PHOTOCOPY
PRESERVATION

WP?

Heather H. Howard
04/11/2000 01:48:12 PM

Record Type: Record

To: Eric P. Liu/OPD/EOP@EOP
cc:
bcc:
Subject: Re: gag rule

Two possible legislative strategies we can envision at this point:

1) Labor-HHS appropriations rider. In 1991the gag rule votes were in the context of Labor-HHS. Given how good the votes were last time, though, it's hard to imagine a new gag rule passing, or even why Republicans would want to bring this up. If they didn't attack the gag rule straight on they could try to cut funding to Title X clinics. Of course, these votes would be late in the session.

2) Bliley has an adoption promotion bill that has a "back door" gag - it has all the counseling options clinics can talk about, exception abortion. But, a Children's Health bill that is moving has part of Bliley's bill and does **not** have the gag rule.

One of the groups just called me and said that the clear message to HHS this morning was that nondirective counseling and referrals should be married, and they should either both be in the rule or both be in the guidance.

She also said that the groups had been confused about the purpose of the big OMB-group meeting, and that is why we didn't get a message that referrals were important.

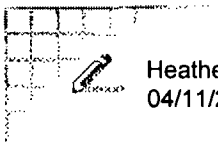
Eric P. Liu

Eric P. Liu
04/11/2000 01:26:35 PM

Record Type: Record

To: Heather H. Howard/OPD/EOP@EOP
cc: anna richter/opd/eop@eop
bcc:
Subject: Re: gag rule

Pls do send the backgrounder. One question: what is the nature of the "legislative response" we would expect? Play this out for me a couple of moves after a final rule is issued.
Heather H. Howard



Heather H. Howard
04/11/2000 01:23:09 PM

Record Type: Record

To: Eric P. Liu/OPD/EOP@EOP, Anna Richter/OPD/EOP@EOP

cc:
Subject: gag rule

Point of clarification: when we talk about the gag rule we always talk about referrals; for example, the President's notice publishing the proposed rule in the Federal Register in 1993 said that the gag rule "prohibited Title X recipients from providing their patients with information, counseling, or referrals concerning abortions."

I wanted to give you a heads up that I just spoke with HHS and they are now strongly advocating that the right to a referral be in the rule with nondirective counseling language, not the accompanying guidance. They feel that you can't separate the right to nondirective counseling from the right to a referral, b/c then you are elevating one over the other (indeed, nondirective counseling doesn't mean much if you can't get a referral to a clinic). As I mentioned earlier in our conversation, the groups did not seem to be arguing for putting referrals in the rule, (indeed, the message had been "don't get greedy"), so we hadn't really considered it, but HHS met with the groups this morning and they now do want it in the rule (HHS said there had been confusion on this point earlier).

I think they make a good argument about linking nondirective counseling and referrals. It is important to note that we already have the moderates on this -- Congressional votes were very strong. In 1991 the Senate overrode Bush's veto on the gag rule (73-27), and the House was just 10 votes short of overriding the veto in 1992.

I have a 2 page backgrounder on the gag rule that I will give to Anna if you want to look at it before the meeting.

Heather H. Howard
04/11/2000 03:57:23 PM

Record Type: Record

To: Eric P. Liu/OPD/EOP@EOP
cc:
bcc:
Subject: Re: gag rule

I agree with you that those legislative possibilities aren't too threatening. We get into such a bunker mentality on abortion issues that we forget that the gag rule is our best issue and that the Congressional votes have been very good.

Another person from a group just called me and apparently they weren't well prepared for that earlier meeting with OMB. They had been told it was a public meeting and that OMB would be briefing them, and that they were not to say much. Instead, OMB asked them what they wanted and they weren't really prepared for that, and that's why we didn't get a coherent message. But they did pre-meet the meeting they had with HHS today, and they have a unified message: don't put promote or encourage in the body of the rule, do move both nondirective counseling and referrals into the body. I think this makes sense substantively and shouldn't necessarily be heavy lifting. If people are upset about us revoking the gag rule they will be upset regardless of where the language is.

One additional point -- if we do move the language to the rule, we will argue that it was necessary for clarification, that the clinics have been confused about what they could do so we put it in the rule. (Some might question why we had to do it since pre-1988 the rule itself didn't have the language, but the groups representing clinics say there has been a lot of uncertainty about what clinics could do and they want a clear directive).

Eric P. Liu

Eric P. Liu
04/11/2000 03:31:48 PM

Record Type: Record

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

Hmm. So, when the groups had earlier suggested we shouldn't get greedy (and I understand that's not where they are anymore), what exactly were they fearing? These two legislative possibilities don't seem too threatening.

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.*

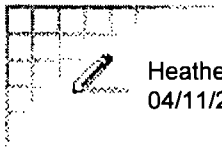
- A gag rule puts a serious strain on the trusting relationship between health care providers and their patients. It also creates ethical and legal problems for medical professionals who are put in the no-win situation of choosing between giving patients complete medical information and complying with 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.



Heather H. Howard
04/11/2000 11:49:05 AM

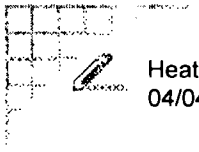
Record Type: Record

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

cc: Ann O'Leary/OPD/EOP@EOP, Anna Richter/OPD/EOP@EOP
Subject: gag rule

I wanted to update you on the rule revoking the gag rule. Last week, OMB decided they didn't need to have an EOP meeting and was prepared to go with the "promote or encourage" language in the rule. (As you may recall, the proposed rule said only that funds could not be used to "provide abortions," and the "not promote or encourage" language was in the guidance only). OMB was under the impression that the groups were comfortable with this language, but I am confident they are not. I spoke with Ann Lewis and Melanne, who agreed; Melanne spoke with Sylvia Matthews to express some concern that this was happening without an EOP meeting, so a meeting is scheduled for today. I will attend and I understand you have been invited as well. OVP, Counsel, Leg Affairs and HHS are also attending.

Since my last memo to you I have discovered that during the comment period three groups wrote in to encourage HHS to move the "promote or encourage" language into the actual rule: the Family Research Council, House Republicans (Chris Smith, Armey and others), and the Catholic Conference. This is troubling -- perhaps the groups envision using this language against clinics -- we know these groups would interpret "promote" and "encourage" differently than we would. HHS has looked at this language again and determined that adding "promote or encourage" to the rule might impose a new legal requirement on Title X clinics, and has changed its position and it now arguing against including the language.



Heather H. Howard
04/04/2000 04:09:31 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP@EOP
cc: Anna Richter/OPD/EOP@EOP, Ann O'Leary/OPD/EOP@EOP
bcc:
Subject: Re: Revocation of the Gag Rule

Bruce -- here are answers to your questions:

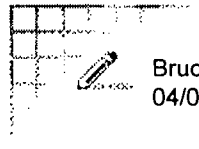
1. **What kind of practitioners are we talking about that are funded by Title X? Does any Title X money go to programs at Catholic hospitals?** These are family planning clinics, such as Planned Parenthood clinics. Title X money wouldn't go directly to a Catholic program (because they wouldn't provide the full range of reproductive services), but it's possible a few might get a grant to do natural family planning.

2. **Under Option 2, would Title X practitioners be banned from providing abortions but required to provide info on abortions if asked?** Yes, but this is true regardless of which option we choose. Under any of the options, providers must provide information on abortion (and all the other options), including a referral. Substantively the options don't really differ; that is, the language proposed in both Options 2 and 3 already exists in substance in the proposed guidance. (For example, under General Principles in the guidance, the first line reads: "In general, section 1008 prohibits Title X programs from engaging in activities which **promote or encourage** abortion as a method of family planning.") The only issue we face is whether to bring that language (either or both the nondirective counseling or "promote or encourage" language) into the rule itself, thereby highlighting it. The groups believe Option 2 is preferable because it is a stronger statement of what constitutes nondirective counseling.

3. **Who speaks for HHS on this issue?** We have been dealing with Counsel's office (Marcy Wilder), but Kevin Thurm is now involved.

4. **Who in the choice community cares most about this?** We met with all the groups (NARAL, Planned Parenthood, ACLU, National Women's Law Center, National Partnership for Women and Families (formerly Women's Legal Defense Fund), American Association of University Women (AAUW), National Family Planning and Reproductive Health Association, Alan Guttmacher Institute, etc.) and they were unanimous on 2 things: 1) the rule should come out sooner, rather than later, so that they have time to prepare for any response, and 2) it should include nondirective counseling language. ACLU also wants language on referrals in the rule, but the other groups did not agree (they want it clean except for nondirective counseling), and we decided that was too much to get into in the actual rule. (The referral language is in the guidance). All the groups seem to care a lot about it. They are concerned that the Administration has had 7 years to get it out and hasn't done so.

Bruce N. Reed



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

APRIL 3, 2000

MEMORANDUM FOR BRUCE REED

FROM: HEATHER HOWARD

SUBJECT: REVOCATION OF 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 has only now been submitted for final review by OMB. The pro-choice groups have recommended that we release the final rule as quickly as possible. As the Administration finalizes the language of the rule, we are considering a number of options:

Option 1: Clean Revocation

The proposed rule published in 1993 was a "clean" revocation of the gag rule and a return to the pre-1988 rule. HHS recommends that the final rule be a clean revocation because they believe that will minimize the likelihood of a legislative response. You should know that this proposal includes 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*

This "must not provide abortion" language is a restatement of the pre-1988 rule and was the language proposed in 1993.

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

The pro-choice community has urged us to make the rule stronger and more detailed by bringing in language from the accompanying guidance. Specifically, they have recommended adding language from the guidance fleshing out the requirements of nondirective counseling. (This would be in addition to the "must not provide abortion" language from Option 1). Proposed language drafted by HHS would state that 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, provide neutral 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.*

Adding this language from the guidance would strengthen the rule and make it harder for a future administration to define nondirective options counseling in such a way that excludes abortion.

The pro-choice groups believe strongly that defining nondirective counseling is an important change to make, even though it means that the rule is no longer a clean revocation. They recommend that we otherwise stick closely to the pre-gag rule language so as not to engender a Congressional backlash or open it up to a legal challenge. (Thus, they counsel against bringing in other controversial language from the guidance such as language regarding referrals).

Although we can expect a legal challenge regardless of the language, we hope to avoid a serious legislative challenge. (Congressman Bliley has introduced H.R. 2511, the "Adoption Awareness Act," which would promote adoption counseling and redefine nondirective counseling to exclude abortion. This bill, and Labor-HHS appropriations, would seem the likely vehicles for such an attack.) It is worth noting, however, that both Representative Porter and Senator Spector have put a reference to nondirective counseling in the conference reports accompanying their Labor-HHS appropriations bills, and the pro-choice groups believe we would have their support on this. ("Provided further, That amounts provided to said projects under such title shall not be expended for abortions, that all pregnancy counseling shall be nondirective . . .").

Option 3: "Promote or Encourage"

Another issue that has been raised regards whether we should strictly adhere to the language of the law that prohibits the use of Title X funds for the practice of abortion, or incorporate into the rule interpretive language that more broadly restricts the use of Title X funds, but that has never been part of the rule in the past. In theory, this would stem potential criticism of expanding the rule to include the description of nondirective counseling, as well as reach out to moderates who may otherwise support a legislative challenge to the rule. HHS has drafted the following possible additional language:

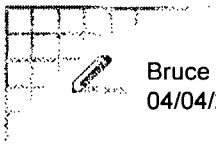
> *Projects supported under this rule must not provide* ***or promote or encourage*** *abortion as a method of family planning.*

Although the law clearly states that Title X projects may not provide abortions, only the interpretive guidance and legislative history of the law have extended that meaning to include promotion and encouragement of abortions. By including this language in the actual rule we may alienate members of the pro-choice community by strengthening and giving deeper legitimacy to this interpretation. In addition, moving this language to the rule would highlight it, and may imply that there has been a problem with Title X clinics promoting or encouraging abortions. Also, the pro-choice groups will argue that such language is one-sided in the context of nondirective counseling, and that any "not promote or encourage" language should apply not only to abortion but also to the whole range of counseling options. However, members of the Counsel's office support the inclusion of this language (if the nondirective language is included) for political reasons, because they fear a legislative backlash.

Legislative affairs is not aware that the gag rule is on anyone's radar screen, but they expect that anti-choice members may want to make an issue of it. However, in this political climate, the Republicans may be more inclined to make other abortion issues the focus of the anti-choice debate this summer and fall (such as "partial birth" and the Child Custody Protection Act).

Recommendation

I believe this is an important opportunity to strengthen Title X and recommend Option 2, inclusion of the nondirective counseling language. I have spoken with Ann Lewis and she agrees that we may face a legislative response regardless of the language, and that therefore we should do the right thing (issue a strong rule) and get credit for doing so. I recommend against the addition of "promote or encourage" because 1) it is already in the guidance and adding it to the rule is a step back from the rule proposed in 1993, 2) it is not clear that it would buy us anything, and 3) it will most certainly upset the pro-choice groups.



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

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

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?

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

3. Who speaks for HHS on this issue?

4. Who in the choice community cares most about this?

ABORTION
GAG RULE

March 22, 2000

1+2

MEMORANDUM FOR ERIC LIU

FROM: **HEATHER HOWARD**

SUBJECT: **REVOCATION OF THE GAG RULE**

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Option 2: Nondirective Counseling Language

The pro-choice community has urged us to make the rule stronger and more detailed by bringing in language from the accompanying guidance. Specifically, they have recommended adding language from the guidance fleshing out the requirements of nondirective counseling. Proposed language drafted by HHS would state that projects supported under this rule must:

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Adding this language from the guidance would strengthen the rule and make it harder for a future administration to define nondirective options counseling in such a way that excludes abortion. The pro-choice groups believe strongly that defining nondirective counseling is an important

change to make, even though it means that the rule is no longer a clean revocation. They recommend that we otherwise stick closely to the pre-gag rule language so as not to engender a Congressional backlash or open it up to a legal challenge. (Thus, they counsel against bringing in other controversial language from the guidance such as language regarding referrals). Although we can expect a legal challenge regardless of the language, we hope to avoid a serious legislative challenge. (Congressman Bliley has introduced H.R. 2511, the "Adoption Awareness Act," which would promote adoption counseling and redefine nondirective counseling to exclude abortion. This bill, and Labor-HHS appropriations, would seem the likely vehicles for such an attack.)

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Legislative affairs is not aware that the gag rule is on anyone's radar screen, but they expect that anti-choice members may want to make an issue of it. However, in this political climate, the Republicans may be more inclined to make other abortion issues the focus of the anti-choice debate this summer and fall (such as "partial birth" and the Child Custody Protection Act).

Recommendation

I believe this is an important opportunity to strengthen Title X and recommend Option 2, inclusion of the nondirective counseling language. Although I share the concern of HHS and the Counsel's office, I believe we may face a legislative response regardless of the language, and therefore I recommend we issue a strong rule and get credit for doing so. I recommend against the addition of "promote or encourage" because it is a step back from the rule proposed in 1993 and it is not clear that it would buy us anything.