Document No. 073408CS

WHITE HOUSE STAFFING MEMORANDUM

DATE: June 14 ACTION/CONCURRENCE/COMMENT DUE BY: June 17th

SUBJECT: DRAFT PROPOSAL FOR "BABY DOE" NOTICE OF PROPOSED RULEMAKING

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	HARPER	☑	☐
MEESE	☐	☑	HERRINGTON	☐	☐
BAKER	☐	☑	JENKINS	☐	☐
DEAVER	☐	☑	McMANUS	☐	☐
STOCKMAN	☐	☐	MURPHY	☐	☐
CLARK	☐	☐	ROGERS	☐	☐
DARMAN	☐P	☑SS	ROLLINS	☐	☐
DUBERSTEIN	☑	☐	VERSTANDIG	☑	☐
FELDSTEIN	☐	☐	WHITTLESEY	☐	☐
FIELDING	☑	☐	BRADY/SPEAKES	☐	☐
FULLER	☐	☐	________	☐	☐
GERGEN	☑	☐	________	☐	☐

REMARKS:

Please provide any comments/recommendations by June 17th.

Thank you.

RESPONSE:

Richard G. Darman
Assistant to the President
Ext. 2702

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 13, 1983

The Honorable Margaret M. Heckler
Department of Health and Human Services
200 Independence Avenue, S.W.
Room 615 F
Washington, D.C. 20201

Dear Madam Secretary:

I enclose herewith a draft proposal for possible inclusion in the "Baby Doe" Notice of Proposed Rulemaking ("NPRM"). The draft sets forth the duty of state child protection agencies to protect handicapped newborns. The inclusion of such a regulatory approach in the NPRM will require some additional explanatory language in the preamble.

We are, of course, prepared to work closely with you to insure that this proposal is fully consistent with your thoughts on this matter.

Sincerely,

W. Bradford Reynolds

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: John Svahn
Juan del Real
Craig Fuller

DRAFT

.01

A state child protective agency receiving Federal financial assistance for its child abuse and child neglect activities which requires health care providers to report to it suspected cases of child abuse or neglect shall require as part of its reporting requirement, that health care providers report to it immediately cases wherein parents or a guardian of a handicapped newborn infant refuse to consent to medically indicated treatment.

.02

Within 60 days of the effective date of this Part, each state child protective agency shall establish and maintain written methods of administration and procedures to assure that the agency utilizes its full authority to protect handicapped newborns subjected to neglect through parental or guardian denial of consent to medically indicated treatment, solely on the basis of handicap, as effectively as they are utilized on behalf of nonhandicapped children subjected to other kinds of child abuse and neglect. These procedures shall include:

(a)(1) A requirement that health care providers report suspected cases of child abuse or neglect due to parental or guardian denial of consent to medically indicated treatment; provided that,

(2) If a hospital has established a board which (i) includes a majority of members not employed by the hospital or making regular use of its facilities or services and some members who are not health professionals and (ii) reviews all cases of prospective withdrawal of care from newborns, then only those cases wherein the board decides withdrawal of care is permissible must be reported to the agency, together with a full written rationale of the board's decision.

(b) Sending all hospitals within the state which treat newborns a copy of its methods of administration.

(c)(1) A means by which the agency can receive reports of such suspected child neglect or child abuse from health care providers, other individuals with knowledge of suspected cases of child abuse or neglect, and the Department on a 24-hour a day, 365 day a year basis;

(2) The means described in §.02(c)(1) shall include the use of an information log prepared by the Department for the purpose of soliciting appropriate information about individual cases of prospective withdrawal of care.

(d)(1) Immediate review of the reports described in §.02(c)(1) and, where appropriate, on-site investigation of such reports;

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(2) In reviewing the report of a board described in §.02(a)(2), the agency shall give due weight to the rationale of the board, but such rationale shall not be dispositive of whether the withdrawal of care from a newborn is in fact child neglect, nor shall it preclude an on-site investigation if the agency deems one to be necessary.

(e) Immediate notification to the Department's Office for Civil Rights of each report of child neglect or abuse based on the child's handicapped condition and the agency's final disposition of said report;

(f) Provision of services to handicapped newborn infants whose parents or guardian refuse to consent to medically indicated treatment solely on the basis of handicap including, where appropriate, seeking timely custody of the infant and consenting to medically indicated treatment or seeking a timely court order to compel the medically indicated treatment.

.03

In determining whether parental or guardian refusal to consent to medical treatment is solely on the basis of handicap, the agency shall follow the guidelines established by the Department. The examples listed in Section .05 are part of those guidelines.

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.04

Definitions

"Refusal to consent to medically indicated treatment solely on the basis of handicap," as used in Section 0.2, means: refusal to permit or authorize a health care provider to provide treatment, including adequate nutritional needs, which would be medically beneficial to the handicapped newborn infant and would otherwise be provided as a matter of reasonable medical judgment but for the fact that after the treatment the infant will continue to be a handicapped individual.

"Medical judgment" does not include opinions based upon the social, psychological, financial, or other impact of the infant's handicap condition on itself or any other person.

.05

Examples

1. If a parent or guardian refuses to consent to medical treatment for the removal of a stomach blockage or other life-threatening condition of a child with Down's Syndrome, in the absence of a reasonable medical judgment that the treatment for the independent ailment presents a greater risk to the infant than the ailment itself, the failure of a state child protective agency to seek to protect the life of that infant or to have procedures to intervene for such protection, is discriminatory under Section 504.

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2. If a parent or guardian refuses to consent to treatment for an infant suffering from spina bifida, in the absence of a reasonable medical judgment that the treatment presents greater risks than the spina bifida condition itself, the failure of a state child protective agency to protect the life of that infant or to have procedures to intervene for such protection is discriminatory under Section 504.

3. If a parent or guardian refuses to consent to treatment for a handicapped infant, where the reasonable medical judgment is that the prognosis is for imminent death regardless of treatment because of the handicapped condition itself or another ailment or ailments, the failure of the state protective agency to intervene to prolong the life of such a dying infant is not discriminatory under Section 504.

Infanticide dispute comes to head

BY A WASHINGTON TIMES STAFF WRITER

It will be "Brad Reynolds against the world," according to one person's description of a high-level White House meeting scheduled for this afternoon relative to administration infanticide regulations.

William Bradford Reynolds is the assistant attorney general for civil rights, and he is opposing President Reagan's infanticide regulations on the grounds they will open the door to broader interpretations of civil rights protections.

The White House staff is prepared to fight for the president's original language, with some modifications to make it more palatable to the courts. A recent court decision invalidated the infanticide regulations on technical grounds.

Those scheduled to attend today's meeting include Presidential Counselor Edwin Meese III, Attorney General William French Smith, Health and Human Services Secretary Margaret Heckler (or a representative of HHS), Reynolds and Bob Carlson, chairman of the Cabinet Council on Human Rights.

White House sources said the meeting will be to "refine" the earlier administration infanticide regulations, taking into account the court's concern that adequate notification be given prior to issuance of the regulations.

Conservatives will be watching today's White House meeting closely. One source predicted it will be a "knockdown, drag-out" session. He said if Reynolds prevails, the administration will lose the confidence of a large number of traditionally conservative groups, particularly the strong "right to life" advocates.

White House sources said the meeting will be to "refine" the earlier administration infanticide regulations.

The infanticide regulations came about primarily because of the "Baby Doe" case in Bloomington, Ind., in which an infant with Down's Syndrome died after treatment and food were withheld at the request of the family and with the backing of a court order. A large number of similar cases have come to light and the administration moved in March to halt the practice. The regulations promulgated at that time called for cutting off federal funds to hospitals that practice infanticide.

The regulations also included "hotline" numbers for persons to call if they suspected a hospital of practicing infanticide, a provision attacked vociferously by the medical profession. U.S. District Judge Gerhard A. Gesell termed the "hotline" regulation "hasty" and "ill-considered" in issuing a permanent injunction against the administration's infanticide rules.

Reynolds is backing the concept of turning over to the states the power to promulgate and enforce infanticide regulations. Should the states fail to meet their responsibilities, Reynolds argues, federal funds could be withheld.

'Bo' Gritz is expelled by Green Beret group

By Whitt Flora
WASHINGTON TIMES STAFF

Controversial former Green

to raise funds for excursions into Laos when "his missions have absolutely no connection with us."

He said the board quietly and

U.S. Department of Justice
Civil Rights Division

Assistant Attorney General *Washington, D.C. 20530*

5/23/83

Jim -

Attached are the letters we discussed earlier today

Brad

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

April 26, 1983

Honorable John A. Svahn
Under Secretary
Department of Health and
Human Services
Washington, D.C. 20201

Re: Infanticide Regulation Working Group

Dear Mr. Svahn:

I enclose herewith a proposed mark-up of the draft regulation which you circulated to members of the working group last week. I am also attaching a brief description of possible alternatives to the approach embodied in the draft regulation.

With respect to the draft regulation, I believe that the working group should consider attaching an appendix to the regulation which sets forth a number of the priniciples stated in the preamble. For example, the appendix might include a discussion of what constitutes discrimination on the basis of handicap under the statute and what the Department of Health and Human Services does not consider to be a violation of Section 504, i.e., the withdrawal of care for an infant who is terminally ill. The definition of "customary medical care," discussed in the preamble, might also be included.

The basis for my suggestion is that the appendix would provide more authoritative guidance as to HHS's interpretation of the regulation and thus might be given more weight by a reviewing court than the preamble alone. Indeed, it is not infrequent that such appendices are published in the Code of Federal Regulation, whereas preambles to regulations are virtually never published. By giving greater weight to the principles we are setting forth in the preamble, I believe that we would enhance the likelihood of the regulation surviving a facial attack.

Indeed, it might be desirable for the regulation itself to set forth some of those principles, i.e., by defining customary care in the case of handicapped newborns, and by defining discrimination in the delivery of care to handicapped newborns or at least expressly excluding, by regulation, those circumstances, described in the preamble, that the Department does not consider discrimination against a handicapped newborn. The articulation of these principles in the regulation itself should also improve its chances of surviving legal attack.

This is, of course, a matter that you will want to review with your Department's General Counsel and Director for Civil Rights. I would be interested in knowing whether they share my concern that the preamble discussion may not alone be sufficient to meet the kinds of objections that Judge Gesell expressed in his opinion.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Michael Uhlmann
Richard Willard
Juan del Real

ALTERNATIVES TO CURRENT PROPOSAL

I. Imposing regulatory requirements on state-child protective agencies

I understand that the Department of Health and Human Services provides funds to state-child protective agencies to aid them in dealing with child neglect and child abuse. I further understand that virtually all states have laws authorizing state intervention in cases of child neglect and child abuse and that the child protective agency of each state seeks to intervene in such cases as appropriate. This intervention includes applying to state courts for custody of the child for a period of time in order to insure proper care and protection against life-threatening conditions.

State child protective agencies, which receive Federal financial assistance, could be required pursuant to Section 504 to have a procedure and active policy providing for intervention to protect handicapped infants who are discriminatorily denied food or medical care solely on account of their handicap. The contents of such a regulation could reflect a variety of approaches. Under such a regulation, the federal role might include all or some of the following:

1. Compelling state-child protective agencies to require such hospital to report all cases of withdrawal of denial of food or care. This requirement would have the advantage of compelling hospitals to reveal all cases of denial of food and care, without need to rely on whistleblowers (reliance on whistleblowers undoubtedly will not result in the reporting of every case of discriminatory denial of treatment). Moreover, if we could obtain the agreement of the medical and hospital associations to this procedure, there would probably be no need for posting a hotline number, a major irritant to these groups.

One part of the state's compliance program might include compelling hospitals to establish the "ethics review board" recommended by the President's Commission for the Study of Ethical Problems in Medicine, and Biomedical and Behavioral Research. The state might require these review boards to rule upon every proposed withdrawal of care and to forward immediately its decision and rationale to the state child protective agency.

If the medical and hospital communities are opposed to this regulatory approach, the state might be encouraged or required to establish a telephone number, and the posting of that number in hospitals, for the reporting of child neglect or child abuse to the appropriate state agency. Thus, in the event that a hospital might not be reporting all appropriate cases, there will be an avenue for whistleblowers to report possible neglect or abuse situations.

2. The Department could provide guidance and "technical assistance" to state-child protective agencies to aid them in meeting their Section 504 obligations. The guidance could take the form of the principles enunciated in the preamble of the draft regulation. Moreover, the Department could train employees of state child protective agencies in handling these matters. The Department might also directly assist the state agencies in reviewing certain hospital decisions to withdraw care as a method of assisting the state agencies in fulfilling their Section 504 obligations.

3. The Department could monitor cases reported to state agencies as well as the follow-up by the state agency. This oversight function could trigger more direct federal guidance to state agencies in individual cases.

This approach is consistent with the President's commitment to federalism. Moreover, so long as we are confident that state-child protective agencies will fulfill their duties (and they will be under threat of fund termination if they fail to do so) this might be a more effective means of protecting the handicapped newborns than reliance on a whistleblower strategy.

II. Legislation

A congressional enactment protecting handicapped newborns from the denial of food or treatment solely because of handicap probably has the best chance of surviving legal attack. Courts are less likely to strike down a congressional enactment, complete with congressional findings, than they are to strike down administrative agency action.

One legislative approach would be to permit the continued receipt of Medicare and Medicaid funding by hospitals on the condition that the hospital not discriminate against handicapped newborns. This approach likens Medicare and Medicaid services to any other goods or services that the Government acquires with federal funds from the private sector, and imposes the nondiscrimination requirement as if federal Medicare and Medicaid funding constitute procurement contracts. Legislation to this effect could define the "Baby Doe" obligation with sufficient precision to reach the situation where medical treatment should be extended to the handicapped infant, while leaving to the parents and their doctor the difficult decision regarding appropriate life-support procedures when the clear medical judgment is that the baby cannot survive on its own.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

May 5, 1983

Honorable John A. Svahn
Under Secretary
Department of Health and
 Human Services
Washington, D. C. 20201

Dear Mr. Svahn:

I offer for your consideration a very rough draft of a possible regulatory approach to the "Baby Doe" problem that targets Federal enforcement activity under Section 504 at state child protective agencies which receive Federal financial assistance to aid their child abuse and child neglect programs.

As you know, questions have been raised in litigation of the earlier "Baby Doe" regulation with respect to Section 504 coverage. Specifically, in briefs filed in American Hospital Association v. Heckler, plaintiffs asserted that health care providers were not recipients of Federal financial assistance within the meaning of 504 if the only Federal funding was tied to the Medicare or Medicaid programs.

The Department of Justice is currently taking a close look at the complex coverage issues raised in the American Hospital Association case. While resolution of those legal questions would not, as I understand it, necessarily require a different regulatory approach to this matter than the one originally taken -- since the original regulation and the proposed modification thereof would apply only to health care providers that furnish "covered" health care services to infants -- certainly the reach of the regulation could be significantly affected.

The enclosed draft is an effort to respond more directly to the referenced concerns about the use of Section 504 in this context. As you know, the statute prohibits discrimination on account of handicap in programs receiving Federal financial assistance. The state child protective agencies have such programs that are explicitly charged with safeguarding against child neglect or child abuse.

The Federal Government's legitimate, and very proper concern, that handicapped infants not be medically "neglected" or "mistreated" solely on account of their handicap, should not ignore the similar state interest in such matters. By working with and through existing state agencies, already having the staff and experience to deal with such matters, my sense is that the desired end can be achieved in a more effective, expeditious and sensitive manner, while avoiding much of the criticism of the undue Federal intrusion that was levelled at the earlier regulation. Obviously, this suggested alternative fully contemplates a vigorous Federal role in overseeing and monitoring a state agency's compliance with its Section 504 responsibilities with respect to handicapped newborns.

As stated at the outset, the draft and these thoughts are offered for the working group's consideration. My interest is in making sure that we have given full consideration to all of the complexities involved with the "Baby Doe" issue in our deliberations of the proper course to pursue.

Sincerely,

W. Bradford Reynolds

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Enclosure

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.01

A state child protective agency receiving Federal financial assistance for its child abuse and child neglect activities which requires health care providers to report to it suspected cases of child abuse or neglect shall require, as part of its reporting requirement, that health care providers report to it immediately cases wherein parents or a guardian of a handicapped newborn infant refuse to consent to medically indicated treatment.

.02

Each state child protective agency shall establish and maintain written methods of administration and procedures to assure that the authorities of the agency to prevent instances of child abuse and neglect are utilized for the protection of handicapped newborns subjected to neglect through parental or guardian denial of consent to medically indicated treatment, solely on the basis of handicap, as effectively as they are utilized on behalf of nonhandicapped children subjected to other kinds of child abuse and neglect. These procedures shall include:

(a) Establishment of the duty of health care providers to report suspected cases of child abuse or neglect;

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(b) A means by which the agency can receive reports of such suspected child neglect or child abuse from health care providers and other individuals with knowlege of suspected cases of child abuse or neglect on a 24-hour a day, 365 day a year basis;

(c) Immediate review of such reports and, where appropriate, on-site investigation of such reports;

(d) The immediate notification to the Office for Civil Rights of each such report and cooperation with OCR;

(e) Provision of services to handicapped newborn infants whose parents or guardian refuses to consent to medically indicated treatment solely on the basis of handicap which are as effective as those provided to other abused or neglected children, including, where appropriate, seeking timely custody of the infant and consenting to medically indicated treatment or seeking a timely court order to compel the medically indicated treatment.

.03

Definitions

"Refusal to consent to medically indicated treatment solely on the basis of handicap," as used in Section 0.2, means: refusal to permit or authorize a health care provider to provide treatment which would be medically beneficial to the handicapped newborn infant and would otherwise be

DRAFT

provided as a matter of reasonable medical judgment but for the fact that after the treatment the infant will continue to be a handicapped individual.

"Medical judgment" does not include opinions based upon the social, psychological, financial, or other impact of the infant's handicap condition on itself or any other person.

.04

Examples

1. The refusal to consent to medical treatment for the removal of a stomach blockage or other life-threatening condition, of a child with Down's Syndrome, in the absence of a reasonable medical judgment that the treatment for the independent ailment presents a greater risk to the infant than the ailment itself, is child neglect and the failure of a state child protective agency to seek to protect the life of that infant or the failure to have procedures to intervene for such protection, is discriminatory under Section 504.

2. The refusal to consent to treatment for an infant suffering from spina bifida, in the absence of a reasonable medical judgment that the treatment presents greater risks than the spina bifida condition itself, is child neglect, and the failure of a state child protective agency to protect the life of that infant or to have procedures to intervene for such protection is discriminatory under Section 504.

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3. The refusal to consent to treatment for a handicapped infant, where the reasonable medical judgment is that the prognosis is for imminent death regardless of treatment because of the handicapped condition itself or another ailment or ailments, is not child neglect and the failure of the state protective agency to intervene to prolong the life of such a dying infant is not discriminatory under Section 504.

The preamble to this regulation could contain a great deal of the material from the preamble in the regualation circulated on April 22, 1983. Moreover, the preamble could contain further explanation of the role of the Department of Health and Human Services in monitoring and guiding state agencies in the enforcement of their Section 504 responsibilities as well as the role of the Department in providing "technical assistance" to state child protective agencies. The Department could provide a good deal of guidance in the handling of certain situations. Further, the regulation itself could be adjusted to provide for the Department's role or a somewhat different role for the state protective agency. The state might be required to compel hospitals to establish ethics review boards -- only those decisions of the Board to withdraw care would need to be reported to the state agency.

Urgent

Document No. 073395CS

WHITE HOUSE STAFFING MEMORANDUM

DATE: June 8, 1983 **ACTION/CONCURRENCE/COMMENT DUE BY:** — — —

SUBJECT: Infanticide Rule: Medicaid/Medicare Issues

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	HARPER	☐	☑
MEESE	☐	☐	HERRINGTON	☐	☐
BAKER	☐	☑	JENKINS	☐	☐
DEAVER	☐	☑	McMANUS	☐	☐
STOCKMAN	☐	☐	MURPHY	☑	☐
CLARK	☐	☐	ROGERS	☐	☐
DARMAN	☐P	☑SS	ROLLINS	☑	☐
DUBERSTEIN	☑	☐	VERSTANDIG	☑	☐
FELDSTEIN	☐	☐	WHITTLESEY	☑	☐
FIELDING	☑	☐	BRADY/SPEAKES	☐	☐
FULLER	☐	☐	________	☐	☐
GERGEN	☑	☐	________	☐	☐

REMARKS:

Attached is a paper developed by the White House Office of Policy Development concerning Medicare and Medicaid as Federal Financial Assistance. Please review the material prior to a principals meeting on the Infanticide Rule which will be scheduled for this week.

RESPONSE:

Richard G. Darman
Assistant to the President
Ext. 2702

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

June 6, 1983

FOR: ROBERT B. CARLESON
MICHAEL M. UHLMANN

FROM: STEPHEN H. GALEBACH

SUBJECT: Medicare and Medicaid as Federal Financial Assistance

I have prepared a summary of pro/con arguments that Medicare and Medicaid do/do not constitute federal financial assistance for purposes of Section 504. The same arguments apply with respect to Title VI and the age discrimination statute.

The argument that Medicare and Medicaid are not federal assistance is well stated in Brad Reynolds' memorandum. I have cited to the relevant parts of his memo, in lieu of more detailed summary.

For the opposite case, I have cited several portions of the legislative history of the 1964 Civil Rights Act and the Medicare Act, which are attached as appendices. My summary of this side of the case is somewhat longer, to give the balancing arguments to those in Brad's memorandum. I have used identical numbering for balancing arguments (e.g., pro argument #2 matches con argument #2).

I believe that the legislative history, the course of administrative interpretation, and the nature of the Medicare and Medicaid programs create a substantial legal argument that the programs constitute federal financial assistance. This is not the position I would favor if we were writing on a clean slate, but any attempt to reverse the longstanding HHS position on this matter would likely meet with a stiff rebuff by the courts. Our best strategy is to draw the line between federal payments going to institutions and federal payments going to individuals. This position will not undermine our past arguments with respect to federal aid to college students.

In addition to the straight legal arguments, I think we should consider the unlikelihood that federal courts would cut back on the scope of institutions covered by civil rights laws, even if the legal considerations favored such a cutback. Further, the political ramifications of releasing hospitals from the coverage of civil rights laws concerning race, handicap, and age are considerable.

Argument that Medicare is Not Federal Financial Assistance to Hospitals

1. Medicare is a program of aid to individuals, not to hospitals. (See Reynolds Memorandum, pp. 4-7)
   a. Though hospitals receive federal payments, these payments are made on behalf of elderly and disabled individuals who receive care at the hospitals. (Memorandum, p. 4-7)
   b. Individual-oriented programs of assistance, such as student loans or Medicare, do not bring civil rights coverage unless Congress expressly so intends. (Memorandum, pp. 5, 7)
   c. Medicare was designed by Congress to ensure medical services for individuals, not to "bail out" health care providers who were giving free services to the elderly and disabled. (Memorandum, p. 4)
2. There is no express indication of Congressional intent to have Medicare constitute federal financial assistance, since the only indications to that effect are floor statements of two individual Senators. (Memorandum, p. 6 & n. 7)
3. The administrative interpretation by HEW and now HHS that Medicare is federal financial assistance is inconsistent with proper statutory interpretation. (Memorandum, pp. 6-7)
4. The several lower courts that have proceeded on the assumption that Medicare constitutes assistance to hospitals have not squarely addressed the issue or given it any real analysis. (Memorandum, p. 7)
5. If we grant that Medicare is federal financial assistance to hospitals, we will give support to arguments that other individual-oriented payments are federal assistance to institutions.
   a. For instance, distribution of Medicare cards to elderly or disabled individuals is no more federal assistance to hospitals than distribution of food stamps is federal assistance to grocery stores. (Memorandum, p. 5)
   b. Medicare is analogous to other programs, such as guaranteed student loans and GI Bill benefits, in which the individual is free to use the government benefit at virtually any institution he chooses; in none of these programs does the government decide to which institution the money flows.
6. Medicare is more akin to a procurement contract than to a federal grant, since the government purchases medical services on behalf of elderly and disabled persons at fair market value or reasonable cost. (Memorandum, p. 6)

7. We are generally trying to hold the line against efforts to make ever-greater encroachments of federal regulatory activity into the private sphere, and we should not make an exception in the case of Medicare and Medicaid.

Argument that Medicare Is Federal Financial Assistance to Hospitals

1. Medicare is a program of payments to hospitals, not just to individuals.

   a. The key question is who receives the federal payment: Medicare Part A payments go to hospitals and thus should carry civil rights coverage; Medicare Part B payments go to individual doctors and patients and thus should not (and in fact do not) carry such coverage.

   b. Medicare payments are tailored to subsidize particular costs of hospitals (e.g., teaching hospitals are often paid at higher rates to cover costs of training); this suggests that one aspect of Medicare/Medicaid is assistance to the institution.

   c. The Senate Report on the Medicare Act said the program "will appreciably reduce the need of hospitals to charge their paying and prepaying patients more than the cost of their services in order to compensate for care rendered to other patients without charge or at less than cost." (1965 Code, Cong. & Admin. News, p. 1943).

   d. Many types of federal payments go to programs that are "individual-oriented" in the sense that they provide specific goods and services to individuals, with the federal payment calculated according to the number of individuals served (e.g., school lunch program, Title I funds for compensatory education programs for underprivileged students); yet whenever the federal payment goes to the institution it is generally considered federal financial assistance.

2. Congress intended Medicare, like other programs with federal payments to institutions, to constitute federal financial assistance to hospitals.

   a. In the debates over Title VI of the 1964 Civil Rights Act, members repeatedly drew the distinction between payments to institutions (e.g., school lunch program) and payments directly to individual beneficiaries (e.g., Social Security checks) -- see examples in Appendices A and B.

   b. Several members of the House Judiciary Committee expressed an intent to cover, with Title VI, "vendor payment programs for medical care of public assistance recipients," which operated in similar manner to Medicare and Medicaid -- see Appendix C.

   c. The direct statements by Senators Hart and Ribicoff (former Secretary of HEW) that hospitals participating in Medicare would have to comply with Title VI -- see Appendices D and E -- were apparently not controverted in the debates and would probably be accorded substantial weight by a court.

   d. Section 504 was expressly designed by Congress to have the same coverage as Title VI -- to provide the same procedures for handicap discrimination as for racial discrimination.

3. Longstanding administrative practice has considered Medicare and Medicaid to be federal financial assistance.

   a. From the outset of the Medicare program, HEW followed the position expressed by Hart and Ribicoff and required Medicare participants to abide by Title VI.

   b. Current HHS regulations require Medicare participants to enter into "provider agreements" in which they must give assurance that they comply with Title VI and Section 504 (42 C.F.R. Section 489.12, 45 C.F.R. Sections 80.4, 84.5).

4. Judicial decisions, while not directly addressing the issue, consistently assume that Medicare and Medicaid are federal financial assistance.

   a. In the earliest cases on this point, in 1967, Administrative Law Judges ruled that Medicare and Medicaid are federal financial assistance.

   b. Hospitals apparently all accepted this ruling and have not to date pressed a case so as to require a federal court decision on the point.

   c. When called upon to address related issues (e.g., whether Medicare and Medicaid payments carry Section 504 coverage over employment practices), federal courts have either stated or implied that they view Medicare and Medicaid as federal financial assistance.

   d. A case directly on point arose last year, when Baylor University Medical Center claimed that Medicare and Medicaid are not federal financial assistance for purposes of Section 504. The Justice Department filed a brief taking the position that these payments are federal assistance. Recently, Justice has filed a further brief modifying, though not reversing, its position.

5. One can draw a workable distinction between Medicare and federal programs of payments to individuals, such as student loans and food stamps, based on whether the federal aid is given to individuals or institutions.

   a. Federal assistance to students goes to the individual student; only in the Pell Grant program do federal payments go to the university (and we have taken the position that Pell Grants are federal financial assistance, in the Grove City case).

   b. Food stamps are given to individuals, not to food stores; they cannot rightly be placed in the same category as Medicare payments to hospitals. (When the federal government gives money to food stores in return for properly endorsed food stamp coupons, the government is simply redeeming a financial instrument, not giving assistance to the food store -- this aspect would hold true for any fixed-amount voucher program.)

   c. Unlike voucher programs such as food stamps, Medicare involves federal approval of particular hospitals as Medicare participants, and detailed governmental review of reimbursable costs -- there is thus a greater relationship between government and institution than in a voucher program.

   d. Our best legal position in all these cases is to rest on the distinction made in the 1964 debates between payments to individuals and payments to programs or activities. It is possible to argue that many federal payments to institutions are "individual-oriented," just as it is possible to argue that many federal payments to individuals are actually for the benefit of institutions; but we invite less judicial tinkering if we stick to the question of who receives the federal payment.

6. Medicare and Medicaid are not akin to a procurement contract, because the medical services are not being procured for the government, and the government does not engage in a contracting process to obtain particular services.

7. Strong though our commitment is to prevent undue regulation of private institutions, this does not resolve the issue in any given case. Rather than adopt a line that has little hope of success in the courts or in Congress, we should take a firm but defensible position that we can successfully maintain to protect the private character of true voucher programs and programs in which federal benefits are given directly to individual beneficiaries.

Argument that Medicaid is Not Federal Financial Assistance to Hospitals

1. Federal payments under the Medicaid program go to participating states, not to health care providers. Hospitals are at most "subrecipients" when they receive reimbursement from the states for medical services rendered.

2. The distribution of Medicaid funds by states to hospitals is not financial assistance to the hospitals, because the states have a contractual relationship with the hospitals, much like a procurement contract, to pay on behalf of indigent patients for medical services rendered to them (thus hospitals are not subrecipients of federal Medicaid assistance for the same reasons they are not properly regarded as recipients of federal Medicare assistance).

Argument that Medicaid is Federal Financial Assistance to Hospitals

1. The fact that Medicaid is administered by the states does not make it any the less federal assistance to participating hospitals -- we have performed many block grants that turn administration of federal funds over to the states, and we always provide that civil rights "cross-cutting" regulations be kept in effect with respect to programs and activities that receive the funds via the states.

2. Medicaid funds channeled via states to hospitals are federal financial assistance for the same reasons that apply to Medicare.

Program-Specificity

1. Section 504, like Title VI and Title IX of the 1964 Civil Rights Act, applies only to the specific program or activity receiving federal financial assistance.

2. It remains an open question whether a hospital is a single "program or activity," or whether wards of a hospital, e.g., neo-natal wards, intensive care nurseries, etc., are each a program or activity in themselves.

3. Thus, participation in Medicare by a hospital might not bring its infant care facilities under Section 504 coverage -- see p. 7, n. 9 of Reynolds Memorandum.

4. Participation in Medicaid, however, would presumably trigger Section 504 coverage over a hospital's infant care facilities, unless the hospital segregated and excluded those facilities from its Medicaid program.

for their participation in voter registration drives, sit-in demonstrations and the like

Much has been done by the executive branch to eliminate racial discrimination from federally assisted programs. President Kennedy, by Executive order, prohibited such discrimination in federally assisted housing, and in employment on federally assisted construction. Individual agencies have taken effective action for the programs they administer. But the time has come for across-the-board legislation by Congress, to declare a broad principle that is right and necessary, and to make it effective for every Federal program involving financial assistance by grant, loan, or contract.

The need for action is clear. This is an area in which the United States, like Caesar's wife, must be above suspicion.

NEED FOR LEGISLATION

Legislation is needed for several reasons. First, some Federal statutes appear to contemplate grants to racially segregated institutions. Such laws include the Hill-Burton Act of 1946, 42 United States Code 291e(f) for hospital construction; the second Morrill Act of 1890 for annual grants to land-grant colleges, 7 United States Code 323; and (by implication) the School Construction Act of 1950, 20 United States Code 636(b)(f). In each of these laws Congress expressed its basic intention to prohibit racial discrimination in obtaining the benefits of Federal funds. But in line with constitutional doctrines current when these laws were passed, it authorized the provision of "separate but equal" facilities. It may be that all of these statutory provisions are unconstitutional and separable, as the Court of Appeals for the Fourth Circuit has recently held in a case under the Hill-Burton Act. *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 957 (C.A. 4, 1963), certiorari denied, March 2, 1964. But it is clearly desirable for Congress to wipe them off the books without waiting for further judicial action.

Second, most Federal agencies probably have authority now to eliminate racial discrimination in their assistance programs. Enactment of title VI will eliminate any conceivable doubts on this score and give express legislative support to the agency's actions. It will place Congress squarely on record on a basic issue of national policy on which Congress ought to be on record.

Third, some Federal agencies appear to have been reluctant to act in this area. Title VI will require them to act. Its enactment will thus serve to insure uniformity and permanence to the nondiscrimination policy.

Fourth, as Senators can well remember, in connection with legislation authorizing or continuing particular programs, a good deal of time has often been taken up with the so-called Powell amendment which would prohibit racial discrimination in the particular program. Many of us have argued that the issue of nondiscrimination should be handled in an overall, consistent way for all Federal programs, rather than piecemeal, and that it should be considered separately from the merits of particular programs of aid to education, health, and the like. This bill gives the Congress an opportunity to settle the issue of discrimination once and for all, in a uniform, across-the-board manner, and thereby to avoid having to debate the issue in piecemeal fashion every time any one of these Federal assistance programs is before the Congress.

Title VI is an authorization and a direction to each Federal agency administering a financial assistance program by way of grant, loan or contract, other than a contract of insurance or guaranty, to take action to effectuate the basic principle of nondiscrimination stated in section 601. Each agency must take some appropriate action; it may do so by "rule, regulation, or order of general applicability," but such a rule, regulation, or order must be approved by the President. Failure of a recipient to comply with such a rule, regulation, or order, may lead to a termination or refusal of Federal assistance. Termination of assistance, however, is not the objective of the title—I underscore this point—It is a last resort, to be used only if all else fails to achieve the real objective, the elimination of discrimination in the use and receipt of Federal funds. This fact deserves the greatest possible emphasis: Cutoff of Federal funds is seen as a last resort, when all voluntary means have failed.

TITLE VI IS NOT PUNITIVE

It seems to be assumed, by some of the opponents of title VI, that its purpose is a punitive or vindictive one. Nothing could be farther from the truth.

The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. In many instances the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions, under the decision in *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (C.A. 4, 1963), certificate denied, March 2, 1964. In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation.

Moreover, the purpose of title VI is not to cut off funds, but to end racial discrimination. This purpose is reflected in the requirement that any action taken by the Federal department or agency must be "consistent with the achievement of the objective of the statute authorizing the financial assistance in connection with which the action is taken." In general, cutoff of funds would not be consistent with the objectives of the Federal assistance statute if there are available other effective means of ending discrimination. And section 602, by authorizing the agency to achieve compliance "by any other means authorized by law" encourages agencies to find ways to end racial discrimination without refusing or terminating assistance.

Title VI does not confer a "shotgun" authority to cut off all Federal aid to a State. Any nondiscrimination requirement an agency adopts must be supportable as tending to end racial discrimination with respect to the particular program or activity to which it applies. Funds can be cut off only on an express finding that the particular recipient has failed to comply with that requirement. Thus, title VI does not authorize any cutoff or limitation of highway funds, for example, by reason of school segregation. And it does not authorize a cutoff, or other compliance action, on a statewide basis unless the State itself is engaging in discrimination on a statewide basis. For example, in the case of grants to impacted area schools, separate compliance action would have to be taken with respect to each school district receiving a grant.

Finally, the authority to cut off funds is hedged about with a number of procedural restrictions. Before funds would be cut off, the following would have to occur: First, the agency must adopt a nondiscrimination requirement, by rule, regulation, or order of general applicability; second, the President must approve that rule, regulation, or order; third, the agency must advise the recipient of assistance that he is not complying with that requirement, and seek to secure compliance by voluntary means; fourth, a hearing must be held before any formal compliance action is taken; fifth, the agency may, and in many cases will, seek to secure compliance by means not involving a cutoff of funds; sixth, if it determines that a refusal or termination of funds is appropriate, the agency must make an express finding that the particular person from whom funds are to be cut off has failed to comply with its nondiscrimination requirement; seventh, the agency must file a full written report with the appropriate congressional committee and 30 days must elapse; eighth, the aid recipient can obtain judicial review and may apply for a stay pending such review.

In short, title VI is a reasonable, moderate, cautious, carefully worked out solution to a situation that clearly calls for legislative action. Why, then, has it been so vehemently attacked in certain quarters? The answer, I submit, is clear. The opponents of title VI want the Federal Government to continue giving financial support to racial segregation. They are unwilling to challenge directly the principle that is stated in section 601—that public funds should not be expended in a way that promotes and maintains discrimination. And so they are attempting to flank attack, by seeking to create false and misleading impressions as to the intention and effect of title VI.

EFFECT ON SPECIFIC PROGRAMS

It, therefore, is important to be quite clear as to just what title VI would and would not do. In terms, it applies to well over a hundred different Federal assistance programs. In fact, however, its effect will be much more limited.

Perhaps the greatest amount of Federal assistance funds goes for direct programs, in which Federal funds are

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paid directly by the United States to the ultimate recipient, such as social security payments, veterans' compensation and pensions, civil service and railroad retirement benefits. Contrary to assertions that have been made, title VI will have no practical effect on such programs, for two reasons. First, the Federal Government does not engage in racial discrimination in determining eligibility for and paying out benefits under such programs. It could not. Neither the statutes authorizing them, nor the fifth amendment to the Constitution, would permit such discrimination. Second, title VI would not authorize the withholding of any of these direct payments on the ground that the recipient engages in racial discrimination in connection with his business or other activities. It is irrelevant, to the purpose of these acts, what the recipient does with the money he receives. His employees, the customers of his business, or other persons with whom he deals, are in no sense participants in or beneficiaries of these Federal programs.

With respect to State welfare programs, which receive Federal grants under the Social Security Act or other Federal laws, the picture is basically the same, with one significant difference. Title VI will not authorize imposition of any requirements on the ultimate beneficiaries of these welfare payments, for the same reasons already discussed under the preceding heading. But it will result in requirements that the State agencies administering these programs refrain from racial discrimination in the allowance of benefits and in treatment of beneficiaries. For example, a State agency administering an unemployment compensation program which participates in the Federal Unemployment Trust Fund, would be prohibited from denying payments to otherwise eligible beneficiaries because they were Negroes, or because they had participated in voter registration drives or sitin demonstrations. The State agency could also be prohibited from maintaining segregated lines or waiting rooms for, or otherwise differentiating in its treatment of, white and Negro beneficiaries.

EFFECT ON HOUSING AND FARM PROGRAMS

Title VI will have little or no effect on federally assisted housing. This is so for two reasons. First, much Federal housing assistance is given by way of insurance or guaranty, such as FHA and VA mortgage insurance and guaranties. Programs of assistance by way of insurance and guaranty are expressly excluded from title VI. Hence enactment of title VI will have no effect on FHA and VA insurance and guaranties. It will impose no new requirements with respect to these programs. On the other hand it will not impair in any way the existing authority of the President, and the agencies administering these programs, to deal with problems of discrimination in them. The provisions of H.R. 7152 simply do not affect them one way or the other.

Second, in those cases where housing assistance is given by Federal grant or loan, such as loans to public housing and urban renewal projects, title VI will require that the public bodies or private entities receiving the benefits of any such loan refrain from racial discrimination. However, like requirements are already in effect under Executive Order No. 11063. Hence title VI will merely give statutory support to the regulations already in effect as to these programs.

Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. HUMPHREY. I prefer not to yield until I conclude my prepared remarks.

Title VI will have little if any effect on farm programs. It will not affect direct Federal programs, such as CCC price support operations, crop insurance, and acreage allotment payments. It will not affect loans to farmers, except to make sure that the lending agencies follow nondiscriminatory policies. It will not require any farmer to change his employment policies. I hope the opponents of title VI will note this statement carefully—there has been a great deal of distortion and misunderstanding in precisely these areas.

Whether and to what extent title VI would affect employment in activities receiving Federal assistance will depend on the nature and purposes of the particular Federal assistance program.

Farm employment would not be affected by title VI. The various Federal programs of assistance to farmers, such as acreage allotments under the Agricultural Adjustment Act, were not intended to deal with problems of farm employment, and farm employees are generally not participants in or beneficiaries of such programs. Hence title VI would not authorize imposition of any requirements under these programs relating to racial discrimination in farm employment.

On the other hand, stimulation of employment is typically a significant purpose of Federal grants for construction of highways, airports, schools, and other public works. For example, in section 12 of the Public Works Acceleration Act of 1962, 42 United States Code 2641(a), Congress found that acceleration of public works construction, including construction assisted by Federal grants and loans, was:

> Necessary to provide immediate useful work for the unemployed and underemployed.

Congress has generally required payment of prevailing wages, and adherence to the 8-hour day and 40-hour week, on such construction. Where Federal funds are made available in order to provide jobs, it would be unconscionable to permit racial discrimination in the availability of these jobs. Racial discrimination in construction financed by Federal grants and loans is now prohibited under Executive Order No. 11114. Title VI would give statutory support to the policy reflected in this Executive order, and would require its extension to those agencies which presently take the position that they are not legally able to comply with it.

Employees and applicants for employment are the primary beneficiaries of Federal assistance to State employment services. Title VI would thus authorize adoption of regulations requiring the elimination of racial discrimination in referral practices, treatment of job applicants, et cetera, by such State employment services receiving Federal funds. For like reasons, it would authorize action in connection with federally assisted vocational training programs.

In this area there is some overlap between title VI and title VII. Both titles call for initial reliance on voluntary methods for achieving compliance. If such methods fail, then the department or agency administering a Federal assistance program would consider the availability of a suit under title VII in determining what means of obtaining compliance with its nondiscrimination requirement would be most effective and consistent with the objectives of the Federal assistance statute.

EFFECT ON EDUCATION PROGRAMS

Title VI would have a substantial and eminently desirable impact on programs of assistance to education. Title VI would require elimination of racial discrimination and segregation in all "impacted area" schools receiving Federal grants under Public Laws 815 and 874. Racial segregation at such schools is now prohibited by the Constitution. The Commissioner of Education would be warranted in relying on any existing plans of desegregation which appeared adequate and effective, and on litigation by private parties or by the Attorney General under title IV of H.R. 7152, as the primary means of securing compliance with this nondiscriminatory requirement. It is not expected that funds would be cut off so long as reasonable steps were being taken in good faith to end unconstitutional segregation.

In such cases the Commissioner might also be justified in requiring elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of students. See *Board of Education* v. *Braxton*, C.A. 5, Jan. 10, 1964, 32 U.S. Law Week 2353.

This does not mean that title VI would authorize a Federal official to prescribe pupil assignments, or to select a faculty, as opponents of the bill have suggested. The only authority conferred would be authority to adopt, with the approval of the President, a general requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers, and authority to achieve compliance with that requirement by cutoff of funds or by other means authorized by law.

In the administration of the school lunch program title VI would also authorize a requirement that the schools receiving school lunch money not engage in racial discrimination. Cutoff of funds would, however, generally be inconsistent with the objectives of the school lunch program, which are to provide urgently needed food for growing bodies, and such cutoffs would not occur so long as other means of achieving compliance were available.

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and the Nation, to make a full commitment "to the proposition that race has no place in American life or law." Title VI makes clear that commitment. The Federal Government must cease to underwrite segregation. It is only simple justice. It is indefensible to use Federal funds to perpetuate segregation in the Hill-Burton hospital construction program, the impacted areas school program, and other federally assisted programs.

Mr. Chairman, earlier in the debate I was disturbed when the very distinguished gentleman from Alabama, the chairman of the Subcommittee on Housing of the Committee on Banking and Currency, suggested that the passage of this title might result in a sitdown strike on the part of those Members of Congress who serve on the Appropriations Committee. It is difficult to believe that appropriations for urban renewal, for public housing, for college dormitories and other public needs would not be voted because Congress had determined finally that they should not be used to perpetuate segregation.

However, if that is the case, let us meet the issue head on, and carry the fight to the country. The people of America will not stand for it.

This title is essential to the bill. It empowers the administrator to strike at the very root of the problem which has been raised numerous times before this body when antidiscrimination and antisegregation amendments have been offered.

Since my election to Congress I have fought against using Federal funds for programs in which discrimination is practiced. I have introduced and supported antidiscrimination amendments to authorization and appropriation bills. When the Housing Act of 1961 was before the House, I was the only Member on my side of the aisle to vote for an antidiscrimination amendment. I have supported an amendment to the Health Professions Education Assistance Act of 1963 to prevent funds from being used for segregated facilities. I introduced, and filed a discharge petition for H.R. 5741 which provides that no Federal financing or other assistance may be furnished in connection with any program or activity which is segregated or in which individuals are discriminated against on the ground of their race, religion, color, ancestry, or national origin. Before the administration's civil rights bill was introduced, I urged the Attorney General to recommend a provision to bar Federal funds for segregated programs.

We who have supported those amendments have constantly been told that there would come a time when we could consider this issue as a distinct matter, separate and apart from the legislation then pending before the House. We have that opportunity in this bill today, and we should seize it. The policy is clearly expressed in section 601:

> No person * * * shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Fed-

This title is not mandatory. I think it should be. For those who are so alarmed about the discretion placed in the hands of the Federal administrators and department heads, I would encourage them to support an amendment to make mandatory the denial of funds for segregated programs. Then they would not have to worry about the use of discretion.

Many of the opponents of this measure have tried to confuse and distract us by talking about the possibility that an individual's benefits could be cut off, such as veterans benefits, social security benefits, unemployment benefits. No such action is envisioned by title VI. If we turn to the hearings, part IV, at page 2773, it is clear from the letter of the Deputy Attorney General, Mr. Katzenbach, to Chairman CELLER that this is not intended. I should like to quote from that. It says:

> 2. A number of programs administered by Federal agencies involve direct payments to individuals possessing a certain status. Some such programs may involve compensation for services rendered, or for injuries sustained, such as military retirement pay and veterans' compensation for service-connected disability, and perhaps should not be described as assistance programs; others, such as veterans' pensions and old-age, survivors, and disability benefits under title II of the Social Security Act, might be considered to involve financial assistance by way of grant. But to the extent that there is financial assistance in either type of program, the assistance is to an individual and not to a "program or activity" as required by title VI. In any event, title VI would not substantially affect such benefits, since these payments are presently made on a nondiscriminatory basis, and since discrimination in connection with them is precluded by the fifth amendment to the Constitution, even in the relatively few instances in which they are not wholly federally administered. Accordingly, such programs are omitted from the list. For similar reasons, programs involving direct Federal furnishings of services, such as medical care at federally owned hospitals, are omitted.

That statement by the Deputy Attorney General should dispel a lot of the confusion which has been created. The purpose is clear—to prevent discrimination among the beneficiaries of Federal programs.

Mr. Chairman, the harsh facts are that constitutionally protected rights have been disregarded in the administration of Federal programs.

For example, the Government has perpetuated school segregation through the allocation of school maintenance and construction funds under the impacted areas program. In fiscal year 1962, the Federal Government allocated $297,169,905 for school maintenance and construction under the impacted areas program. Of this total, 36 percent, or $106,129,107, was allocated to Southern and border States. In fiscal year 1963, $315,110,323 was allocated for school maintenance and construction under the impacted areas program. Of this total, 33 percent, or $106,092,763, was allocated to Southern and border States.

A subcommittee of the House Education and Labor Committee in 1962 prepared a statistical sample of school districts in Southern and border States which had received Federal funds for school maintenance and operation under this program in fiscal year 1961. The study shows that 63.6 percent of the funds allocated to this area went to segregated school districts.

A Civil Rights Commission study shows that, for the 1962-63 school year, totally segregated schools in military base impacted areas in Alabama, Georgia, South Carolina, and Mississippi received $16,592,733.

On March 30, 1962, the Secretary of the Department of Health, Education, and Welfare stated:

> Beginning in September 1963, we will exercise sound discretion, take appropriate steps as set forth in the law with respect to those children still attending segregated schools who by law are entitled to suitable education.

However, the Secretary determined that he had discretion only with respect to children living on Federal property. In eight situations where only segregated schools were available to children living on military bases, the Government has built schools—three schools in Alabama, two in South Carolina, two in Georgia, and one in Louisiana. However, this ruling only applies to the 285,863 children of Federal employees living on Federal property and does not apply to the 1,555,154 children living off Federal-owned property.

The 1963 Report of the Civil Rights Commission points out the limited effectiveness of this ruling:

> Up to September 1963, however, the HEW ruling has affected only 26 of the 242 southern school districts where children reside on Federal property and attend schools in the community. And for the most part, the ruling will redound only to the benefit of children living on base. They constitute only 10 percent of all military dependents in the South.

Mr. Chairman, in Alabama, Florida, Georgia, Louisiana, South Carolina, Mississippi, North Carolina, and Virginia segregated school districts are still receiving Federal assistance under the impacted areas program.

The Hill-Burton hospital construction program is another example of a program in which Federal funds have been used to underwrite segregation.

The Hill-Burton Act provides that Federal funds can be allocated "in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provisions on the basis of need for facilities and services of like quality for each such group." In addition to "separate but equal" hospitals, Federal funds have gone to hospitals within which patients are segregated on the basis of race.

The Civil Rights Commission 1963 Report states:

> The Public Health Service has stated that, from the inception of the Hill-Burton program in 1946 until December 31, 1962, grants have been made to aid in the construction or remodeling of 89 medical facilities intended for the exclusive use of either white or Negro persons. The Federal contribution to these projects totals $36,775,994; of this amount, Federal contribution to the 13 projects intended for the use of Negroes, is $4,080,308.

many regions of the country, citizens are denied the equal benefits from Federal financial assistance programs because of their color.

The Hill-Burton Act is a relevant case in point. Under this act, Federal funds are granted to assist in the construction and equipment of public and voluntary general, mental, tuberculosis, and chronic disease hospitals. Assistance is also provided for the establishment of other forms of medical care facilities such as nursing homes and public health centers. As of May 1963, $2 billion have been devoted to this purpose by the Government. Despite the extent of this Federal contribution, however, example after example is available which establishes that Negroes are denied equal treatment under the act. Negro patients are denied access to hospitals or are segregated within such facilities. Negro doctors are denied staff privileges—thereby precluding them from properly caring for their patients. Qualified Negro nurses, medical technicians, and other health personnel are discriminated against in employment opportunities. The result is that the health standards of Negroes and, thereby, the Nation are impaired; and the incentive for Negroes to become doctors or to remain in many communities, after gaining a medical education, is reduced.

In a related fashion, racial discrimination has been found to exist in vendor payment programs for medical care of public assistance recipients. Hospitals, nursing homes, and clinics in all parts of the country participate in these programs and, in some, Negro recipients have received less than equal advantage.

The school lunch program is another instance of unfair treatment. Through this program, the Federal Government seeks to provide surplus food in order that needy children may have a nourishing meal at least once a day. Many Negro families, in particular, rely upon this program as a means of maintaining the health of their children. The denial of other rights—especially the lack of equal job opportunities—demands the acceptance of this support. Yet, testimony presented before our committee reveals that Negro children have been denied free lunches on the unfounded claim that their parents could afford to buy their noontime meals.

Similarly, Negro families have been denied access to or eliminated from receiving surplus agricultural commodities which are distributed by the U.S. Department of Agriculture. Whether through coincidence or otherwise, instances of this nature have occurred in counties where resistance was strongest to the Negroes' attempt to gain voting rights. Interestingly enough, though, distribution was recommenced when the Federal Government made it clear that it would take over direct distribution unless the counties managed the program fairly.

Billions of dollars of Federal money is expended annually on research. This money which primarily goes to universities and research centers for scientific and educational investigation is granted regularly by such agencies as NASA, AEC, the Department of Defense, NIH, Office of Education, and National Science Foundation. Regrettable as it may seem, a number of universities and other recipients of these grants continue to segregate their facilities to the detriment of Negro education and the Nation's welfare.

Funds for guidance training of high school teachers and administrators are also unavailable to Negroes in a number of Southern States, while, in

APPENDIX C

Last year, most of us supported a program of hospital insurance for the aged through social security as a major step toward first-class citizenship for the aged. I, for one, could not be more pleased that we now have the opportunity to support a voluntary medical insurance program also.

In addition to the new economic independence it will create, I am hopeful that the bill will promote first-class citizenship in another fashion also. We decided last year, and wrote into law, that Federal tax funds collected from all the people may not be used to provide benefits to institutions or agencies which discriminate on the grounds of race, color, or national origin. This principle will, of course, apply to hospital and extended care and home health services provided under the social security system, and will require institutions and agencies furnishing these services to abide by title 6 of the Civil Rights Act of 1964.

Although the hospital and medical insurance programs are major strides forward in this proposed legislation, there is another facet of health protection which is far more important to many; namely, the incentive for improvement in State Kerr-Mills plans. We must reluctantly realize that there are still among us those unfortunate few who experience poverty and illness beyond the scope of any economically feasible social insurance program. This bill not only provides incentive for better health care for the independent aged, but also offers strong guidelines for a new streamlined approach to comprehensive health services for those on welfare programs serving the blind, disabled, and dependent children.

It requires an offering of more comprehensive care to receive greater Federal support, and prohibits many of the sad practices such as relative responsibility tests which have plagued Kerr-Mills programs in the past.

Mr. President, many of us remember the fears that were expressed when the social security system was first proposed and debated 28 year ago—that it would regiment Americans, be administratively unworkable, financially unsound, cripple and impede private life insurance and pension programs. We know today how unfounded those fears were. The medical profession has expressed great fear for the health of the people, the quality of medical service and the future of the medical profession if this program is established. I remind the Senate that 30 or so years ago tremors of apprehension ran through the medical profession when voluntary health insurance plans were being started. Then, also, cries of "socialized medicine" were heard from many physicians.

In starting anything new we must study the problem and situation carefully, and consider equally as carefully the views of those who believe the proposed step is unwise—there are always those who believe that anything new or different is unwise—and if we are sure that we are on the right track, go ahead. I believe that the proposed program will be a godsend for the aged—and, in due course, all of us will be aged—I believe that it will be a boon for the country, for the hospitals, and—though they cannot imagine it now—for the medical profession.

Mr. PASTORE. Mr. President, I compliment the distinguished Senator from Michigan for an excellent statement. I am proud to associate myself with everything he has said.

Mr. HART. Mr. President, I am very grateful for the remarks by a man who has been sensitive to this problem and has given national leadership to it for many years more than I have.

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. ALLOTT. Mr. President, I ask unanimous consent that the order for a quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ALLOTT. Mr. President, I also ask unanimous consent that I may speak on an extraneous subject for 20 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

ECONOMIC OPPORTUNITY ADMINISTRATION TELECAST

Mr. ALLOTT. Mr. President, last week I discussed on the floor of the Senate certain matters pertaining to a television program which was shown last week on one of the networks. At that time I expressed myself in what I believe to be fully justified and righteous indignation, and even anger.

The remarks pertain particularly to a show, sponsored either by one of the networks or by the so-called poverty program—the Office of Economic Opportunity—and at that time, I was under the impression—apparently at least partially false—that the show had been sponsored and paid for in its entirety by the Office of Economic Opportunity. I was extremely critical of the Office for that reason. I am still critical of it.

In order to set the record straight, I believe I should state the facts upon which I based my remarks last week.

On the evening of the show I called the president of the broadcasting network. I identified myself and asked if the broadcast was being sponsored by his system. The reply was "No."

I said: "Is this a public service program?"

The answer was, "Yes."

To me, the only reasonable conclusion that anyone could draw from these two questions and answers was, first, that it was not being paid for by the Columbia Broadcasting System; second, that the broadcasting system was donating its time for the purpose of the program; and, third, that the program itself, that is, the production, and the payment to the participants—I will not dignify most of them by calling them artists—was paid for by the Office of Economic Opportunity.

After I had made my remarks on the floor of the Senate, the vice president of the network called upon me in the reception room outside the Chamb and explained the facts as he understo them. He said that during the mon of May the Office of Economic Opport nity decided that it had a really h subject in the way of selling poverty, a that they were not reaching the dro outs. They came to the network a asked for time and cooperation in t production of a program which wou be slanted toward this particular gro

He further told me at that time t the network had picked up all of t production costs and had paid, at regu union scale, all the participants in t program.

I wish to make perfectly plain tha am not casting a blanket indictm against all the participants in the p gram. I excepted one in particular t I happened to know by sight and recognition last week—Johnny Math I except another one whom I have si identified, a man by the name of Cos who made the only rational appeal, a who probably was the only excuse in whole program for what is claimed be the purpose of the program.

In looking over my remarks of l week, I described this as a shameful a disgraceful exhibition. I said that intelligence of the people of this co try was insulted and degraded by t particular program. I see no reasor retract either one of those stateme Neither do I, for that matter, see reason to retract any portion of statement made by me last week whe said that the program was decadent the extreme.

I should like to go back to the ques of who was responsible for the progr The president of the broadcasting c pany wrote me a letter which, altho it is dated July 2, was just delivere me today. In that letter he falls the same trap into which almost ev one else has fallen in this situation

As soon as the present administra could get its manager out here at W and the rest of some of its columnists commentators on the ball, they imm ately picked this up and said, "Well, Senator from Colorado is sort of fashioned. You cannot expect hir like this kind of business—this rock roll stuff. He doesn't like this partic kind of music."

Mr. President, that is not the at all. That has nothing to do with

First, if radio and TV stations only programs which appealed to on dividual in the United States, they p ably would not even exist.

Second, I am the last person in world who thinks that every prog which goes on TV in this country sh be slanted to suit the tastes of m or any other individual. In fact, or 8 years I have carried on a run battle with the FCC to keep them doing exactly that sort of thing. the advent of Newton Minnow in the FCC became colored with the co that they had a bunch of brilliant ple—and thank God, this is not uni throughout the FCC, I must say the majority felt that they had a b of brilliant people who could someho lect for us better than we could sele

Sen. [illegible]

basic plan; the costs of X-ray, radium, and isotope therapy; the costs of dressings, splints, braces, and other prosthetic devices; and the costs of laboratory and diagnostic services. This coverage, provided under part B of the new title VIII, will be available to all individuals who are over 65 and residents of the United States.

The $3 monthly premium will not place an added burden on our older people, because other portions of H.R. 6675 provide for a 7-percent across-the-board increase in cash social security benefits. The 7-percent increase will amount to a larger monthly payment of at least $4 for an individual, or $6 for a man and wife over 65, and the beneficiaries can elect to have the premiums for the voluntary, supplementary coverage deducted from their monthly cash benefit payments.

States will be permitted to elect to have some or all of the aged who receive cash payments under their public assistance programs covered by the supplementary plan, and the State would then pay the premiums in behalf of the individuals.

Enrollment and reenrollment in the supplementary plan will be limited to specific periods of time, and the bill provides for increased premiums in the case of those who drop out of the program and reenroll, or who enroll late. These limitations are necessary to safeguard against the possibility of people enrolling in the program only when their health has deteriorated to the point where the prospect of payment is no longer an insurable risk, but a virtual certainty. For the insurance program to be soundly based, it must cover essentially all members of the group in periods of good health, as well as in illness.

The supplementary plan provides a comprehensive package of benefits, buttressed at the appropriate places by safeguards against overutilization.

A separate trust fund will be established for the supplementary plan so that the old age and survivors' insurance trust fund can in no way be endangered by the existence of health care insurance.

ADMINISTRATION OF THE SUPPLEMENTARY PLAN

With the supplementary plan, just as with the basic plan, the overall responsibility for administration of the program will rest with the Secretary of Health, Education, and Welfare. But the detailed administration and supervision of the supplementary plan, will be performed by intermediaries. The bill provides that, to the extent possible, the Secretary shall enter into contracts with carriers to perform the major administrative functions relating to the medical aspects of the program. Thus, it would be the carrier's responsibility under the contract to see that payments of Federal financial assistance were made to institutional providers of services on a cost basis, and that the charges for services rendered by physicians are reasonable. It would be the carrier, pursuant to the contract, that would audit records and determine compliance with utilization review requirements. The Secretary's job, essentially, would be to see that the carriers do their job.

ROLE OF THE PHYSICIAN UNDER MEDICARE

The physician is the key figure in these health care plans. He is the one who will determine in the first instance whether a patient should be admitted to a hospital; he will determine what drugs, what tests are necessary; he will determine how long the patient should remain in the hospital, whether the patient should be transferred to an extended care facility, and whether home health services are necessary to rehabilitation or recovery. The physicians will be the key figure in utilization review. There will be no change in the form or organization of medical practice as a result of this bill.

Doctors will not change; hospitals will not change; the patient's free choice of doctor and hospital will not be altered. The Government will not tell physicians how to practice their profession. The Government will not provide any services to patients under the health care plans.

Under the supplementary plan, which, as I have said, will be administered by the private sector—by private carriers—physicians will have the same responsibility and authority for treating their patients as they do today when they treat patients who participate in privately financed insurance plans. Under the basic plan, the physician will have basically the same experience that he has when the patient's hospital bills are paid through Blue Cross.

For most general hospitals, the only thing new that the law will require—since most hospitals will already have rejected racial discrimination—will be that they have a utilization review plan. Apart from that condition, the law will adopt professionally established standards generally recognized as necessary by the professional health associations, as necessary to insuring safe and adequate care in the facilities which will receive Federal financial assistance under this legislation.

STANDARDS OF HEALTH CARE

Far from attempting to dictate conditions to the health professionals, the implementation of this law will support their most responsible, forward-looking efforts to raise the standards of health care. The legislation provides that hospitals accredited by the Joint Commission on Accreditation of Hospitals will be conclusively presumed to meet all the conditions necessary for participation, except utilization review. The joint commission is a voluntary association composed of representatives of the American Medical Association, the American Hospital Association, the American College of Physicians, and the American College of Surgeons. At the present time, hospitals having 594,000 of the 698,000 general hospital beds are accredited by the Joint Commission.

If the Joint Commission should adopt a utilization review requirement, then its accreditation of a hospital could be made conclusive on that matter also. Both the American Medical Association and the American Hospital Association have recommended that hospitals initiate utilization review plans. The AMA statement on utilization review said that:

> The judicious use of hospital facilities by the public and physicians is essential to the efficient and economic functioning of the prepayment and voluntary health insurance systems.

That statement applies equally no matter what the source of payment is—whether the patient's bills are paid out of a privately financed insurance fund, or out of a contributory social insurance fund, as they will be under this legislation. I think it is fair to say, then, that to the extent that the requirement of utilization review is something new to some institutions, it is a step forward, and one desired by the health professionals themselves.

IMPROVED NURSING HOME CARE

The conditions set out in the legislation for the participation of extended care facilities are necessary to assure that covered services will provide high quality convalescent and rehabilitative care to patients once the acute stage of their illness has passed. These conditions are also intended to carry out the intent of this legislation to provide essentially medical, rather than custodial care in these facilities. Thus, the bill requires that the extended care facility have an agreement with a hospital for the orderly transfer of patients; that its policies be determined by a physician, registered nurse or medical staff; that it maintain clinical records on all patients; and that it maintain around-the-clock nursing service, and require that each patient be under the care of a physician.

The conditions for participation will be applied by State agencies, not by the Federal Government.

Each State, under an agreement with the Secretary of Health, Education, and Welfare, will determine whether the hospitals, extended care facilities, and home health agencies within its jurisdiction meet the conditions for participation in the program of Federal financial assistance. The bill also authorizes the Secretary to enlist the aid of the State agencies to assist institutions in establishing and maintaining the necessary records and utilization review procedures for participation in the program.

Beyond these conditions, necessary to assure safety and high quality of care, and to avoid improper or excessive utilization of facilities, hospitals and other institutions have only to enter into an agreement not to charge patients for services paid for under the hospital insurance program, and to abide by title VI, of the Civil Rights Act. That agreement could be terminated by the hospital on relatively brief notice at any time; and the hospital is protected by right of hearing and judicial review against arbitrary termination of the agreement by the government.

Hospitals will be receiving payments through third parties of their own choosing; the supplementary plan will be administered by private insurance carriers; conditions for hospital participation will be determined by State

Medicare. In order to be accepted, it must meet—

(1) The conditions of participation set forth elsewhere in this chapter; and

(2) The civil rights requirements specified in 45 CFR Parts 80, 84, and 90.

(b) The State survey agency will ascertain whether the provider meets the conditions of participation and make its recommendation to HCFA.

§ 489.11 Acceptance of a provider as a participant.

(a) *Action by HCFA.* If HCFA determines that the provider meets the requirements, it will send the provider—

(1) Written notice of that determination; and

(2) Two copies of the provider agreement.

(b) *Action by provider.* If the provider wishes to participate, it must return both copies of the agreement, duly signed by an authorized official, to HCFA, together with a written statement indicating whether it has been adjudged insolvent or bankrupt in any State or Federal court, or whether any insolvency or bankruptcy actions are pending.

(c) *Notice of acceptance.* If HCFA accepts the agreement, it will return one copy to the provider with a written notice that—

(1) Indicates the dates on which it was signed by the provider's representative and accepted by HCFA;

(2) Specifies the effective date of the agreement; and

(3) If the agreement is with a SNF, specifies the term of the agreement.

§ 489.12 Decision to deny an agreement.

(a) *Bases for denial.* HCFA may refuse to enter into or renew an agreement for any of the following reasons:

(1) Principals of the provider have been convicted of fraud (see § 420.204 of this chapter);

(2) The provider has failed to disclose ownership and control interests in accordance with § 420.206 of this chapter; or

(3) The provider has been adjudged bankrupt or insolvent.

(b) *Effect of bankruptcy or insolvency.* (1) HCFA will not enter into an agreement with a provider that has been adjudged insolvent or bankrupt under appropriate State or Federal law, or against which there is pending a court proceeding to make a judgment concerning this matter. The reason for denial is that the provider is unable to give satisfactory assurances of compliance with the requirements of title XVIII of the Act.

(2) If a provider who is participating and receiving payments under Medicare is subsequently adjudged insolvent or bankrupt by a court of competent jurisdiction, HCFA will not terminate its participation in the program because of that financial condition. However, the intermediary will adjust payments to the provider (as specified in § 405.454(k) of this chapter) to preclude overpayments.

(c) *Compliance with civil rights requirements.* HCFA will not enter into a provider agreement if the provider fails to comply with civil rights requirements set forth in 45 CFR Parts 80, 84, and 90.

§ 489.13 Effective date of agreement.

(a) *All Federal requirements are met on the date of the survey.* The agreement will be effective on the date the onsite survey is completed (or on the day following the expiration date of a current agreement) if, on the date of the survey, the provider meets all Federal health and safety standards, and any other requirements imposed by HCFA.

(b) *All Federal requirements are not met on the date of the survey.* If the provider fails to meet any of the requirements specified in paragraph (a) of this section, the agreement will be effective on the earlier of the following dates:

(1) The date on which the provider meets all requirements.

(2) The date on which the provider submits a correction plan acceptable to HCFA or an approvable waiver request, or both.

§ 489.15 Time limits on agreements with skilled nursing facilities (SNFs).

(a) *Basic limitation.* An agreement with a SNF must be for a specified term, determined by HCFA in accord-

U.S. Department of Justice
Civil Rights Division

Assistant Attorney General

Washington, D.C. 20530

5/23/83

Jim -

Attached are the letters we discussed earlier today

Brad

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

April 26, 1983

Honorable John A. Svahn
Under Secretary
Department of Health and
 Human Services
Washington, D.C. 20201

Re: Infanticide Regulation Working Group

Dear Mr. Svahn:

I enclose herewith a proposed mark-up of the draft regulation which you circulated to members of the working group last week. I am also attaching a brief description of possible alternatives to the approach embodied in the draft regulation.

With respect to the draft regulation, I believe that the working group should consider attaching an appendix to the regulation which sets forth a number of the priniciples stated in the preamble. For example, the appendix might include a discussion of what constitutes discrimination on the basis of handicap under the statute and what the Department of Health and Human Services does not consider to be a violation of Section 504, *i.e.*, the withdrawal of care for an infant who is terminally ill. The definition of "customary medical care," discussed in the preamble, might also be included.

The basis for my suggestion is that the appendix would provide more authoritative guidance as to HHS's interpretation of the regulation and thus might be given more weight by a reviewing court than the preamble alone. Indeed, it is not infrequent that such appendices are published in the Code of Federal Regulation, whereas preambles to regulations are virtually never published. By giving greater weight to the principles we are setting forth in the preamble, I believe that we would enhance the likelihood of the regulation surviving a facial attack.

Indeed, it might be desirable for the regulation itself to set forth some of those principles, *i.e.*, by defining customary care in the case of handicapped newborns, and by defining discrimination in the delivery of care to handicapped newborns or at least expressly excluding, by regulation, those circumstances, described in the preamble, that the Department does not consider discrimination against a handicapped newborn. The articulation of these principles in the regulation itself should also improve its chances of surviving legal attack.

This is, of course, a matter that you will want to review with your Department's General Counsel and Director for Civil Rights. I would be interested in knowing whether they share my concern that the preamble discussion may not alone be sufficient to meet the kinds of objections that Judge Gesell expressed in his opinion.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Michael Uhlmann
Richard Willard
Juan del Real

ALTERNATIVES TO CURRENT PROPOSAL

I. Imposing regulatory requirements on state-child protective agencies

I understand that the Department of Health and Human Services provides funds to state-child protective agencies to aid them in dealing with child neglect and child abuse. I further understand that virtually all states have laws authorizing state intervention in cases of child neglect and child abuse and that the child protective agency of each state seeks to intervene in such cases as appropriate. This intervention includes applying to state courts for custody of the child for a period of time in order to insure proper care and protection against life-threatening conditions.

State child protective agencies, which receive Federal financial assistance, could be required pursuant to Section 504 to have a procedure and active policy providing for intervention to protect handicapped infants who are discriminatorily denied food or medical care solely on account of their handicap. The contents of such a regulation could reflect a variety of approaches. Under such a regulation, the federal role might include all or some of the following:

1. Compelling state-child protective agencies to require such hospital to report all cases of withdrawal of denial of food or care. This requirement would have the advantage of compelling hospitals to reveal all cases of denial of food and care, without need to rely on whistleblowers (reliance on whistleblowers undoubtedly will not result in the reporting of every case of discriminatory denial of treatment). Moreover, if we could obtain the agreement of the medical and hospital associations to this procedure, there would probably be no need for posting a hotline number, a major irritant to these groups.

One part of the state's compliance program might include compelling hospitals to establish the "ethics review board" recommended by the President's Commission for the Study of Ethical Problems in Medicine, and Biomedical and Behavioral Research. The state might require these review boards to rule upon every proposed withdrawal of care and to forward immediately its decision and rationale to the state child protective agency.

If the medical and hospital communities are opposed to this regulatory approach, the state might be encouraged or required to establish a telephone number, and the posting of that number in hospitals, for the reporting of child neglect or child abuse to the appropriate state agency. Thus, in the event that a hospital might not be reporting all appropriate cases, there will be an avenue for whistleblowers to report possible neglect or abuse situations.

2. The Department could provide guidance and "technical assistance" to state-child protective agencies to aid them in meeting their Section 504 obligations. The guidance could take the form of the principles enunciated in the preamble of the draft regulation. Moreover, the Department could train employees of state child protective agencies in handling these matters. The Department might also directly assist the state agencies in reviewing certain hospital decisions to withdraw care as a method of assisting the state agencies in fulfilling their Section 504 obligations.

3. The Department could monitor cases reported to state agencies as well as the follow-up by the state agency. This oversight function could trigger more direct federal guidance to state agencies in individual cases.

This approach is consistent with the President's commitment to federalism. Moreover, so long as we are confident that state-child protective agencies will fulfill their duties (and they will be under threat of fund termination if they fail to do so) this might be a more effective means of protecting the handicapped newborns than reliance on a whistleblower strategy.

II. Legislation

A congressional enactment protecting handicapped newborns from the denial of food or treatment solely because of handicap probably has the best chance of surviving legal attack. Courts are less likely to strike down a congressional enactment, complete with congressional findings, than they are to strike down administrative agency action.

One legislative approach would be to permit the continued receipt of Medicare and Medicaid funding by hospitals on the condition that the hospital not discriminate against handicapped newborns. This approach likens Medicare and Medicaid services to any other goods or services that the Government acquires with federal funds from the private sector, and imposes the nondiscrimination requirement as if federal Medicare and Medicaid funding constitute procurement contracts. Legislation to this effect could define the "Baby Doe" obligation with sufficient precision to reach the situation where medical treatment should be extended to the handicapped infant, while leaving to the parents and their doctor the difficult decision regarding appropriate life-support procedures when the clear medical judgment is that the baby cannot survive on its own.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

May 5, 1983

Honorable John A. Svahn
Under Secretary
Department of Health and
Human Services
Washington, D. C. 20201

Dear Mr. Svahn:

I offer for your consideration a very rough draft of a possible regulatory approach to the "Baby Doe" problem that targets Federal enforcement activity under Section 504 at state child protective agencies which receive Federal financial assistance to aid their child abuse and child neglect programs.

As you know, questions have been raised in litigation of the earlier "Baby Doe" regulation with respect to Section 504 coverage. Specifically, in briefs filed in American Hospital Association v. Heckler, plaintiffs asserted that health care providers were not recipients of Federal financial assistance within the meaning of 504 if the only Federal funding was tied to the Medicare or Medicaid programs.

The Department of Justice is currently taking a close look at the complex coverage issues raised in the American Hospital Association case. While resolution of those legal questions would not, as I understand it, necessarily require a different regulatory approach to this matter than the one originally taken -- since the original regulation and the proposed modification thereof would apply only to health care providers that furnish "covered" health care services to infants -- certainly the reach of the regulation could be significantly affected.

The enclosed draft is an effort to respond more directly to the referenced concerns about the use of Section 504 in this context. As you know, the statute prohibits discrimination on account of handicap in programs receiving Federal financial assistance. The state child protective agencies have such programs that are explicitly charged with safeguarding against child neglect or child abuse.

The Federal Government's legitimate, and very proper concern, that handicapped infants not be medically "neglected" or "mistreated" solely on account of their handicap, should not ignore the similar state interest in such matters. By working with and through existing state agencies, already having the staff and experience to deal with such matters, my sense is that the desired end can be achieved in a more effective, expeditious and sensitive manner, while avoiding much of the criticism of the undue Federal intrusion that was levelled at the earlier regulation. Obviously, this suggested alternative fully contemplates a vigorous Federal role in overseeing and monitoring a state agency's compliance with its Section 504 responsibilities with respect to handicapped newborns.

As stated at the outset, the draft and these thoughts are offered for the working group's consideration. My interest is in making sure that we have given full consideration to all of the complexities involved with the "Baby Doe" issue in our deliberations of the proper course to pursue.

Sincerely,

W. Bradford Reynolds

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Enclosure

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.01

A state child protective agency receiving Federal financial assistance for its child abuse and child neglect activities which requires health care providers to report to it suspected cases of child abuse or neglect shall require, as part of its reporting requirement, that health care providers report to it immediately cases wherein parents or a guardian of a handicapped newborn infant refuse to consent to medically indicated treatment.

.02

Each state child protective agency shall establish and maintain written methods of administration and procedures to assure that the authorities of the agency to prevent instances of child abuse and neglect are utilized for the protection of handicapped newborns subjected to neglect through parental or guardian denial of consent to medically indicated treatment, solely on the basis of handicap, as effectively as they are utilized on behalf of nonhandicapped children subjected to other kinds of child abuse and neglect. These procedures shall include:

(a) Establishment of the duty of health care providers to report suspected cases of child abuse or neglect;

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(b) A means by which the agency can receive reports of such suspected child neglect or child abuse from health care providers and other individuals with knowlege of suspected cases of child abuse or neglect on a 24-hour a day, 365 day a year basis;

(c) Immediate review of such reports and, where appropriate, on-site investigation of such reports;

(d) The immediate notification to the Office for Civil Rights of each such report and cooperation with OCR;

(e) Provision of services to handicapped newborn infants whose parents or guardian refuses to consent to medically indicated treatment solely on the basis of handicap which are as effective as those provided to other abused or neglected children, including, where appropriate, seeking timely custody of the infant and consenting to medically indicated treatment or seeking a timely court order to compel the medically indicated treatment.

.03

Definitions

"Refusal to consent to medically indicated treatment solely on the basis of handicap," as used in Section 0.2, means: refusal to permit or authorize a health care provider to provide treatment which would be medically beneficial to the handicapped newborn infant and would otherwise be

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provided as a matter of reasonable medical judgment but for the fact that after the treatment the infant will continue to be a handicapped individual.

"Medical judgment" does not include opinions based upon the social, psychological, financial, or other impact of the infant's handicap condition on itself or any other person.

<u>.04</u>

<u>Examples</u>

1. The refusal to consent to medical treatment for the removal of a stomach blockage or other life-threatening condition, of a child with Down's Syndrome, in the absence of a reasonable medical judgment that the treatment for the independent ailment presents a greater risk to the infant than the ailment itself, is child neglect and the failure of a state child protective agency to seek to protect the life of that infant or the failure to have procedures to intervene for such protection, is discriminatory under Section 504.

2. The refusal to consent to treatment for an infant suffering from spina bifida, in the absence of a reasonable medical judgment that the treatment presents greater risks than the spina bifida condition itself, is child neglect, and the failure of a state child protective agency to protect the life of that infant or to have procedures to intervene for such protection is discriminatory under Section 504.

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3. The refusal to consent to treatment for a handicapped infant, where the reasonable medical judgment is that the prognosis is for imminent death regardless of treatment because of the handicapped condition itself or another ailment or ailments, is not child neglect and the failure of the state protective agency to intervene to prolong the life of such a dying infant is not discriminatory under Section 504.

The preamble to this regulation could contain a great deal of the material from the preamble in the regualation circulated on April 22, 1983. Moreover, the preamble could contain further explanation of the role of the Department of Health and Human Services in monitoring and guiding state agencies in the enforcement of their Section 504 responsibilities as well as the role of the Department in providing "technical assistance" to state child protective agencies. The Department could provide a good deal of guidance in the handling of certain situations. Further, the regulation itself could be adjusted to provide for the Department's role or a somewhat different role for the state protective agency. The state might be required to compel hospitals to establish ethics review boards -- only those decisions of the Board to withdraw care would need to be reported to the state agency.