Congress of the United States
House of Representatives
Washington, DC 20515

April 6, 1993

The Honorable Donna Shalala
Secretary
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Shalala:

We write to express our opposition to the interim and proposed rules for Title X of the Public Health Service Act published in the Federal Register on February 5, 1993 (pages 7462-7467) in their current form and strongly recommend that significant modificiations be made to them.

First of all, we find that the newly proposed regulations, inasmuch as they simply reinstate the Title X regulations in place before February 2, 1988, do not provide adequate guidance to projects on the meaning and application of the prohibition found in Section 1008 of Title X which states that "[n]one of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." Moreover, the Department should clarify in the new rule, rather than rely on certain unpublished (and confusing) compliance standards, the Department's intent that "Title X projects...not be permitted to promote or encourage abortion as a method of family planning...," (p. 7464), make specific changes which will ensure that the new rule meet the statutory requirement and departmental intent,[1] and give the public an opportunity to comment on these changes.

Clearly, the meaning of section 1008 is not limited to a mere prohibition on using Title X funds to perform abortions. The chairman of the committee with oversight of the Title X program, himself the author of section 1008, stated clearly the intent of this prohibition in a speech before the full House when it originally considered Title X:

> "With the 'prohibition of abortion' amendment–Title X, section 1008–the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37375 (1970).

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[1] The General Accounting Office found the 1980 regulations and the 1981 Program Guidelines to be so inadequate as to be the cause of much of the confusion among Title X providers.

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Moreover, in 1978, when the House considered an amendment to Title X to specifically prohibit abortion counseling and referral (and to prevent the abuses that had come to light), it was opposed by former Rep. Rogers (then-chairman of the authorizing committee) on the grounds that it was "unneeded"; he denied that counseling on abortion was even allowed in Title X clinics. (124 Cong. Rec. 37045 (1978))

The February 2, 1988 regulations[2], which clarified the activities that were and were not allowed under section 1008, were directly the result of the reported abuses at Title X clinics and the recommendation by the General Accounting Office (after an audit in 1982 of 14 Title X clinics) "that the Secretary establish clear operational guidance by incorporating into the title X program regulations and guidelines HHS' position on the scope of the abortion restriction in section 1008."[3] The proposed regulation fails to provide such "clear operational guidance."

Secondly, we note that HHS intends to discard the February 2, 1988 regulations in their entirety -- definitions and all -- regardless of whether any particular portion was the subject of court challenge or legislative action.[4] No explanation or rationale was provided in the proposed rule for the suspension of the sections of the 1988 regulations which have nothing to do with abortion counseling and referral. We believe the rejection of the 1988 rule is precipitous and that each portion of the 1988 regulations must be reviewed on its merits and justification provided in any final regulations as to why the 1988 clarifications were or were not maintained in a new rule. It should be further noted that these regulations were upheld by the Supreme Court of the United States in *Rust v. Sullivan* 111 S.Ct. 1759 (1991) as a constitutional and reasonable interpretation of the prohibition in section 1008, and we refer you to the holdings of the Court with regard to the distinction between "subsidized" and "free" speech.

Thirdly, we were puzzled that certain statements found in the "Supplementary Information" section of the February 5th proposed rule regarding the intent of the Secretary

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[2] 53 FR 2922.

[3] Comp. Gen. Rep. No. GAO/HRD-82-106, "Restrictions on Abortion and Lobbying Activities in Family Planning Programs Need Clarification," p. 22 (1982).

[4] For example, no group or individual has ever challenged the revisions in the definition section (42 CFR section 59.2), nor were questions ever raised concerning section 59.7 (Standards of compliance with prohibition on abortion) and section 59.10 (Prohibition on activities that encourage, promote or advocate abortion).

were not actually included in the proposed regulations. Specifically, it is asserted 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." However, you do not include this prohibition in the proposed regulations and suspend this specific section in the 1988 regulations (i.e., 42 CFR 59.10).

The "Supplementary Information" section of the Proposed Rule also states that "Title X projects would also be required 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." However, again, you do not include this prohibition in the proposed regulations and suspend this specific section in the 1988 regulations (i.e., 42 CFR 59.9).

Since these two issues – concerning the use of federal funds for lobbying on abortion and the separation of abortion services from Title X subsidized family planning services in clinics – were both found by GAO to need specific guidance in HHS regulations,[5] we are concerned that no specific regulations to remedy these problems were proposed, and that the ones which were published in the 1988 rule were suspended.

Finally, we strongly disagree with the assertion in the "Family Impact" section that "[t]he proposed rules below would get Title X clinics out of the middle of the abortion decision...." ((p. 7465) On the contrary, by suspending the 1988 regulations and requiring Title X projects to provide abortion counseling and referral upon request, the interim and proposed rules do not get government *out* of the abortion decision; rather, they force the federal government *into* the abortion decision.

This said, we would like to conclude our comments by offering recommendations for guidance to family planning projects on Congress' intent in enacting section 1008 of Title X of the Public Health Service Act. In general, we support the regulations concerning counseling and referral for abortion as a method of family planning, and the separation of Title X family planning services from abortion-related activities, which were published in the Federal Register on February 2, 1988 and which amended 42 CFR Part 59.[6] Specifically,

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[5] or, in the case of lobbying restrictions, OMB regulations

[6] We note the assertion in the interim rule that "evidence exists that the continued failure to provide women with complete and accurate medical information will result in significant health risks." We are not aware of the data substantiating this claim and request copies of such information. Has the Department studied the effects of the 1988 regulations on the timeliness of obtaining an abortion?

we recommend that you incorporate in any final rule published subsequent to the receipt of these and other comments all of the revisions made to 42 CFR Part 59 by the February 2, 1988 regulations, including (but not limited to) the following sections:

* 59.2 (definitions, as amended),
* 59.7 (Standards of compliance with prohibition on abortion),
* 59.8 (Prohibition on counseling and referral for abortion services; limitation of program services to family planning),
* 59.9 (Maintenance of program integrity), and
* 59.10 (Prohibition on activities that encourage promote or advocate abortion).

We appreciate this opportunity to share with you our suggestions for preserving the integrity of the Title X program.

Sincerely,

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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.

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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