988 policy. The new rule was proposed in 1993.

Q. Why is the Administration finalizing the rule only now?

A. The rule codifies longstanding pre-1988 policy that this Administration sought to reinstate in 1993. Since the policy has been effectively in place since 1993, there was no rush to finalize the rule.

Q. What does this rule allow clinics to do?

A. This rule requires that clinics offer patients factual information about their pregnancy and their options. Upon the patient's request, clinics must provide patients factual, non-directive information about all treatment options, including pregnancy termination. Consistent with accepted medical practice, clinics must provide their patients referrals for any medical service the patient wishes to obtain.

Background: The 1988 rule prohibited clinics from offering patients any information regarding pregnancy termination. It further prohibited clinics from providing referrals upon request. The Administration believes that this was an unreasonable and entirely inappropriate

intrusion into the doctor-patient relationship. In his January 1993 memorandum, the President wrote that the 1988 rule "...endangers women's lives and health by preventing them from receiving complete and accurate medical information and interferes with the doctor-patient relationship by prohibiting information that medical professionals are otherwise ethically and legally required to provide to their patients."

FAX

gag rule talking points

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Date: 6/28

Number of pages including cover sheet: 3

To: Heather Howard

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From: Cynthia

____Original will not follow
____Original will follow, via _____

MESSAGE:

For your eyes only.

Draft - ~~Confidential~~

Final Regulation Repealing the "Gag Rule" Published

As one of his first acts in office, President Clinton issued an executive memoranda suspending the domestic family planning "gag rule" on January 22, 1993. The "gag" restriction limited the medical options that health care providers in Title X family planning clinics could discuss with patients facing an unintended pregnancy. President Clinton's executive memoranda directed the Secretary of Health and Human Services to formalize this action through federal regulation. Accordingly, interim and proposed regulations were published on February 5, 1993 that included a notice and comment period. A final regulation was published on June __, 2000 (__ CFR ___).

- Today's publication of a final regulation to repeal the gag rule is merely a formality. It is a necessary follow-up to proposed regulations published in 1993 that included a public notice and comment period.

- The final regulation simply reiterates Title X's long-standing policy requiring pregnancy counselors in federally funded family planning clinics to provide a woman facing an unintended pregnancy with full and complete information about all of her medical options. This policy is consistent with the professional standards of major medical organizations such as the American College of Obstetricians and Gynecologists, and demanded by the ethical principle of informed consent.

Background

The national family planning program, Title X of the Public Health Service Act, was established in 1970 with broad bipartisan support. The program provides federal grants to public and private nonprofit organizations for the provision of contraceptives and related preventive health care services to low-income, uninsured women. These services include Pap smears, breast exams, and testing and treatment for sexually transmitted diseases.

Since its inception, the Title X statute has prohibited project funds from being used for abortion. However, long-standing Title X guidelines specify that women facing an unintended pregnancy who request information about their options must receive *non-directive* counseling about *all* of their options, including "prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination." Women must also receive a referral for services upon request.

In 1988, the Reagan Administration promulgated a regulation prohibiting health care professionals in Title X family planning clinics from providing abortion information or referrals to a woman facing an unintended pregnancy, even when she specifically requested such information. This "gag rule" was challenged in court on the grounds that it interfered with medical providers' First Amendment right to free speech and their ability to discuss the full range of medical options with patients. Although the gag rule was opposed by 78 major national organizations, 36 state health departments, and the nation's 25 schools of public health, it was ultimately upheld in a 1991 Supreme Court decision, *Rust v. Sullivan*, by a 5-4 vote. The Court said that the regulation was a permissible exercise of executive authority.

In 1991, Congress voted to approve a Labor/HHS Appropriations bill explicitly allowing options counseling for pregnant women that included discussion of abortion. President Bush vetoed the bill. The Senate subsequently overrode the veto (73-27) but the House failed to do so by 12 votes. In 1992, a second gag rule fight took place in the context of a Title X reauthorization bill, which also explicitly allowed full options counseling. This bill was approved by Congress but, once again, vetoed by President Bush. This time, the effort to override the President's veto fell 10 votes short in the House. Key to the failure to override the veto was a letter from the President allowing *physicians* to counsel or refer patients for abortion, but not other health care professionals who often provide the bulk of services at Title X clinics.

In 1992, the Bush Administration's new policy was challenged in court in *National Family Planning and Reproductive Health Association (NFPRHA) v Sullivan.* In its decision, the U.S. Court of Appeals ruled that the Administration had violated the Administrative Procedures Act by reinterpreting the regulation without allowing the public an opportunity to comment on the change.

While the gag rule was never fully implemented—first due to the injunctions that accompanied the various court challenges over the years, and then due to the publication of the 1993 interim regulation—it remained on the books, necessitating today's final rulemaking. The final rule is consistent with Title X's long-standing policy requiring counselors in Title X clinics to provide non-directive counseling to pregnant women who request information about their options, as well a legislative rider that has been enacted into law on an annual basis in recent Labor/HHS appropriations bills requiring non-directive counseling in Title X clinics.

American College of Obstetricians and Gynecologists
National Abortion and Reproductive Rights Action League
National Family Planning and Reproductive Health Association
Planned Parenthood Federation of America, Inc.
The Alan Guttmacher Institute

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

May 22, 2000

MEMORANDUM FOR THE DEPUTY DIRECTOR

FROM: John T. Spotila

SUBJECT: Potential Revisions to the Gag Rule

After further review of the draft final rule, we have the following observations:

- The draft submission will need some minor rewriting to add the new Section 59.5(a)(5) to the rule and to incorporate minor related changes in the preamble. We are unclear as to how long HHS would need to make the changes.

- Since the rule primarily finalizes the 1993 interim final revocation of the Gag Rule, the new language must emphasize that it is designed to clarify the Department's policy in this area, not change it fundamentally. If for any reason the new language were challenged successfully as going beyond the proposal, the Department would want to be able to fall back on the basic revocation (which tracks the proposal and the interim final rule exactly).

- It would be difficult to define the phrase "not promote or encourage" narrowly or with absolute precision. Historically, the Department has defined it by referring to a guiding principle and then citing examples. The proposed guidance and preamble reflect this traditional approach (see the attached pages).

- The Department's policy on nondirective counseling is identical to the pre-1988 policy. In the guidance, HHS mandates that clinics provide, upon patient request, comprehensive and balanced counseling on all treatment options.

- The Department's policy on referrals is essentially identical to its pre-1988 approach with one clarification. In discussing referrals to abortion providers, the pre-1988 guidance drew a distinction between making a "mere referral" and taking "further affirmative action to secure the services". In the former case, the guidance equated a "mere referral" to giving a patient the name, address and/or telephone number of the provider. The new guidance preserves this conceptual distinction, but allows the clinic to give the patient additional information on provider policies (customary charges; whether Medicaid coverage is accepted; other restrictions).

- The new guidance matches the pre-1988 guidance in its discussion of restrictions on advocacy. It also matches the pre-1988 guidance in its discussion of physical and financial separation of services, with one minor exception. It eliminates a confusingly vague reference in the earlier guidance to allowing "impermissible" abortion-related materials in common waiting rooms.

New Section 59.5(a)(5)

(5) Not provide abortion as a method of family planning. Each project must offer pregnant women the opportunity to be provided information and counseling regarding:

(A) Prenatal care and delivery;
(B) Infant care, foster care, or adoption; and
(C) Pregnancy termination.

If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, except for any options about which the pregnant woman indicates that she does not wish to receive information and counseling.

, and appropriate referral on request,

DRAFT GUIDANCE

Program Policies Regarding the Title X National Family Planning Program and the Section 1008 Abortion Prohibition

Section 1008 of the Title X statute, 42 U.S.C. 300a-6, states: "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." This prohibition applies not only to the performance of abortion by a Title X project, but also to the conduct of certain abortion-related activities by the project. However, the prohibition does not apply to all the activities of a Title X grantee, but only to those within the Title X project. This statement summarizes the Department policies and interpretations in existence prior to the imposition of the 1988 "Gag Rule" with regard to implementation of section 1008, as modified following the rulemaking of 1993.

1. General principles. In general, section 1008 prohibits Title X programs from engaging in activities which promote or encourage abortion as a method of family planning. However, section 1008 does not prohibit the funding under Title X of activities which have only a possibility of encouraging or promoting abortion; rather, a more direct nexus is required. The general test is whether the immediate effect of the activity in question is to promote or encourage the use of abortion as a method of family planning. If the immediate effect of the activity in question is essentially neutral, then it is not prohibited by the statute. Thus, a Title X project may not provide services that directly facilitate the use of abortion as a method of family planning, such as providing transportation for an abortion, explaining and obtaining signed abortion consent forms from clients interested in abortions, negotiating a reduction in fees for an abortion, and scheduling or arranging for the performance of an abortion, promoting or

advocating abortion within Title X program activities, or failing to preserve sufficient separation between Title X program activities and abortion-related activities.

2. Abortion counseling and referral. According to the 1981 Title X Guidelines:

> Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:
>
> - o Prenatal care and delivery
> - o Infant care, foster care, or adoption
> - o Pregnancy termination.

There are limitations on what abortion counseling and referral is permissible under the statute: (a) a Title X project may not provide pregnancy counseling which promotes abortion or encourages persons to obtain abortion, although the project may provide patients with complete factual information about all medical options and the accompanying risks and benefits; (b) a Title X project may provide a referral for abortion. A referral may include providing a patient with the name, address, telephone number, and other relevant factual information (such as whether the provider accepts Medicaid, charges, etc.) about an abortion provider. The project may not take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient; and (c) where a referral to another provider who might perform an abortion is medically indicated because of the patient's condition or the condition of the fetus (such as where the woman's life would be endangered), such a referral by a Title X project is not prohibited by section 1008 and is required by 42 CFR 59.5(b)(1). The limitations on referrals do not apply in cases in which a referral is made for medical indications.

3. Advocacy activities. A Title X project may not promote or encourage the use of abortion as a method of family planning through advocacy activities such as providing speakers to debate in opposition to anti-abortion speakers, bringing legal action to liberalize statutes relating to abortion, or producing and/or showing films that encourage or promote a favorable attitude toward abortion as a method of family planning. Films that present only neutral, factual information about abortion are permissible. A Title X project may be a dues paying participant in a national abortion advocacy organization, so long as there are other legitimate program-related reasons for the affiliation (such as access to certain information or data useful to the Title X project). A Title X project may also discuss abortion as a backup method of family planning in a discussion of relative risks of various methods of contraception.

4. Separation. Non-Title X abortion activities must be separate and distinct from Title X project activities. Where a grantee conducts abortion activities that are not part of the Title X project and would not be permissible if they were, the grantee must ensure that the Title X-supported project is separate and distinguishable from those other activities. What must be looked at is whether the abortion element in a program of family planning services bulks so large and is so intimately related to all aspects of the program as to make it difficult or impossible to separate the eligible and non-eligible items of cost.

The Title X project is the set of activities the grantee agreed to perform in the relevant grant documents as a condition of receiving Title X funds. A grant applicant may include both project and nonproject activities in its grant application, and, so long as these are properly distinguished from each other and prohibited activities are not reflected in the amount of the total approved budget, no problem is created. Separation of Title X from abortion activities does not

require separate grantees or even a separate health facility, but separate bookkeeping entries alone will not satisfy the spirit of the law. Mere technical allocation of funds, attributing federal dollars to non-abortion activities, is not a legally supportable avoidance of section 1008.

Certain kinds of shared facilities are permissible, so long as it is possible to distinguish between the Title X supported activities and non-Title X abortion-related activities: (a) a common waiting room is permissible, as long as the costs are properly pro-rated; (b) common staff is permissible, so long as salaries are properly allocated and all abortion related activities of the staff members are performed in a program which is entirely separate from the Title X project; a hospital offering abortions for family planning purposes and also housing a Title X project is permissible, as long as the abortion activities are sufficiently separate from the Title X project; and (d) maintenance of a single file system for abortion and family planning patients is permissible, so long as costs are properly allocated.

Whether a violation of section 1008 has occurred is determined by whether the prohibited activity is part of the funded project, not by whether it has been paid for by federal or non-federal funds. A grantee may demonstrate that prohibited abortion-related activities are not part of the Title X project by various means, including counseling and service protocols, intake and referral procedures, material review procedures, and other administrative procedures.

Dated: Nov 22, 1999

Denese O. Shervington
Deputy Assistant Secretary for Population Affairs

PREAMBLE

With respect to the comments objecting to the revocation of the Gag Rule or the use of tax dollars for abortion on moral grounds, the Secretary notes that, under the interpretations adopted in conjunction with the regulations below, the funding of abortion or activities that promote or encourage abortion with Title X funds has been and will continue to be prohibited. Rather, what changes under the interpretations reinstated in conjunction with the regulations below is which activities are considered to "promote or encourage" abortion. In contrast to the position taken under the Gag Rule, under the present view (which was also the Department's view of the statute prior to 1988), the provision of neutral and factual information about abortion is not considered to promote or encourage abortion as a method of family planning. Thus, the basic statutory interpretation underlying both the Gag Rule and the specific policies that governed the Title X program prior to 1988 -- that section 1008 prohibits activities that promote or encourage abortion as a method of family planning -- remains unchanged.

With respect to the contentions that the Secretary lacks a rational basis for revoking the Gag Rule and that it must justify each separate part of the Gag Rule that it is discarding, we do not agree that either contention is sound. Both the pre-1988 interpretations of the statute and the revised interpretation of the statute embodied in the Gag Rule are legally supportable; they represent different points on the spectrum of what is legal and, thus, both represent a permissible exercise of administrative discretion. The crucial difference between the two options is one of experience. Because of ongoing litigation, the Gag Rule was never implemented on a nation-wide basis, so that its proponents can point to no evidence that it can and will work operationally on a national basis in the Title X program. The policies and interpretations reinstituted in conjunction with the regulations below, on the other hand, have been used by the program for

abortions.

D. Abortion information and counseling. The Gag Rule prohibited the provision of information other than information directed at protecting maternal and fetal health to women determined to be pregnant; thus, it prohibited what is generally known as "options counseling", i.e., the provision to pregnant women in a nondirective fashion of neutral, factual information about all options for the management of a pregnancy, including abortion. See, 42 CFR 59.8 (1989 ed.). The pre-1988 policies, in contrast, required options counseling, if requested. As stated in the 1981 "Title X Guidelines" :

> Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:
>
> - Prenatal care and delivery
> - Infant care, foster care, or adoption
> - Pregnancy termination.

The June, 1993 summary of the pre-1988 interpretations also stated that Title X projects were not permitted to provide options counseling that promoted abortion or encouraged patients to obtain abortion, but could advise patients of all medical options and accompanying risks.

Most of those comments supporting adoption of the proposed rules appeared to agree with the pre-1988 policies and interpretations. However, there appeared to be some confusion among those who agreed with the pre-1988 requirement for options counseling as to how much information and counseling could be provided. Several of these comments also suggested that that the "on request" limitation be deleted, particularly where State law requires the provision of information about abortion to women considering that option.

Several comments opposing adoption of the proposed rules and revocation of the Gag Rule also specifically addressed the issue of counseling. Several of these comments suggested that counseling on "all options" include the option of keeping the baby, and two comments suggested that the rules should contain an exception for grantees or individuals who object to providing such information and counseling on moral grounds.

In response to the apparent confusion as to the amount of counseling permitted to be provided under the pre-1988 interpretations, the interpretive summary published in the notices section of the Federal Register clarifies that Title X grantees are not restricted as to the completeness of the factual information they may provide relating to all options, including the option of pregnancy termination. However, the previous restriction as to the "kind" of information that may be provided about abortion continues: in keeping with the decision to adhere to the longstanding interpretation of the statute that projects may not "promote or encourage" abortion as a method of family planning, information and counseling provided by Title X projects on all options for pregnancy management, including pregnancy termination, must be nondirective. This interpretation, it should be noted, is also consistent with the requirement in the program's three most recent appropriations, Pub. L. 104-208 (110 Stat. 3009-243), Pub. L. 105-78 (111 Stat. 1478) and Pub. L. 105-277 (112 Stat. 2681), that pregnancy counseling in the Title X program be "nondirective." Thus, grantees may provide as much factual, neutral information about abortion as they consider warranted by the circumstances, but may not steer or direct clients toward selecting the option of abortion, or any other option, in providing options counseling.

The Secretary is retaining the "on request" policy in the interpretive summary published

have such objections to provide such counseling. However, in such cases the grantees must make other arrangements to ensure that the service is available to Title X clients who desire it.

E. Referral for abortion. The Gag Rule specifically prohibited referral for abortion as a method of family planning and required grantees to give women determined to be pregnant a list of providers of prenatal care, which list could not include providers "whose principal business is the provision of abortion." 42 CFR 59.8(a) (1989 ed.). The Gag Rule permitted referral to an abortion provider only where there was a medical emergency. 42 CFR 59.8(a)(2) (1989 ed.). The pre-1988 policies and interpretations, in contrast, permitted Title X projects to make what was known as a "mere referral" for abortion; a "mere referral" was considered to be the provision to the client of the name and address and/or telephone number of an abortion provider. Affirmative actions, such as obtaining a consent for the abortion, arranging for transportation, negotiating a reduction in the fee for an abortion or arranging for or scheduling the procedure, were considered to promote abortion as a method of family planning and thus to be prohibited by section 1008. The pre-1988 rules (§ 59.5(b)(1)) were interpreted by the agency to require referral for abortion where medically indicated. See, Valley Family Planning v. State of North Dakota, 489 F.Supp. 238 (D.N.D. 1980), aff'd., 661 F.2d 99 (8th Cir. 1981).

A number of comments, mostly from individuals and organizations supporting revocation of the Gag Rule, suggested modifications of the proposed referral policies and interpretations. Most of these comments suggested that the content limitations on referrals be broadened, with Title X grantees being permitted to provide other relevant information, such as comparative charges, stage of pregnancy up to which referral providers may under State law or will provide abortion, the number of weeks of estimated gestation, etc. These comments argued

that the provision of such factual information does not "promote or encourage" abortion any more than does the provision of the abortion providers' names and addresses and/or telephone numbers. One comment also suggested that the restriction on negotiating fees for clients referred for abortion conflicts with the requirement to refer for abortion where medically indicated.

Several comments opposing revocation of the Gag Rule also expressed problems with the proposed referral policies and interpretations. A few comments urged that referrals to agencies that can assist clients who choose the "keeping the baby" or adoption options should be required. Another comment criticized the requirement for referral where "medically indicated" as confusing. Revisions suggested were that "self-referrals" for abortion be specifically prohibited, to reduce commercialization and profiteering by Title X grantees who are also abortion providers and that grantees who objected to abortion on moral or religious grounds be permitted not to make abortion referrals.

The Secretary agrees with the comments advocating expanding the content of what information may be provided in the course of an abortion referral. The content (as opposed to action) restrictions of the "mere referral" policy proceeded from an assumption that the provision of information other than the name and address and/or telephone number of an abortion provider might encourage or promote abortion as a method of family planning. The Secretary now agrees, based on experience and the comments of several providers on this point, that the provision of the types of additional neutral, factual information about particular providers described above is likely to do little, if anything, to encourage or promote the selection of abortion as a method of family planning over and above the provision of the information previously considered permissible; at most, such information would seem likely to assist clients in making a rational

selection among abortion providers, if abortion is being considered. Moreover, it does not seem rational to restrict the provision of factual information in the referral context, when no similar restriction applies in the counseling context. Accordingly, the Secretary has revised the policies and interpretations summarized in the notice section to clarify that grantees are not restricted from providing neutral, factual information about abortion providers in the course of providing an abortion referral, when one is requested by a pregnant Title X client.

The Secretary is not accepting the remainder of the comments on this issue, as they either proceed from a misunderstanding of, or do not raise valid objections to, the proposed policies and interpretations. The comment arguing that the restriction on negotiating fees conflicts with the requirement to refer for abortion where medically indicated is based on a misunderstanding of that requirement: in such circumstances, the referral is not for abortion "as a method of family planning" (i.e., to determine the number and/or spacing of one's children) but is rather for the treatment of a medical condition; thus, the statutory prohibition does not apply, so there is no restriction on negotiating fees and similar actions. The suggestion that referrals to agencies that can assist clients who choose the options of "keeping the baby" or adoption be required is likewise rejected as unnecessary. Under the policy set out in the 1981 "Title X Guidelines" provision set out in the preceding section, the options of prenatal care and delivery and adoption are options that are required to be part of the options counseling and referral process; thus, referral to providers who can assist a client with one of these options is already required, where that option is selected by the client. The Secretary also rejects the criticism that the provision requiring referral for abortion where medically indicated is undefined and confusing. It is noted that this comment came from a law school, not a health care provider. The meaning of the

organizations and was negative. Although it was generally agreed that the financial separation of Title X project activities from abortion-related activities was required by statute and, in the words of one comment, "absolutely necessary," many of these comments objected that requiring additional types of separation would be unnecessary, costly, and medically unwise. The argument was made that the requirement for physical separation is unnecessary, as it is not required by the statute which, on its face, requires financial separation only. Further, it was argued that since Title X grantees are subject to rigorous financial audits, it can be determined whether program funds have been spent on permissible family planning services, without additional requirements being necessary. With respect to the issue of cost, it was generally objected that requiring separation of staff and facilities would be inefficient and cost ineffective. For example, one comment argued that --

> The wastefulness and inefficiency of the separation requirements is ... illustrated by the policy which allows common waiting rooms, but disallows "impermissible materials" in them. This puts grantees in the position of having to continuously monitor health information for undefined "permissibility" or to build a separate waiting room just to be able to utilize those materials....

It was argued that these concerns were particularly important for small and rural clinics "that may be the only accessible Title X family planning and/or abortion providers for a large population of low-income women." Of particular concern for such clinics was the duplication of costs inherent in the separation requirements, as they --

> cannot afford to operate separate facilities or to employ separate staff for these services without substantially increasing the prices of ... services. Nor can they offer different services on different days of the week because so many of their patients ... are only able to travel to the clinic on one day.

Many providers also pointed out that requiring complete physical separation of services would be

inconsistent with public health principles, which recommend integrated health care, and would impact negatively on continuity of care. As one comment stated, "women's reproductive health needs are not artificially separated between services: a woman who needs an abortion may also need contraceptive services, and may at another time require prenatal care." Several providers objected in particular that such a separation would, in the words of one comment, "remove ... one of the most opportune time[s] to facilitate the entry of the abortion patient into family planning counseling, which is at the post-abortion check-up." It was also pointed out that separation of services would burden women, by making them "make multiple appointments or trips to visit different staff or facilities." Finally, the separation policy was objected to by several of the comments that otherwise generally supported the proposed rule as unnecessarily broad, ambiguous, and vague.

Several of the comments opposing the revocation of the Gag Rule and the adoption of the proposed rules likewise objected specifically to the separation requirements, generally on the ground that the pre-1988 policies were vague and unenforceable. Two comments also argued that, if the pre-1988 requirement of physical separation was to be reinstituted, it made no sense to revoke § 59.9 of the Gag Rule in its entirety, as that section of the Gag Rule contained specific standards to implement this requirement; alternatively, it was argued that if the Secretary is going to use different standards to determine whether the requisite physical separation existed, those should be published for public comment.

The Secretary agrees that the comments on both sides of this issue have identified substantial concerns with the pre-1988 policies and interpretations with respect to the issue of how much physical separation should be required between a grantee's Title X project activities

and abortion-related activities. The Secretary agrees with the comments that the pre-1988 interpretation that some physical separation was required was unenforceable. Indeed, since the pre-1988 interpretations had held that it was permissible to provide abortions on a Title X clinic site and to have common waiting areas, records, and staff (subject largely to proper allocation of costs), it was difficult to tell just what degree and kind of physical separation were prohibited. As a consequence, the agency attempted to enforce this requirement on only a few occasions prior to 1988. The Secretary does not agree with opponents of the proposed rules, however, who argued that the "physical separation" requirements in § 59.9 of the Gag Rule should be retained on the ground that they provide a necessary clarification of this issue. Although § 59.9 provided ostensibly more specific standards, the fundamental measure of compliance under that section remained ambiguous: "the degree of separation from facilities [in which prohibited activities occurred] and the extent of such prohibited activities," and "[t]he extent to which" certain materials were present or absent. Furthermore, since under § 59.9 compliance was to be determined on a "facts and circumstances" basis, this section of the Gag Rule provided grantees with less specific advance notice of the compliance standards than did the pre-1988 policies and interpretations. Moreover, the change in policy from the more concrete policies proposed during the Gag Rule rulemaking to the less concrete "facts and circumstances" standard ultimately adopted in the final Gag Rule as a result of the public comment suggests the practical difficulties of line-drawing in this area. In fact, since the Gag Rule was never implemented on a national basis, the precise contours of the compliance standards of § 59.9 were never determined. The Secretary has accordingly not accepted the suggestion from several opponents of the proposed rule that the policies of § 59.9 be retained.

respond to the remaining comments on the issue.

G. Advocacy restrictions. The Gag Rule, at 42 CFR 59.10 (1989 ed.), prohibited Title X projects from encouraging, promoting, or advocating abortion as a method of family planning. This section prohibited Title X projects from engaging in actions to "assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes," including actions such as lobbying for the passage of legislation to increase the availability of abortion as a method of family planning, providing speakers to promote the use of abortion as a method of family planning, paying dues to any group that as a significant part of its activities advocated abortion as a method of family planning, using legal action to make abortion available as a method of family planning, and developing or disseminating materials advocating abortion as a method of family planning. The pre-1988 policies and interpretations likewise prohibited the promotion or encouragement of abortion as a method of family planning through advocacy activities such as providing speakers, bringing legal action to liberalize statutes relating to abortion, and producing and/or showing films that tend to encourage or promote abortion as a method of family planning. However, under those prior policies and interpretations, it was considered permissible for Title X grantees to be dues-paying members of abortion advocacy groups, so long as there were other legitimate program-related reasons for the affiliation.

Very few comments were received concerning these proposed policies and interpretations. Those received from persons and entities that generally supported the proposed rules generally argued against the restriction on showing films advocating abortion, on the ground that it was possible to violate this restriction by showing a film that was purely factual and detailed relative risks. The few comments on this part of the policies and interpretations

received from those who generally opposed revoking the Gag Rule pointed out the similarity between the advocacy policies articulated in the proposed policies and interpretations and § 59.10 of the Gag Rule and argued that § 59.10 should accordingly be reinstated.

As set out above, the Secretary is of the view that the Gag Rule cannot and should not be adopted piecemeal, as recommended by these comments. Moreover, the Secretary is of the view that the prohibition against dues paying contained in § 59.10 is not required by the statute and does not represent sound public policy. Accordingly, the suggestion that § 59.10 be reinstated has not been adopted. With respect to the criticism of the prohibition against Title X grantees showing films advocating abortion as a method of family planning, it is recognized that the prohibition should not encompass the kind of neutral, factual information that grantees are permitted to provide in the counseling context; the policies and interpretations have been clarified accordingly. To the extent that these comments seek to further liberalize the advocacy restrictions, however, they are rejected as inconsistent with the Secretary's basic interpretation of section 1008.

H. Miscellaneous. A number of comments were received on miscellaneous issues. Those comments, and the Secretary's responses thereto, are summarized below.

1. Changes outside the scope of the rulemaking. Several comments were received advocating changes to other sections of the regulations on issues other than the issue of compliance with section 1008. These comments included the following suggestions: that the regulations be revised to permit natural family planning providers to be Title X grantees; that the regulations be revised to prohibit single method providers from participating in Title X projects; that the footnote in the regulation addressing Pub. L. 94-63 be revised to state that the law also

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

FAX TRANSMITTAL

TO:	Melanne Verveer/Ruby Shamir	6-6244
	Heather Howard	6-2878
	Martha Foley	6-2271
	Bill Marshall	6-6279
	Sarah Wilson	6-1647
	Lauren Supina/Angela Blake	6-7311
	Lisa Brown	6-
	Audrey Haynes/Melissa Preston	6-6298

PAGES: 2 (Including cover sheet)

FROM: **Amy Squires**
Special Assistant
Ph: 202/395-4852
Fax: 202/395-3047

MESSAGE:

Please replace the language you received yesterday with the attached. Heather Howard ably caught an inadvertent typo. (Thanks Heather!)

Suggested New Section 59.5(a)(5) 5-24-00

(5) Not provide abortion as a method of family planning. Each project must offer pregnant women the opportunity to be provided information and counseling regarding:

(A) Prenatal care and delivery;
(B) Infant care, foster care, or adoption; and
(C) Pregnancy termination.

If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling, and appropriate referral on request, on each of the options, except for any options about which the pregnant woman declines information and counseling.

DRAFT

new language

handicapping condition, age, sex, number of pregnancies, or marital status.

(5) *Not provide or promote or encourage abortion as a method of family planning. A project must:*

(i) Offer pregnant women the opportunity to be provided information and counseling regarding:

(A) Prenatal care and delivery;

(B) Infant care, foster care, or adoption; and

(C) Pregnancy termination.

If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling, and appropriate referral on request, on each of the options, except for any options that the pregnant woman indicates that she does not wish to receive information and counseling about.

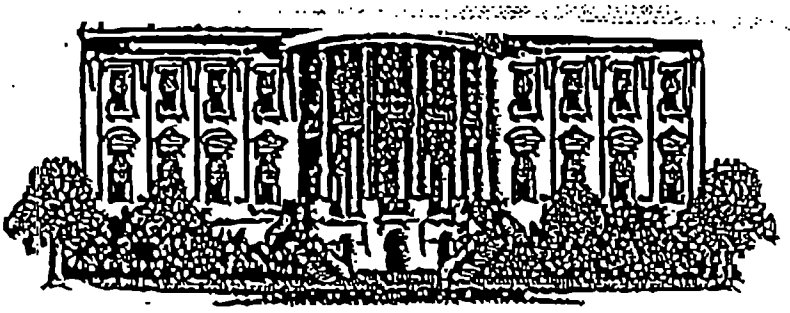
(ii) Ensure that project funds are not used for, and project activities are separate and distinct from, any non-title X activities of the grantee that provide or promote or encourage abortion as method of family planning.

(6) Provide that priority in the provision of services will be given to persons from low-income families.

(7) Provide that no charge will be made for services provided to any persons from a low-income family except to the extent that payment will be made by a third party (including a government agency) which is authorized to or is under legal obligation to pay this charge.

(8) Provide that charges will be made for services to persons other than those from low-income families in accordance with a schedule of discounts based on ability to pay, except that charges to persons from families whose annual income exceeds 250 percent of the levels set

in



HHS background + Q+A

THE WHITE HOUSE

Gag Rule

Domestic Policy Council

DATE: 7/7/00

FACSIMILE FOR: Heather Howard

FAX: 6-2878
PHONE:

FACSIMILE FROM: Andrea Kane

FAX: 202-456-7431
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NUMBER OF PAGES (INCLUDING COVER): 13

COMMENTS:

Title X "Gag Rule" Revocation
Fact Sheet

- In 1970, Congress created the family planning program as Title X of the Public Health Service Act. It is the only Federal grant program devoted solely to the provision of family planning services. The program is designed to make contraceptive services and information available to all who want them and need them, and may not otherwise be able to afford them.

- In 1999, the Title X program supported family planning services through grants to eighty-three grantees. Most are State or local health departments (49 of the 83 grantees).

- Each year, the Title X program provides family planning and related reproductive health care services to an estimated 4.4 million individuals, primarily women. Nearly two-thirds (64%) of clients have incomes at or below the poverty level. Many of these women who depend on Title X for their health care often have no other place to go for medical services or health information.

- The Title X family planning program guidelines which have been in place for twenty years stipulate that pregnant women requesting information on options for the management of an unintended pregnancy are to be given nondirective counseling on *all options, including prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination, as well as referral upon request.* The purpose of pregnancy counseling is to convey factual information on all options in a nonjudgmental manner so women can make their own decisions given their individual circumstances.

- On February 2, 1988, the Department promulgated final rules, widely known as the "Gag Rule," which substantially revised the longstanding policies and interpretation defining the restrictions on abortion-related activities under Title X's statutory limitation on abortion services.

- The Gag Rule set out detailed requirements that would have:

  - **Prohibited** doctors and other health professional in Title X-funded clinics from providing any **abortion-related information or referrals,** even when requested by a client. Those rules required Title X clinics to provide all pregnant patients with only a list of available providers for prenatal care services and delivery, and social services.

  - **Prohibited referrals** for abortion services. If a client asked for such a referral, family planning clinics were required to give a list of prenatal care providers. The list could not include providers "whose principal business is the provision of abortion."

- **Required separation** restrictions between any organization that provided abortion or abortion-related services with non-Federal funds, and also provided family planning services as a Title X-funded family planning program. These organizations would have to create a "wall of separation" between their Title X supported activities and their privately funded activities. Individual determinations would have been required to be made on a case-by-case basis. Title X clinics would have had to choose between accepting the new separation requirements or no longer providing family planning services under the program.

- The detailed restrictions of the Gag Rule were ultimately codified in the Title X program regulations (42 CFR §§ 59.2 and 59.7 - 59.10), but were never implemented on a nationwide basis.

- Over a period of several years, the Gag Rule was the subject of ongoing litigation which prevented enforcement of the rule. In May, 1991, in a 5-4 ruling in *Rust v. Sullivan*, the Supreme Court upheld the Gag Rule as a permissible (although not the only) construction of the Title X statute. In March 1992, the Bush Administration issued a directive on the implementation of the Gag Rule stipulating that "nothing in these regulations is to prevent a woman from receiving complete medical information about her condition from a physician." The directive became the focus of renewed legal challenges which argued that allowing physicians to provide counseling (but not other clinic personnel such as nurses, nurse practitioners, physician assistants, etc. who deliver the vast majority of counseling in Title X clinics), was an action in violation of the APA requirements for public notice and comment on federal rule changes. Ongoing litigation concerning the 1992 directive blocked implementation of the Gag Rule.

- On January 22, 1993, President Clinton issued a Presidential Memorandum to the Secretary of Health and Health Services directing her to suspend the rules and initiate a new rulemaking. In his memorandum, the President stated,

> *"The Gag Rule endangers women's lives and health by preventing them from receiving complete and accurate medical information and interferes with the doctor-patient relationship by prohibiting information those medical professionals are otherwise ethically and legally required to provide to their patients."*

- On February 5, 1993, Secretary Shalala suspended the Gag Rule and issued proposed rules for public comment.

- The Secretary re-opened the public comment period and proposed that the policies and interpretations in effect prior to the issuance of the Gag Rule be reinstated.

- On June 23, 1993, through a notice in the Federal Register, the Secretary re-opened the public comment period and made available for public comment a detailed summary of the abortion policies and interpretations.

- The Department received 146 comments, virtually all of which concerned the proposed policies and interpretations rather than the proposed regulation itself.

  - Approximately one-third of these opposed the proposed policies and interpretations. Most of these comments were from individuals who, in general, were opposed to any change to the Gag Rule.

  - The remainder of the public comments came from providers and other health organizations who generally supported the reinstatement of the prior policies and interpretations. A number of these comments suggested modifications to the policies and interpretations.

- The current action is being taken to eliminate any confusion or uncertainty about the status of the Title X program regulations. It codifies what has been longstanding program policy with regard to the provision of nondirective counseling and referral on all pregnancy options, ensuring that women have access to factual information. It also clarifies the relevant interpretations governing restrictions on abortion-related activities in the family planning program.

Qs and As re: the Gag Rule regulation

What is the purpose of this rule?

This action is being taken to eliminate any confusion or uncertainty about the status of the Title X program regulations and the relevant interpretations governing restrictions on abortion-related activities. The rule also adopts options counseling and referral requirements.

The rule codifies what has been longstanding program policy with regard to the provision of nondirective counseling and referral on all pregnancy options, ensuring that women have access to factual information.

The rule also revokes the compliance standards, promulgated in the 1988 and popularly known as the Gag Rule, which among other things restricted health professionals in federally funded family planning clinics from providing factual information about abortion to clients.

What was the Gag Rule?

The Gag Rule issued on February 2, 1988 established detailed abortion-related restrictions in the Title X program regulations. These restrictions would have:

- **Prohibited** doctors and other health professionals in Title X funded clinics from providing any **abortion-related information or referrals**, even if requested by a client. Those rules required Title X health care providers to give all pregnant patients a list of available providers for prenatal care services and delivery, and social services. The provision by Title X health care providers of other information relating to management of the pregnancy was prohibited.

- **Prohibited referrals** for abortion services. A pregnant woman making such a request was to be given a list of prenatal care providers. The list could not include providers "whose principal business is the provision of abortion."

- **Required separation** restrictions between any organization that provided abortion or abortion-related services with non-Federal funds, and also provided family planning services as a Title X-funded family planning program. These organizations would have to create a "wall of separation" between their Title X supported activities and their privately funded activities. Individual determinations would have been required to be made on a case-by-case basis. Title X clinics would have had to choose between accepting the new separation requirements or no longer providing family planning services under the program.

Who is affected by this regulation?

The regulation governs entities that receive Title X family planning service grants. Currently the program funds eighty-three (83) grantees.

- Forty-nine (49) are State or local health departments
- Eight (8) are Planned Parenthood affiliates
- the others are private, nonprofit family planning agencies or universities.

What are the documents being published in the Federal Register?

Two documents are being published:

(1) A *final regulation* that adopts the Title X family planning program rules that were in existence prior to the 1988 Gag Rule. The final rule has been modified to incorporate and codify what has been longstanding program policy requiring nondirective pregnancy counseling and referral. The final rule revokes the provisions that were added to the program regulations by the Gag Rule. The final rule also includes technical changes to remove and/or update regulatory references; and

(2) A *separate notice* summarizing the Department's governing interpretations regarding abortion-related activities. This document re-institutes, with some changes in response to the public comments, the interpretations of the statute that applied to the program prior to the issuance of the Gag Rule. The modifications and the rationale are described in the preamble to the final rule. For example, the notice clarifies that only activities that present neutral, factual information about abortions are permissible. In addition, in response to public comments, the Department has accepted the suggestion that it interpret the statute as not requiring physical separation. Financial and administrative separation is sufficient to comply with the law and adequately demonstrates that no Federal funds have been used inappropriately.

What is the effect of this rule?

- The Title X statutory restriction still governs the programs – no Title X funds may be used for abortion services.

- The final rule ensures that clients will continue to have access to complete and medically accurate information about **all** their pregnancy options, and referral to services of their own choosing.

- The final regulation reinstates the program regulations as they existed prior to the adoption of the Gag Rule. It also codifies longstanding program policy requiring nondirective pregnancy options counseling and referral, which have governed the

program for much of its life. A number of technical amendments were made to the program regulation to delete obsolete statutory or regulatory references or to incorporate new regulatory or other references.

- The accompanying policy notice summarizes the specific Title X abortion-related program interpretations.

What policies govern abortion information and counseling in Title X clinics?

- The final rule codifies the longstanding requirement for the provision of nondirective pregnancy options counseling by stating that Title X projects must:

  "Not provide abortion as a method family planning. A project must offer pregnant women the opportunity to be provided information and counseling regarding each of the following options:

  - *Prenatal care and delivery*
  - *Infant care, foster care, or adoption: and*
  - *Pregnancy termination.*

  If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant woman indicates she does not wish to receive such information and counseling"

- Non-directive options counseling is consistent with the prevailing medical standards recommended by national medical groups.

What policies govern referrals for abortion?

- Consistent with the incorporation of the nondirective counseling in the final rule, the regulation also codifies the requirement to provide a referral, if requested by the client.

- Grantees may provide neutral, factual information about abortion providers in the course of providing an abortion referral.

- The longstanding restrictions on other kinds of assistance remain in effect. For example, a clinic may not provide transportation to an abortion provider or negotiate a fee for a client.

What about clinic personnel who object to counseling about abortion or referring for abortion services?

- Under existing law (42 U.S.C. 300a-7d) Federal grantees may not require individual employees who have religious or moral objections to provide counseling about abortion.
- However, in such cases the grantee must make other arrangements to ensure that complete counseling and information is available to clients who desire it.

What are the policies governing advocacy restrictions?

- Grantees must continue to adhere to a longstanding policy that projects may not promote or encourage abortion as a method of family planning.
- The accompanying policy statement clarifies that activities (such as films) that present only neutral, factual information about abortion are permissible. This is consistent with the policy regarding the provision of neutral, factual information in the individual counseling context.

What requirements govern separation of Title X family planning program activities and any abortion-related activities conducted with non-government funds?

- The Department has deleted from the policy statement the requirement for physical separation. Financial and administrative separation is sufficient to comply with the law and adequately demonstrates that no Federal funds have been used inappropriately.
- Title X grantees are periodically subject to rigorous financial audits that can determine whether program funds have been spent appropriately. Grantees must continue to demonstrate through financial records, counseling and service protocols, administrative procedures, and other means that promotion of abortion as method of family planning does not occur.

What is the rationale behind the Department's change of policy concerning physical separation requirements?

Financial and administrative separation is sufficient to comply with the law and adequately demonstrate that no Federal funds have been used inappropriately. The Department's pre-1988 interpretations required Title X grantees to maintain physical and financial separation between Title X family planning projects and any abortion-related activities conducted with private funds.

However, it was considered permissible for organizations that are Title X providers to provide abortions with non-Title X funds, as long as "sufficient" separation was maintained. Common waiting rooms were permitted, as were shared staff and a unitary filing, as long as costs are properly allocated. A requirement for physical separation is not necessary to ensure compliance with the law.

What about critics who maintain that Title X family planning clinics will make "self-referrals" for abortion, and that this practice should be specifically prohibited?

Very few current Title X providers are also abortion providers. Forty-nine of the current 83 Title X grantees are State and local health departments. It has been estimated that the percentage of Title X providers located with or near abortion providers has been at or below five percent – approximately half of these providers are hospitals.

For those few organizations that are Title X grantees and that may also provide abortion services with private funds – some may be the only, or one of only a few, abortion providers in their service area, making "self-referrals" a necessity in such situations. We have no evidence that commercialization and profiteering are occurring in these circumstances – absent such evidence, we see no reason to limit or cut off a legal service option for those Title X clients who freely select it.

Why was there a gap between the 1993 proposed action and this final rule?

The rule was suspended in 1993, so there was no particular urgency. Because we had obtained useful public comments and because we had occasionally received questions about the policy, we decided it would be useful to elaborate and clarify the guidance. Today's action also formally revokes the rule.

What were the specific actions the Secretary took to suspend the Gag Rule?

On February 5, 1993, the Secretary published two documents in the Federal Register:

1. An *interim rule suspending* the effectiveness of the 1988 final rule popularly known as the Gag Rule. In that document, the Secretary noted that the Gag Rule had been the subject of much litigation and controversy, and inappropriately restricts family planning grantees. The Secretary also announced that, on an interim basis, during the pendency of proposed rulemaking (see below), the compliance standards that were in effect prior to the issuance of the Gag Rule would be used to administer the program.

2. A *Notice of Proposed Rulemaking (NPRM)* requesting public comment on a proposal to revoke the 1988 Gag Rule, and readopt the Title X family planning program regulations that were in place prior to the Gag Rule. [Since the Gag Rule was issued as a final rule in 1988, the provisions were codified as part of the Title X family planning program regulation at 42 CFR §§ 59.7-59.10.]

Do you expect this to make legal abortion more available?

No. Family planning programs funded by Title X are prohibited by law from providing abortions and from promoting or encouraging abortion as a method of family planning. Guidelines that were in place for 20 years prior to the Gag Rule, and that continue in effect, provide that women requesting information are to be given non-directive counseling and referral for services upon request. We do not anticipate that this will lead to a rise in abortion rates.

What are the current statistics on abortion and why do you think abortion rates are falling?

According to the National Center for Health Statistics, abortion rates appear to be falling due to a several possible factors, including increased use and effectiveness of family planning methods, changing attitudes toward premarital sex, and increased economic opportunities for teenagers and women.

Why is Denese Shervington leaving her post as director of the Office of Population Affairs?

The Department does not publicly discuss personnel issues. With regard to concerns over recent program initiatives at OPA, including our efforts to end racial and ethnic disaparities in access to services, the expansion of family planning services to address HIV/AIDS among women, and our efforts to promote responsible sexual behavior, these will continue to be among our highest priorities. We have appointed a new Acting Deputy Director of OPA who will continue to work toward these important objectives.

Why was Mimi Kanda chosen to become the Acting Deputy Director of OPA? What are her qualifications?

Dr. Kanda will come on board to serve as Acting Deputy Director of OPA. She will be running OPA while a decision is being made about a permanent replacement.

Dr. Kanda has served vulnerable children and their families for more than two decades, and we feel very fortunate that she has accepted this assignment. She currently serves as Director of Health and Disabilities Services for HHS' Head Start Bureau, which provides services to 850,000 children across the United States form birth to age five. She has been very involved in the development of the new Early Head Start Initiative serving families with pregnant women, infants and toddlers. Before joining Head Start, Dr. Kanda was Director of the Division of Child

Protection at Children's National Medical Center in Washington. She is a three-time recipient of DHHS' ACYF Commissioner's Award for Outstanding Leadership and Service in the Prevention of Child Abuse and Neglect, and she has also been honored by mayoral proclamation for her service to the children of Washington D.C.

Draft Talking Points
For Use in Contacting Key Groups

- The purpose of this call is to inform you about the pending publication of a final rule in the Title X Family Planning program regulations. The current action is being taken to eliminate any confusion or uncertainty about the status of the Title X program regulations. It codifies what has been longstanding program policy with regard to the provision of nondirective counseling and referral on all pregnancy options, ensuring that women have access to factual information. It also clarifies the relevant interpretations governing restrictions on abortion-related activities in the family planning program.

- The documents will be on display at the Office of the Federal Register tomorrow and we are expecting it to be published in the Federal Register on Monday, July 3rd.

- When published in the Federal Register, the documents will be available on the Office of Population Affairs website. The website address is: http://www.dhhs.gov/progorg/opa/

- The Department will be publishing two documents in the Federal Register:

  (1) A **final regulation** that adopts, with one substantive modification, the Title X family planning program rules that were in existence prior to the 1988 Gag Rule.

  - The final rule revokes the provisions that were added to the program regulations by the Gag Rule.

  - The Title X statutory restriction still governs the program – no Title X funds may be used in programs where abortion is a method of family planning.

  - The final rule has been modified to incorporate and codify what has been longstanding program policy requiring nondirective pregnancy options counseling and referral.

  - The final rule also includes technical changes to remove and/or update regulatory references.

  - The preamble to the final rule summarizes and responds to the comments raised during the public comment period, and explains modifications made in the program's governing interpretations.

(2) A **separate notice** summarizes the program's governing interpretations regarding abortion-related activities.

- The notice reiterates the general principle that the Title X statute prohibits family planning programs from engaging in activities that promote or encourage abortion as method of family planning. For example, projects may not provide services that directly facilitate the use of abortion such as provide transportation to an abortion provider or negotiate fees for a client.

- This document re-institutes, with some changes in response to public comments, the interpretations of the statute that applied to the program prior to the issuance of the Gag Rule.

- For example, the notice clarifies that activities (such as films) that provide only neutral, factual information about abortion are permissible.

- The notice also clarifies the limitations on counseling and referrals for abortion. Projects may not promote or encourage abortion, although projects may provide complete factual information about all medical options. In making a referral, a provider may include relevant factual information to a client, for instance, the name, telephone number and address of a provider, as well as information about the charges involved.

- Based on public comment, the notice also deletes the requirement for physical separation between Title X program activities and abortion-related activities conducted with non-government funds. Financial separation is sufficient to comply with the law and adequately demonstrates that no Federal funds have been used inappropriately.

Family Research Council®
Gary L. Bauer, President

April 6, 1993

The Honorable Donna E. Shalala
Secretary of Health and Human Services
Hubert Horatio Humphrey Bldg.
Washington D.C. 20201

Dear Secretary Shalala:

I am writing to convey my comments on the proposed rules governing recipients of family planning grants under Title X of the Public Health Act, 42 U.S.C. 300 *et seq.* These rules are published at 58 Fed. Reg. 7462-7468, amending 42 CFR, Part 59.

1. By comparison with the regulations that they replace, the Proposed Rule represents a shift away from "fetal health" as a component of "prenatal care." *See* 53 Fed. Reg. 2944, § 59.2. In an even more dramatic instance of the same policy shift, the Proposed Rule drops the language from the 1988 regulations to the effect that "[f]amily planning, as supported under this subpart, should reduce the incidence of abortion." *Id.* Departure from this language marks a glaring inconsistency with President Clinton's stated objective of making abortion "rare," though legal.

2. The Proposed Rule reverses the pluralism of the previous regulations with regard to eligibility of various family planning methods. The 1988 regulations clearly stated: "These means [of family planning] include a broad range of acceptable and effective methods...(including natural family planning and abstinence)...." *Id.* In stark contrast, the Proposed Rule states: "If an organization offers only a single method of family planning, such as natural family planning, it may participate as part of a project *as long as the entire project offers a broad range of family planning services.*" 58 Fed. Reg. 7465, § 59.2 (emphasis added). Thus, in practice, organizations that offer only natural family planning will be eligible to receive Title X funds if, but only if, they are willing to hitch themselves to other projects or organizations that offer artificial methods. Yet, as experts in family planning policy cannot but be aware, organizations that teach natural family planning methods are often motivated in part by a sincere and deeply-held *moral* objection to artificial contraceptive methods. Requiring such organizations, as a condition of obtaining Title X funds, to attach themselves to organizations that promote artificial contraception -- thus putting them to a choice between foregoing federal funds to which they would otherwise be entitled, and becoming materially complicit in what they regard as immoral activity -- is a form of unjust discrimination against organizations that wish to further the goals of Title X by promoting natural family planning among women who desire to learn such methods.

3. Title X requires that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. The summary of the Proposed Rule states that "Title X projects would not be permitted to promote or encourage abortion as a method of family planning, such as by engaging in pro-choice litigation or lobbying activities." 58 Fed. Reg. 7462. However, this prohibition is conspicuously absent from the main body of the Proposed Rule. Indeed, the Proposed Rule contains no standards of compliance with the statutory requirement of § 300a-6. The rule includes merely a brief and vague requirement that projects must "[n]ot *provide* abortion as a method of family planning." 58 Fed. Reg. 7466, § 59.5 (emphasis added). A grantee could encourage and promote abortion extensively and still be within the requirement of this language, as long as that grantee did not actually "provide" the abortion. This is not a credible reading of the statutory requirement.

4. Whereas the former regulations gave detailed requirements for the separation of grantee facilities from abortion-related facilities, 53 Fed. Reg. 2945, § 59.9, the Proposed Rule merely notes, in a parenthetical remark in its summary, that such separation "must be more than a mere exercise in bookkeeping." 58 Fed. Reg. 7462. The main body of the Proposed Rule is silent on point. Indeed, the summary announces a policy goal of sparing grantees the need to "make extensive and expensive alterations in their facilities and organizations structures." This concern for the convenience of grantees who co-locate counselling centers with abortion clinics must be understood in light of the absence of any specification in the Proposed Rule as to how much "more than a mere exercise in bookkeeping" the separation must be.

5. The review of the impact of the Proposed Rule on families, required by Executive Order 12606, 58 Fed. Reg. 7465, is fanciful at best. It is difficult to see how allowing Title X grantees to counsel for abortions will get them "out of the middle of the abortion decision," 58 Fed. Reg. 7465. Indeed, that would appear to be exactly where the Proposed Rule would allow grantees to roam at will, without accountability for their use of taxpayer money with regard to abortion. While the Proposed Rule might be said to "promote the stability of the family" by removing the destabilizing subject of abortion from the parental purview and transferring it to the confidential recesses of the grantee's parlor, it is difficult to see how this transfer can be said to "support parental influence." The same question would apply to the claim that the Proposed Rule would "reduce governmental intrusion on family activities" and "enhance the role and autonomy of the family in decision-making." These laudable goals are ill-served by federal policies that provide government-funded alternatives to the family, especially in the extremely sensitive area of abortion.

6. The Proposed Rule contains no measures to ban or regulate commercialization and profiteering by providers resulting from mandatory abortion referral and counseling at Title X facilities. Situations involving conflict of interest could abound. Obvious instances would include physician or grantee self-referral for clinical laboratory services such as pregnancy tests. Other inappropriate situations might involve facilities receiving kickbacks, perks, or bribes in connection with the referral and delivery of abortion. Remuneration schemes, however, may not be the only, nor even the most common form of conflict of interest in Title X clinics. A more common and equally objectionable circumstance would be the subtle practice whereby patients seeking abortion are referred to the physician who serves as the medical director or as an advisory board member of the Title X clinic making the referral. The proposed rule is oblivious to these real or apparent conflicts of interest that could arise after its implementation. Since the need for clarification of counseling and referral practices in Title X clinics is publicly documented (Report by the Comptroller General of the United States, *Restrictions on Abortion and Lobbying Activities in Family Planning Programs Need Clarification*, 1982), a minimal goal of the proposed regulation should be to distinguish between legitimate referral arrangements and disguised commercial schemes.

Before the Department of Health and Human Services implements the proposed regulation, I ask that it supply the public through the Federal Register with complete documentation on the number of facilities from among its 4000 grantees that raise conflict of interest issues or whose operations display a material weakness in the administration of these clinics which make them vulnerable to abuses of public funds. What assurances do you currently receive from grantees that they do not participate in inappropriate referral practices? Are these assurances adequate? Please provide the public through the Federal Register the criteria you use to make this judgement. I ask that you set aside two percent of FY 1994 program funds to conduct an independent investigation by the Inspector General of all Title X grantees and their referral relationships with abortion professionals.

Finally, what kind of assurances are you being given by your grantees that they are referring patients only to providers in full compliance with OSHA standards relating to blood borne pathogens? *See* 29 CFR Part 1910.1-30 *et seq.* I would ask that the IG include an examination of grantee enforcement of provider compliance with OSHA standards relating to blood borne pathogens as part of the larger investigation.

Sincerely,

Gary L. Bauer

Gary L. Bauer
President

Executive Office of the President of the United States
Office of Management and Budget

Office of Information and Regulatory Affairs
Human Resources and Housing Branch
New Executive Office Building
Room 10235
Washington, DC 20503

FAX TRANSMITTAL

FAX: 202-395-6974

DATE: 4/7/2000

TO: Heather Howard

FROM: Allison Eydt

Total number of pages (Including Transmittal Sheet): 6 pgs

Recipient's Fax Number: 6-2878

Recipient's Telephone Number: _____

Comments: Pursuant to your request . . . .

4/17 Bob Blum

4/17 call re National Campaigns
raise issue of Family Meal Times

youth paper { youth-related accomplishments
budget piece

OPL youth council

Brenda packets for audience - synopsis of Add Health Study
/ Community Counts - Milbrey
need 300 CEA snapshot
YMCA poll
Natl. Campaign parent piece
Stuff on web sites - parenting web site

one pager on policy deliverables - Loretta
one pager on stats - Lowell

Speakers - add for one page bio by COB Wed.
Shirley's letter - be vague about where they are speaking or the program

briefing for HRC

Pediatricians

AMA

Writers – Family Physicians – support →

~~Am Academy of Child & Adolescent Psychiatry~~

America Nurses

School Nurses

Nat'l MH Assoc

Nat'l Alliance for MI → (NO) – check up Trump

School Psychol.

Fed. Families for Children's MH

Pediatricians

facilitate meeting process

make it happen on staff level - get everyone seated so Shirlena can open it up.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	re: Gag Rule meeting (2 pages)	05/15	P5

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rc684

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P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

FAX

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Date: April 26, 2000

To: Heather Howard

Fax #: 456-2878

From: Cynthia Dailard

Number of pages (including cover sheet):

COMMENTS:

I am faxing you the materials on colocation that I promised you.

Lets Talk.

Amendment to H.R. 4274, as Reported
Offered by Mr. Tiahrt of Kansas

Page 53, after line 8, insert the following new section:

SEC. 221. The program under section 1001 of title X of the Public Health Service Act shall be carried out in accordance with section 59.9 of title 42, Code of Federal Regulations, as issued on February 2, 1988 (53 Fed. Reg. 2945), except that such section 59.9 shall apply as if there were no references in the section to sections 59.8 and 59.10 of such title 42.

Tiahrt

Tiahrt amendment
Labor HHS FY99
Failed in committee on
a tie vote.

July 24, 1998

[Code of Federal Regulations]
[Title 42, Volume 1, Parts 1 to 399]
[Revised as of October 1, 1998]
From the U.S. Government Printing Office via GPO Access
[CITE: 42CFR59.9]

[Page 403]

TITLE 42--PUBLIC HEALTH

CHAPTER I--PUBLIC HEALTH SERVICE, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 59--GRANTS FOR FAMILY PLANNING SERVICES--Table of Contents

Subpart A--Project Grants for Family Planning Services

Sec. 59.9 Maintenance of program integrity.

A title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and Sec. 59.8 and Sec. 59.10 of these regulations from inclusion in the title X program. In order to be physically and financially separate, a title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (e.g., treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the title X project are present and signs and material promoting abortion are absent.

[53 FR 2945, Feb. 2, 1988]

Editorial Note: For provisions of Sec. 59.9 which have been suspended, see the Editorial Note following the Source of Subpart A.

Title X amendment - mere bookkeeping

Reagan regulation.

The Tiahrt amendment would place into statute the stringent separation requirements of the Reagan-Bush-era "Gag Rule." (In 1993, President Clinton suspended all the provisions of the Gag Rule.)

- The amendment would impose a provision of the 1988 Gag Rule which would mandate onerous and ill-defined physical and financial separation requirements between Title X supported family planning projects and any abortion-related activities.

- Current policies require Title X family planning projects to ensure that the Title X family planning supported projects are separate and distinguishable from abortion-related activities. Those policies were summarized in a document made available to the public through a June 23, 1993 Federal Register notice (attached).

- The proposed amendment is unnecessary. Current policies provide sufficient safeguards to ensure the appropriate use of Federal funds. Title X grantees must demonstrate in financial records, counseling and service protocols, and administrative procedures that abortions are not be performed, or promoted or encouraged with the use of Title X funds. Periodically, grantees undergo rigorous site reviews to ensure compliance with all program requirements, including compliance with these requirements.

- The Department is not aware of issues of non-compliance with the existing program requirements.

- Requiring additional types of separation would be unnecessary, costly and medically unwise.

- Implementation of this provision would be very costly, requiring in many cases separate facilities, staff and equipment. The impact on hospitals would be enormous.

- This amendment would create fragmentation in the delivery of health care services and disrupt the continuity of care to clients.

- It would create enormous confusion as grantees try to define the scope of the physical separation requirements -- which were never satisfactorily defined during the five year life-span of the "Gag Rule." The separation standards contained in the Gag Rule were purposefully vague and arbitrary with respect to how much physical separation should be required between a grantee's Title X project activities and abortion-related activities.

- To the extent that it would require separate medical records, this is impractical for many health care facilities which maintain centralized medical records. Dividing medical records of a patient into two separate medical records could endanger health, or even her life.

OPPOSE ATTACKS ON THE TITLE X FAMILY PLANNING PROGRAM

During consideration of the FY 1999 Labor-HHS Appropriations bill by the full Appropriations Committee, Representative Todd Tiahrt (R-KS) offered an amendment to reinstate a section of the controversial "gag rule" that was suspended in January of 1993. That section would require that Title X projects providing family planning must be "physically" separate from non-Title X-funded activities related to abortion. Title X clinic services are *already* required to be financially separate from any abortion-related activities. The amendment failed during the House Appropriations Committee mark-up of the bill on a 26-26 vote.

- **The amendment is designed to correct a problem that doesn't exist and would reimpose a portion of the "gag rule" that has been discredited and rejected.** Section 1008 states "None of the funds appropriated under the title shall be used in programs where abortion is a methods of family planning." There is no evidence that the provision of the law prohibiting payment for abortion services has been violated. The Department of Health and Human Services has said since the program's inception in 1971 that this prohibition applies not only to the performance of abortion by a Title X project, but also to the conduct of certain abortion-related activities.

- **Current policies require Title X family planning projects to ensure that the Title X family planning supported projects are separate and distinguishable from abortion related activities.**

- **HHS has *already* gone well beyond just prohibiting payment for abortions.** HHS has also prohibited other abortion-related activities in a Title X project such as providing transportation for an abortion, explaining and obtaining signed abortion consent forms from clients interested in abortions, negotiating a reduction in fees for an abortion, promoting or advocating abortion.

- **Many Title X project sites that *with non-Title X funds* provide abortions are hospitals.** It makes little sense to force hospitals to require separate facilities for abortions.

- **The term "physical separation" is so vague as to be meaningless, impossible to enforce, and an invitation to litigation.** Does this mean that a hospital would not be allowed to offer both abortion services and family planning services in the same facility? Would separate entrances or waiting areas meet this requirement? Would one facility used on different days for different purposes pass the test?

- **The measure could disproportionately impact rural providers, who may, due to financial constraints, be unable to provide separate facilities for different types of health services.**

- **The proposed amendment is unnecessary.** Current policies provide sufficient safeguards to ensure the appropriate use of Federal funds. Title X grantees must demonstrate in financial records, counseling and service protocols, and administrative procedures that abortions are not performed, promoted, or encouraged with the use of Title X funds. Periodically, grantees undergo rigorous site reviews to ensure compliance with all program requirements including those listed above.

Planned Parenthood®
Federation of America, Inc.

March 12, 1993

Mr. Gerald Bennett
Acting Deputy Assistant Secretary
for Population Affairs.
Department of Health and Human Services
P.O.B. 23783
Washington, D.C. 20026 - 3783

RE: Proposed Rule Governing Title X

Dear Mr. Bennett:

In response to the Notice in the Federal Register of February 5, 1993, the Planned Parenthood Federation of America ("PPFA") submits the following comments addressed to the proposed changes in the regulations governing the Title X family planning program.

PPFA is the nation's oldest and largest private provider of family planning services. In 1991, PPFA's 170 affiliates operated more than 900 clinics located in 49 states, serving almost two million women, almost 70% of whom had incomes below 150% of the federally defined poverty level. In 1983 (the last year for which this information is available), our affiliates operated approximately 13% of the Title X sites nationwide, and served approximately 28% of the Title X caseload.

In large part, PPFA applauds the proposed rules. They replace rules (the infamous "gag rule") that, had they ever been implemented, would have mandated unsound medical practices, interfered with the ability of women to make informed and voluntary decisions concerning options for management of a pregnancy, and denied important information to patients and communities served by Title X programs. The proposed rules mark a welcome affirmation of responsible and ethical medical and educational practices.

The proposed rules are laudable also from the perspective of program administration. Most significantly, they abandon the premise of the gag rule that Title X recipients must subject substantial amounts of non-Title X funds to federal regulation. Appropriately, proposed rule 59.9 focuses instead on regulating the use of grant funds.

However, the Supplementary Information preceding the proposed rules raises a concern in this regard. It states that the Secretary intends to reinstate "compliance standards" that will require Title X projects, "to maintain a separation (that is more than a mere exercise in bookkeeping) of their project activities from any activities that promote or encourage abortion as a method of family planning." 58 Fed. Reg. 7464.

cont'd

810 Seventh Avenue New York, New York 10019 212/541-7800 FAX 212/245-1845

March 12, 1993

Mr. Gerald Bennett
Acting Deputy Assistant Secretary
for Population Affairs
Department of Health and Human Services

This "standard" is not based on an explicit statutory mandate. Rather it originated as a counsel's interpretation of the "spirit" of the statute. Thus, the Secretary is free to alter or abandon this standard.

Doing so would be particularly appropriate at this time. This standard forces grantees to waste money better spent on the provision of services, and it imposes constraints that are medically and socially unwise. When control of health care costs and improvement of access to health care services are national priorities, eliminating this unnecessary compliance standard makes perfect sense - both fiscally and medically.

The burden of the compliance standard is most significant for the relatively small programs that are the regional providers of Title X family planning services and of abortion services. These providers may be the only source of family planning services accessible to low income women within a 100 mile radius, and the only provider of abortion services accessible to low income women within an even larger radius. These providers cannot afford to operate separate facilities or to employ separate staff for these services without substantially increasing the prices of one or both services. Nor can they offer different services on different days of the week because so many of their patients, regardless of the service needed, are only able to travel to the clinic on one day (for example, Saturday). Thus, in order to provide the most accessible and affordable services to their target patient population - a matter of substantial importance, when these providers are the only providers for indigent women within a large geographic area - it must be permissible to provide abortion services and family planning services in the same facility during the same hours.

The separation requirement is unwise for another reason. PPFA's affiliates have learned that the post-abortion check-up is the perfect opportunity to involve a patient in the family planning program. Thus, wherever possible, the two are simultaneous, providing continuity of care to the patient. This socially and medically desirable approach is complicated enormously when the two services must be "separated." Such a requirement can impact on record-keeping, staffing patterns and patient-staff relationships, and on the ability to facilitate the entry of the abortion patient into the family planning program.

PPFA and its affiliates are committed to operating Title X programs where DHHS can be assured that its funds are only supporting activities for which they were awarded. PPFA

March 12, 1993

Mr. Gerald Bennett
Acting Deputy Assistant Secretary
for Population Affairs
Department of Health and Human Services

and its affiliates are also committed to providing all medical services in the most cost efficient and medically sound manner.

We believe the separation compliance standard referred to in the Supplementary Information does nothing to advance the Secretary's legitimate interest in verifying the purposes for which grant funds are expended; and our experience tells us that it significantly undermines the goals of cost efficiency and high medical standards. Accordingly, we urge the Secretary not to impose a compliance standard that requires program separation to a greater extent than is necessary to comply with the cost accounting standards set forth elsewhere in the regulations.

Thank you.

Sincerely,

Pamela J. Maraldo
President

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Date: _____

Number of pages including cover sheet: 10

To: Heather Howard

@ 456-2878

From: Cynthia

____Original will not follow
____Original will follow, via _____

MESSAGE:

vote counts - 1991

1992

November 22, 1991 (*WM*-18)

Washington Memo

The Alan Guttmacher Institute

An Independent, Nonprofit Corporation for Research, Policy Analysis and Public Education

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Bid to Override Bush Veto Falls 12 Votes Short . . .

Future Uncertain as Congressional Drive to Block Title X Gag Rule Falls

By far greater margins than on any other reproductive rights votes in recent history, both houses of Congress this month overwhelmingly rejected the Title X "gag rule" regulations — but the bottom line is that on the key November 19 vote in the House, gag rule opponents fell just short of the two-thirds majority needed to override President George Bush's veto of the appropriations measure to which language blocking the regulations was attached. In the wake of the intense political pressure surrounding the debate over the gag rule, the Department of Health and Human Services (DHHS) has been giving out mixed signals regarding the speed with which it intends to implement the regulations against Title X family planning clinics, and congressional leaders are already regrouping to discuss how to keep up the pressure on the administration in the coming election year.

The Issue

The attempt by the House to override the president's veto of H.R.2707, the $205 billion fiscal year 1992 Labor-HHS appropriations measure, was a major way-station in an odyssey beginning in 1988 with the promulgation of new regulations governing the Title X family planning program. Those regulations, which prohibit health care professionals working in federally funded family planning clinics from providing information about abortion to women facing unintended pregnancies, were challenged in three federal courts but were ultimately upheld by the U.S. Supreme Court in *Rust v. Sullivan* in May (*WM*-9, May 29, 1991).

The focus shifted immediately to Congress, where freestanding bills were introduced in both the House and the Senate to permanently overturn the gag rule and require clinics to provide such information, and where the appropriations committees were also looking for ways at least to prevent implementation of the regulations for fiscal year 1992. By October 1, the beginning of the new fiscal year, the Senate had already successfully passed its freestanding bill (S.323), introduced by Sen. John Chafee (R-RI), but attached to it were two controversial parent-notice-for-abortion requirements (*WM*-12, July 22, 1991). In the House, legislation including comparable gag rule language, which would also reauthorize the Title X program (H.R.3090), was approved by the Energy and Commerce Committee last July (*WM*-13 and 14, Aug. 9, 1991), but it was held back so that all attention could be focused on the L-HHS appropriations measure. It was on the appropriations bill, which included identical language approved by both houses blocking implementation of the regulations for one year, that the real challenge to the gag rule occurred.

The Veto

By the time H.R.2707 reached the president for his consideration, many of the peripheral issues surrounding the giant funding measure had been clarified or set aside. Two abortion-related provisions — one a compromise parental notice amendment originally written by Sen. Nancy Kassebaum (R-KS), the other an endorsement of Medicaid funding in cases of rape and incest — had been dropped by the House and Senate conferees (*WM*-17, Oct. 31, 1991). In addition, however, several members and the president were reportedly upset that in order to meet the requirements of the 1990 budget agreement, over $4 billion of the $205 billion contained in the funding bill was technically to be pushed over into fiscal

Also in this Issue . . .

1993, a budgetary gimmick known as "forward funding." Nonetheless, when President Bush's veto message was finally delivered to the House on November 19 — only a day before the bill would have become law without his signature — it was made clear to every member that he was "compelled to disapprove H.R.2707" because of the language blocking the gag rule. Despite his briefly stated concern over the budgetary issues (one paragraph of the seven-paragraph message), the president explicitly stated that he would sign the bill if the gag rule language were removed.

The Debate

Up to the last minute, strong statements by the House leadership led many to hope that enough members with otherwise antiabortion voting records could be persuaded by the forceful combination of strong constituent pressure and Democratic Party imperatives — a combination which to date has not successfully overridden the president in 24 attempts. That the political stakes were high became increasingly apparent as one member of the leadership after another spoke of the need to vote for the bill despite the veto, including a rare appearance by Speaker Thomas Foley (D-WA). However, the lopsided debate focused less on party politics than on the substance of the issues involved. Fully half of the Republican members who spoke asked their colleagues to vote to override the veto (53 Republicans ultimately voted to override), while only one Democratic member called for the veto to be sustained.

Instead, the debate was polarized by the issue of the gag rule itself. Those members supporting the overturn of the regulations concentrated on the far-reaching effects should the regulations be implemented. Rep. Olympia Snowe (R-ME) reminded her colleagues that the low-income women who depend on family planning clinics would be the hardest hit, but that other issues were involved. "A vote to sustain," she said, "means that we feel women do not deserve the same doctor-patient relationship as men have. No male patient is affected by this gag rule; we are creating a situation for women only. . . .A vote to sustain means that fundamentally you believe women are second-class citizens that deserve second-class treatment."

Rep. Jim McDermott (D-WA), one of two doctors in the House, found the idea of the government telling health care professionals what to say to their patients profoundly disturbing, pointing out that "the doctor-patient relationship is built on trust, not politics. It must be defined by a patient's medical needs, not White House political strategy." And Rep. John Porter (R-IL), who had spearheaded the gag rule overturn language in the appropriations bill, questioned the impact this type of restriction might have on other government-funded programs in the future, stating, "This is America. We do not attempt to control people by withholding the truth from them. We do not lie to people to control their conduct."

None of these arguments served to convince the hardest core antiabortion members, who seem to view any speech mentioning abortion as a government-sanctioned directive to have an abortion. However, these same members apparently find it perfectly acceptable for federally funded family planning clinics to direct pregnant women to carry their pregnancies to term. As Rep. Henry Hyde (R-IL) put it, "Once you are pregnant, you are no longer within the purview of family planning. You need prenatal care. . . . What you pro-abortion people want are counselors and receptionists to steer people to Planned Parenthood."

The Vote

When all was said and done, antiabortion forces successfully persuaded enough members that this vote should not be distinguished from any other vote on abortion funding or services, and held on — barely — to the votes they needed to sustain the veto. The final vote to override was 276-156, just 12 votes short of the two-thirds required (see vote chart, p. 3). Prochoice House members were greatly encouraged by the progress made, evinced by the number of members uncomfortable with the issue of abortion who nonetheless voted to override.

Close on the heels of the veto override attempt, several options regarding the disposition of the gag rule were considered, among them bringing the authorization bill to the House floor or attaching the gag rule overturn language to another piece of "must-pass" legislation. Due to the imminence of Congress' adjournment for the holidays, however, as well as the pervasive feeling among the prochoice members that they had done as well as could be expected for now, those ideas have been temporarily postponed. On November 21, the gag rule language was stripped from the appropriations measure, which then — after a failed attempt to recommit the bill on the budgetary issues — was adopted both by the House, by a vote of 364-58, and the Senate, by voice vote, on November 22.

[Despite the best efforts of the House leadership, the margin of votes in that body changed little between the November 19 vote on the president's veto and the earlier vote on the Labor-HHS conference report, which passed, 272-156, on November 6. The Senate passed the conference report on November 7, 72-25, sending the bill to the president. Because the House did not have the votes needed to override, the Senate did not vote on that question.]

(continued on p. 4)

Washington Memo

Cory Richards
Vice President for Public Policy

Terry Sollom, Editor

Regina Toler, Editorial Assistant

Contributors: Susan Cohen, Daniel Daley, Patricia Donovan, Rachel Gold, Lisa Kaeser

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Vote to Override Bush Veto of L-HHS Appropriations Bill with Language Blocking Implementation of the 'Gag Rule' (H.R.2707)

YEAS (276)

Democrats (222)

Abercrombie (D-HI)
Ackerman (D-NY)
Alexander (D-AR)
Allen (R-VA)
Anderson (D-CA)
Andrews (D-ME)
Andrews (D-NJ)
Andrews (D-TX)
Anthony (D-AR)
Aspin (D-WI)
Atkins (D-MA)
AuCoin (D-OR)
Bacchus (D-FL)
Bellenson (D-CA)
Bentley (R-MD)
Bereuter (R-NE)
Berman (D-CA)
Bevill (D-AL)
Bilbray (D-NV)
Blackwell (D-PA)
Boehlert (R-NY)
Bonoir (D-MI)
Boucher (D-VA)
Boxer (D-CA)
Brewster (D-OK)
Brooks (D-TX)
Browder (D-AL)
Brown (D-CA)
Bruce (D-IL)
Bryant (D-TX)
Bustamente (D-TX)
Byron (D-MD)
Campbell (R-CA)
Campbell (D-CO)
Cardin (D-MD)
Carper (D-DE)
Carr (D-MI)
Chandler (R-WA)
Chapman (D-TX)
Clay (D-MO)
Clement (D-TN)
Clinger (R-PA)
Coleman (R-MO)
Coleman (D-TX)
Collins (D-IL)
Collins (D-MI)
Condit (D-CA)
Conyers (D-MI)
Cooper (D-TN)
Coughlin (R-PA)
Cox (D-IL)
Coyne (D-PA)
Cramer (D-AL)
Darden (D-GA)
DeFazio (D-OR)
DeLauro (D-CT)
Dellums (D-CA)
Derrick (D-SC)
Dicks (D-WA)
Dingell (D-MI)
Dixon (D-CA)
Dooley (D-CA)
Dorgan (D-ND)
Downey (D-NY)
Durbin (D-IL)
Dwyer (D-NJ)
Dymally (D-CA)
Early (D-MA)
Eckart (D-OH)
Edwards (D-CA)
Edwards (D-TX)
Engel (D-NY)
English (D-OK)
Erdreich (D-AL)
Espy (D-MS)
Evans (D-IL)
Fascell (D-FL)
Fawell (R-IL)
Fazio (D-CA)
Feighan (D-OH)
Fish (R-NY)
Flake (D-NY)
Foglietta (D-PA)
Foley (D-WA)
Ford (D-MI)
Ford (D-TN)
Frank (D-MA)
Franks (R-CT)
Frost (D-TX)
Gallo (R-NJ)
Gaydos (D-PA)
Gejdenson (D-CT)
Gekas (R-PA)
Gephardt (D-MO)
Geren (D-TX)
Gibbons (D-FL)
Gilchrest (R-MD)
Gilman (R-NY)
Glickman (D-KS)
Gonzalez (D-TX)
Goodling (R-PA)
Gordon (D-TN)
Gradison (R-OH)
Grandy (R-IA)
Green (R-NY)
Guarini (D-NJ)
Gunderson (R-WI)
Hamilton (D-IN)
Harris (D-AL)
Hayes (D-IL)
Hefner (D-NC)
Hertel (D-MI)
Hoagland (D-NE)
Hobson (R-OH)
Hochbrueckner (D-NY)
Horn (D-MO)
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Houghton (R-NY)
Hoyer (D-MD)
Hubbard (D-KY)
Hughes (D-NJ)
Jacobs (D-IN)
Jefferson (D-LA)
Jenkins (D-GA)
Johnson (R-CT)
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Johnston (D-FL)
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Jontz (D-IN)
Kaptur(D-OH)
Kennedy (D-MA)
Kennelly (D-CT)
Kleczka (D-WI)
Klug (R-WI)
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Kopetski (D-OR)
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Lancaster (D-NC)
Lantos (D-CA)
Laughlin (D-TX)
Leach (R-IA)
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Lloyd (D-TN)
Long (D-IN)
Lowey (D-NY)
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Markey (D-MA)
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Matsui (D-CA)
McCloskey (D-IN)
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McNulty (D-NY)
Meyers (R-KS)
Mfume (D-MD)
Miller (D-CA)
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Mink (D-HI)
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Mollnari (R-NY)
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Price (D-NC)
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Ramstad (R-MN)
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Waxman (D-CA)
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Wheat (D-MO)
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Williams (D-MT)
Wilson (D-TX)
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Billey (R-VA)
Boehner (R-OH)
Borski (D-PA)
Broomfield (R-MI)
Bunning (R-KY)
Burton (R-IN)
Callahan (R-AL)
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Coble (R-NC)
Combest (R-TX)
Costello (D-IL)
Cox (R-CA)
Crane (R-IL)
Cunningham (R-CA)
Dannemeyer (R-CA)
Davis (R-MI)
de la Garza (D-TX)
DeLay (R-TX)
Dickinson (R-AL)
Donnelly (D-MA)
Doolittle (R-CA)
Dornan (R-CA)
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Duncan (R-TN)
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Ewing (R-IL)
Fields (R-TX)
Gallegly (R-CA)
Gillmor (R-OH)
Gingrich (R-GA)
Goss (R-FL)
Hall (D-OH)
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Hammerschmidt (R-AR)
Hancock (R-MO)
Hansen (R-UT)
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Hayes (D-LA)
Hefley (R-CO)
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Hyde (R-IL)
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Ireland (R-FL)
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Kasich (R-OH)
Kildee (D-MI)
Kolter (D-PA)
Kyl (R-AZ)
LaFalce (D-NY)
Lagomarsino (R-CA)
Lent (R-NY)
Lewis (R-CA)
Lewis (R-FL)
Lightfoot (R-IA)
Lipinski (D-IL)
Livingston (R-LA)
Lowery (R-CA)
Luken (D-OH)
Manton (D-NY)
Marlenee (R-MT)
Mavroules (D-MA)
Mazzoli (D-KY)
McCandless (R-CA)
McCollum (R-FL)
McCrery (R-LA)
McDade (R-PA)
McEwen (R-OH)
McGrath (R-NY)
McMillan (R-NC)
Michel (R-IL)
Miller (R-OH)
Mollohan (D-WV)
Montgomery (D-MS)
Moorhead (R-CA)
Murphy (D-PA)
Nichols (R-KS)
Nowak (D-NY)
Nussle (R-IA)
Oberstar (D-MN)
Ortiz (D-TX)
Orton (D-UT)
Oxley (R-OH)
Packard (R-CA)
Parker (D-MS)
Paxon (R-NY)
Peterson (D-MN)
Petri (R-WI)
Poshard (D-IL)
Quillen (R-TN)
Ray (D-GA)
Rhodes (R-AZ)
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Ritter (R-PA)
Roberts (R-KS)
Roe (D-NJ)
Rogers (R-KY)
Rohrabacher (R-CA)
Ros-Lehtinen (R-FL)
Roth (R-WI)
Santorum (R-PA)
Sarpalius (D-TX)
Saxton (R-NJ)
Schaefer (R-CO)
Schulze (R-PA)
Sensenbrenner(R-WI)
Shaw (R-FL)
Shuster (R-PA)
Smith (R-NJ)
Smith (R-OR)
Solomon (R-NY)
Spence (R-SC)
Staggers (D-WV)
Stallings (D-ID)
Stearns (R-FL)
Stenholm (D-TX)
Stump (R-AZ)
Sundquist (R-TN)
Tallon (D-SC)
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Walsh (R-NY)
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The Future

In a last-minute attempt to obfuscate the issues surrounding the gag rule regulations, President Bush had sent to Capitol Hill copies of a memorandum he had sent to DHHS Secretary Louis Sullivan the evening before the first House vote on the conference report. Seeking to respond to many of the charges leveled against the gag rule, the memo stated that "we must ensure that the confidentiality of the doctor/patient relationship will be preserved and that the operation of the Title X family planning program is compatible with free speech and the highest standards of medical care." Thus, ostensibly to "clarify" the matter, Bush directed Sullivan to implement the regulations so as to allow a woman to receive complete medical information "about her condition from a physician," ensure that Title X projects provide necessary referrals to "appropriate health care facilities when medically indicated" and allow referrals to "full service health care providers that perform abortions but not to providers whose principal business is providing abortions."

The import of the memo was quickly dismissed by most members, especially after an opinion was issued by the Congressional Research Service's legal department that the statement, by itself, "is not a modification" of the regulations, which explicitly state that *no* Title X provider — whether physician or not — may provide any counseling related to abortion. Others pointed out that the president seemed to be misinformed as to the realities of family planning clinics, where trained nursing professionals provide the bulk of direct patient services under the standing orders of physicians.

Nevertheless, the memorandum, which has been forwarded by Sullivan to DHHS Assistant Secretary James Mason for implementation, is now creating some confusion within DHHS. Mason has stated that there will need to be a "lengthy process" before the regulations are implemented, including a request for letters from Title X projects that they will comply. First, however, "guidances" must be written to resolve the conflicts between the regulations and the president's memo, and they must be approved by DHHS' general counsel for consistency. Thus far, Mason has asserted publicly that the guidances will allow a physician to discuss with a pregnant woman abortion as an option if the physician so decides.

Still, in many ways, Title X-funded clinics have no more clear idea of what will be enforced than before Congress' recent actions. In the meantime, enough political progress may have been made on the issue that, by the time some impact has been felt by the clinics, Congress may see fit to act again.

Election Results Mixed As Voters Give Economy Priority Over Abortion

As the year's biggest legislative battle — over the gag rule — was reaching its climax in Congress and a federal court dealt another serious blow to the security of *Roe v. Wade*, the off-year elections brought mixed results for reproductive rights. In this year's electoral process, the abortion issue clearly took a back seat to economic concerns. As a result, major losses were sustained in two state legislatures and an important governor's seat where restrictive legislation has been resisted until now. The significant good news is that the one abortion-related ballot measure this year, a prochoice initiative, appears to have passed in Washington state. It seems that where abortion is the issue, the prochoice side can still reap the benefit.

Washington is an overwhelmingly prochoice state that was one of the first to reform its abortion law in 1970 and one of the nine remaining states that voluntarily pays for abortions for its indigent residents. Against that backdrop, and looking ahead to the eventual demise of *Roe*, prochoice advocates there saw this year's election as an opportunity to revise the state's pre-*Roe* law to codify the principles of *Roe* and to reflect Washington's abortion funding policy. The 1970 law, while liberal for its era, was enjoined once *Roe* was decided because of its many restrictions including parental consent and spousal notification requirements. The ballot measure would provide statutory protection for abortion rights in Washington, including publicly funded abortions for poor women, that will become increasingly important as *Roe* continues to erode in the federal courts.

The Washington ballot measure appears to have won, 50.1 percent to 49.9, but, under state law, the closeness of the vote requires an automatic recount. It took more than two weeks following election day to tally all the absentee ballots, which seem largely responsible for the measure's apparent passage. The surprisingly narrow victory in such a prochoice state illustrates the unpredictability of initiating a ballot measure campaign. A testament to the strength of the prochoice position is that it prevailed while a popular legislative term-limitation measure, which was leading in the polls only days before the election, failed, as did a measure to allow euthanasia, which along with the abortion measure had been the subject of intense opposition from the Roman Catholic Church. Still, the Washington experience demonstrates the high-risk nature of attempting a "pre-emptive strike" to protect abortion rights at the state level before the constitutional right to abortion is really lost.

Impact on FOCA Debated

Initiating a pro-active campaign to protect abortion rights at the state level, whether through the legislature or popular vote, is controversial for other reasons as well. One important consideration is the effect that a successful effort might have on the real and political imperatives to enact the Freedom of Choice Act (FOCA), which is designed to protect the residents of all states equally. If other states are able to enact prochoice laws, some of the pressure to deal with the issue at the national level would be removed. And the consequences for the majority of states where passage of protective legislation is unlikely could be disastrous, since they would be left fending for

themselves as federal legislators from protected states might take the position that their constituents are already taken care of. The resulting "patchwork quilt" of abortion laws would leave American women's privacy rights a matter of geography once again.

Pennsylvania Case Appealed

Another impetus for congressional action on FOCA is the recent decision by the U.S. Court of Appeals for the Third Circuit to uphold most of Pennsylvania's restrictive abortion law and effectively discard the constitutional reasoning underlying *Roe* (*WM* 17, Oct. 31, 1991). The American Civil Liberties Union (ACLU) and Planned Parenthood Federation of America (PPFA) announced their appeal of the decision at a November 7 press conference. ACLU attorney Kathryn Kolbert declared that the groups "have presented the nine justices with one — and only one — question: Has the Supreme Court overruled *Roe v. Wade*?" It is time, she said, "to settle this question once and for all and to determine whether *Roe v. Wade* remains the law of the land."

That question arises from the lower court's ruling that a majority of the Supreme Court no longer supports the holding in *Roe* that abortion is a fundamental right that can be infringed only if it serves a "compelling" state interest. Instead, the lower court held, states may impose conditions on abortion as long as they do not place an "undue burden" or constitute an "absolute obstacle" on a woman's decision to terminate her pregnancy and are "rationally related" to a legitimate state interest — a less stringent standard than has been applied in the past in judging restrictions on abortion.

Whether the Court will hear the appeal during its current term — and therefore decide the case by next summer, just months before the 1992 elections — may hinge on how quickly Pennsylvania files its appeal of the portion of the appeals court's decision declaring the law's spousal notification requirement unconstitutional. (In the same opinion, the lower court upheld a 24-hour waiting period, various informed consent and reporting requirements and a parental consent provision.) The state has announced its intention to appeal, but if it takes the full 90 days it has to file, it would likely be too late to schedule oral arguments before next fall.

Kolbert and PPFA President Faye Wattleton acknowledged that the appeal could accelerate the opportunity for the Supreme Court to reverse *Roe*, which at least some of the justices are clearly anxious to do. Kolbert noted, however, that for women living in Pennsylvania, New Jersey and Delaware (the three states under the Third Circuit's jurisdiction), the constitutional right of privacy "has already been lost." Wattleton pointed out that because abortion cases in Guam, Louisiana and Utah are already working their way through the courts, "we're talking about one year to two years," at the most, before another case reaches the Court. Kolbert added that the groups decided to appeal now "to clarify the issues as quickly as possible." If the Court reaffirms *Roe*, "we must immediately move to insure that all women can exercise their liberty to choose abortion free of governmental interference. If [it does not do so], American women must look elsewhere for redress."

Voters Not Focused on Abortion

Aside from litigation under some state constitutions, that "elsewhere" lies primarily in the political process, both electoral and legislative. Unfortunately, the newly elected legislatures in New Jersey and Virginia will likely be substantially more hostile to abortion rights than before, despite the fact that few of the individual races turned on the abortion issue itself. In the past, prochoice leaders in both legislatures have successfully killed parental notification for abortion bills. Now, the parental notification issue presents a much more serious threat. Ironically, New Jersey and Virginia were the two states where abortion politics were credited with the election of both states' prochoice governors in November 1989 — the first statewide elections held after the Supreme Court decided the *Webster* case.

In Mississippi, meanwhile, Democratic Gov. Ray Mabus, who repeatedly vetoed abortion limitation bills, lost his re-election bid to conservative, antiabortion Republican Kirk Fordice. Louisiana Gov. Buddy Roemer (R), who also vetoed restrictive abortion legislation, lost his re-election bid in a primary, leaving former Gov. Edwin Edwards (D) and state legislator David Duke (R) in a run-off. Both Edwards and Duke are antiabortion, although Duke formerly was an active supporter of abortion — at least for welfare recipients. While he recently recanted, having been "born again," and now opposes abortion altogether, he did introduce legislation in the Louisiana legislature that would have provided financial incentives for welfare recipients to accept Norplant. Duke lost to Edwards, but abortion was not an issue in the campaign. It did come up in Kentucky, however, where U.S. Rep. Larry Hopkins (R) promised to shut down all the state's abortion clinics. He lost the open governor's seat to prochoice Lt. Gov. Brereton Jones (D).

Pennsylvania held the only U.S. Senate election this year, to fill the vacancy left by the death of prochoice Republican Sen. John Heinz. Sen. Harris Wofford (D), who was appointed by Gov. Bob Casey (D) to fill Heinz' seat temporarily, beat former Governor and U.S. Attorney General Richard Thornburgh (R) in an upset. Wofford's main theme was the call for a national health care plan. Abortion did not play a major role, since both candidates have sent mixed signals on the issue. Wofford was suspect because he endorsed the Pennsylvania antiabortion law now before the Supreme Court. At the same time, since he joined the Senate in April, Wofford has voted for the prochoice position on all the issues presented to him, ranging from the gag rule to the Mexico City policy to abortion funding and parental notification. Thornburgh, meanwhile, was prochoice in his first gubernatorial term, but since having served in the Bush administration his views have become much more conservative across-the-board, including on abortion.

Perhaps the main lesson emanat-

ing from these election results is the importance — and difficulty — of keeping reproductive rights in the forefront of the mind of the electorate. The issue still seems to resonate positively for the prochoice side, but the message must be loud and clear. Prochoice candidates at all levels may be able to win with "choice," but only if they choose to. Since the 1992 presidential and congressional election high season is virtually upon us, this lesson could not have come at a more important time. This is especially crucial as the constitutionally protected right to abortion edges ever closer to the precipice.

Newsbriefs

■ Separate House-Senate conference committees working on the fiscal 1992 defense appropriations and authorization bills each abandoned parallel efforts to overturn a 1988 **Defense Department antiabortion policy** that prohibits women in the military and military dependents stationed overseas from using their own funds to pay for an abortion at a base hospital. Despite prochoice majorities in both the House and Senate, and even within the two conference committees, the conferees succumbed in the face of presidential veto promises and the pressure to expedite enactment of the two defense bills before the end of the congressional session. Even though no federal funds would be involved if the policy were reversed, the president insisted he would veto the bills solely over the abortion provision. Conference managers apparently feared that after a veto other delicate agreements in the bills might unravel if Congress had to reopen debate on the abortion language. Prochoice advocates had reasoned that the president would be loathe to veto a defense bill as quickly as a bill to fund social programs so they were interested in seeing the first showdown with the president on abortion rights in this context. They also had counted on the continued support of prochoice conferees, such as Sens. Robert Byrd (D-WV), Ted Stevens (R-AK) and Warren Rudman (R-NH), whose apparent priority, however, was to ensure smooth passage of the defense bills rather than reaffirm their prochoice positions.

■ Congress passed a resolution declaring the week beginning October 20, 1991 as **"World Population Awareness Week"** for the purpose of calling public attention to the human and environmental devastation associated with rapid population growth. In response, President Bush issued a proclamation in accordance with the resolution, but in so doing appeared to mock the notion of any global population problem. He echoed the infamous 1984 Reagan administration declaration at the International Conference on Population in Mexico City saying that "population growth, in and of itself, is a neutral phenomenon," and that "every human being represents hands to work, and not just another mouth to feed." He added that "because people are producers as well as consumers, population growth can also be a sign and source of strength." While acknowledging that rapid population growth sometimes can be detrimental, he attributed the problem primarily to developing countries' "failure to adopt market-oriented policies." He eventually did mention international family planning aid as "one part of a comprehensive economic development assistance program" that includes maternal and child health, improved sanitation, reduction of illiteracy and alleviation of poverty among many worthy efforts to promote sustainable development.

On the same subject but taking a different approach, a first-time substantive **statement on the environment from the National Conference of Catholic Bishops** (NCCB) was approved at its semiannual meeting on November 14. NCCB considers overpopulation a drain on world resources that is detrimental to the global environment and encourages the use of natural family planning to help curb excessive population growth. According to Archbishop John Roach of St. Paul-Minneapolis, however, "overconsumption is in fact a larger problem than overpopulation." The final statement emphasizes the obligation of developed nations such as the United States to reduce consumption of natural resources in an effort to lessen pollution. While it is certainly true that addressing overconsumption is an important part of the equation in the effort to protect the global environment, it is questionable that it is the "larger" problem. Furthermore, the NCCB statement implies that effective means of reducing rapid population growth do not deserve serious attention. At the same meeting, in a statement urging a national campaign on behalf of children, NCCB reaffirmed its commitment to promote antiabortion legislation.

■ On November 17, the Fox Broadcasting Company became the first national network to broadcast **television advertisements for condoms**. However, Fox has made clear that it will accept the commercials, to be aired during primetime, only if condoms are promoted as a method of disease prevention; those that refer to contraception will not be used. Fox has already rejected one advertisement after ruling that the ad violated the required exclusive focus on disease prevention because the word "spermicide" appeared on the condom box — notwithstanding that in laboratory tests, spermicides kill organisms responsible for gonorrhea, chlamydia and several viral infections including HIV. Ultimately, it is up to Fox's individual affiliate stations to make the decision whether or not to air the disease prevention-focused condom commercials. Meanwhile, although a spokesperson for CBS said that network is reviewing its policy of refusing such advertisements, spokepersons for ABC and NBC have announced that those networks are not currently planning to change their policies on condom advertising.

Washington Memo

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Last-Ditch Bid to Block Gag Rule Compliance Fails . . .

House Passes Title X Renewal Bill, But Veto Expected and Override Uncertain

On April 30, the House of Representatives voted, 268-150, to repudiate the Title X gag rule and to reauthorize the nation's family planning program for five years. Despite this overwhelming show of support, however, the fact remains that a veto from President Bush is a near certainty, and even Title X's chief supporters realize that a successful override will be exceedingly difficult to obtain. To make the situation worse, the May 4 deadline for Title X grantees to formally signal their intent to comply with the regulations has passed, and a last-ditch legal effort to block the regulations before that time has failed.

House action came during consideration of H.R.3090, introduced by Rep. Henry Waxman (D-CA), which would reauthorize the Title X program through fiscal 1997 and raise the funding ceiling to $180 million for fiscal 1993. In addition to language permanently overturning the gag rule, the bill requires Title X-funded clinics that also provide abortions with other funds to follow the laws of the states where they are located regarding parental notification for minors' abortion procedures. [Having steeled themselves for a battle on the notification issue, a first-time confrontation for the full House, proponents of Title X were surprised when Rep. Thomas Bliley (R-VA) withdrew his strict parental notification amendment two days before the vote. Since H.R.3090 already deferred to state laws on this question, straw polls had shown that many members preferred that approach to setting a federal standard far more restrictive than most state laws now in force.]

Clarifying Amendments Adopted

The debate on the gag rule and the bill itself fell within predictable parameters. But what was surprising was the sheer amount of debate; over 50 members took the floor to speak about both the need for family planning and for the free flow of information between family planning patient and health professional. Challenging his colleagues who oppose abortion to support the bill, Rep. Richard Durbin (D-IL) asked, "Why is it that whenever a family planning issue comes to this floor those who have spoken today always find a reason to oppose it, and yet stand and pronounce that they are for family planning?"

As one of the members with an antiabortion voting record who makes no apologies for opposing the gag rule, Durbin offered one of two amendments intended to clarify the gag rule reversal language that was already in the bill — both of which were adopted on voice votes. To counter the argument that overturning the gag rule would "force speech" on medical professionals, Durbin offered a "conscience clause" allowing individual clinicians or entire Title X projects to opt out of counseling women about abortion if they were morally opposed to doing so, so long as they refer their patients to a nearby clinic where they can get the information they request.

The Durbin amendment left many antiabortion members at a loss as to how to oppose it, but oppose it they did. Rep. Henry Hyde (R-IL) urged the amendment's defeat on the grounds that it "forced complicity" with abortion — but he could not explain why the Durbin provision for abortion information was any different from the policy long in effect under Title X for provision of family planning services. That

Also in this issue . . .

is, if a Title X-funded clinic — such as a Catholic hospital — does not for reasons of conscience offer the full range of contraceptive methods, it refers patients to another clinic in the area that does.

The other "clarifying" amendment was offered by Rep. Ralph Regula (R-OH), who sought to make clear that women who are happy about their pregnancies would not be forced to hear information about abortion. The Regula amendment restates pre-gag rule Title X policy — that information and referrals concerning abortion would be provided only when requested. [Another amendment urging family planning clinics to "buy American" was also adopted without debate.]

While the debate on the gag rule focused largely on the rights of family planning providers, Rep. Nancy Johnson (R-CT) was one of the few who rose to discuss the impact of the gag rule on patients. Decrying the administration's attempt to fudge the issue by allowing doctors, but only doctors, to counsel Title X patients, she alluded to the fact that most services in family planning clinics are provided by nurses and other trained health professionals. "What is really wrong about the gag rule is that it allows doctors to tell you everything, but there are no doctors," she said. "The gag rule is a cruel hoax that offers services it does not provide."

One of two physicians in the House, Rep. Jim McDermott (D-WA) echoed the same theme, saying, "The President's attempt to weasel around fundamental medical ethics represents cynical politics at its worst. The gag rule is nothing but voodoo medicine. It is dishonest, it will not work, and it is the wrong prescription for the country."

Compliance Deadline Nears

The bill now goes to conference with S.323, originally introduced by Sen. John Chafee (R-RI) and passed last summer, which would overturn the gag rule but does not include a formal reauthorization of Title X (*WM*-12, July 22, 1991). How soon that occurs depends upon a wide range of outside factors, including the schedule of Congress and the sense of urgency in the field. Meanwhile, a last-ditch attempt to block the regulations in federal court before May 4, the deadline set by the Department of Health and Human Services (DHHS) for Title X grantees to sign documents stating whether they intend to comply (within 30 days), has failed.

Two lawsuits were filed arguing that various administration statements and its "guidance" to grantees, that doctors may counsel women about abortion in Title X clinics, represent sufficient change from the original gag rule to warrant new notice and comment procedures under the Administrative Procedures Act (*WM*-7, April 20, 1992). The suit filed by Planned Parenthood of America received a preliminary hearing May 1, but the judge declined to issue an injunction blocking the rules at this time, while holding open the possibility for further action at a later date. The underlying regulations could not be enjoined, she said, because their constitutionality had been decided by the Supreme Court in the *Rust* case; and in the "public's interest," she would not enjoin the guidance, which allows at least some counseling by doctors. A hearing in a similar case filed by the National Family Planning and Reproductive Health Association is slated for May 28.

Thus, it will be weeks if not months before all of the legislative and legal issues around the gag rule have been settled. In the meantime, Title X grantees have been struggling with the decision whether to provide a statement of intent to comply. Several model responses are emerging: outright statements of compliance from some grantees, outright refusals to comply from others (understanding that they must give up Title X funds) and with many grantees somewhere in the middle — seeking to find ways to retain their Title X funds while still ensuring that their clients get the information and counseling they request with funds from other sources. Whether and for how long they will be able to do so remains to be seen.

'Standard of Review' Is Argued Before High Court, But Roe v. Wade Is the Issue

Whether abortion remains a fundamental right entitled to the highest level of constitutional protection was the central issue in the hour-long oral argument on the Pennsylvania abortion law before the U.S. Supreme Court April 22. The law imposes various restrictions on abortion, including a waiting period and parental consent, informed consent and spousal notice requirements, but the arguments focused almost exclusively on the critical question of what standard the Court should use to judge the constitutionality of those provisions.

ACLU attorney Kathryn Kolbert urged the Court to reaffirm its holding in *Roe v. Wade* that the decision to have an abortion is a fundamental right that cannot be abridged unless a state can show that it has a "compelling" interest in doing so. This standard of review, known as strict scrutiny, is the toughest test for states to meet and has been used by the Court since 1973 to strike down most restrictions on abortion, including some virtually identical to those contained in the Pennsylvania law. "To abandon strict scrutiny for a less protective standard," Kolbert told the Court, "would be the same as overruling *Roe*."

But Pennsylvania Attorney General Ernest Preate argued that the justices could uphold his state's law without

Washington Memo

Cory Richards
Vice President for Public Policy

Terry Sollom, Editor

Regina Toler, Editorial Assistant

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House Members' Positions on Title X Gag Rule
(as determined by three votes†)

Members Voting Consistently for Gag Rule Reversal (255)

Democrats (210)
Abercrombie (HI)
Ackerman (NY)
Alexander (AR)
Anderson (CA)
Andrews (TX)
Andrews (NY)
Andrews (ME)
Anthony (AR)
Aspin (WI)
Atkins (MA)
AuCoin (OR)
Bacchus (FL)
Bellenson (CA)
Berman (CA)
Bevill (AL)
Bilbray (NV)
Blackwell (PA)
Bonior (MI)
Boucher (VA)
Boxer (CA)
Brewster (OK)
Brooks (TX)
Browder (AL)
Brown (CA)
Bruce (IL)
Bryant (TX)
Bustamante (TX)
Byron (MD)
Cardin (MD)
Carper (DE)
Carr (MI)
Chapman (TX)
Clay (MO)
Clement (TN)
Coleman (TX)
Collins (IL)
Condit (CA)
Conyers (MI)
Cooper (TN)
Cox (IL)
Coyne (PA)
Cramer (AL)
Darden (GA)
DeFazio (OR)
Dellums (CA)
Derrick (SC)
Dicks (WA)
Dingell (MI)
Dixon (CA)
Dorgan (ND)
Downey (NY)
Durbin (IL)
Dwyer (NJ)
Dymally (CA)
Early (MA)
Eckart (OH)
Edwards (TX)
Edwards (CA)
Engel (NY)
English (OK)
Erdreich (AL)
Espy (MS)
Evans (IL)
Fascell (FL)
Fazio (CA)
Feighan (OH)
Flake (NY)
Foglietta (PA)
Ford (TN)
Ford (MI)
Frank (MA)
Frost (TX)
Gejdenson (CT)
Gephardt (MO)
Geren (TX)
Gibbons (FL)
Glickman (KS)
Gonzalez (TX)
Gordon (TN)
Guarini (NJ)
Hamilton (IN)
Harris (AL)
Hatcher (GA)
Hayes (IL)
Hefner (NC)
Hertel (MI)
Hoagland (NE)
Hochbrueckner (NY)
Horn (MO)
Hoyer (MD)
Hubbard (KY)
Hughes (NJ)
Jacobs (IN)
Jefferson (LA)
Jenkins (GA)
Johnson (SD)
Johnston (FL)
Jones (GA)
Jones (NC)
Jontz (IN)
Kaptur (OH)
Kennedy (MA)
Kennelly (CT)
Kleczka (WI)
Kopetski (OR)
Kostmayer (PA)
Lancaster (NC)
Lantos (CA)
LaRocco (ID)
Laughlin (TX)
Lehman (CA)
Lehman (FL)
Levin (MI)
Levine (CA)
Lewis (GA)
Lloyd (TN)
Long (IN)
Lowey (NY)
Markey (MA)
Martinez (CA)
Matsui (CA)
McCloskey (IN)
McCurdy (OK)
McDermott (WA)
McHugh (NY)
McMillen (MD)
McNulty (NY)
Mfume (MD)
Miller (CA)
Mineta (CA)
Mink (HI)
Moody (WI)
Moran (VA)
Morrison (WA)
Mrazek (NY)
Nagle (IA)
Natcher (KY)
Neal (MA)
Neal (NC)
Obey (WI)
Olin (VA)
Oliver (MA)
Owens (NY)
Owens (UT)
Pallone (NJ)
Panetta (CA)
Pastor (AZ)
Patterson (SC)
Payne (NJ)
Payne (VA)
Pease (OH)
Pelosi (CA)
Penny (MN)
Peterson (FL)
Pickett (VA)
Pickle (TX)
Price (NC)
Rangel (NY)
Reed (RI)
Richardson (NM)
Roemer (IN)
Rose (NC)
Rostenkowski (IL)
Rowland (GA)
Roybal (CA)
Russo (IL)
Sabo (MN)
Sangmeister (IL)
Savage (IL)
Sawyer (OH)
Scheuer (NY)
Schroeder (CO)
Schumer (NY)
Serrano (NY)
Sharp (IN)
Sikorski (MN)
Sisisky (VA)
Skaggs (CO)
Slattery (KS)
Slaughter (NY)
Smith (IA)
Solarz (NY)
Spratt (SC)
Stark (CA)
Stokes (OH)
Studds (MA)
Swett (NH)
Swift (WA)
Synar (OK)
Tanner (TN)
Thomas (GA)
Thornton (AR)
Torres (CA)
Torricelli (NJ)
Towns (NY)
Traficant (OH)
Unsoeld (WA)
Valentine (NC)
Vento (MN)
Visclosky (IN)
Washington (TX)
Waxman (CA)
Weiss (NY)
Wheat (MO)
Williams (MT)
Wilson (TX)
Wise (WV)
Wolpe (MI)
Wyden (OR)
Yates (IL)
Sanders (I-VT)

Republicans (44)
Allen (VA)
Bereuter (NE)
Boehlert (NY)
Campbell (CA)
Chandler (WA)
Clinger (PA)
Coleman (MO)
Coughlin (PA)
Fawell (IL)
Fish (NY)
Franks (CT)
Gallo (NJ)
Gekas (PA)
Gilchrest (MD)
Gilman (NY)
Green (NY)
Hobson (OH)
Horton (NY)
Houghton (NY)
Johnson (CT)
Klug (WI)
Leach (IA)
Machtley (RI)
Martin (NY)
Meyers (KS)
Miller (WA)
Molinari (NY)
Morella (MD)
Porter (IL)
Pursell (MI)
Ramstad (MN)
Ravenel (SC)
Regula (OH)
Ridge (PA)
Roukema (NJ)
Schiff (NM)
Shays (CT)
Skeen (NM)
Smith (TX)
Snowe (ME)
Thomas (CA)
Upton (MI)
Zeliff (NH)
Zimmer (NJ)

Members Voting Consistently to Uphold Gag Rule (137)

Democrats (37)
Annunzio (IL)
Applegate (OH)
Bennett (FL)
Borski (PA)
Costello (IL)
de la Garza (TX)
Donnelly (MA)
Hall (TX)
Hall (OH)
Hayes (LA)
Hutto (FL)
Kanjorski (PA)
LaFalce (NY)
Lipinski (IL)
Luken (OH)
Manton (NY)
Mavroules (MA)
Mazzoli (KY)
Mollohan (WV)
Montgomery (MS)
Murphy (PA)
Nowak (NY)
Ortiz (TX)
Orton (UT)
Parker (MS)
Peterson (MN)
Poshard (IL)
Ray (GA)
Roe (NJ)
Sarpalius (TX)
Staggers (WV)
Stenholm (TX)
Tallon (SC)
Tauzin (LA)
Taylor (MS)
Volkmer (MO)
Yatron (PA)

Republicans (100)
Allard (CO)
Archer (TX)
Armey (TX)
Baker (LA)
Barrett (NE)
Barton (TX)
Bateman (VA)
Billirakis (FL)
Billey (VA)
Boehner (OH)
Broomfield (MI)
Bunning (KY)
Burton (IN)
Callahan (AL)
Camp (MI)
Coble (NC)
Combest (TX)
Cox (CA)
Crane (IL)
Cunningham (CA)
Davis (MI)
DeLay (TX)
Doolittle (CA)
Dornan (CA)
Dreier (CA)
Duncan (TN)
Edwards (OK)
Emerson (MO)
Ewing (IL)
Gallegly (CA)
Gillmor (OH)
Gingrich (GA)
Goss (FL)
Hammerschmidt (AR)
Hancock (MO)
Hansen (UT)
Hastert (IL)
Hefley (CO)
Henry (MI)
Herger (CA)
Holloway (LA)
Hopkins (KY)
Hunter (CA)
Hyde (IL)
Inhofe (OK)
Ireland (FL)
James (FL)
Johnson (TX)
Kasich (OH)
Kyl (AZ)
Lagomarsino (CA)
Lent (NY)
Lewis (FL)
Lightfoot (IA)
Livingston (LA)
Lowery (CA)
McCollum (FL)
McCrery (LA)
McGrath (NY)
Michel (IL)
Miller (OH)
Moorhead (CA)
Nussle (IA)
Oxley (OH)
Packard (CA)
Paxon (NY)
Petri (WI)
Quillen (TN)
Rhodes (AZ)
Rinaldo (NJ)
Ritter (PA)
Roberts (KS)
Rogers (KY)
Rohrabacher (CA)
Ros-Lehtinen (FL)
Roth (WI)
Santorum (PA)
Saxton (NJ)
Schaefer (CO)
Schulze (PA)
Sensenbrenner (WI)
Shaw (FL)
Shuster (PA)
Smith (NJ)
Smith (OR)
Solomon (NY)
Spence (SC)
Stearns (FL)
Stump (AZ)
Sundquist (TN)
Taylor (NC)
Vander Jagt (MI)
Vucanovich (NV)
Walker (PA)
Walsh (NY)
Weber (MN)
Wolf (VA)
Wylie (OH)
Young (FL)
Young (AK)

Members With Inconsistent or Incomplete Votes (43)

Democrats (21)
Barnard (GA) ——NV••
Campbell (CO) + + NV•
Collins (MI) + + NV•
DeLauro (CT) + + NV•
Dooley (CA) + + NV•
Foley (WA) NV + NV•
Gaydos (PA) — + NV
Huckaby (LA) —— +
Kildee (MI) + ——
Kolter (PA) ——NV••
Moakley (MA) —— +
Murtha (PA) + + —
Oakar (OH) + + —
Oberstar (MN) + ——
Perkins (KY) + + —

Rahall (WV) — + —
Skelton (MO) + + —
Smith (FL) + + NV•
Stallings (ID) —— +
Traxler (MI) + + NV
Waters (CA) + + NV•

Republicans (22)
Ballenger (NC) —— +
Bentley (MD) + + NV
Dannemeyer (CA) ——NV••
Dickinson (AL) + — +
Fields (TX) ——NV••
Goodling (PA) + + —
Gradison (OH) — + +
Grandy (IA) + + —
Gunderson (WI) + + —
Kolbe (AZ) — + +
Lewis (CA) —— +
Marlenee (MT) ——NV
McCandless (CA) —— +
McDade (PA) ——NV••
McEwen (OH) ——NV••
McMillan (NC) —— +
Myers (IN) + + —
Nichols (KS) —— +
Riggs (CA) — + +
Thomas (WY) —— +
Weldon (PA) + ——
Whitten (MS) + + —

†Votes on Title X gag rule:
1) Vote on conference report on L—HHS bill with gag rule reversal language (Oct. 29, 1991).
2) Vote on attempt to override Bush veto of L—HHS bill (Nov. 19, 1991).
3) Vote on Title X reauthorization bill with gag rule reversal language (Apr. 30, 1992).

\+ Indicates vote for gag rule reversal.
— Indicates vote to uphold gag rule.
NV Indicates not voting.
• member on record in opposition to gag rule.
•• member on record in support of gag rule.

February 17, 2000

Ms. Lauren Supina, Deputy Assistant to the President
Director of Women's Initiatives and Outreach
122 Old Executive Office Building
Washington, D.C. 20503

Dear Ms. Supina:

We are writing on behalf of women's organizations with a strong interest in reproductive rights to request a meeting to discuss the Administration's final rule to permanently lift the "gag rule" affecting Title X family planning clinics. We understand that the final rule was sent to the Office of Management and Budget in late December. A timely resolution of this rulemaking is of the utmost importance to us.

Representatives of the American Association of University Women, the American Civil Liberties Union, the National Abortion and Reproductive Rights Action League, the National Family Planning and Reproductive Health Association, the National Women's Law Center, the National Partnership for Women and Families, Planned Parenthood Federation of America, and The Alan Guttmacher Institute would be available to meet with you, John Spotila, and Sylvia Mathews at your earliest convenience.

Please contact Nancy Zirkin at the American Association of University Women (785-7720) or Marilyn Keefe at the National Family Planning and Reproductive Health Association (293-3114) if we can be helpful in setting up the meeting.

Sincerely,

Judith M. DeSarno

Judith M. DeSarno
President and CEO, National Family Planning and Reproductive Health Association

cc: Sylvia Mathews, Deputy Director, Office of Management and Budget
John Spotila, Administrator, Office of Information and Regulatory Affairs

HHS' FINAL "GAG" RULE

Issue

The Department has requested expeditious E.O. review of a final rule **revoking** the 1988 "gag" rule. The Department requests expeditious consideration for the following reasons:

- Because this rule has a contentious history, it is preferable to promulgate it earlier rather than later this year; and
- A significant period of time has elapsed since the 1993 proposed rule, and the rule's status may be raised around the anniversary of Roe v. Wade (January 22nd.)

Background

Statute and Legislative History – Title X explicitly prohibits the use of family planning grant monies for abortion. (Abortion must not be considered as a means of contraception.) Furthermore, Representative Dingell, sponsor of the legislation, has clarified that grant monies must not be used for the *promotion or encouragement* of abortion.

Final Rule – On December 28, 1999, we received for E.O. 12866 review the final rule revoking the 1988 "gag" policy. In addition, the Department has submitted revised program guidance interpreting the rule. The final "gag" rule has not changed fundamentally from the proposed rule. However, refinements have been made to the program guidance in response to 1993 public comment. In particular:

- *The rule finalizes the revocation of previous 1988 rules explicitly prohibiting Title X grantees from disclosing abortion-related information when providing family planning services.* As clarified by the program guidance, the final rule allows for the disclosure of such information in a *nondirective* manner and *upon request.* Abortion-related information must be offered along with information regarding prenatal care/delivery and foster care/adoption. (As before, the rule requires that a special Advisory Committee must approve all informational and educational materials.) Referrals may be made for abortion services but additional affirmative action to secure abortion services for a patient is prohibited.

- *HHS further amended the program guidance to reflect the operational and health policy concerns of family planning clinics and public health departments.*

    - **Burdensome separation of physical and staff resources.** The pre-1988 policy was confusing and perceived as prohibiting shared waiting room facilities for abortion services and Title X family planning services. The revised guidance clarifies that shared waiting rooms, staff, and file systems are allowed as long as costs are properly prorated and allocated.
    - **Referral information.** The rule's preamble and revised program guidance clarify that referrals for abortion services may include providing a patient with the name, address, telephone number, *and "other factual information* (such as whether the provider accepts Medicaid, fee schedules, etc.)"

"GAG" RULE TIMELINE

February 2, 1988	Publication of final rules establishing "gag" policy.
January 22, 1993	Executive Memorandum suspending the 1988 "gag" rule.
February 5, 1993	Publication of interim final rule suspending the 1988 "gag" rule. Publication of proposed rule revoking the "gag" rule.
April 6, 1993	Comment period on proposed rule closes.
June 24, 1993	Publication of 1981 Title X Guidance and reopening of comment period. (146 public comments received.)
December 28, 1999	E.O. submission of final rule and revised program guidance.

(d)(1) A grant may be made or a contract entered into under section 1001 or 1005 only upon assurances satisfactory to the Secretary that informational or educational materials developed or made available under the grant or contract will be suitable for the purposes of this title and for the population or community to which they are to be made available, taking into account the educational and cultural background of the individuals to whom such materials are addressed and the standards of such population or community with respect to such materials.

(2) In the case of any grant or contract under section 1001, such assurances shall provide for the review and approval of the suitability of such materials, prior to their distribution, by an advisory committee established by the grantee or contractor in accordance with the Secretary's regulations. Such a committee shall include individuals broadly representative of the population or community to which the materials are to be made available.

VOLUNTARY PARTICIPATION

SEC. 1007 [300a-5]

The acceptance by any individual of family planning services or family planning or population growth information (including educational materials) provided through financial assistance under this title (whether by grant or contract) shall be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service or assistance from, or to participation in, any other program of the entity or individual that provided such service or information.

PROHIBITION OF ABORTION

SEC. 1008 [300a-6]

None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.

PLANS AND REPORTS*

SEC 1009

(a)Not later than seven months after the close of each fiscal year, the Secretary shall make a report to the Congress setting forth a plan to be carried out over the next five fiscal years for -

(1) extension of family planning services to all persons desiring such services,

(2) family planning and population research programs,

(3) training of necessary manpower for the programs authorized by this title and other Federal laws for which the Secretary has responsibility and which pertain to family planning, and

(4) carrying out the other purposes set forth in this title and the Family Planning Services and Population Research Act of 1970.

(b)Such a plan shall, at a minimum, indicate on a phased basis--

(1) the number of individuals to be served by family planning programs under this title and other

Vol. 58, No. 23
Friday, February 5, 1993

Presidential Documents

Title 3—

The President

Memorandum of January 22, 1993

The Title X "Gag Rule"

Memorandum for the Secretary of Health and Human Services

Title X of the Public Health Services Act provides Federal funding for family planning clinics to provide services for low-income patients. The Act specifies that Title X funds may not be used for the performance of abortions, but places no restrictions on the ability of clinics that receive Title X funds to provide abortion counseling and referrals or to perform abortions using non-Title X funds. During the first 18 years of the program, medical professionals at Title X clinics provided complete, uncensored information, including nondirective abortion counseling. In February 1988, the Department of Health and Human Services adopted regulations, which have become known as the "Gag Rule," prohibiting Title X recipients from providing their patients with information, counseling, or referrals concerning abortion. Subsequent attempts by the Bush Administration to modify the Gag Rule and ensuing litigation have created confusion and uncertainty about the current legal status of the regulations.

The Gag Rule endangers women's lives and health by preventing them from receiving complete and accurate medical information and interferes with the doctor-patient relationship by prohibiting information that medical professionals are otherwise ethically and legally required to provide to their patients. Furthermore, the Gag Rule contravenes the clear intent of a majority of the members of both the United States Senate and House of Representatives, which twice passed legislation to block the Gag Rule's enforcement but failed to override Presidential vetoes.

For these reasons, you have informed me that you will suspend the Gag Rule pending the promulgation of new regulations in accordance with the "notice and comment" procedures of the Administrative Procedure Act. I hereby direct you to take that action as soon as possible. I further direct that, within 30 days, you publish in the Federal Register new proposed regulations for public comment.

You are hereby authorized and directed to publish this memorandum in the Federal Register.

William J. Clinton

THE WHITE HOUSE,
Washington, January 22, 1993.

[FR Doc. 93-2973
Filed 2-3-93; 1:16 pm]
Billing code 3195-01-M

Editorial note: The Secretary of Health and Human Services is publishing documents relating to this memorandum in Part V of this issue. For the President's remarks on signing this memorandum, see p. 85 of the *Weekly Compilation of Presidential Documents.*

AUTHORITY: 42 U.S.C. 300a-4.

Subpart A - Project Grants for Family Planning Services

Sec.

§ 59.1 To what programs do these regulations apply?

The regulations of this subpart are applicable to the award of grants under section 1001 of the Public Health Service Act (42 U.S.C. 300) to assist in the establishment and operation of voluntary family planning projects. These projects shall consist of the educational, comprehensive medical, and social services necessary to aid individuals to determine freely the number and spacing of their children.

§59.2 Definitions.

As used in this subpart:

"Act" means the Public Health Service Act, as amended.

"Family" means a social unit composed of one person, or two or more persons living together, as a household.

"Low income family" means a family whose total annual income does not exceed 100 percent of the most recent Poverty Guidelines issued pursuant to 42 U.S.C. 9902(2). "Low-income family" also includes members of families whose annual family income exceeds this amount, but who, as determined by the project director, are unable, for good reasons, to pay for family planning services. For example, unemancipated minors who wish to receive services on a confidential basis must be considered on the basis of their own resources.

"Nonprofit," as applied to any private agency, institution, or organization, means that no part of the entity's net earnings benefit, or may lawfully benefit, any private shareholder or individual.

"Secretary" means the Secretary of Health and Human Services and any other officer or employee of the Department of Health and Human Services to whom the authority involved has been delegated.

"State" includes, in addition to the several States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the U.S.Virgin Islands, American Samoa, the U.S. Outlying Islands (Midway, Wake, et al.), the Marshall Islands, the Federated States of Micronesia and the Republic of Palau.

§59.3 Who is eligible to apply for a family planning services grant?

Any public or nonprofit private entity in a State may apply for a grant under this subpart.

§59.4 How does one apply for a family planning services grant?

(a) Application for a grant under this subpart shall be made on an authorized form.

(b) An individual authorized to act for the applicant and to assume on behalf of the applicant the obligations imposed by the terms and conditions of the grant, including the

regulations of this subpart, must sign the application.

(c) The application shall contain -

(1) A description, satisfactory to the Secretary, of the project and how it will meet the requirements of this subpart;

(2) A budget and justification of the amount of grant funds requested;

(3) A description of the standards and qualifications which will be required for all personnel and for all facilities to be used by the project; and

(4) Such other pertinent information as the Secretary may require.

§59.5 What requirements must be met by a family planning project?

(a) Each project supported under this part must:

(1) Provide a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (including infertility services and services for adolescents). If an organization offers only a single method of family planning, it may participate as part of a project as long as the entire project offers a broad range of family planning services.

(2) Provide services without subjecting individuals to any coercion to accept services or to employ or not to employ any particular methods of family planning. Acceptance of services must be solely on a voluntary basis and may not be made a prerequisite to eligibility for, or receipt of, any other services, assistance from or participation in any other program of the applicant. 1/

1/Section 205 of Pub. L. 94-63 states: "Any (1) officer or employee of the United States, (2) officer or employee of any State, political subdivision of a State, or any other entity, which

(3) Provide services in a manner which protects the dignity of the individual.

(4) Provide services without regard to religion, race, color, national origin, handicapping condition, age, sex, number of pregnancies, or marital status.

(5) Not provide abortions as a method of family planning.

(6) Provide that priority in the provision of services will be given to persons from low-income families.

(7) Provide that no charge will be made for services provided to any persons from a low-income family except to the extent that payment will be made by a third party (including a government agency) which is authorized to or is under legal obligation to pay this charge.

(8) Provide that charges will be made for services to persons other than those from low-income families in accordance with a schedule of discounts based on ability to pay, except that charges to persons from families whose annual income exceeds 250 percent of the levels set forth in the most recent Poverty Guidelines issued pursuant to 42 U.S.C. 9902(2) will be made in accordance with a schedule of fees designed to recover the reasonable cost of providing services.

(9) If a third party (including a Government agency) is authorized or legally obligated to pay for services, all reasonable efforts must be made to obtain the third-party payment without application of any discounts. Where the cost of services is to be reimbursed under title XIX, XX, or XXI of the Social Security Act, a written agreement with the title XIX, XX, or XXI agency is

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administers or supervises the administration of any program receiving Federal financial assistance, or (3) person who receives, under any program receiving Federal assistance, compensation for services, who coerces or endeavors to coerce any person to undergo an abortion or sterilization procedure by threatening such person with the loss of, or disqualification for the receipt of, any benefit or service under a program receiving Federal financial assistance shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

required.

(10)(i) Provide that if an application relates to consolidation of service areas or health resources or would otherwise affect the operations of local or regional entities, the applicant must document that these entities have been given, to the maximum feasible extent, an opportunity to participate in the development of the application. Local and regional entities include existing or potential subgrantees which have previously provided or propose to provide family planning services to the area proposed to be served by the applicant.

(ii) Provide an opportunity for maximum participation by existing or potential subgrantees in the ongoing policy decisionmaking of the project.

(11) Provide for an Advisory Committee as required by §59.6.

(b) In addition to the requirements of paragraph (a) of this section, each project must meet each of the following requirements unless the Secretary determines that the project has established good cause for its omission. Each project must:

(1) Provide for medical services related to family planning (including physician's consultation, examination prescription, and continuing supervision, laboratory examination, contraceptive supplies) and necessary referral to other medical facilities when medically indicated, and provide for the effective usage of contraceptive devices and practices.

(2) Provide for social services related to family planning, including counseling, referral to and from other social and medical services agencies, and any ancillary services which may be necessary to facilitate clinic attendance.

(3) Provide for informational and educational programs designed to -

(i) Achieve community understanding of the objectives of the program;

(ii) Inform the community of the availability of services; and

(iii) Promote continued participation in the project by persons to whom family planning services may be beneficial.

(4) Provide for orientation and in-service training for all project personnel.

(5) Provide services without the imposition of any durational residency requirement or requirement that the patient be referred by a physician.

(6) Provide that family planning medical services will be performed under the direction of a physician with special training or experience in family planning.

(7) Provide that all services purchased for project participants will be authorized by the project director or his designee on the project staff.

(8) Provide for coordination and use of referral arrangements with other providers of health care services, local health and welfare departments, hospitals, voluntary agencies, and health services projects supported by other federal programs.

(9) Provide that if family planning services are provided by contract or other similar arrangements with actual providers of services, services will be provided in accordance with a plan which establishes rates and method of payment for medical care. These payments must be made under agreements with a schedule of rates and payment procedures maintained by the grantee. The grantee must be prepared to substantiate, that these rates are reasonable and necessary.

(10) Provide, to the maximum feasible extent, an opportunity for participation in the development, implementation, and evaluation of the project by persons broadly representative of all significant elements of the population to be served, and by others in the community

knowledgeable about the community's needs for family planning services.

§59.6 What procedures apply to assure the suitability of informational and educational material?

(a) A grant under this section may be made only upon assurance satisfactory to the Secretary that the project shall provide for the review and approval of informational and educational materials developed or made available under the project by an Advisory Committee prior to their distribution, to assure that the materials are suitable for the population or community to which they are to be made available and the purposes of title X of the Act. The project shall not disseminate any such materials which are not approved by the Advisory Committee.

(b) The Advisory Committee referred to in paragraph (a) of this section shall be established as follows:

(1) Size. The Committee shall consist of no fewer than five but not more than nine members, except that this provision may be waived by the Secretary for good cause shown.

(2) Composition. The Committee shall include individuals broadly representative (in terms of demographic factors such as race, color, national origin, handicapped condition, sex, and age) of the population or community for which the materials are intended.

(3) Function. In reviewing materials, the Advisory Committee shall:

(i) Consider the educational and cultural backgrounds of individuals to whom the materials are addressed;

(ii) Consider the standards of the population or community to be served with respect to such materials:

(iii) Review the content of the material to assure that the information is factually correct;

(iv) Determine whether the material is suitable for the population or community to which is to be made available; and

(v) Establish a written record of its determinations.

§59.7 What criteria will the Department of Health and Human Services use to decide which family planning services projects to fund and in what amount?

(a) Within the limits of funds available for these purposes, the Secretary may award grants for the establishment and operation of those projects which will in the Department's judgment best promote the purposes of section 1001 of the Act, taking into account:

(1) The number of patients, and, in particular, the number of low-income patients to be served;

(2) The extent to which family planning services are needed locally;

(3) The relative need of the applicant;

(4) The capacity of the applicant to make rapid and effective use of the federal assistance;

(5) The adequacy of the applicant's facilities and staff;

(6) The relative availability of non-federal resources within the community to be served and the degree to which those resources are committed to the project; and

(7) The degree to which the project plan adequately provides for the requirements set forth in these regulations.

(b) The Secretary shall determine the amount of any award on the basis of his

estimate of the sum necessary for the performance of the project. No grant may be made for less than 90 percent of the project's costs, as so estimated, unless the grant is to be made for a project which was supported, under section 1001, for less than 90 percent of its costs in fiscal year 1975. In that case, the grant shall not be for less than the percentage of costs covered by the grant in fiscal year 1975.

(c) No grant may be made for an amount equal to 100 percent for the project's estimated costs.

§59.8 How is a grant awarded?

(a) The notice of grant award specifies how long HHS intends to support the project without requiring the project to recompete for funds. This period, called the project period, will usually be for three to five years.

(b) Generally the grant will initially be for one year and subsequent continuation awards will also be for one year at a time. A grantee must submit a separate application to have the support continued for each subsequent year. Decisions regarding continuation awards and the funding level of such awards will be made after consideration of such factors as the grantee's progress and management practices, and the availability of funds. In all cases, continuation awards require a determination by HHS that continued funding is in the best interest of the government.

(c) Neither the approval of any application nor the award of any grant commits or obligates the United States in any way to make any additional, supplemental, continuation, or other award with respect to any approved application or portion of an approved application.

§59.9 For what purpose may grant funds be used?

MAY 1, 2000

MEMORANDUM FOR JOHN PODESTA

FROM: **HEATHER HOWARD**
DOMESTIC POLICY COUNCIL

CC: **BRUCE REED**
MELANNE VERVEER
ANN O'LEARY

SUBJECT: **BACKGROUND MEMO ON THE GAG RULE**

As you know, in 1993 the President revoked the Federal gag rule which prevented medical practitioners in Title X funded facilities from offering women their full set of family planning options, including abortion. Although the lift of the gag rule became effective when the President signed the executive order, the final rule for its revocation was only recently submitted for final review. The pro-choice groups have urged that we release the final rule as quickly as possible so that they have time to prepare for any legislative response. As the Administration finalizes the language of the rule, we are considering a number of options:

Option 1: Clean Revocation – Return to Pre-1988 Rule

The proposed rule published in 1993 was a "clean" revocation of the gag rule and simply a return to the pre-1988 rule. A clean revocation might minimize the likelihood of a legislative response, but the pro-choice groups, after waiting seven years for the final rule, want more: they see this as an opportunity to clarify and strengthen the Title X rules, and they therefore urge the Administration to elevate language from the guidance to the rule. (See Option 2)

You should know that a clean revocation would include language reflecting current law's ban on the use of Title X funds to provide abortions:

> *Projects supported under this rule must not provide abortion as a method of family planning.*

Whichever option we choose would have this language as a base.

Option 2: Option 1 <u>Plus</u> Nondirective Counseling and Referrals Language

The pro-choice community has urged us to make the rule stronger and clearer by bringing in language from the accompanying guidance – essentially codifying part the guidance. Specifically, they have recommended moving language from the guidance into the rule making clear the right to nondirective counseling and referrals. The groups argue that inclusion of this language in the rule itself is important because 1) they claim that clinics are uncertain about what they can and cannot do and will feel they have more legal protection if the provisions are in the actual rule; and 2) codification would make it harder for a future administration to define

nondirective counseling in such a way that excludes abortion or to prevent clinics from giving referrals (because it is easier to change a guidance than a rule).

Language would look like this:

Projects supported under this rule must offer pregnant women the opportunity to be provided information and counseling regarding:

(a) prenatal care and delivery;
(b) infant care, foster care or adoption; and
(c) pregnancy termination.

If requested to provide such information and counseling, projects must provide neutral and nondirective counseling, ***and appropriate referral on request****, on each of the options, except for any options about which the pregnant woman indicates that she does not wish to receive information and counseling.* (Emphasis added).

The pro-choice groups believe strongly that defining nondirective counseling and including the right to a referral are important changes to make, even though doing so will raise a red flag. In internal discussions, concern has been expressed that this option will provoke a legislative backlash because although nondirective counseling itself is not controversial, adding the right to a referral is, and will "tip" the balance. Labor-HHS appropriations (or another appropriations bill) would seem the likely vehicle for a legislative response. It remains unclear whether the Republicans will be more inclined to make other abortion issues the focus of the debate this summer and fall (such as "partial birth," the Child Custody Protection Act, and Unborn Victims).

Option 3: "Promote or Encourage"

To provide a balance, if we decide to include the nondirective counseling and referrals language, we could move language from the guidance into the rule further restricting the use of Title X funds. The language would look like this:

Projects supported under this rule must not provide ***or promote or encourage*** *abortion as a method of family planning.* (Emphasis added).

In theory, this would stem potential criticism of expanding the rule. You should know that both Gary Bauer (while at the Family Research Council) and House Republicans wrote during the rule's comment period to request that "promote or encourage" be included in the rule.

Including this language in the actual rule has the effect of highlighting it, and may imply that we believe there has been a problem with Title X clinics promoting or encouraging abortions. In addition, codifying the language may give anti-choice groups a club to harass clinics in litigation. Pro-choice groups oppose inclusion of this language, but it is unclear how strong their opposition is.

Conclusion

In summary, there are several issues we need to address:

1) Does adding nondirective counseling and referrals tip the balance and invite a legislative response?
2) Does adding the "promote or encourage" language help counter that? How upset will the groups be if we add this language?
3) Timing: when should we release the rule?

DRAFT

new language

handicapping condition, age, sex, number of pregnancies, or marital status.

(5) *Not provide or promote or encourage abortion as a method of family planning. A project must:*

(i) Offer pregnant women the opportunity to be provided information and counseling regarding:

(A) Prenatal care and delivery;

(B) Infant care, foster care, or adoption; and

(C) Pregnancy termination.

If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling, and appropriate referral on request, on each of the options, except for any options that the pregnant woman indicates that she does not wish to receive information and counseling about.

(ii) Ensure that project funds are not used for, and project activities are separate and distinct from, any non-title X activities of the grantee that provide or promote or encourage abortion as method of family planning.

(6) Provide that priority in the provision of services will be given to persons from low-income families.

(7) Provide that no charge will be made for services provided to any persons from a low-income family except to the extent that payment will be made by a third party (including a government agency) which is authorized to or is under legal obligation to pay this charge.

(8) Provide that charges will be made for services to persons other than those from low-income families in accordance with a schedule of discounts based on ability to pay, except that charges to persons from families whose annual income exceeds 250 percent of the levels set

in

Charles

Byer

David

[illegible]

Paul

4/18 Gag Rule

fight will be on labor-H

→ Labor-H will gag & vote anyway
4 billion Labor Pres. on education

May 10 - subc. markup - can tie or win b/c Porter
May 24 - full markup

Porter has increases in Title X + nondirective counseling
nothing bad will happen in subc. - he protects Title X.

Full comte - could have a big fight
may win b/c have Porter
have won on parental consent

have never lost on Title X.

Do The Right Thing

T + C, in Senate so don't have to conference
they will then send to pres. after SC. rules

children's Health bill - probably won't have bad stuff
b/c the bill is so popular - has lots of good stuff -
folic acid campaign, safe motherhood
hypertension, pro choice + anti smoking

History of the "Gag Rule"

Background

In 1988, the Reagan Administration promulgated a regulation prohibiting health care professionals in Title X family planning clinics from providing abortion information or referrals to a woman facing an unintended pregnancy, even when she specifically requested such information. This "gag rule" was challenged in court on the grounds that it interfered with medical providers' First Amendment right to free speech and their ability to discuss the full range of medical options with patients. The gag rule was ultimately upheld in a 1991 Supreme Court decision, *Rust v. Sullivan*, by a 5-4 vote. The Court agreed with lower court rulings that Congress had not spoken to this issue and therefore the regulation was a permissible exercise of executive authority.

In 1991, Congress voted to approve a Labor/HHS Appropriations bill explicitly allowing options counseling for pregnant women that included discussion of abortion. President Bush vetoed the bill. The Senate subsequently overrode the veto (73-27) but the House failed to do so by 12 votes. In 1992, a second gag rule fight took place in the context of a Title X reauthorization bill, which also explicitly allowed full options counseling. This bill was approved by Congress but, once again, vetoed by President Bush. This time, the effort to override the President's veto fell 10 votes short in the House. Key to the failure to override the veto was a letter from the President allowing *physicians* to counsel or refer patients for abortion, but not other health care professionals who often provide the bulk of services at Title X clinics.

In 1992, the Bush Administration's new policy was challenged in court by the National Family Planning and Reproductive Health Association (NFPRHA). The resulting decision by the U.S. court of appeals in *NFPRHA v. Sullivan* ruled that the Administration had violated the Administrative Procedures Act by reinterpreting the regulation without allowing the public an opportunity to comment on the change. As one of his first acts, President Clinton issued an executive memoranda formally suspending the gag rule on January 22, 1993.

Talking Points

The national family planning program, Title X of the Public Health Service Act, was established in 1970 with broad bipartisan support. The program provides federal funds for project grants to public and private nonprofit organizations for the provision of family planning information and services – services which improve maternal and infant health, lower the incidence of unintended pregnancy, reduce the incidence of abortion, and lower rates of sexually transmitted diseases (STDs). The program's FY 2000 appropriation will enable clinics to provide services to more than 4.3 million clients in 4,500 clinics nationwide.

- The Title X program is statutorily prohibited (section 1008) from paying for abortion services. Separate reports by the General Accounting Office and the Office of the Inspector General at the Department of Health and Human Services found all Title X clinics to be operating in full compliance with the law.

- Title X guidelines specify that clinics must provide ***non-directive*** counseling to women facing an unintended pregnancy on ***all*** of their options, including "prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination." Women must also be provided with a referral for such services upon request. *It is important to note that a woman must specifically ask for information on options for the management of an unintended pregnancy before a counselor may offer any non-directive information to her.*

- A gag rule puts a serious strain on the trusting relationship between health care providers and their patients. It also creates ethical and legal problems for medical professionals who are put in the no-win situation of choosing between giving patients complete medical information and complying with the gag rule. In fact, a fundamental principle of modern medical ethics known as "informed consent" requires health care providers to fully disclose the range of options available to a patient, so that person can make a decision regarding treatment in a fully informed and self-determined manner. Obtaining informed consent is required by professional and ethical standards established by the American Medical Association and the American College of Obstetricians and Gynecologists, among others. Additionally, most states recognize a legal right of recovery for a lack of informed consent. Health care providers who do not comply with a patient's right to full information and self-determination may be held liable for medical malpractice.

- Over the years, Congress repeatedly rejected attempts to impose a gag rule on family planning providers. The most recent vote occurred in 1992, when Congress voted overwhelmingly to require full pregnancy options counseling under the Title X program which included discussion of abortion.

- The conference report to the FY2000 Omnibus Appropriations Act, which contains funding for the Title X program, requires pregnancy counseling provided under the program to be non-directive.

- A woman facing a crisis pregnancy who visits a Title X clinic and requests a referral to an abortion provider and is denied such information risks delaying safe and timely care, possibly jeopardizing her health. The gag rule will <u>not</u> limit access to abortion services, since no Title X funds are spent on abortion.

- The gag rule would force Title X clinics to choose between offering only government-approved information or foregoing federal funding. If they opt in favor of full disclosure and turn down federal funds, some clinics may be forced to close and low-income women will lose out on access to contraceptive services and related health care. This will only serve to compromise the health of low-income women, and, by denying women access to contraceptives, would only lead to more unintended pregnancies and abortions.

Department of Health and Human Services
Policies regarding the Title X National Family Planning Program and the Section 1008 Abortion Prohibition

Section 1008 of the Title X statute states: "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." It has been the position of the Department since 1971 that this prohibition applies not only to the performance of abortion by a Title X project, but also to the conduct of certain abortion-related activities by the project. On the other hand, it has also been the Department's position that the prohibition does not apply to all the activities of a Title X grantee, but only to those within the Title X project. This statement sets out more specifically the Department policy in existence prior to the imposition of the 1988 "Gag Rule" with regard to implementation of §1008.

In general, the Department views §1008 as prohibiting Title X programs from engaging in activities which promote or encourage abortion as a method of family planning.

- However, §1008 does not prohibit the funding under Title X of activities which have only a possibility of encouraging or promoting abortion; rather, a more direct nexus is required.

- The general test is whether the immediate effect of the activity in question is to promote or encourage the use

of abortion as a method of family planning. If the immediate effect of the activity in question is essentially neutral, then it does not fall afoul of §1008.

Thus, it has been held that a Title X project may not provide services that directly facilitate the use of abortion as a method of family planning. Actions prohibited in a Title X project include providing transportation for an abortion, explaining and obtaining signed abortion consent forms from clients interested in abortions, negotiating a reduction in fees for an abortion, scheduling or arranging for the performance of an abortion, promoting or advocating abortion within Title X program activities, or failing to preserve sufficient separation between Title X program activities and abortion-related activities.

Abortion Counseling and Referral

Although the Department in 1988 acted to prohibit options counseling and referral in Title X projects, the Department has since returned to the standards of the 1981 Title X Guidelines, which state:

> Pregnant women should be offered information and counseling regarding their pregnancies. Those requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:
>
> - Prenatal care and delivery
> - Infant care, foster care, or adoption
> - Pregnancy termination.

Limitations on Abortion Counseling and Referral

- A Title X project may not provide pregnancy counseling which promotes abortion or encourages persons to obtain abortion.

- However, the project may advise patients of all medical options and the accompanying risks.

- A Title X project may, consistent with §1008, provide a "mere referral" for abortion. "Mere referral" means providing a patient with the name, address, and/or telephone number of an abortion provider, without further affirmative action to secure the services.

- However, where a referral to another provider who might perform an abortion is medically indicated because of the patient's condition or the condition of the fetus (such as where the woman's life would be endangered), such a referral by a Title X project is not prohibited by §1008 and is required by 42 CFR 59.5(b)(1). The "mere referral" limitation does not apply in cases in which a referral is required by medical indications.

Advocacy Activities

- A Title X project may not promote or encourage the use of abortion as a method of family planning through advocacy activities such as:

  -- providing speakers to debate in opposition to anti-abortion speakers,

  -- bringing legal action to liberalize statutes relating to abortion, or

  -- producing and/or showing films that tend to encourage or promote a favorable attitude toward abortion as a method of family planning.

- However, a Title X project may be a dues-paying participant in a national abortion advocacy organization, so long as there are other legitimate program-related reasons for the affiliation (such as access to certain information or data useful to the Title X project).

- A Title X project may also discuss abortion as a backup method of family planning in a discussion of relative risks of various methods of contraception.

FAX

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Web site: www.agi-usa.org

Date: 4/4

Number of pages including cover sheet: 10

To: Heather Howard

@ 456-2878

From: Cynthia Dailard

____Original will not follow
____Original will follow, via _____

MESSAGE:

as promised.

Title X $ – some states object $ sometimes agency disperses

Bruce N. Reed
04/04/2000 12:56:56 PM

[redacted]

Record Type: Record

To: Heather H. Howard/OPD/EOP@EOP

cc: eric p. liu/opd/eop@eop, anna richter/opd/eop@eop, ann o'leary/opd/eop@eop

Subject: Re: Revocation of the Gag Rule

maybe natural family planning – not direct recipients

Thanks for the good memo. I have a couple of questions:

1. What kind of practitioners are we talking about that are funded by Title X? Does any Title X money go to programs at Catholic hospitals?

Don't know – OPA + Evelyn Kappeler 301-594-7608

2. Under Option 2, would Title X practitioners be banned from providing abortions but required to provide info on abortions if asked? – see p. 4

would differ

3. Who speaks for HHS on this issue? – Kevin Thurm Gen'l Counsel

4. Who in the choice community cares most about this? – They all do –

can't arrange transportation –

NARAL
NWLC
AAUW

(ACLU ~~wants~~ language – referral, but that's more complicated.)

296-4012

Chris Casino –

Some clinics might have arrangements to provide referral family planning – but they are not direct recipient & obliged to provide full range.

Evelyn – possible Title X contracts w/ clinics – but Catholic Hs don't want to refer back to Title X clinics for family planning

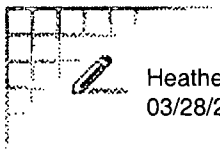
Allison

3/29

Kevin Thurm told Sophia the needed to check w/ his staff – he was unfamiliar w/ the language?
- So he is checking back + will get back to OMB.

may attend our meeting but doesn't want to bias our decision making – ~~they want~~ our unbiased opinion

- goal for Friday mtg – what is WH position



Heather H. Howard
03/28/2000 01:25:04 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Revocation of the Gag Rule

In case we haven't met yet, I am new to the DPC and handling the choice issue. As many of you know, the final rule for revocation of the gag rule has been submitted for review by OMB, and there is debate about what language should be included. The hope is to get the rule out as soon as possible. DPC would like to bring together WH Counsel, Leg and VP to discuss the options. When we settle on a time for the meeting, I will circulate a background discussion memo I have written.

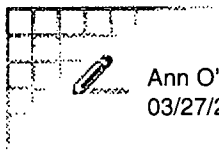
I would like to propose two times: this Friday 3/31 at 1:30 or 2:00, or Monday, April 3 at 2 or 3. Let me know if these work, and if not, we'll go back to the drawing board.

If you have any questions, give me a call at 6-7263. Thanks.

Message Sent To:

William Marshall/WHO/EOP@EOP
Sarah Wilson/WHO/EOP@EOP
Kirsten N. Pflomm/WHO/EOP@EOP
Broderick Johnson/WHO/EOP@EOP
Taneesha J. Johnson/WHO/EOP@EOP
Joel K. Wiginton/WHO/EOP@EOP
Lisa M. Brown/OVP@OVP ← Can Soreson
Anna Richter/OPD/EOP@EOP
Ann O'Leary/OPD/EOP@EOP

Can Sylvia



Ann O'Leary
03/27/2000 01:17:04 PM

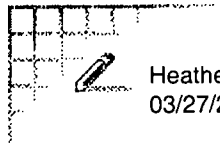
Record Type: Record

To: Heather H. Howard/OPD/EOP@EOP
cc:
bcc:
Subject: Re: gag rule question

I would suggest that you pull together a meeting with WH Counsel, Leg, OMB, VP and include your memo as a background attachment for discussion at meeting.

Could you please cc me and Eric Liu/Anna Richter on meeting -- I will come just to listen and Eric might, too.

Thanks.
Heather H. Howard



Heather H. Howard
03/27/2000 01:04:05 PM

Record Type: Record

To: Ann O'Leary/OPD/EOP@EOP
cc:
Subject: Re: gag rule question

related question - with whom can I share the gag rule memo I did? (Leg affairs? Lisa Brown?)

Congresswoman Nita Lowey

2421 Rayburn HOB
Washington, DC 20515
202/ 225-6506
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222 Mamaroneck Avenue; #310
White Plains, NY 10605
914/ 428-1707
fax: 914/ 328-1505

Date: March 28, 2000

To: Heather Howard

Fax: 456 - 2878

From: Clare Coleman
Legislative Director

pages: 3

Appeared in 98 as part of FY99.
Remains in bill.

105TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
105–825

MAKING OMNIBUS CONSOLIDATED AND EMERGENCY SUPPLEMENTAL APPROPRIATIONS FOR FISCAL YEAR 1999

CONFERENCE REPORT

TO ACCOMPANY

H.R. 4328

OCTOBER 19, 1998.—Ordered to be printed

Security Act, the Health Care Quality Improvement Act of 1986, as amended, and the Native Hawaiian Health Care Act of 1988, as amended, $4,108,040,000, of which $150,000 shall remain available until expended for interest subsidies on loan guarantees made prior to fiscal year 1981 under part B of title VII of the Public Health Service Act, and of which $65,345,000 shall be available for the construction and renovation of health care and other facilities, and of which $25,000,000 from general revenues, notwithstanding section 1820(j) of the Social Security Act, shall be available for carrying out the Medicare rural hospital flexibility grants program under section 1820 of such Act: Provided, That the Division of Federal Occupational Health may utilize personal services contracting to employ professional management/administrative and occupational health professionals: Provided further, That of the funds made available under this heading, $250,000 shall be available until expended for facilities renovations at the Gillis W. Long Hansen's Disease Center: Provided further, That in addition to fees authorized by section 427(b) of the Health Care Quality Improvement Act of 1986, fees shall be collected for the full disclosure of information under the Act sufficient to recover the full costs of operating the National Practitioner Data Bank, and shall remain available until expended to carry out that Act: Provided further, That no more than $5,000,000 is available for carrying out the provisions of Public Law 104–73: Provided further, That of the funds made available under this heading, $215,000,000 shall be for the program under title X of the Public Health Service Act to provide for voluntary family planning projects: Provided further, That amounts provided to said projects under such title shall not be expended for abortions, that all pregnancy counseling shall be nondirective, and that such amounts shall not be expended for any activity (including the publication or distribution of literature) that in any way tends to promote public support or opposition to any legislative proposal or candidate for public office: Provided further, That $461,000,000 shall be for State AIDS Drug Assistance Programs authorized by section 2616 of the Public Health Service Act: Provided further, That notwithstanding any other provision of law, funds made available under this heading may be used to continue operating the Council on Graduate Medical Education established by section 301 of Public Law 102–408: Provided further, That, notwithstanding section 502(a)(1) of the Social Security Act, not to exceed $107,434,000 is available for carrying out special projects of regional and national significance pursuant to section 501(a)(2) of such Act: Provided further, That of the amount provided, $2,000,000 shall be for support of the Center for Sustainable Health Outreach at the University of Southern Mississippi in affiliation with Harrison Institute at Georgetown University for the establishment of demonstration programs that create model health access programs, health-related jobs and sustainability of community-based providers of health services in rural and urban communities; and $1,250,000 shall be for the American Federation for Negro Affairs Education and Research Fund.

Gag Rule

3/20

Nancy Wilden -

HHS

their leg people feel putting any thing
in leg provides an unwanted response
they feel - it will seriously escalate -

3/21 Sarah Wilson - 6- 2144

favors putting in nondirective counseling
Bell also favors "promote nervousness" ing -
it's in leg history anyway

but doesn't it strengthen it?
maybe it buys us something?

Sarah tends to think we should do the right thing + get credit for it

3/24 published leg rule (only) in 1993 } published separately
HHS then published guidance for counselors in 1993

Ann O'Leary
03/22/2000 04:56:55 PM

Record Type: Record

To: Heather H. Howard/OPD/EOP@EOP
cc:
bcc:
Subject: Re: Revocation of the Gag Rule

Great! I agree with you. I think that you or OMB will have to pull together a meeting with WH Counsel and Leg Affairs with Melanne, Anne Lewis and Eric to come to final internal WH agreement.

Heather H. Howard

Heather H. Howard
03/22/2000 04:48:54 PM

Record Type: Record

To: Eric P. Liu/OPD/EOP@EOP

cc: Ann O'Leary/OPD/EOP@EOP, Katharine Button/WHO/EOP@EOP
Subject: Revocation of the Gag Rule

gag rule memo 3-22-00.do

OMB is considering different options for the final rule revoking the Gag Rule. Attached is a short memo on the issue and my recommendation. I have run this by Ann Lewis and she agrees. Please let me know if I can tell OMB this is the DPC response. Thanks.

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03/22/2000 04:48:54 PM

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To: Eric P. Liu/OPD/EOP@EOP

cc: Ann O'Leary/OPD/EOP@EOP, Katharine.Button/WHO/EOP@EOP
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3/13

Gag Rule

2 options for language: ..... Allison 54650

feedback → COB tomorrow (Tuesday)

pre-'88 language - "not provide abortion as a method of family planning"

~~NFP language - the law~~

reflect law -

Q - maintain
or add promote or encourage

---

former-1988 guidance - never = rule

"pvandi" = pre-1988 + proposed = 1993

Broderick - CM

Allison - HHS - Kevin Thurm (Dept. Secty)
has made decision not to include
new directive concerning Title X.
- he thinks that legislatively that's a option
Dept. - recommending - don't know details as to why?

Withdrawal/Redaction Marker
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. note	re: Gag Rule meeting (3 pages)	03/03	P5

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21197

FOLDER TITLE:
Gag Rule

2012-0254-S
rc684

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. note	re: Gag Rule meeting (4 pages)	03/08	P5

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21197

FOLDER TITLE:
Gag Rule

2012-0254-S
rc684

RESTRICTION CODES

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Adoption Awareness Act of 1999 (Introduced in the House)

HR 2511 IH

106th CONGRESS

1st Session

H. R. 2511

To amend the Public Health Service Act to make grants to carry out certain activities toward promoting adoption counseling, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

July 14, 1999

Mr. DEMINT (for himself, Mr. BLILEY, Mr. DELAY, Mr. WATTS of Oklahoma, Mr. OBERSTAR, Mr. LAFALCE, Mr. SHOWS, Mr. LARGENT, Mr. WELDON of Florida, Mr. SMITH of New Jersey, Mr. PITTS, Mr. MCINTOSH, Mr. SPENCE, Mrs. MYRICK, Mr. JONES of North Carolina, Mr. TERRY, Mr. LATOURETTE, Mr. ADERHOLT, Mr. GARY MILLER of California, Mr. POMBO, Mr. DOOLITTLE, Mr. CHABOT, Mr. TANCREDO, Mr. RYUN of Kansas, Mr. HILLEARY, and Mr. PICKERING) introduced the following bill; which was referred to the Committee on Commerce

A BILL

To amend the Public Health Service Act to make grants to carry out certain activities toward promoting adoption counseling, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Adoption Awareness Act of 1999'.

SEC. 2. GRANTS FOR CERTAIN ACTIVITIES TOWARD PROMOTING ADOPTION COUNSELING.

Subpart I of part D of title III of the Public Health Service Act (42 U.S.C. 254b et seq.) is amended by adding at the end the following section:

`SEC. 330D. CERTAIN SERVICES FOR PREGNANT WOMEN.

`(a) ADOPTION COUNSELING-

`(1) IN GENERAL- The Secretary shall make grants to national adoption organizations for the purpose of developing and implementing programs to train the staff of eligible health centers in providing adoption counseling to pregnant women and infertile married couples. With respect to such a grant--

`(A) a national adoption organization may expend the grant to carry out the programs directly or through grants to or contracts with other adoption organizations;

`(B) the purposes for which the national adoption organization expends the grant may include the development of a training curriculum; and

`(C) a condition for the receipt of the grant is that, with respect to an eligible health center for which such training is to be provided, the national adoption organization agree to make reasonable efforts--

`(i) to provide such training at the center or at a site that is near the center; and

`(ii) to provide the training through individuals who are experienced in providing adoption counseling in the geographic area in which the center is located.

`(2) ADOPTION ORGANIZATIONS; ELIGIBLE HEALTH CENTERS; OTHER DEFINITIONS- For purposes of this section:

`(A) The term `adoption organization' means an organization--

`(i) whose primary purpose is the promotion of adoption;

`(ii) that is knowledgeable on the process for adopting a child and on providing adoption counseling to pregnant women; and

`(iii) that is a nonprofit private entity.

`(B) The term `eligible health centers' means public and nonprofit private entities that provide health-related services to pregnant women.

`(C) The term `married couples' means couples who have entered into marriage as defined in section

7 of title 1, United States Code.

`(3) TRAINING FOR CERTAIN ELIGIBLE HEALTH CENTERS- A condition for the receipt of a grant under paragraph (1) is that the national adoption organization involved agree to make reasonable efforts to ensure that the eligible health centers with respect to which training under the grant is provided include--

`(A) eligible health centers that receive grants under section 1001 (relating to voluntary family planning projects);

`(B) eligible health centers that receive grants under section 330 (relating to community health centers, migrant health centers, and centers regarding homeless individuals and residents of public housing);

`(C) eligible health centers that receive grants under this Act for the provision of services in schools; and

`(D) eligible health centers that do not perform or make referrals for abortions, or provide or make referrals for counseling that presents abortion as an option.

`(4) PARTICIPATION OF CERTAIN ELIGIBLE HEALTH CLINICS- In the case of eligible health centers that receive grants under section 330 or 1001, the Secretary shall provide for the training of the staff of such centers through the program under paragraph (1), subject to subsection (c)(4).

`(b) REQUIREMENTS REGARDING FEDERALLY-FUNDED FAMILY PLANNING SERVICES- The Secretary shall require that each program providing voluntary family planning services with a grant from the Secretary provide nondirective counseling and referrals regarding--

`(1) prenatal care and delivery;

`(2) infant care;

`(3) foster care; and

`(4) adoption.

`(c) RELIGIOUS ORGANIZATIONS-

`(1) IN GENERAL- Religious organizations may receive grants under subsection (a) on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and

without diminishing the religious freedom of beneficiaries of assistance funded under such program.

`(2) NONDISCRIMINATION AGAINST RELIGIOUS ORGANIZATIONS- Religious organizations are eligible for grants under subsection (a) on the same basis as any other nonprofit private entity as long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. The Federal Government shall not discriminate against an organization that applies to receive such a grant on the basis that the organization has a religious character.

`(3) RELIGIOUS CHARACTER AND FREEDOM-

`(A) RELIGIOUS ORGANIZATIONS- A religious organization receiving a grant under subsection (a) shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

`(B) ADDITIONAL SAFEGUARDS- The Federal Government shall not require a religious organization receiving a grant under subsection (a)--

`(i) to alter its form of internal governance; or

`(ii) to remove religious art, icons, scripture, or other symbols;

in order to be eligible for a grant under subsection (a).

`(4) RIGHTS OF BENEFICIARIES OF ASSISTANCE-

`(A) IN GENERAL- If an individual described in subparagraph (B) has an objection to the religious character of the organization from which the individual receives services pursuant to a grant under subsection (a), the organization shall provide such individual, within a reasonable period of time after the date of such objection, with services from an alternative provider that is accessible to the individual and the value of which is not less than the value of the services that the individual would have received from such organization.

`(B) INDIVIDUAL DESCRIBED- An individual described in this subparagraph is an individual who receives, applies for, or requests to apply for, services under a program carried out with a grant under subsection (a).

`(5) EMPLOYMENT PRACTICES- A religious organization's exemption

provided under section 702 of the Civil Rights Act of 1964 regarding employment practices shall not be affected by its participation in, or receipt of funds from, a program carried out with a grant under subsection (a).

`(6) NONDISCRIMINATION AGAINST BENEFICIARIES- Except as otherwise provided in law, a religious organization shall not discriminate against an individual in regard to providing services under a grant under subsection (a) on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.

`(7) FISCAL ACCOUNTABILITY-

`(A) IN GENERAL- Except as provided in subparagraph (B), any religious organization receiving a grant under subsection (a) shall be subject to the same regulations as other grantees under such subsection to account in accord with generally accepted auditing principles for the expenditure of the grant.

`(B) LIMITED AUDIT- If a religious organization receiving a grant under subsection (a) segregates the grant funds into separate accounts, then only such funds shall be subject to audit.

`(8) COMPLIANCE- Any party which seeks to enforce its rights under this subsection may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

`(9) PREEMPTION- Nothing in this subsection shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

`(10) LIMITATIONS ON USE OF FUNDS FOR CERTAIN PURPOSES- A grant under subsection (a) may not be expended for sectarian worship, instruction, or proselytization.

`(d) APPLICATION FOR GRANT- The Secretary may make a grant under subsection (a) only if an application for the grant is submitted to the Secretary and the application is in such form, is made in such manner, and contains such agreements, assurances, and information as the Secretary determines to be necessary to carry out this section.

`(e) AUTHORIZATION OF APPROPRIATIONS- For the purpose of carrying out

this section, there are
authorized to be appropriated $7,000,000 for fiscal year 2000, and such sums as may be necessary for each of the
fiscal years 2001 through 2004.'.